



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





**A DIGEST**  
**OF THE**  
**REPORTED DECISIONS**

**OF THE**  
**COURTS OF COMMON LAW, BANKRUPTCY, PROBATE,**  
**ADMIRALTY, AND DIVORCE,**

**TOGETHER WITH**  
**A SELECTION FROM THOSE OF THE COURT OF CHANCERY**  
**AND IRISH COURTS.**

**From 1756 to 1883 inclusive.**

***FOUNDED ON FISHER'S DIGEST.***

**BY**  
**JOHN MEWS,**  
**ASSISTED BY**  
**C. M. CHAPMAN,**  
**HARRY H. W. SPARHAM,**  
**AND**  
**A. H. TODD,**  
**BARRISTERS-AT-LAW.**

***IN SEVEN VOLUMES.***

**VOL. I. ABANDONMENT—CARRIERS.**

**LONDON:**  
**H. SWEET, 3, CHANCERY LANE;**  
**STEVENS AND SONS, 119, CHANCERY LANE;**  
**W. MAXWELL AND SON, 8, BELL YARD, TEMPLE BAR.**  
**1884.**

**LIBRARY OF THE  
LELAND STANFORD, JR., UNIVERSITY  
LAW DEPARTMENT.**

58,111

LONDON:  
BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS



## ADVERTISEMENT.

---

THE present work is a consolidation of Fisher's Harrison's Digest published in 1870, the Digest of the cases from 1870 to 1880 published in 1880, and the annual Digests published since that date including that for the year 1883. In arranging the work the editors have endeavoured to collect the cases under comprehensive general titles. By this means all the cases bearing on any given subject will be found close to one another. The general titles are subdivided into sub-titles arranged in what appeared to be the most natural order, and the cases themselves are distinguished by numerous catch-words, so that the practitioner may find as quickly as possible the point for which he happens to be in search. At the same time numerous cross references are added referring to the general titles, in order that the work may fulfil the purposes of an index to the cases as well as a Digest.

Cases relating to matters exclusively assigned to the Chancery Division, including the whole subject of Administration Actions, have been omitted, and great changes have been made in the treatment of Settlements, Trusts and Wills. It has been found necessary to retain many cases which are to some extent obsolete, because they are still valuable to persons practising in the Colonies and other places where English Law has been adopted or retained, and are also of importance for collateral purposes, upon the ground that new principles are often best explained by reference to old cases.

Statutes have generally been omitted, as it was found impossible to incorporate them in a complete manner without largely increasing the bulk of the work; readers are therefore referred to the Chronological Index of Statutes published by her Majesty's Stationery Office.

The proofs of the whole work have been read by Mr. R. A. Roberts, of the Inner Temple.



# A LIST

## OF THE

# ABBREVIATIONS AND REFERENCES

ADOPTED IN

## THE DIGEST,

WITH EXPLANATIONS.

---

### A.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
A. & E. . . . .	Adolphus & Ellis . . . . .	Queen's Bench
Adm. . . . .	. . . . .	Admiralty
Adm. D. . . . .	Law Reports . . . . .	Admiralty Division
Amb. . . . .	Ambler . . . . .	Chancery
Anst. . . . .	Anstruther . . . . .	Exchequer
App. Cas. . . . .	Law Reports . . . . .	House of Lords and Privy Council
Arn. . . . .	Arnold . . . . .	Common Pleas
Arn. & H. . . . .	Arnold & Hodges . . . . .	Queen's Bench
Asp. M. C. . . . .	Aspinal Maritime Cases . . . . .	Admiralty and other Courts

### B.

B. & A. . . . .	Barnewall & Alderson . . . . .	King's Bench
B. & Ad. . . . .	Barnewall & Adolphus . . . . .	King's Bench
B. C. C. . . . .	Lowndes & Maxwell's Bail Court Cases . . . . .	Bail Court
B. C. Rep. . . . .	Saunders & Cole's Bail Court Reports . . . . .	Bail Court
Bayl. Bills . . . . .	Bayley on Bills . . . . .	
Beav. . . . .	Beavan . . . . .	Rolls
B. & S. . . . .	Best & Smith . . . . .	Queen's Bench
Bell, C. C. . . . .	Bell's Criminal Cases . . . . .	Criminal Appeal
Bing. . . . .	Bingham . . . . .	Common Pleas
Bing., N. C. . . . .	Bingham's New Cases or Series . . . . .	Common Pleas
Bk. . . . .	Bankruptcy. . . . .	
Bligh . . . . .	Bligh . . . . .	House of Lords
Bligh, N. S. . . . .	Bligh's New Series . . . . .	House of Lords
B. & P. . . . .	Bosanquet & Puller . . . . .	Common Pleas
Bott's P. L. . . . .	Bott's Poor Law. . . . .	
B. & B. . . . .	Broderip & Bingham . . . . .	Common Pleas
Bro. C. C. . . . .	Brown's Chancery Cases . . . . .	Chancery
Bro. P. C. . . . .	Brown's Cases in Parliament . . . . .	House of Lords
B. & L. . . . .	Browning & Lushington . . . . .	Admiralty
Buck . . . . .	Buck . . . . .	Bankruptcy
Bull, N. P. . . . .	Buller's Law of Nisi Prius. . . . .	
Burr. . . . .	Burrow . . . . .	King's Bench
Burr. S. C. . . . .	Burrow's Settlement Cases . . . . .	King's Bench

### C.

C. . . . .	. . . . .	Lord Chancellor
Cald. . . . .	Caldecott's Settlement Cases . . . . .	King's Bench



## ABBREVIATIONS AND REFERENCES.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
Camp. . . . .	Campbell . . . . .	Nisi Prius
Car. C. L. . . . .	Carrington's Criminal Law. . . . .	
Car. & M. . . . .	Carrington & Marshman . . . . .	Nisi Prius
Car. & K. . . . .	Carrington & Kirwan . . . . .	Nisi Prius
C. & P. . . . .	Carrington & Payne . . . . .	Nisi Prius
Chit. . . . .	Chitty . . . . .	King's Bench
C. & F. . . . .	Clark & Finnelly . . . . .	House of Lords
Collyer, C. C. . . . .	Collyer's Chancery Cases . . . . .	Chancery
C. B. . . . .	Common Bench Reports, Old Series . . . . .	Common Pleas
C. B., N. S. . . . .	Common Bench Reports, New Series . . . . .	Common Pleas
C. L. R. . . . .	Common Law Reports of 1855-56 . . . . .	Queen's Bench, Common Pleas and Exchequer Common Pleas Division
C. P. D. . . . .	Law Reports . . . . .	
Colt. . . . .	Coltman's Registration Cases. . . . .	
Cooper, C. C. . . . .	Cooper's Chancery Cases . . . . .	Chancery
Cowp. . . . .	Cowper . . . . .	King's Bench
Cox . . . . .	Cox . . . . .	Chancery
Cox, C. C. . . . .	Cox's Criminal Cases . . . . .	Crown & Criminal Appeal
Cr. & Ph. . . . .	Craig & Philip . . . . .	Chancery
C. & J. . . . .	Crompton & Jervis . . . . .	Exchequer
C. & M. . . . .	Crompton & Meeson . . . . .	Exchequer
C., M. & R. . . . .	Crompton, Meeson & Roscoe . . . . .	Exchequer
Curt. . . . .	Curteis . . . . .	Ecclesiastical

## D.

Daniell . . . . .	Daniell . . . . .	Exchequer
D. & M. . . . .	Davison & Merivale . . . . .	Queen's Bench
Deacon . . . . .	Deacon . . . . .	Bankruptcy
Deac. & Chit. . . . .	Deacon & Chitty . . . . .	Bankruptcy
Deane, Ecc. Rep. . . . .	Deane's Ecclesiastical Reports . . . . .	Ecclesiastical
Dears. C. C. . . . .	Dearsly's Crown Cases . . . . .	Criminal Appeal
Dears. & B. C. C. . . . .	Dearsly & Bell's Crown Cases . . . . .	Criminal Appeal
De G. . . . .	De Gex . . . . .	Bankruptcy
De G., F. & J. . . . .	De Gex, Fisher & Jones . . . . .	Lord Chancellor and Appeals in Chancery
De G., J. & S. . . . .	De Gex, Jones & Smith . . . . .	Do.
De G., M. & G. . . . .	De Gex, Macnaghten & Gordon . . . . .	Do.
De G. & Sm. . . . .	De Gex & Smale . . . . .	Knight Bruce, V.-C.
Den. C. C. . . . .	Denison . . . . .	Criminal Appeal
Dick. . . . .	Dickens . . . . .	Chancery
Dougl. . . . .	Douglas . . . . .	King's Bench
D. P. C. . . . .	Dowling's Practice Cases, Old Series . . . . .	Queen's Bench, Common Pleas, Exchequer and Bail Court
D. N. S. . . . .	Dowling's New Series . . . . .	Do.
D. & L. . . . .	Dowling & Lowndes . . . . .	Do.
D. & R. . . . .	Dowling & Ryland . . . . .	King's Bench
D. & R. N. P. C. . . . .	Dowling & Ryland's Nisi Prius Cases . . . . .	Nisi Prius
Dom. Proc. . . . .	Domus Procerum . . . . .	House of Lords
Drink. . . . .	Drinkwater . . . . .	Common Pleas
Drew. . . . .	Drewry . . . . .	Kindersley, V.-C.
Drew. & Sm. . . . .	Drewry & Smale . . . . .	Chancery

## E.

East . . . . .	East . . . . .	King's Bench
East, P. C. . . . .	East's Pleas of the Crown. . . . .	
Eden . . . . .	Eden . . . . .	Chancery
El. & Bl. . . . .	Ellis & Blackburn . . . . .	Queen's Bench
El., Bl. & El. . . . .	Ellis, Blackburn & Ellis . . . . .	Queen's Bench
El. & El. . . . .	Ellis & Ellis . . . . .	Queen's Bench
Eq. R. . . . .	Equity Reports of 1855-56 . . . . .	Chancery
Esp. . . . .	Espinasse . . . . .	Nisi Prius
Ex. . . . .	Exchequer Reports by Welsby, Hurlstone & Gordon . . . . .	Exchequer Exchequer Chamber Exchequer Division
Ex. Ch. . . . .	Law Reports . . . . .	
Ex. D. . . . .	Law Reports . . . . .	

## F.

Forrest . . . . .	Forrest . . . . .	Exchequer
-------------------	-------------------	-----------

# ABBREVIATIONS AND REFERENCES.

vii

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
Fonb. N. R. . . . .	Fonblanque's New Reports . . . . .	Bankruptcy
F. & F. . . . .	Foster & Finlason . . . . .	Nisi Prius

## G.

Gale . . . . .	Gale . . . . .	Exchequer
G. & D. . . . .	Gale & Davison . . . . .	Exchequer
Giff. . . . .	Giffard . . . . .	Vice-Chancellor Stewart
Giff. & H. . . . .	Giffard & Hemming . . . . .	Vice-Chancellor Stewart
Glyn & J. . . . .	Glyn & Jameson . . . . .	Bankruptcy
Gow . . . . .	Gow . . . . .	Nisi Prius

## H.

H. & T. . . . .	Hall & Twells . . . . .	Lord Chancellor and Appeals in Chancery
Hare . . . . .	Hare . . . . .	Wigram, V.-C., Turner, V.-C., and Wood, V.-C.
H. & R. . . . .	Harrison & Rutherford . . . . .	Common Pleas
H. & W. . . . .	Harrison & Wollaston . . . . .	King's Bench
H. or Hem. & M. or Mil. . . . .	Hemming & Miller . . . . .	Chancery
Hodges . . . . .	Hodges . . . . .	Common Pleas
Holt . . . . .	Holt . . . . .	Nisi Prius
H. & H. . . . .	Horn & Hurlstone . . . . .	Exchequer
H. L. . . . .	House of Lords Cases, by Clark . . . . .	House of Lords
H. L. Cas. . . . .	Hurlstone & Coltman . . . . .	House of Lords
H. & C. . . . .	Hurlstone & Norman . . . . .	Exchequer
H. & N. . . . .	Hurlstone & Walmsley . . . . .	Exchequer
H. & W. . . . .	Hopwood & Philbrick's Election Cases . . . . .	Exchequer
H. & P. . . . .	Hopwood & Coltman's Election Cases . . . . .	Common Pleas
Hopw. & C. . . . .	Hopwood & Coltman's Election Cases . . . . .	Common Pleas

## I.

Ir. C. L. R. . . . .	Irish Common Law Reports (1850-1866) . . . . .	Common Law
Ir. Ch. Rep. . . . .	Irish Chancery Reports (1850-1866) . . . . .	Chancery
Ir. R., C. L. . . . .	Irish Common Law Series (1866-1878) . . . . .	Common Law
Ir. R., Eq. . . . .	Irish Equity (1866-1878) . . . . .	Chancery
Ir. L. R. . . . .	Irish Law Reports (1879-1883) . . . . .	All the Courts

## J.

J. P. . . . .	Justice of the Peace . . . . .	All the Courts
J. & W. . . . .	Jacob & Walker . . . . .	Chancery
Johns. . . . .	Johnson . . . . .	Chancery
Johns. & H. . . . .	Johnson & Hemming . . . . .	Chancery
Jur. . . . .	Jurist . . . . .	All the Courts
Jur., N. S. . . . .	Jurist, New Series . . . . .	All the Courts

## K.

Kay . . . . .	Kay . . . . .	Wood, V.-C.
Kay & J. . . . .	Kay & Johnson . . . . .	Wood, V.-C.
K. & G. . . . .	Keane & Grant . . . . .	Common Pleas
Keen . . . . .	Keen . . . . .	Chancery
Ld. Kenyon . . . . .	Lord Kenyon's Notes of Cases . . . . .	King's Bench

## L.

L. C. . . . .	Lord Chancellor
L. J. or L. JJ. . . . .	Lord Justice or Lords Jus- tices
L. J., Adm. . . . .	Law Journal, New Series
L. J., Bk. . . . .	" "
L. J., Ch. . . . .	" "
L. J., C. P. . . . .	" "
L. J., Ex. . . . .	" "
	Admiralty
	Bankruptcy
	Chancery
	Common Pleas
	Exchequer

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
L. J., M. C. . . .	Law Journal, New Series . . . . .	Magistrates' Cases
L. J., Q. B. . . .	" " . . . . .	Queen's Bench
L. J., Mat. . . .	" " . . . . .	Divorce and Matrimonial
L. J., P. C. . . .	" " . . . . .	Privy Council
L. L., P. . . . .	" " . . . . .	Probate Court
L. R., Q. B. . . .	Law Reports . . . . .	Queen's Bench
L. R., C. P. . . .	" . . . . .	Common Pleas
L. R., Ex. . . . .	" . . . . .	Exchequer
L. R., Adm. . . .	" . . . . .	Admiralty
L. R., P. . . . .	" . . . . .	Probate
L. R., C. C. . . .	" . . . . .	Crown Cases Reserved
L. R., Eq. . . . .	" . . . . .	Master of the Rolls and Vice-Chancellors
L. R., Ch. . . . .	" . . . . .	Lord Chancellor's and Appeal
L. R., P. C. . . .	" . . . . .	Privy Council
L. R., H. L. . . .	" . . . . .	House of Lords
L. T., O. S. . . .	Law Times Reports, Old Series . . . . .	All the Courts
L. T. . . . .	Law Times Reports, New Series . . . . .	All the Courts
Leach, C. C. . . .	Leach's Crown Cases. . . . .	
Lofft . . . . .	Lofft . . . . .	King's Bench
Lewin, C. C. . . .	Lewin's Crown Cases . . . . .	Crown Cases
L. & C. or L. & C. C. C. . . . .	Leigh & Cave's Crown Cases . . . . .	Crown Cases
L., M. & P. . . .	Lowndes, Maxwell & Pollock . . . . .	Bail Court
Lush. . . . .	Lushington . . . . .	Admiralty
Lutw. Reg. Cas. .	Lutwyche's Registration Election Cases . . . . .	Common Pleas

## M.

Mac. & G. . . . .	Macnaghten & Gordon . . . . .	Lord Chancellor
Macq. H. L. Cas. .	Macqueen's Scotch Appeals . . . . .	House of Lords
Madd. . . . .	Maddock . . . . .	Chancery
M. & G. . . . .	Manning & Granger . . . . .	Common Pleas
M. R. . . . .	" . . . . .	Master of the Rolls
M. C. . . . .	Magistrate Cases. . . . .	
Mat. . . . .	Matrimonial . . . . .	Matrimonial and Divorce
M. & W. . . . .	Meeson & Welsby . . . . .	Exchequer
M. C. C. . . . .	Moody's Crown Cases . . . . .	Exchequer Chamber
M. & M. . . . .	Moody & Malkin . . . . .	Nisi Prius
M. & P. . . . .	Moore & Payne . . . . .	Common Pleas
M. & Rob. . . . .	Moody & Robinson . . . . .	Nisi Prius
M. & R. . . . .	Manning & Ryland . . . . .	King's Bench
M. & S. . . . .	Maule & Selwyn . . . . .	King's Bench
M. & Scott . . . .	Moore & Scott . . . . .	Common Pleas
M'Clel. . . . .	M'Cleland . . . . .	Exchequer
M'Clel. & Y. . . .	M'Cleland & Younge . . . . .	Exchequer
Marsh. . . . .	Marshall . . . . .	Common Pleas
Mer. . . . .	Merivale . . . . .	Chancery
Mont. . . . .	Montagu . . . . .	Bankruptcy
Mont. & Ayr. . . .	Montagu & Ayrton . . . . .	Bankruptcy
Mont. & Bligh. . .	Montagu & Bligh . . . . .	Bankruptcy
Mont. & Chit. . . .	Montagu & Chitty . . . . .	Bankruptcy
Mont., D. & D. . .	Montagu, Deacon & De Gex . . . . .	Bankruptcy
Mont. & Mac. . . .	Montagu & Macarthur . . . . .	Bankruptcy
Moore . . . . .	J. B. Moore . . . . .	Common Pleas
Moore, P. C. C. . .	Moore's Privy Council Cases . . . . .	Privy Council
Moore, P.C.C., N.S.	Moore's Privy Council Cases, New Series . . . . .	Privy Council
Moore, Ind. App. .	Moore's Indian Appeals . . . . .	Privy Council
Mur. & H. . . . .	Murphy & Hurlstone . . . . .	Exchequer
Myne & C. . . . .	Myne & Craig . . . . .	Chancery
Myne & K. . . . .	Myne & Keen . . . . .	Chancery

## N.

N. R. . . . .	Bosanquet & Puller's New Reports . . . . .	Common Pleas
N. & M. . . . .	Neville & Manning . . . . .	King's Bench
N. & P. . . . .	Neville & Perry . . . . .	Queen's Bench
Nev. & Mac. . . .	Neville & Macnamara . . . . .	Railway Cases
New Sess. Cas. . .	Carrow, Hamerton and Allen . . . . .	All the Courts
Nolan . . . . .	Nolan . . . . .	King's Bench



P.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
Ph. . . . .	Phillips . . . . .	Chancery
Park, Ina. . . . .	Park on Insurance.	
Peake . . . . .	Peake . . . . .	Nisi Prius
Peake's Addl. Cas.	Peake's Additional Cases . . . . .	Nisi Prius
P. Wms. . . . .	Peere Williams . . . . .	Chancery
P. & D. . . . .	Perry & Davison . . . . .	Queen's Bench
Price . . . . .	Price . . . . .	Exchequer
Price P. C. . . . .	Price's Notes of Points in Practice . . . . .	Exchequer
P. D. . . . .	Law Reports . . . . .	Probate Division
P. C. . . . .	Privy Council.	

Q.

Q. B. D. . . . .	Law Reports . . . . .	Queen's Bench Division
------------------	-----------------------	------------------------

R.

Railw. Cas. . . . .	Railway Cases by Nicholl, Hare, Oliver, Beavan & Lefroy . . . . .	All the Courts
Rob. . . . .	Robinson . . . . .	House of Lords
Rob. Adm. Rep. . . . .	Dr. W. Robinson's Admiralty Reports . . . . .	Admiralty
Rob. Ecc. Rep. . . . .	Dr. Robertson's Ecclesiastical Reports . . . . .	Ecclesiastical
Romilly's Notes of Cases.		
Rose . . . . .	Rose . . . . .	Bankruptcy
Russ. . . . .	Russell . . . . .	Chancery
Russ. & Mylne . . . . .	Russell & Mylne . . . . .	Chancery
Russ. C. & M. . . . .	Russell on Crimes and Misdemeanors, by Greaves.	
R. & R. C. C. . . . .	Russell & Ryan's Crown Cases.	
R. & M. . . . .	Ryan & Moody . . . . .	Nisi Prius

S.

Scott . . . . .	Scott . . . . .	Common Pleas
Scott, N. R. . . . .	Scott's New Reports . . . . .	Common Pleas
Selw. N. P. . . . .	Selwyn's Law of Nisi Prius, by Keane & Smith.	
Sim. . . . .	Simon . . . . .	Shadwell, V.-C. E.
Sim. N. S. . . . .	Simon's New Series . . . . .	Chancery
Sim. & Stu. . . . .	Simon & Stuart . . . . .	Lord Cranworth, V.-C.
Smith . . . . .	Smith . . . . .	King's Bench
Stark. . . . .	Starkie . . . . .	Nisi Prius
Swans. . . . .	Swanston . . . . .	Chancery
S. C. . . . .	Same case.	
S. P. . . . .	Same point or principle.	
Sm. & G. . . . .	Smale & Giffard . . . . .	Stuart, V.-C.
S. & T. . . . .	Swabey & Tristram . . . . .	Divorce and Probate

T.

Tamlyn . . . . .	Tamlyn . . . . .	Rolls
Taunt. . . . .	Taunton . . . . .	Common Pleas
T. R. . . . .	Term Reports (Durnford & East) . . . . .	King's Bench
Tidd's Prac. . . . .	Tidd's Practice.	
Turn. & Russ. . . . .	Turner & Russell . . . . .	Chancery
Tyr. . . . .	Tyrwhitt . . . . .	Exchequer
Tyr. & G. . . . .	Tyrwhitt & Granger . . . . .	Exchequer
T. & M. . . . .	Temple & Mew . . . . .	Criminal Appeal

U.

U. C. L. J. . . . .	Upper Canada Law Journal.	
---------------------	---------------------------	--

V.

Ves. jun. . . . .	Vesey, junior . . . . .	Chancery
Ves. & B. . . . .	Vesey & Beames . . . . .	Chancery

## ABBREVIATIONS AND REFERENCES.

## W.

ABBREVIATIONS.	NAMES OF REPORTERS AND REPORTS.	NAMES OF COURTS OR JUDGES.
West . . . . .	West . . . . .	House of Lords
Wightw. . . . .	Wightwick . . . . .	Exchequer
W., W. & D. . . . .	Wilmore, Wollaston & Davison . . . . .	Queen's Bench
W., W. & H. . . . .	Wilmore, Wollaston & Hodges . . . . .	Queen's Bench
Wils. . . . .	Wilson . . . . .	King's Bench and Common Pleas
Wils. C. C. . . . .	Wilson's Chancery Cases . . . . .	Chancery
Wils. Exch. . . . .	Wilson's Exchequer Reports . . . . .	Exchequer, Equity
W. P. C. . . . .	Wollaston's Practice Cases . . . . .	Queen's Bench, Common Pleas and Exchequer
Woodf. L. & T. . . . .	Woodfall's Law of Landlord and Tenant, by Cole.	
W. Bl. . . . .	Sir William Blackstone . . . . .	King's Bench and Common Pleas
W. R. . . . .	Weekly Reporter . . . . .	All the Courts

## Y.

Younge . . . . .	Younge . . . . .	Exchequer, Equity
Y. & C. . . . .	Younge & Collyer . . . . .	Exchequer, Equity
Y. & C. N. C. C. . . . .	Younge & Collyer's New Chancery Cases . . . . .	Knight Bruce, V.-C.
Y. & J. . . . .	Younge & Jervis . . . . .	Exchequer

# A CHRONOLOGICAL LIST

## OF

# THE REPORTS

## COMPRIED IN THE DIGEST.

### HOUSE OF LORDS.

<p>Brown's Reports—1702 to 1800.  Dow—1812 to 1818.  Bligh—1819 to 1821.  Bligh, New Series—1827 to 1837.  Dow &amp; Clark—1827 to 1832.  West—1839 to 1841.  Clark &amp; Finnely—1831 to 1846.  House of Lords Cases (Clark)—1847 to 1866.</p>	<p>Law Journal, New Series—1832 to 1883.  Law Reports—1865 to 1883.  Jurist—1837 to 1854.  Jurist, New Series—1855 to 1866.  Law Times, New Series—1859 to 1883.  Weekly Reporter—1852 to 1883.  Macqueen—1851 to 1866.</p>
---	---

### PRIVY COUNCIL.

<p>Knapp's Reports—1829 to 1836.  Moore—1836 to 1852.  Moore's Indian Appeals—1836 to 1873.  Moore's New Series—1852 to 1873.  Jurist—1837 to 1854.  Jurist, New Series—1855 to 1866.</p>	<p>Law Journal, New Series—1865 to 1883.  Law Reports—1865 to 1883.  Law Times, New Series—1859 to 1883.  Swabey—1858 to 1859.  Lushington—1860 to 1863.  Browning &amp; Lushington—1863 to 1865.</p>
---	---

### QUEEN'S BENCH AND BAIL COURT.

<p>Wilson's Reports—1742 to 1774.  Kenyon's Notes—1753 to 1760.  Sir William Blackstone—1746 to 1780.  Burrow—1757 to 1771.  Burrow's Settlement Cases—1732 to 1776.  Caldecott's Settlement Cases—1775 to 1786.  Nolan—1791 to 1792.  Lofft—1772 to 1774.  Cowper—1774 to 1778.  Douglas—1778 to 1784.  Term Reports—1785 to 1800.  Smith—1803 to 1806.  East—1801 to 1812.  Maule &amp; Selwyn—1813 to 1817.  Barnewall &amp; Alderson—1817 to 1822.  Barnewall &amp; Cresswell—1822 to 1830.  Barnewall &amp; Adolphus—1830 to 1834.  Adolphus &amp; Ellis—1834 to 1840.  Queen's Bench Reports (Adolphus &amp; Ellis, New Series)—1841 to 1852.  Ellis, Blackburn &amp; Ellis—1858.  Ellis &amp; Ellis—1858 to 1861.  Best &amp; Smith—1861 to 1869.  Law Journal, New Series—1832 to 1883.</p>	<p>Law Reports—1866 to 1893.  Dowling &amp; Ryland—1821 to 1827.  Manning &amp; Ryland—1827 to 1830.  Nevile &amp; Manning—1831 to 1836.  Nevile &amp; Perry—1836 to 1838.  Perry &amp; Davison—1838 to 1841.  Gale &amp; Davison—1841 to 1843.  Davison &amp; Merivale—1843 to 1844.  Chitty—1819 to 1820.  Dowling's Practice Cases, Old Series—1830 to 1840.  Dowling's Practice Cases, New Series—1841 to 1842.  Harrison &amp; Wollaston—1835 to 1837.  Willmore, Wollaston &amp; Davison—1837.  Willmore, Wollaston &amp; Hodges—1838 to 1839.  Jurist—1837 to 1854.  Jurist, New Series—1855 to 1866.  Law Times, New Series—1859 to 1883.  Weekly Reporter—1852 to 1883.  Lowndes, Maxwell &amp; Pollock—1850 to 1851.  Lowndes &amp; Maxwell—1852.  Saunders &amp; Cole—1842 to 1848.</p>
---	--



## COMMON PLEAS.

H. Blackstone—1788 to 1796.  
 Bosanquet & Puller—1796 to 1807.  
 Taunton—1808 to 1819.  
 Broderip & Bingham—1819 to 1822.  
 Bingham—1822 to 1834.  
 Bingham's New Cases—1834 to 1840.  
 Manning & Granger—1840 to 1844.  
 Hodges—1835 to 1837.  
 Arnold—1838 to 1839.  
 Marshall—1814 to 1816.  
 Moore—1817 to 1827.  
 Moore & Payne—1828 to 1831.  
 Moore & Scott—1831 to 1834.  
 Scott—1834 to 1840.  
 Scott's New Reports—1840 to 1845.

Common Bench Reports—1845 to 1856.  
 Common Bench Reports, New Series—1856 to 1865.  
 Harrison & Rutherford—1866 to 1868.  
 Law Journal, New Series—1832 to 1883.  
 Law Reports—1865 to 1883.  
 Dowling's Practice Cases, Old Series—1830 to 1840.  
 Dowling's Practice Cases, New Series—1841 to 1842.  
 Jurist—1837 to 1854.  
 Jurist, New Series—1855 to 1866.  
 Law Times, New Series—1859 to 1883.  
 Weekly Reporter—1852 to 1883.

## EXCHEQUER.

Anstruther's Reports—1792 to 1797.  
 Forrest—1801.  
 Wightwick—1810 to 1811.  
 Price—1814 to 1824.  
 M'Clelland—1824.  
 M'Clelland & Younge—1825.  
 Younge & Jervis—1826 to 1830.  
 Crompton & Jervis—1830 to 1832.  
 Crompton & Meeson—1832 to 1834.  
 Crompton, Meeson & Roscoe—1834 to 1836.  
 Meeson & Welsby—1836 to 1847.  
 Exchequer Reports—1847 to 1856.  
 Hurlstone & Norman—1856 to 1861.  
 Hurlstone & Coltman—1862 to 1865.  
 Law Journal, New Series—1832 to 1883.

Law Reports—1865 to 1883.  
 Tyrwhitt—1830 to 1835.  
 Tyrwhitt & Granger—1836.  
 Dowling's Practice Cases, Old Series—1830 to 1840.  
 Dowling's Practice Cases, New Series—1841 to 1842.  
 Gale—1835 to 1836.  
 Murphy & Hurlstone—1836 to 1837.  
 Horn & Hurlstone—1838 to 1839.  
 Jurist—1837 to 1854.  
 Jurist, New Series—1854 to 1866.  
 Law Times, New Series—1859 to 1883.  
 Weekly Reporter—1852 to 1883.

## ADMIRALTY.

Robinson (W.)—1838 to 1852.  
 Swabey—1858 to 1859.  
 Spinks—1854 to 1855.  
 Lushington—1860 to 1863.  
 Browning & Lushington—1863 to 1865.  
 Jurist—1837 to 1854.

Jurist, New Series—1855 to 1866.  
 Law Journal, New Series—1832 to 1883.  
 Law Reports—1865 to 1883.  
 Weekly Reporter—1852 to 1883.  
 Law Times, New Series—1859 to 1883.

## DIVORCE AND PROBATE.

Swabey & Tristram—1858 to 1865.  
 Jurist, New Series—1858 to 1866.  
 Law Journal, New Series—1832 to 1883.

Law Reports—1865 to 1883.  
 Law Times, New Series—1859 to 1883.  
 Weekly Reporter—1852 to 1883.

## BANKRUPTCY.

Rose—1810 to 1816.  
 Buck—1816 to 1820.  
 Glyn & Jameson—1821 to 1828.  
 Montagu & Macarthur—1828 to 1830.  
 Montagu—1830 to 1832.  
 Montagu & Bligh—1832 to 1833.  
 Montagu & Ayerton—1833 to 1838.  
 Montagu & Chitty—1838 to 1840.  
 Deacon & Chitty—1832 to 1835.  
 Deacon—1836 to 1839.

Montagu, Deacon & De Gex—1840 to 1844.  
 De Gex—1845 to 1848.  
 De Gex, Macnaghten & Gordon—1851 to 1857.  
 De Gex & Jones—1857 to 1860.  
 De Gex, Fisher & Jones—1860 to 1862.  
 De Gex, Jones & Smith—1862 to 1865.  
 Jurist—1837 to 1854.  
 Jurist, New Series—1855 to 1866.  
 Law Times, New Series—1859 to 1883.  
 Weekly Reporter—1852 to 1883.

## NISI PRIUS.

Peake's Reports—1790 to 1812.  
 Peake's Additional Cases—1795 to 1812.

Espinasse—1793 to 1807.  
 Campbell—1808 to 1816.

## CHRONOLOGICAL LIST OF THE REPORTS.

xiii

### NISI PRIUS—*Continued.*

Starkie—1815 to 1822.  
Holt—1815 to 1817.  
Gow—1818 to 1820.  
Ryan & Moody—1823 to 1826.  
Moody & Malkin—1827 to 1830.  
Moody & Robinson—1831 to 1844.

Dowling & Ryland—1822 to 1823.  
Carrington & Payne—1823 to 1841.  
Carrington & Marshman—1840 to 1842.  
Carrington & Kirwan—1843 to 1850.  
Foster & Finlason—1858 to 1867.

### CROWN CASES.

Leach—1730 to 1815.  
Russell & Ryan—1799 to 1823.  
Lewin—1822 to 1838.  
Moody—1824 to 1844.  
Denison—1844 to 1852.  
Temple & Mew—1848 to 1851.

Dearsly—1852 to 1856.  
Dearsly & Bell—1856 to 1858.  
Bell—1858 to 1860.  
Leigh & Cave—1861 to 1865.  
Cox—1843 to 1883.

### REGISTRATION ELECTION APPEALS.

Lutwyche—1843 to 1853.  
Keane & Grant—1854 to 1862.  
Hopwood & Philbrick—1862 to 1867.

Hopwood & Coltman—1868 to 1879.  
Coltman—1880 to 1883.

---

## ADDENDUM.

Col. 89, *add* "VI. Destroying Dangerous Dogs. See HEALTH."



# A Digest

OF THE

## CASES REPORTED

FROM 1756 TO 1883.

---

### ABANDONMENT.

*See INSURANCE.*

---

### ABATEMENT OF ACTION.

*See PRACTICE (PARTIES).*

---

### ABDUCTION.

*See CRIMINAL LAW.*

---

### ABORTION.

*See CRIMINAL LAW.*

---

### ABSCONDING DEBTOR.

*See ARREST—BANKRUPTCY.*

---

### ABSTRACT OF TITLE.

*See VENDOR AND PURCHASER.*

---

### ACCESSORY.

*See CRIMINAL LAW.*

---

### ACCIDENT.

- I. GENERALLY.
- II. IN CASES OF NEGLIGENCE.—*See NEGLIGENCE.*
- III. DURING THE CARRIAGE OF PASSENGERS AND GOODS.—*See CARRIER.*
- IV. TO SHIPS.—*See SHIPPING.*

#### I. GENERALLY.

**Act of God—Definition.]**—In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God. *Nitro-Phosphate and Odam's Chemical Manure Company v. London and St.*

*Katharine Docks Company*, 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267—C. A. Affirming with variation, 37 L. T. 330.

**Exemption from Liability for Injuries caused by.**—Sect. 74 of the Harbours, Docks and Piers Act, 1847, enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done shall also be liable to make good the same . . . . . Provided always, that nothing herein contained shall extend to impose any liability" upon the owner when the vessel is at the time when the damage is caused in charge of a compulsory pilot. A vessel was driven aground by a violent storm, and after the master and crew had been obliged to abandon her, was forced by the wind and waves against a pier, whereby serious damage was occasioned:—Held, that the owners of the ship were not liable under the above section. *River Wear Commissioners v. Adamson*, 2 App. Cas. 743; 47 L. J., Q. B. 193; 37 L. T. 543—H. L.

The exemption from obligation to make good losses or injuries caused by the act of God applies to liabilities created by sect. 74 no less than to those existing before the passing of the act. *Ib.*

**When a Defence.**—A loss occasioned by the act of God is a loss arising from and occasioned by the agency of nature which cannot be guarded against by the ordinary exertions of human skill and prudence so as to prevent its effect. *Nugent v. Smith*, 1 C. P. D. 423; 45 L. J., C. P. 697; 34 L. T. 827; 25 W. R. 117—C. A.

The plaintiff delivered to the defendant in London a mare to be carried by him by steamer from London to Aberdeen, between which places he ran steamers as a carrier. A storm arising during the voyage, the mare was so injured that she died. The jury found that the injury was caused partly by excessive bad weather and partly by the fright and struggling of the mare, and negatived all negligence on the part of the defendant:—Held, that upon these findings he was not liable. *Ib.*

To an action upon a recognizance or an obligation, impossibility, by act of God, of performance of the condition, is a good defence. *Leitrim (Earl) v. Steward*, 5 Ir. R., C. L. 27

A carrier is not bound to incur unreasonable expense to surmount obstructions caused by an act of God, as a fall of snow. *Briddon v. Great Northern Railway Company*, 28 L. J., Ex. 51. But see cases, sub tit. SHIPPING (Charterparty, Frost preventing Loading).

A carrier contracted to carry goods between Gosport and Ryde. The goods were put in a boat and towed by his steam vessel, which proceeded to Portsmouth pier to take in passengers. There was another vessel alongside the pier; and it was the usual and most safe course for the steamboat so approaching to stop until the other vessel had left. On this occasion the steamboat with the boat in tow was twice stopped, in consequence of the stopping of the other vessel, and on the second time of stopping the tide lifted up the tow-boat and

pitched it on the rudder of the steamboat, whereby the tow-boat sprang a leak and the goods were damaged. There was no negligence on the part of the captains of either vessel:—Held, that the damage was not caused by the act of God, and therefore the carrier was liable. *Oakley v. Portsmouth and Ryde Steam Packet Company*, 11 Ex. 618; 25 L. J., Ex. 99.

Where damage was done to the cargo of a steam vessel by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost:—Held, that this was not an act of God, but negligence of the captain in filling his boiler before the time for heating it. *Siordet v. Hall*, 4 Bing. 607.

**Alternatives.**—An agreement to do either of two things is not discharged when one becomes impossible by the act of God. *Barkworth v. Young*, 4 Drew. 1; 26 L. J., Ch. 153; 3 Jur., N.S. 34.

**Escape of Water.**—The defendants under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates, which it was the duty of the person in charge of them to open when the water within them became eight feet deep,—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done, and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto and a quantity of coals deposited therein and thereon:—Held, that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were *primâ facie* liable for the damage done, within the principle of *Rylands v. Fletcher*, 3 L. R., H. L. 330; but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what parliament had authorized them to do, they were not liable. *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418; 50 L. J., Q. B. 772; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.

The defendant was the owner of a series of artificial lakes, which had existed for a long time without causing damage. Upon a most unusual rainfall occurring, the bank at the end of the higher lake gave way, and the water rushing with great violence into the lakes below caused their banks also to give way, and the aggregate volume of water from the lakes rushing down the valley, caused damage to certain county bridges lower down the stream. On the trial of an action by the surveyor of the county against the defendant to recover for the damage done to the bridges, the jury found that there had been no negligence in the construction or the maintenance of the lakes, but that if the flood had been anticipated, the effect might have been prevented:—Held, that the rainfall being so unusual as to amount to *vis major* or the act of God, the defendant was not liable. *Nicholls v. Mansland*, 2 Ex. D. 1; 46 L. J., Ex. 174; 35 L. T. 725; 25 W. R. 173—C. A.

The principle that if a man brings and

accumulates upon his land anything which, if it escapes, may cause damage to his neighbour, he does so at his peril, is not applicable to the case of water stored in tanks in India, which have existed from time immemorial, and are preserved and repaired by the landowners by reason of their tenure, as essential to the welfare and existence of the people. *Madras Railway Company v. Carcettinagarum (Zemindar)*, 30 L. T. 770; 22 W. R. 865—P. C.

Where water escaped from the pipes of a company owing to an extraordinary frost and caused damage, the company were held not liable. *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781; but see *Great Western Railway Company v. Braid*, 1 Moo. N. S. 101.

— **Underground.**—A's mine was flooded by water which had, after an unusual rainfall, accumulated in an excavation made by B. on his land, and had escaped thence through his mine into A's, which was situated at a lower level:—Held, that although B. in making the excavation had no intention of collecting water therein, and although he had provided an outlet for such an amount of water as might be looked for in ordinary seasons, he was liable for the damage sustained by A. *Fletcher or Mungrate v. Smith*, 2 App. Cas. 781; 47 L. J., Ex. 4; 37 L. T. 367; 26 W. R. 83—H. L. Affirming *S. C.*, 7 L. R., Ex. 305; 41 L. J., Ex. 193; 27 L. T. 164; 20 W. R. 987. And see WATER and GAS.

— **Personal Incapacity.**—In a contract of apprenticeship, by which it is agreed that the apprentice shall honestly remain with and serve his master during the term fixed, there is in law an implied condition that the apprentice shall not be prevented from serving by the act of God. *Boast v. Firth*, 4 L. R., C. P. 1; 38 L. J., C. P. 1; 19 L. T. 264; 17 W. R. 29.

The plaintiff contracted with a wife as her husband's agent that she should play the piano at a concert. She was unable to attend owing to illness. In an action against the husband for breach of contract:—Held, that his wife's illness and consequent incapacity excused him. *Robinson v. Davison*, 6 L. R., Eq. 269; 40 L. J., Ex. 172; 24 L. T. 755; 19 W. R. 1036.

An order in bastardy was made on the 8th of February. On the 12th the appellant entered into the proper recognizance, and on the same day sent a written notice of his having done so by the post, addressed to the mother of the child. The mother died on the 9th February:—Held, that the sessions were bound to hear the appeal, the appellant being excused from performing the duty of giving notice, under 8 & 9 Vict. c. 10, s. 3, by its becoming impossible by the act of God. *Reg. v. Leicestershire (Justices)*, 15 Q. B. 88; 4 New Seas. Cas. 124; 19 L. J., M. C. 209; 14 Jur. 550. See also CONTRACT (Impossibility).

— **Inevitable Accident—Charterparty.**—By the terms of a charterparty a ship was to be loaded in regular and customary turn, except in cases of riot, strikes, or any other accident beyond the freighter's control, which might prevent or delay the loading:—Held, that a fall of snow, which rendered it impossible to bring the cargo to the place of shipment, was not an accident within the meaning of the exception. *Fenwick v. Schmalz*, 3 L. R., C. P. 313; 37 L. J., C. P. 78; 18 L. T., 27; 16 W. R. 481.

— **Collision.**—In order to constitute an inevitable accident it is necessary that the accident should not have been capable of being prevented by ordinary skill and diligence—not extraordinary skill or extraordinary diligence—by that degree of diligence and skill which is generally to be found in persons who properly discharge their duty. *The Thomas Powell v. The Cuba*, 14 L. T. 603.

Inevitable accident, in a cause of damage to a ship, is that which a party could not possibly prevent by the exercise of ordinary care, caution and maritime skill. *The Uhla*, 19 L. T. 89.

When damage might have been avoided by shipping cable and setting sail:—Held, that it was not an inevitable accident, but the result either of negligence or the absence of proper nautical skill. *Ib.*

— **Costs.**—A sailing ship in a gale drove from her anchors across a sand and her rudder was so damaged as to render the ship unmanageable: in this condition she came into collision after sunset with a brig at anchor. At the time of the collision the ship had her anchor light exhibited and no other light. In an action of damage by the owners of the brig against the ship it was held that the collision was occasioned by inevitable accident, and that the ship, in the circumstances of the case, was not to be deemed in fault for not carrying side lights or the three red lights prescribed by Article 5 of the Regulations for preventing Collisions at Sea, and that the suit ought to be dismissed without costs. *The Buckhurst*, 6 P. D. 152; 30 W. R. 232.

Inevitable accident is where the collision could not possibly have been prevented by proper care and seamanship under the particular circumstances of the case. So that where the defence of inevitable accident is set up on behalf of a vessel *prima facie* to blame for a collision, the defence, to succeed, must be supported by proof that everything was done which could and ought to have been done to avoid the collision; and this, though the vessel is in some degree disabled, and so less manageable than she would otherwise have been. *The Calcutta*, 21 L. T. 768—P. C.

Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. *The Marpesia*, 4 L. R., C. P. 212; 26 L. T. 333; 8 Moore, P. C. C., N. S. 468.

— **Evidence of Negligence.**—The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plaintiff must give some affirmative evidence of negligence on the part of the defendant. *Hammack v. White*, 11 C. B., N. S. 588; 31 L. J., C. P. 129; 8 Jur., N. S. 796; 5 L. T. 676; 10 W. R. 230.

But accidents may be of such a nature that negligence may be presumed from the very fact of the happening of the accident. *Byrne v. Boadle*, 2 H. & C. 722; 33 L. J. Ex. 13; 9 L. T. 450; 12 W. R. 279. And see NEGLIGENCE, CARRIERS and SHIPPING.

## ACCOMPLICE.

See CRIMINAL LAW.

## ACCORD AND SATISFACTION.

### I. WHAT AMOUNTS TO—

1. *Generally.*
2. *By new or substituted Agreement.*
3. *By Receipt of Negotiable Instrument.*

### II. BY WHOM.

### III. EVIDENCE AS TO.

### IV. BY PAYMENT.—See PAYMENT.

### I. WHAT AMOUNTS TO—

#### 1. GENERALLY.

**Accord without Satisfaction.**—Accord without satisfaction cannot be pleaded alone to a deed. *Parker v. Ramsbottom*, 3 B. & C. 257; 5 D. & R. 138.

To an action for a debt, a plea that the plaintiff in consideration that the defendant would secure the debt by executing a mortgage of premises when called on to do so, the amount to carry interest and be payable by instalments, undertook that no proceedings should be instituted against him in respect of the debt unless default were made in paying the instalments. The plea averred the defendant's constant readiness to execute the mortgage, but that he had never been called on to do so:—Held bad, for pleading matter of accord without alleging it by way of satisfaction. *Allies v. Probyn*, 2 C. M. & R. 408; 5 Tyr. 1079; 4 D. P. C. 153.

**Satisfaction.**—To an action for work done, the defendant pleaded that, before action the plaintiff sued the defendant in a county court for 50*l.*, and, being an infant, gave notice that he should set up his infancy; whereupon, before the trial, it was agreed that he should pay the plaintiff 30*l.* and his costs in the county court, and that the plaintiff should accept the 30*l.* and the performance by the defendant of the agreement in satisfaction as well of the causes of action for which the plaintiff in the county court was levied as of all causes of action which the plaintiff had against the defendant, and that the defendant paid the 30*l.* and the costs, which the plaintiff accepted in pursuance of the agreement, in satisfaction:—Held, that the plea disclosed a sufficient satisfaction. *Cooper v. Parker*, 15 C. B. 822; 24 L. J., C. P. 68; 1 Jur., N. S. 281—Ex. Ch.

**Bond given for Bond.**—To an action on a bond, the defendant pleaded that before breach, M. and others, as his sureties, executed and delivered another bond in satisfaction and discharge of the bond in the declaration, and of all covenants therein contained, and that the plaintiff accepted the bond in satisfaction and discharge of the bond in the declaration, and of all covenants:—Held, that the plea was not good, either by way of accord and satisfaction or release.

*Berwick-upon-Tweed (Mayor, &c.) v. Oswald*, 1 El. & Bl. 295; 22 L. J., Q. B. 129; 17 Jur. 1148.

**Acceptance.**—An acceptance in satisfaction must be an act of the will in the party receiving. *Hardman v. Bellhouse*, 9 M. & W. 596; 11 L. J., Ex. 135.

**of Indemnity.**—The plaintiff, acceptor of a bill of exchange, on the day it fell due sent a person to the defendant, who held it, to pay the amount, and bring it back. The defendant received the money and gave a receipt for it, but said he could not give up the bill. The plaintiff being informed of this, sent again to the defendant to demand the bill or the money, but he did not give up either. Afterwards, on the same day, the defendant sent to the plaintiff a paper signed by G., acknowledging the receipt from the defendant of the amount of the bill, and undertaking to bear the plaintiff harmless for the amount, if the bill, which he stated to have been lost, should be presented. The plaintiff kept this guarantee, but nevertheless sued the defendant for money received:—Held, that his right of action vested on the defendant's refusal to repay the money or give up the bill; and that the receipt by the plaintiff of G.'s guarantee operated in the nature of an accord and satisfaction. *Alexander v. Strong*, 9 M. & W. 733; 2 D. N. S. 256; 11 L. J., Ex. 316.

**of Security.**—Shares in a company were deposited by B. with A., to be sold by A. in case B. neglected to provide for two bills accepted by A. for B.'s accommodation. B. having failed to provide for the bill, A. sold the shares, and gave notice of that fact to B., who refused to execute a transfer to the purchaser. In an action by A. to recover the amount paid by him to take up one of the bills, B. pleaded in bar the deposit and sale of the shares. Upon an issue taken on this plea:—Held, that B. was entitled to the verdict, notwithstanding his refusal to give effect to the sale by executing a transfer. *Ross v. Moser*, 1 C. B. 227.

**of less sum than amount of Debt.**—Acceptance of a less sum cannot be a satisfaction in law of a greater. *Fitch v. Sutton*, 5 East, 230; 1 Smith, 415.

An agreement by a debtor to pay to the creditor or his nominees a less sum than the debt payable to the creditor is not a sufficient consideration for an agreement by the creditor not to take further proceedings. *Beer v. Foakes*, 11 Q. B. D. 221; 52 L. J., Q. B. 712—C. A. Reversing 52 L. J., Q. B. 426.

A plea, therefore, alleging the acceptance of a less sum in satisfaction of a larger sum, will be bad after verdict. *Down v. Hatcher*, 10 A. & E. 121; 2 P. & D. 292; 3 Jur. 651.

So, where a defendant pleaded a payment in discharge and satisfaction, and the plaintiff replied a writ sued out before such payment; the plea held bad, because it did not allege the payment to have been made in discharge of the costs and damages as well as of the promises, and it appeared upon the record that the plaintiff had still a cause of action unsatisfied. *Francis v. Crywell*, 1 D. & R. 546; 5 B. & A. 886. But see *Corbett v. Scinburne*, 3 N. & P. 551; 8 A. & E. 673.

Where to an action by assignees of a bankrupt

to recover 1,000*l.* received by the defendant before the bankruptcy, he pleaded, that, on an account stated between him and the bankrupt before the bankruptcy, the former was found to be indebted to the bankrupt in 400*l.*, for which the bankrupt drew a bill of exchange upon the defendant, payable to him or his order, which he accepted for and on account of the debt, and returned it to the bankrupt:—Held, that the plea was no answer, as it was pleaded to the whole of the demand, and giving a bill for 400*l.* was not a legal satisfaction of 1,000*l.*, being the amount of the debt claimed. *Thomas v. Heathorne*, 3 D. & R. 647; 2 B. & C. 477.

**Payment of Debt by Cheque of Smaller Amount.**—A., being indebted to B, in 125*l.* 7*s.* 9*d.* for goods sold and delivered, gave B. a cheque for 100*l.* payable on demand, which B. accepted in satisfaction:—Held, a good accord and satisfaction. *Cumber v. Wane* (Stra. 426), and *Sibree v. Tripp* (15 M. & W. 23), observed upon. *Guddard v. O'Brien*, 9 Q. B. D. 37; 46 L. T. 306; 30 W. R. 549.

**Joint Debt—Discharge of one Debtor.**—B. & C. being jointly indebted to A, the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce A.'s demand if he gained a verdict, and proposed to put an end to the action by paying part of the debt, and costs. This was acceded to, and a receipt given for the sum paid, which was stated to be for debt and costs in that action. A. afterwards sued C.:—Held, that the composition did not operate as a discharge of the whole debt, but only to relieve B. and, therefore, it was no defence for C. *Walters v. Smith*. 2 B. & Ad. 889.

**Allowance of Cross Demands.**—To an action for money due on an account stated, it is not sufficient to plead that the defendant and plaintiff accounted together of and concerning the action, and all other claims and demands between them, amounting to 1,000*l.*; and that on such accounting, a small sum, to wit, 150*l.*, was found to be due and owing to the plaintiff, which the defendant promised to pay, and afterwards paid to the plaintiff, who accepted it, in full satisfaction of the sum due to him from the defendant: for such a plea does not shew that, at the time of the second accounting relied on, any cross demand by the defendant against the plaintiff existed, or that, if it existed, it had not been agreed to be given up by the defendant in consideration of the plaintiff's giving up some other demand of his on the defendant, so as to make payment of the balance a satisfaction of the larger sum. *Smith v. Page*, 15 M. & W. 683.

To an action on several bills of exchange and for goods, the defendant pleaded that he and the plaintiff accounted together of and concerning these causes of action, and of and concerning other claims and demands of the plaintiff against the defendant, and certain other claims and demands of the defendant against the plaintiff; and on that accounting the sum of 50*l.* and no more was found to be due from the defendant to the plaintiff, which sum the defendant promised the plaintiff to pay to him on request; and that the plaintiff received from the defendant 50*l.* in satisfaction of such sum:—Held, that the plea amounted to an allegation of the allowance of

cross demands upon an account stated, and payment of the balance, and afforded substantially a good defence. *Callander v. Howard*, 10 C. B. 250; 1 L. M. & P. 562; 19 L. J., C. P. 312; 14 Jur. 672.

**For Personal Injuries.**—In an action for an injury sustained through a railway accident, the plaintiff, at the time, not supposing that he had sustained any serious injury, accepted of the company 2*l.* as compensation for damage to his clothes:—Held, that the receipt of this sum could not be set up as an accord and satisfaction for a patent and severe injury to the brain or spine. *Roberts v. Eastern Counties Railway Company*, 1 F. & F. 460.

In an action for injuries arising from a concussion, caused by a collision of railway trains, the plaintiff having the day after the occurrence agreed in terms to accept a sum in satisfaction of the injuries, and all consequences arising therefrom:—Held, that if his mind went with those terms, and he understood their effect when he assented to them, he was bound by the agreement, and could recover no further compensation, even although it appeared that he had sustained serious and permanent injuries, latent and undiscovered until some time afterwards, and of which he had no idea at the time he entered into the arrangement. *Rideal v. Great Western Railway Company*, 1 F. & F. 706.

To an action for compensation for personal injuries from a railway accident the company pleaded a receipt in full; the plaintiff then filed a bill in equity alleging the receipt to have been obtained by fraud, and praying that the company might be restrained from setting it up, but for no further relief:—Held, that, although the plaintiff might have met the plea by an equitable replication, he was entitled to come to equity for the relief needed for the purposes of his action, and that he had rightly limited the prayer of his bill to such relief. *Stewart v. Great Western Railway Company*, 2 De G., J. & S. 319; 11 Jur., N. S. 627; 13 L. T. 79; 13 W. R. 907.

**Under Lord Campbell's Act.**—In an action under 9 & 10 Vict. c. 93 (Lord Campbell's Act), accord and satisfaction with the person injured in his lifetime is a defence to proceedings by his representatives after his death. *Read v. Great Eastern Railway Company*, 9 B & S. 714; 3 L. R., Q. B. 555; 37 L. J., Q. B. 278; 18 L. T. 82; 16 W. R. 1040.

**In Action for Libel.**—Accord and satisfaction is a good plea to an action for a libel. *Boosey v. Wood*, 3 H. & C. 484; 34 L. J., Ex. 65; 11 Jur., N. S. 181; 13 W. R. 317.

An agreement that apologies on each side shall appear in the several newspapers of the plaintiff and the defendant, executed by the latter, will form a valid plea of that kind. *Id.*

**In Equity.**—An agreement between a bond debtor and his creditor that the latter shall take all the debtor's property, and pay his other creditors 5*s.* in the pound, though not a discharge of the bond at law by way of accord and satisfaction, because not under seal, still operates in equity as a satisfaction of the debt; and it is not possible in equity, upon such a transaction, to reserve any rights against the surety, and any attempt to do so would be void, as being incon-



sistent with the agreement. *Webb v. Hewitt*, 8 Kay & J. 438.

**Sufficiency of Plea.**—In an action upon a covenant to pay money upon a contingency, an accord executed before the contingency happened is a bad plea. *Healey v. Spence*, 8 Ex. 668; 22 L. J. Ex. 249.

To an action for money lent, a plea that the defendant gave the plaintiff an authority to receive, as the defendant's agent, money due to the defendant, to an amount exceeding the amount lent, and to pay himself, and agreed not to receive the same otherwise than by the plaintiff's agency; and that the money was not received in consequence of the plaintiff's negligence and default, and thereby became wholly lost to the defendant:—Held, bad, as amounting neither to an accord nor satisfaction. *Gifford v. Whitaker*, 6 Q. B. 249; 13 L. J., Q. B. 325; 8 Jur. 1134. *S. P. Griffiths v. Owen*, 13 M. & W. 58; 2 D. & L. 190; 13 L. J. Ex. 345.

**Replication to Avoid.**—To a plea of accord and satisfaction by the delivery by the defendant to the plaintiff and acceptance by him of monies, deeds and securities for money, and allotting him shares in a company, an equitable replication as to the deeds and securities, that such deeds and securities were accepted by the plaintiff on the faith of a representation by the defendant that they were valid and binding securities, whereas they were not valid and binding on the company, and were before action repudiated by the company, is good. *Stears v. South Essex Gas Light and Coke Company*, 9 C. B., N. S. 180; 7 Jur., N. S. 447; 9 W. R. 533.

To an action on a covenant in a demise of mines, alleging non-payment of tonnage rents and not keeping books of accounts, the defendant pleaded that during eight years he did keep such books containing an account of all ore gotten, and that such account was submitted for examination to the plaintiff, and that he and the defendant in each of those years stated an account concerning all the ore got by the defendant during the preceding year, and the tonnage rent payable in respect of the same, and that in each of such accounts a certain sum was agreed upon between the plaintiff and the defendant to be the balance due, which sum was paid and accepted by the plaintiff in satisfaction of the tonnage rent payable by the defendant during the said period. Replication, that the accountings were not true and correct accountings according to the deed, but were erroneous in this: that divers tons of ore which ought to have been included in the account, and divers quantities of tonnage rent payable in respect thereof, were, by mistake and ignorance of the facts on the part of the plaintiff, omitted from the accounts, and that the balances were erroneously agreed to be the balances due under the deed:—Held, that the plea afforded no answer to the action, and that if it afforded a *prima facie* defence, it was answered by the replication. *Perry v. Attwood*, 6 El. & Bl. 691; 25 L. J., Q. B. 408; 2 Jur., N. S. 1071.

To an action for use and occupation, the defendant pleaded, first, that the plaintiff seized goods of the defendant sufficient to pay the rent and costs, and detained them for two years; and it was then agreed between them, that the plaintiff should retain the goods in satisfaction of the

debt, and that he did so accordingly. Secondly, that after a wrongful seizure of the goods of sufficient value to pay the rent, the plaintiff and the defendant agreed that the plaintiff should retain the goods, and that they should relinquish their claims on each other. Thirdly, that they agreed that the plaintiff should retain the goods so seized, and that they should relinquish their claims, and the defendant should give up possession. Replication traversed the seizure of goods of sufficient value to pay the rent:—Held, that the pleas were good, and that the replication was bad, for putting in issue matter which was only inducement to the acceptance in satisfaction, such acceptance being the material part of the pleas. *Jones v. Sawkins*, 5 C. B. 142; 5 D. & L. 353; 17 L. J., C. P. 92.

To an action for a debt the defendant pleaded, that he delivered to the plaintiff, in satisfaction of the action, a deed, by which an annuity was granted to him. The plaintiff replied, that no memorial of the deed was enrolled according to 53 Geo. 3, c. 141, and that, to an action by him on the deed to recover money due from that defendant in respect of the annuity, he had pleaded that no memorial was enrolled; and that the plaintiff in consequence elected that the deed should be null, and discontinued such action:—Held, that the replication was good, and answered the apparent satisfaction shown in the plea. *Turner v. Broune*, 4 D. & L. 201; 3 C. B. 157; 15 L. J., C. P. 223; 10 Jur. 811.

## 2. BY NEW OR SUBSTITUTED AGREEMENT.

**How far Accepted in Satisfaction.**—To an action for infringing a patent, the defendant pleaded, that it was agreed between the plaintiff and the defendant that the latter should admit his liability to the action; that he should take and the plaintiff grant a licence for the use of the invention; that he should hand a cheque to a third person, to be held till the grant of the licence; that the plaintiff and the defendant should bear their own costs of the action, and that "the action and the causes of action included in the same, should be settled, satisfied and terminated by the arrangement and agreement before mentioned." That the defendant admitted his liability, drew and delivered the cheque, and had always been ready and willing to perform the agreement, take the licence, and pay his own costs, of which the plaintiff had notice:—Held, that the plea was bad; for if the agreement were construed as an accord in respect of the things to be done, there was no averment of satisfaction, the stipulation of the defendant not having been all performed; and if making the agreement itself was relied upon, there was no allegation, expressed or implied, that the agreement was accepted in satisfaction. *Hall v. Flockton*, 16 Q. B. 1039; 20 L. J., Q. B. 201; 15 Jur. 600—Ex. Ch.

To an action by payee against acceptors of two bills, they pleaded that before the bills became due, and before the delivery to the plaintiff, it was agreed between him through the drawers, as his agents, and the acceptors and A., that in consideration of them and A. paying the drawers 500*l.* in settlement of accounts, the plaintiff would accept a dividend of 2*s.* 9*d.* in the pound on these and other bills accepted by the defendants and A., and within one month would deliver up the bills, receiving the dividend on each acceptance; that

a place of tender of the composition was agreed upon, and a penalty of 500*l.* agreed to be paid on default on either side; that the defendants and A. paid to the drawers, and they accepted, the 500*l.* in settlement, and the defendants and A. tendered the dividend, of all which the plaintiff had notice; that the plaintiff refused to accept the dividend, and failed to deliver up the acceptances:—Held, that the plea was bad in substance, as it contained no allegation that the agreement to accept the dividend was taken in satisfaction or substitution of the agreement on the bill, and it was consistent with the plea that the plaintiff may have elected to pay the penalty for default in performance of the agreement. *Huttligeig v. Booker*, 9 C. B. 689; 19 L. J., C. P. 330.

To an action upon a contract for the delivery of 600 loads of timber at Dantzic, the defendant pleaded that before action, it was agreed that he should deliver to the plaintiff, in London, other timber, and that such other timber should be received by him in full satisfaction of all causes of action upon the contract; that the defendant, in part performance of such agreement, delivered to the plaintiff, who received of him, 143 loads in full satisfaction of the causes of action so far as they related to 143 loads of timber in the contract mentioned; and that the defendant, within a reasonable time, tendered the residue of the timber to complete the contract:—Held, that the plea was neither good as a plea of accord and satisfaction, for want of an averment of satisfaction, nor as a plea of performance, there being no averment, expressed or implied, that the substituted agreement was accepted in satisfaction. *Gabriel v. Dresser*, 15 C. B. 622; 3 C. L. R. 415; 24 L. J., C. P. 81.

A passenger who was injured by a railway accident sent in a claim for 69*l.* compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted 400*l.*, and gave a receipt acknowledging it to be in full discharge of his claims. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that he had accepted 400*l.* in full satisfaction and discharge of the causes of action. The plaintiff then filed a bill to restrain them from relying on the plea, and from setting up the acceptance of the 400*l.* or the receipt, as a satisfaction or discharge of the damages, except to the extent of 400*l.* The bill did not allege fraud, but that the plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time:—Held, that, as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity; and that the bill ought to be dismissed. *Lee v. Lancashire and Yorkshire Railway Company*, 6 L. R., Ch. 527; 25 L. T. 77; 19 W. R. 729.

To a defence in an action for personal injuries, of a release by deed, it was replied that the execution of the deed by the plaintiff was procured by the company fraudulently representing for that purpose that his injuries were of a trivial and temporary nature, and that if they should afterwards turn out to be more serious than he then anticipated, he would still, even though he had executed the deed, be in a position to obtain and would obtain further compensation from the

company:—Held, that there was a fraudulent misrepresentation of fact alleged sufficient to avoid the deed as against the plaintiff, who had been thereby induced to execute it. *Miracchfield v. London, Brighton and South Coast Railway Company*, 2 Q. B. D. 1; 46 L. J., Q. B. 94; 35 L. T. 473.

Semble, that the deed would equally have been avoided by the second allegation that the fraudulent misrepresentation had been as to the legal effect of the deed which the plaintiff was thereby induced to sign. *Ib.*

**Sufficiency of Consideration for.]**—Covenant for not repairing. The defendant pleaded, that, after breach, an agreement was entered into between the plaintiff and himself, that in consideration that the defendant had become tenant of the premises, and promised to repair the same before the 12th of April, the plaintiff would not in the mean time commence any action on account of the breach of covenant; but that the plaintiff commenced his action before the 12th of April:—Held, that this plea was bad in being a plea of accord executory only, and not executed, in shewing no good consideration between the parties to the agreement, as the defendant was already liable to damages under the covenant for not repairing; and therefore his promise to repair by the 12th of April was no consideration for the plaintiff's promise to forbear; and that the defendant's promise to repair not having been made until after the new tenancy was contracted, the plaintiff derived no consideration from such tenancy. *Bailey v. Homan*, 3 Bing. N. C. 915; 3 Hodges, 184; 5 Scott, 94.

Action on an agreement, that two actions pending at the suit of the plaintiff against the defendant should be settled, and all proceedings therein stayed, and that the defendant should pay the plaintiff's money. Breach, nonpayment:—Held, that the count disclosed not a mere executory accord, but an agreement, with sufficient consideration to support the promise; and that the action lay. *Crouther v. Furrer*, 15 Q. B. 677; 15 Jur. 535.

To a note given by the defendant to his father, he pleaded that he had just grounds to complain of the distribution of his father's property, as his father had admitted, and that it was therefore agreed between them that the defendant should cease for ever to make any such complaint, and that in consideration thereof his father would discharge him from liability on the note, and that the defendant's agreement should be accepted in full satisfaction and discharge, and that it was so accepted:—Held, that the plea was bad, as not shewing any consideration for the promise by the father. *White v. Bluet*, 2 C. L. R. 301; 23 L. J., Ex. 36.

Action upon two deeds, whereby the defendant's testator covenanted to pay money with interest. Plea, that the plaintiff was a mortgagee of an estate which was insufficient, upon an estimate of its value, to pay the mortgage money due from the testator; that three other mortgagees were in the same situation, the estate realised to each being less in estimated value than the charge upon it; that the defendant was devisee of the real estate, and executor of the deceased mortgagor; that he had received assets, which, after deducting the costs and expenses payable by him in the first instance, and in preference to the debts due from the testator, and also

excepting some furniture, amounted to the deficiency on each mortgage; and thereupon it was agreed between the plaintiff and the defendant, and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the balance of the assets, after deducting the furniture which should be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; that all the rights and equities of redemption, or other rights of the defendant as executor and trustee to the mortgaged property, should thenceforth be wholly barred, extinguished, and discharged, and the mortgagees should become absolute owners, both at law and in equity, of the mortgaged estates; and that the covenants sued on should be satisfied and discharged in consideration of the premises. The plea averred payment to each of his share of the assets, and that the several rights and equities of redemption were barred and extinguished. The judge having ruled that the plea could not be proved, except by an agreement in writing:—Held, that although an agreement to convey an equity of redemption must be in writing, this plea would have been good, even though it had expressly stated the contract to have been by parol, inasmuch as the agreement by the plaintiff to forego the balance of his mortgage beyond the value of the estate, upon receiving his share of the assets, was binding on him, and the receipt of his share of the assets was a satisfaction for the estate, because the agreement of the other mortgagees to take their shares of the assets also was a good consideration for giving up the claim for the residue of the debt against the defendant. *Massey v. Johnson*, 1 Ex. 241; 17 L. J., Ex. 182.

**Subsequent Cause of Action.**—A declaration stated that the plaintiff was seised in fee of land and houses, which were contiguous to other land, and he was entitled to the support of the land and houses by the land to which the same were so contiguous, and by the strata under the same, and also by the strata of minerals under the plaintiff's land; and that the defendant wrongfully and without leaving any proper or sufficient pillars or supports, worked the coal mines under the land and houses of the plaintiff, and under the land so contiguous to the same, by reason whereof the soil and surface of the plaintiff's land sunk in, and the houses became ruinous. Plea, that by an agreement between the plaintiff and the defendant, after reciting that an action had been commenced against the defendant to recover compensation for the injury to the land and houses by the defendant working the mines under the same, it was agreed that all further proceedings in the action should be stayed, on the terms that he should make good all damages done to the premises, and repair the same to the satisfaction of a surveyor, and should pay the loss of rent till the premises should be restored, and also the costs of the action and of the surveyor. New assignment, that the plaintiff sued not for the damages and injury in satisfaction and discharge of which the agreement was entered into, but for that, after the repairing, by reason of the same acts that caused the damage, the land on which the houses were

erected further sunk, by reason whereof the houses so repaired and other houses of the plaintiff being on the same land became ruinous:—Held, that the cause of action was not the damage done to the plaintiff's land and houses by improperly working the mines, but the injury to his right to have his land and houses supported by the contiguous land and strata of coal; and therefore when any part of the necessary support was removed, although no actual damage, there was a complete cause of action, for which the plaintiff might have recovered prospective damage, and no new cause of action arose from the subsequent damage, and consequently the agreement stated in the plea and its performance were a bar to the action. *Nichlin v. Williams*, 10 Ex. 269; 23 L. J., Ex. 335.

**To refer to Arbitration.**—Matters in difference existing between the plaintiff and the defendant, some of which were the subject of an action, it was agreed between them, that in consideration that the defendant would consent to refer to arbitration the matters of the action, the plaintiff would accept such agreement in satisfaction of all damages sustained by him in respect of the other matters:—Held, that the agreement and its performance were a bar to an action in respect of the last-mentioned matters. *Williams v. London Commercial Exchange Company*, 10 Ex. 569.

**Under Lands Clauses Act, 1845.**—A company obtained parliamentary powers to make a railway cutting through a private owner's land, and for that purpose they entered into an agreement under the Lands Clauses Act, 1845, s. 6, to purchase part of his land; and it was also agreed that the purchase-money should be taken in full compensation for all damage by severance and injury to the adjoining lands (if any) of the owner, and also for injuriously affecting such lands. Deeds of conveyance of the lands taken were afterwards executed. His houses on the adjoining land suffered structural injury from subsidence of the land consequent upon the excavations in accordance with the deposited plans, and he obtained against the company an assessment by inquisition under the Lands Clauses Act, s. 68, and afterwards brought an action to recover the amount of the assessment and the costs of the inquisition; to which the company pleaded satisfaction and discharge under the agreement:—Held, that the agreement covered the injury complained of, although possibly caused by the construction of the works on land other than that purchased from him; and that the Lands Clauses Act, s. 51, giving the costs of inquisition to the owner of land when the assessment is greater than the sum offered, does not apply where the promoters have made no offer, and are not liable at all for the claim made. *Todd v. Metropolitan District Railway Company*, 24 L. T. 435; 19 W. R. 720.

**Performance of.**—To an action by indorsee against maker of a note, he pleaded that the note was made by himself and E., his partner; and that, whilst the plaintiff was the holder of the note, the defendant and E. delivered to him nineteen signed bills of costs, which were referred to taxation; that it was agreed that the balance found due from the plaintiff to the defendant and E. on such taxation, should be applied in

part payment of the note, and that the balance of the note, with interest, should be secured by a judgment payable at certain periods, which had elapsed before action; that the taxation was still pending, and the balance not ascertained, and that the defendant and E. had always been ready and willing to apply the balance due to the defendant towards the payment of the note, and on the completion of the taxation to receive the balance due on the note by a judgment in accordance with the agreement:—Held bad, as even supposing it to be a good agreement to suspend the remedy, the lapse of time shewed the performance of it to be impossible. *Carter v. Wormald*, 5 D. & L. 731; 1 Ex. 81; 16 L. J., Ex. 231.

**Effect of.]**—Action on a note for 140*l.*, payable twelve months after date, and on a note for 200*l.*, payable two years after date. Plea, that after the notes became due, it was agreed between the plaintiff and the defendant and A., that A. should and would, at the request of the plaintiff, pay to the plaintiff in trust for B. 200*l.* for her own sole use and benefit, or 25*l.* per annum so long as the 200*l.* should remain unpaid, which 25*l.* should be paid quarterly; and that the rights and causes of action of the plaintiff upon and in respect of the notes should be suspended so long as A. should continue to pay 6*l.* 6*s.* every quarter; and that A. paid the 25*l.* quarterly, according to the agreement:—Held, that in order best to effectuate the intention of the parties, the agreement must be construed to mean that the plaintiff agreed to forbear his suit until the quarterly payments should cease to be made; and that the legal effect of such agreement was, not to suspend the plaintiff's right of action upon the notes in the meantime, but to subject him to an action for damages in the event of his suing contrary to the agreement; and, therefore the plea was no bar. *Ford v. Beech*, 5 D. & L. 610; 11 Q. B. 852; 17 L. J., Q. B. 114; 12 Jur. 310—Ex. Ch. *S. C.* 7 Hare, 208.

A declaration stated that an action had been commenced by a banking company against A. for the recovery of a bill of exchange drawn by him upon and accepted by the defendant for 1,250*l.*; that while the action was pending, it was agreed between the company, A. and the defendant that the action should be settled as follows:—250*l.* and 500*l.* by the notes of A., and 500*l.* by the defendant's note at twelve months, the defendant consenting to the company appropriating the securities held by them to the payment of such balance, and the defendant agreeing to give them a power to sell the properties mentioned in the securities, the company to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on, and the 1000*l.* bill received on account of the bill. Breach: that the defendant did not nor would give the company the note for 500*l.*, nor the power of sale:—Held, that the agreement was a binding engagement, and not a mere accord, inasmuch as it would have been broken if the company had proceeded with the original action, a new person having been made a party to the contract. *Henderson v. Stobart*, 5 Ex. 99; 19 L. J., Ex. 135.

A declaration stated an agreement under seal, between the plaintiff and the defendant, by which, after reciting a contract for the execution by them, as partners, of certain works, and that

disputes had arisen relating to their partnership, and that the plaintiff had consented to retire from the partnership upon terms to be ascertained by arbitration, it was agreed that the parties should abide by and fulfil the award of the arbitrators or umpire; and that the umpire afterwards awarded that the defendant should pay to the plaintiff 5,003*l.* by instalments, viz. 2,000*l.* on the 1st January, 2,000*l.* on the 1st April, and 1,003*l.* on the 1st July. Breach: nonpayment of a part of the sum so awarded. Plea, that after breach in nonpayment of the first instalment, but before any further instalment became due, it was agreed that the defendant should not assist B. in establishing a partnership with the plaintiff in the recited contract, and that the defendant should pay and the plaintiff accept 4,500*l.* by instalments, all of which were to become due before the day on which the last instalment was to become due, in full satisfaction and discharge of the sum awarded and of the breach of the award, and that the plaintiff accepted the agreement and its performance by the defendant in full satisfaction and discharge. The plea stated payment of these instalments on the day specified, and that the plaintiff accepted the 4,500*l.* and the payment thereof by the instalments. The agreement in the plea was not under seal, and one of the instalments was paid on the 19th instead of the 14th of April, the day specified:—Held, that the action being not upon the submission but upon the award, the plea could be sustained without showing an agreement under seal; that the nonpayment of the first instalment due under the award was a breach of the whole contract to perform the award, and that the plea was therefore an answer to the action by way of accord and satisfaction, the agreement being the payment of a smaller sum at an earlier day; and that the payment of the instalment on the 19th of April having been accepted as payment by the plaintiff on the 14th was a performance of the agreement. *Smith v. Trowdale*, 3 El. & Bl. 83; 2 C. L. R. 874; 23 L. J., Q. B. 107; 18 Jur. 552.

Held, secondly, that the day of payment was immaterial, and therefore, the performance of the agreement stated in the plea was proved. *Ib.*

A. and B., brothers, were principal and surety in an annuity bond. By an agreement afterwards executed by them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property was made among the three, and the bond was declared to be B.'s (the surety's) debt:—Held, that this agreement (whether subsequently acted upon or not) was a binding accord between A. and B., and that B., having been obliged to pay arrears of the annuity, could not recover them from A. *Cartwright v. Cooke*, 3 B. & Ad. 701.

**Sufficiency of Pleading.]**—In an action for a debt, a defendant pleaded that, in consideration that he would at once pay to the plaintiff the whole of his claim, except a portion claimed by the defendant as a deduction from it, the plaintiff agreed that that sum should be deposited in the hands of a third party, to be held by him in trust for the plaintiff and defendant until the difference between them should be adjusted; alleging performance, and that the

difference was still pending:—Held, good as a special plea of payment. *Page v. Meek*, 3 B. & S. 259.

To an action by assignees of a bankrupt assurance association, the defendant pleaded, that, before the bankruptcy, it was agreed between the association and the defendant that policies which had been effected by the defendant with the association, and which were existing, should be forthwith cancelled and delivered up to the association, which should thereupon be exonerated and discharged from the insurances, and that the premiums thereupon paid or payable by the defendant, or a rateable proportion thereof, after deducting so much as would be fairly payable in respect of risks already incurred, should be allowed in account to the defendant, and set off against the monies due from the defendant to the association, and that the defendant thereupon should be acquitted, exonerated, and discharged from the payment of so much of the monies as the premiums so to be allowed should amount to. The plea stated that the amount of premium so to be allowed was a certain sum, and averred that, in pursuance of the agreement, the defendant delivered up the policies, and that they were cancelled, and that the defendant was in consequence thereof exonerated and discharged from the payment of that sum:—Held, that the plea was bad in substance; for, that the agreement being to deliver up the policies to be cancelled, and to allow the premiums, the plea ought to have alleged that such allowance was made. *Graham v. Gibson*, 4 Ex. 768; 19 L. J., Ex. 204.

To a declaration alleging a breach of an agreement therein set forth, and consequent damage to the plaintiffs, it was pleaded that a certain agreement had been come to between the plaintiffs and defendants after disputes had arisen. The plea did not in terms admit or deny the alleged breach; nor did it in terms state that the agreement pleaded had been accepted by the parties in accord and satisfaction of the causes of action alleged in the declaration:—Held, on demurrer, reversing the judgment of the court below, that such plea was bad. It could not be assumed that an agreement, the defendant's version of which was set out in the plea, had been accepted in accord and satisfaction. *Barclay v. Bank of New South Wales*, 5 App. Cas. 374; 42 L. T. 196—H. L.

### 3. BY RECEIPT OF NEGOTIABLE INSTRUMENT.

**For Less Amount than Debt.**—To an action on a note for 50*l.* with a count for 1000*l.* money received, the defendant pleaded as to 500*l.*, parcel, &c., that the plaintiff commenced an action for the recovery of 500*l.* and 500*l.* in the Tolzey Court at Bristol; that the defendant disputed the debt, and denied that he owed, or was liable to pay, or that the plaintiff could recover the same; that thereupon, to terminate the dispute and claim and demand, and finally to determine the action, the plaintiff and the defendant agreed that the action should be settled by the defendant delivering to the plaintiff three notes for 125*l.*, 125*l.*, and 50*l.*, and that the plaintiff should receive the same in satisfaction for and in discharge of the 500*l.* and 500*l.*, and all damages and costs, and that the plaintiff

should discontinue the action. Replication, that no such agreement was ever made. It was proved that the action in the Tolzey Court was for 500*l.*, and that it was agreed between the plaintiff and the defendant that the defendant should give the plaintiff, in discharge of the 500*l.*, three notes, two for 125*l.* and the third for 50*l.* The notes were given, and the following agreement was indorsed by the plaintiff's attorney on the process served on the defendant: "This action is settled, by the defendant giving three notes—viz. one at three months, 125*l.*; one at four months, 125*l.*; and one at twelve months, 50*l.*: upon payment of which notes I undertake to deliver to the defendant's attorney the papers and letters in my possession in reference to this action:—Held, first, that the real meaning of the parties was to put an end to the action, and for the larger sum claimed therein to substitute a smaller, secured by three notes; and that the plea was proved. *Sibree v. Tripp*, 15 M. & W. 23; 15 L. J., Ex. 318.

Held, secondly, that, although payment of part of a liquidated and an ascertained sum cannot be a satisfaction of the whole, yet that, upon a mere simple contract, a negotiable security may be a satisfaction of a claim for a larger amount. *Id.*

A., being indebted to B. in 125*l.* 7*s.* 9*d.* for goods sold and delivered, gave B. a cheque for 100*l.* payable on demand, which B. accepted in satisfaction:—Held, a good accord and satisfaction. *Cumber v. Wane* (Stra. 426) and *Sibree v. Tripp* (15 M. & W. 23) observed upon. *Goddard v. O'Brien*, 9 Q. B. D. 37; 46 L. T. 306; 30 W. R. 549.

**In Exchange for other Negotiable Instrument.**—A plea to an action on a bill of exchange for 43*l.* by indorsee against acceptor that, after the bill became due, the drawer gave the plaintiff his note for 44*l.* in satisfaction, and that he accepted it in satisfaction, is a good answer to the action; and a replication that the note was not paid when due is bad. *Sard v. Rhodes*, 4 D. P. C. 743; 1 M. & W. 153; 1 Gale, 376.

**As Payment for Amount due on Bond.**—To an action on a bond conditioned for payment of money, the defendant pleaded, that after the day of payment the obligee received certain bills of exchange not yet due, on account of part of the sum due on the bond, and certain monies in satisfaction of the residue:—Held, that the plea was no answer. *Worthington v. Wigley*, 3 Bing. N. C. 454; 3 Scott, 558; 5 D. P. C. 504; 1 Jur. 183.

**When Creditor's rights only Suspended—Bill not negotiated.**—Action for goods sold. Plea, as to 9*l.* 15*s.* 9*d.*, that the defendant drew upon a piece of paper an instrument purporting to be a bill of exchange, without a drawer's name, whereby he was required to pay to such person, or his order, who should place his name thereto as drawer, 20*l.*, two months after date; which instrument the plaintiff requested the defendant to accept towards payment of 9*l.* 15*s.* 9*d.*, and for the plaintiff's accommodation as to the rest; and which the defendant accepted accordingly, and delivered to the plaintiff, and thereby became liable to the plaintiff, or to such person who should place his name thereto as drawer, or his

order, 20*l.*, viz. towards payment of 9*l.* 15*s.* 9*d.* and for his accommodation as to the rest; and that he received the bill in satisfaction of 9*l.* 15*s.* 9*d.*, and which bill was not due at the commencement of the action. Replication, that the bill remained unnegotiated in the hands of the plaintiff, without any drawer's name to it, and unpaid:—Held, that under the circumstances alleged, the plaintiff's right to sue for the original debt was suspended until the expiration of the two months, and of the period of the instrument becoming due and being dishonoured. *Simon v. Lloyd*, 2 C. M. & R. 187; 3 D. P. C. 813; 5 Tyr. 701.

**Accepted by third party.**—It is an answer to an action for a debt, that the creditor has taken from a third person, for and on account of such debt, a bill of exchange drawn by the creditor on and accepted by such third person for an amount equal to the amount of such debt, and that the creditor indorsed the bill over, and that the same was in the hands of such indorsee at the time of action, although the bill was then overdue and unpaid. *Belshaw v. Bush*, 11 C. B. 191; 22 L. J., C. P. 24; 17 Jur. 67.

**By Agent.**—A plea that A. was indebted to the defendant in a larger sum, and that A. being in prison in Scotland as a debtor the defendant authorized the plaintiff to receive from A. the sum so due to him from the defendant; and that the plaintiff, instead of receiving the sum from A., received from A. a bill of exchange for and on account of the sum, and that he appropriated and retained the bill for and in liquidation and discharge of the debt, and that he discharged A. from the debt, according to the law of Scotland:—Held, that the plea did not import either satisfaction or payment. *Baillie v. Moore*, 8 Q. B. 489; 15 L. J., Q. B. 169; 10 Jur. 592.

**How far a Suspension or Extinguishment of Debt.**—An averment that a bill of exchange was given for and on account, and in payment and discharge of a debt, is not equivalent and does not amount to a satisfaction or an extinguishment of the debt. *McDorall v. Boyd*, 6 D. & L. 149; 2 B. C. Rep. 298; 17 L. J., Q. B. 295; 12 Jur. 990.

To an action for 40*l.* for goods, the defendant pleaded, except as to 10*l.* and 9*l.* 15*s.* 4*d.*, parcel, &c., that the debts, except as to 9*l.* 15*s.* 4*d.*, accrued to the plaintiff for clothes delivered to the defendant; and in consideration that the defendant would deliver to the plaintiff a blank acceptance of his for 25*l.* he would discharge the defendant from all claims for clothes, if the acceptance should be paid in six months, and if it should not be paid within that time the defendant should be liable to pay the plaintiff 10*l.* only, that the defendant delivered the acceptance, and that the same was not paid within six months, whereby the defendant became liable to pay 10*l.* only (which sum he paid into court):—Held, a good plea of accord and satisfaction. *Curlewis v. Clark*, 3 Ex. 375; 6 D. & L. 455; 18 L. J., Ex. 144.

## II. BY WHOM.

**By Joint Covenantors.**—One of three joint covenantors gave a bill of exchange for part of a debt secured by a covenant, on which bill judgment was recovered:—Held, that such judg-

ment was no bar to an action of covenant against the three, such bill not being averred to have been accepted in satisfaction, nor to have produced it in fact. *Drake v. Mitchell*, 3 East, 251.

If a plaintiff, in an action against several, accepts satisfaction from one, and drops the action, it seems he cannot afterwards sue the others. *Dufresne v. Hutchinson*, 3 Taunt. 117.

A judgment by cognovit against one of the makers of a joint and several promissory note, and a levy of part under a fi. fa., is no discharge of the other. *Ayrey v. Duxenport*, 2 N. R. 474.

To an action by three for a joint demand, the defendant pleaded satisfaction with one of them, by part payment in cash, and a set-off of a debt due from that one to the defendant:—Held, a good plea, without alleging any authority from the other two to make the settlement. *Wallace v. Kelsall*, 7 M. & W. 264; 8 D. P. C. 841; 4 Jur. 1064.

To an action by surviving partners against a defendant, for a debt alleged to be due to the firm, he pleaded that he had been tenant to the deceased partner of a house in which he had an interest, and that, pursuant to an agreement between himself and such partner, he had surrendered the house, in satisfaction of the debt. There was no allegation that the plaintiffs were parties to the agreement:—Held a good defence, because the effect of the agreement having been to suspend the right of action during the life of the deceased partner, that could not revive upon his death, but was altogether extinguished. *Croove v. Lysaght*, 12 Ir. C. L. R. 481.

A count that A. and B. were tenants of chambers to C., at a rent payable quarterly, and that, in consideration that A. and B. would underlet the chambers to D. at a certain rent, D. promised A. and B. to pay the rent to C., and, if not, to indemnify A. and B. in respect thereof, and to pay the same to them. Breach, non-payment by D. of the rent due from A. and B. to C. Plea, that before the rent became due from A. and B. to C., it had been agreed between A., for and on behalf of B. and with his authority, and D., that D. should deliver up possession to A., and that in consideration D. should be discharged from further liability for rent, and that D. delivered up possession to A., which he on behalf of himself and B. accepted:—Held, that the plea set up a good defence by way of executed contract. *Smith v. Lovell*, 10 C. B. 6; 20 L. J., C. P. 37; 15 Jur. 250.

**By Co-trespasgers.**—In an action for a trespass committed by the servant and by command of A., acceptance of satisfaction by the plaintiff from A. is a defence. *Thurman v. Wild*, 11 A. & E. 453; 3 P. & D. 489.

**By Stranger.**—In an action for work done, the defendant pleaded that the claim accrued under an agreement for building a church; that the plaintiff having suspended the work, another agreement was entered into between him and A., under which the plaintiff, in consideration of stipulated payments, undertook to complete the work, and to rely for the residue of the contract price upon subscriptions which were to be raised; and that A. made, and the plaintiff received, the payments stipulated for by the second agreement, in satisfaction of the original agreement between the plaintiff and the defendant, and of

the performance thereof by the latter :—Held, that the plea was bad in substance, inasmuch as it did not show that the agreement made by A., and the payments under it, were intended to be made for the benefit of the defendant, and that he had adopted A.'s acts. *James v. Isaacs*, 12 C. B. 791 ; 22 L. J., C. P. 73 ; 17 Jur. 69.

To an action by indorsee against acceptor of a bill for 55*l.*, he pleaded that he accepted it for the drawer's accommodation, and without consideration ; that the drawer indorsed it with other bills to the plaintiff as a security for repayment of 30*l.* advanced by him to the drawer ; and that after action the plaintiff's claim on the bill was satisfied and discharged by payment to him by the acceptor of one of the other bills of the sum of money so advanced, and all interest thereon ; and that from that time the plaintiff held the bill declared on, without value or consideration :—Held, that the plea was bad, both on the ground that it did not answer the damages in the action, and also that the payment relied on as made by a stranger was not alleged to have been made for and on account of the debt, and to have been ratified by the defendant. *Kemp v. Balls*, 10 Ex. 607 ; 3 C. L. R. 195 ; 24 L. J., Ex. 47.

**Action on Bill of Exchange—Indorsee against Acceptor—Payment by other Party to Bill.]—**

To an action on a bill of exchange for 49*l.* by indorsee against acceptor, he pleaded that the drawer delivered to the plaintiff, who accepted, goods of the value of 50*l.* in satisfaction of the bill and of all damages and causes of action in respect thereof, and that he from the time of the satisfaction of the bill had always held the same against the will and consent of the drawer, and had commenced the action and prosecuted the same against and in opposition to the will and consent of the drawer :—Held, that the plea was no bar to the plaintiff's right to recover against the defendant on the bill. *Jones v. Broadhurst*, 9 C. B. 173.

Action against acceptor of a bill indorsed by T. to the plaintiff. Plea, *pais darrein continuance*, that after the bill become due T. paid to the plaintiff, being the holder of the bill, and he accepted, the amount of the bill and all interest due thereon in satisfaction of the bill and of all monies payable on account and in respect thereof :—Held, that the plaintiff was entitled to proceed for the recovery of costs, and therefore the plea was no bar to the continuance of the action. *Goodwin v. Cremer*, 18 Q. B. 757 ; 22 L. J., Q. B. 30 ; 17 Jur. 2.

### III. EVIDENCE AS TO.

**Generally.**—In an action on a bill drawn by W. upon and accepted by the defendant, and by W. indorsed to the plaintiff, the defendant pleaded, that he delivered it to W. as a security for a loan, and that certain scrip of the defendant was deposited with, and received by W. as a collateral security, with the bill, for repayment of the loan, and upon the terms, that any sums which should be received by W., or any person to whom he might indorse the bill and deliver the scrip, for or in respect of the scrip, should be taken to be in satisfaction *pro tanto* of the bill ; that the plaintiff took the bill with notice of the agreement, and that while he held the bill upon

these terms W. delivered to the plaintiff the scrip upon and subject to these terms ; that W. indorsed the bill to the plaintiff after it became due, and the plaintiff received it upon and subject to the same terms ; that the plaintiff had received in respect of the scrip a sum equal to the amount of the bill and all damages ; and that the sum was thereupon accepted in satisfaction. The plaintiff replied, that the scrip was not delivered to or received by W. upon the terms alleged. The defendant gave in evidence a memorandum, signed by W., and dated the same day as the bill, stating that the defendant "has this day deposited with me 220 shares in the H. Railway, as a collateral security for the due payment of his acceptance :"—Held, that the evidence supported the plea. *Malpas v. Clements*, 19 L. J., Q. B. 435.

To an action on a note for 150*l.*, the defendant pleaded that A., being indebted to the plaintiff in 3,612*l.* 10*s.*, it was agreed that the plaintiff should accept 1,500*l.* in satisfaction, and that the defendant should deliver the note to the plaintiff in part payment ; and that he should not enforce payment of the original debt ; that A. afterwards became bankrupt, and that the plaintiff, in violation of the agreement, proved for the original debt :—Held, that the plea was not proved by an agreement, that, upon giving 350*l.* down, and a bond of other parties for 1,000*l.*, and the note, A. should be released from the original debt. *Gillet v. Whitmarsh*, 8 Q. B. 966 ; 15 L. J., Q. B. 291 ; 10 Jur. 904.

A plea to an action for a debt, that the plaintiff drew, and the defendant accepted, a bill of exchange for 60*l.*, in satisfaction of the plaintiff's demand, is not supported by evidence that the defendant transmitted to the plaintiff a blank acceptance, with 60*l.*, in figures, written in the margin, which the plaintiff altered, and filled up as a bill for 46*l.*, before he signed his name to it as drawer. *Baker v. Jubber*, 1 M. & G. 212 ; 1 Scott, N. R. 26 ; 8 D. P. C. 539.

To an action for goods the defendant pleaded, that he was possessed of a public house, and it was agreed that, in consideration that the defendant would give up possession, the plaintiff would pay to the defendant 100*l.*, and discharge him from the debt, that the plaintiff paid the 100*l.*, and the defendant quitted the house. The agreement was not in writing :—Held, that, having been executed, it was receivable as evidence to prove the plea. *Lavery v. Turley*, 6 H. & N. 239 ; 30 L. J., Ex. 49.

In an action to recover the amount of a bill of sale, after breach of a warranty to defend the goods against all persons whatsoever, evidence that the amount secured by the bill has in fact been received since the breach cannot be admitted in the absence of a plea of payment, or of accord and satisfaction. *Horsley v. Cox*, 15 L. T. 391.

**Contract to be performed in futuro—Alleged New Contract—Lapse of Time.]—**The lapse of twenty years from the time of making a contract, to be performed in futuro, is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract. *Siboni v. Kirkman*, 1 M. & W. 418.

## ACCOUNT.

### I. ACTION OF.

1. *By and against Tenants in common.*
2. *Pleadings.*
3. *Practice.*

### II. MERCHANTS' ACCOUNTS.

### III. IN OTHER CASES.

#### I. ACTION OF.

##### 1. BY AND AGAINST TENANTS IN COMMON.

###### Of Real Property—Action against Co-Tenant.]

—One tenant in common of real property cannot maintain an action for money received against his co-tenant, his remedy being by an action of account under 4 Ann. c. 16, s. 27. *Thomas v. Thomas*, 5 Ex. 28; 1 L. M. & P. 229; 19 L. J., Ex. 175; 14 Jur. 180.

In an action of account by a joint tenant, or tenant in common, against his companion, it is necessary to allege that he has received more than his share of the rent; he is not chargeable as a bailiff at common law. *Sturton v. Richardson*, 2 D. & L. 182; 13 M. & W. 17; 13 L. J. Ex. 281; 8 Jur. 476.

Semble, that where several parties are tenants in common, an action of account may be brought by one against another without joining the rest. *Id.*

**When Co-Tenant Answerable as Bailiff.]**—If there are tenants in common, and one tenant alone occupies the property, he is answerable as bailiff to his co-tenant in an action of account if he receives more than comes to his share, but not otherwise. And he is answerable only for what he receives more than comes to his just share. *Henderson v. Eason*, 17 Q. B. 701; 21 L. J., Q. B. 82; 16 Jur. 518—Ex. Ch.

He receives more than his just share if he receives money or something else, given or paid by another, which the co-tenants are entitled to simply by their being tenants in common, and if the amount which he so receives and keeps is more than in proportion to his interest as such tenant. *Id.*

He does not receive more than comes to his just share if he merely has the sole enjoyment of the property, even though by the employment of his own industry and capital he makes a profit by the enjoyment, and takes the whole of such profit. *Id.*

A. and B., tenants in common in fee, made a joint demise of land to C., with a general reddendum, not saying to whom the rent was payable. A. died on the 15th of March, 1848, and B. received the half-year's rent due at Lady-day, less 12s. 6d., which he deducted as the share of A.'s heir for the period between A.'s death and the time the half year's rent became due:—Held, that although the words of the demise were joint, the reversions were several, and the rent followed the reversion, and consequently that the heir of A. was entitled to the moiety of the half year's rent accruing at Lady-day, 1848, and might maintain an action against B. as bailiff for receiving more than his just share. *Beer v. Beer*, 12 C. B. 60; 21 L. J., C. P. 124; 16 Jur. 223.

Held also, on motion in arrest of judgment, that the declaration was good without an averment that a reasonable time had elapsed between

the request to account and the commencement of the action. *Id.*

— **Claim for Arrears.]**—Two, being tenants in common, one entered into possession in 1827, with the consent of the other, upon an understanding that he should pay an occupation rent when called upon to do so. The tenant in possession died in 1839. The survivor claimed six years' rent:—Held, that the claim must be allowed, and that 4 Ann. c. 16, was not repealed by 3 & 4 Will. 4, c. 27. *Henderson v. Eason*, 15 L. J., Ch. 457; 10 Jur. 821.

##### 2. PLEADINGS.

A declaration by a plaintiff that the defendant was his tenant in common, and received in respect of rent, 48l. 15s. more than came to his just share and proportion, is bad for want of an averment of a request and refusal to render an account, and for being framed for a liquidated sum instead of laying as a breach the not accounting. *Purcell v. Harding*, 15 W. R. 128.

Held also, that an averment of receipt, as bailiff, is also necessary. *Id.*

Action by one tenant in common against another for not accounting for rents received by him. Plea, that before the receipt of the rents, they, by deed, demised the premises to A. for a term of years, which by divers mesne assignments vested in the defendant. Equitable replication, that the deed was a mortgage to secure a sum of money and interest; that the defendant received more than sufficient to pay the mortgage debt, interest and costs, and he accordingly paid the same:—Held, that the court could not deal with the replication, since they had no power to compel a reconveyance, and, therefore, ordered it to be struck out. *Gorely v. Gorely*, 1 H. & N. 144.

In an action of account, nothing can be pleaded before auditors contrary to what has been pleaded to the action and found by verdict. *Godfrey v. Saunders*, 3 Wils. 73, 94.

A plea by a merchant against his partner, as tenant in common and bailiff, that after selling goods and merchandises the defendant rendered to the plaintiff a reasonable account of his goods and merchandises, and of the proceeds and profits, is in substance a plea of plene computavit. *Baxter v. Hoxier*, 7 Scott, 233; 5 Bing. N. C. 288; 1 Arn. 519.

To satisfy such a plea, the defendant must prove an account rendered, showing an agreed balance between the plaintiff and the defendant; an account in which the defendant charges himself as factor for the whole, instead of charging himself as factor for one moiety and as owner of the other, thereby making himself liable for a moiety of the losses arising from the sale of the whole, is insufficient. *Id.*

A declaration stated that L., being seised in fee by deeds of lease and release and settlement, conveyed tenements to the use of himself for life, with remainder to the use of the plaintiff and defendant, his children by his late wife, in such shares as he should by deed or will appoint, and in default of such appointment to the plaintiff and the defendant, as tenants in common. Averment, that L. died without having made any appointment, and that thereby the plaintiff became seised in fee tail of one moiety of the tenements in common with the defendant. First plea, that, in pursuance of the power in the deed



of settlement, L., by deed, appointed to A. and B. the tenements, upon certain trusts; and thereby made a valid appointment, under and by virtue of the power in the deed of settlement. Second plea, that, in pursuance of the power in the deed of settlement, L., by will, appointed the tenements, subject to the term created by the deed of appointment, to certain uses:—Held, that the allegation in the declaration, that L. died without having made an appointment, was premature, and therefore the defendant was not bound to traverse it; and that if it was not necessary in the declaration to allege that the power had not been exercised, the defendant was obliged to shew how and to whom the appointment was made, in order to shew that the plaintiff and defendant were not tenants in common; and therefore, that the pleas were good. *Rickets v. Loftus*, 14 Q. B. 482; 14 Jur. 389.

A defendant can now pay money into Court. *Anon.*, Bull. N. P. 128. See *Tomkins v. Wiltshire*, 1 Marsh. 115; 5 Taunt. 431; 15 & 16 Vict. c. 76, s. 70; and *Cresswell v. Hedger*, 31 L. J., Ex. 497; 8 Jur., N. S. 767.

### 3. PRACTICE.

Two principal officers of the court were appointed auditors after judgment of quod computet. *Smith v. Smith*, 2 Chit. 10.

A rule to appoint auditors is absolute in the first instance. *Archer v. Pritchard*, 3 D. & R. 596.

In an action of account, the defendant having suffered judgment by default, the court granted a rule, calling on him to shew cause why he should not appear and consent to the appointment of auditors, or why a *capias ad computandum* should not issue against him. No cause was shewn, and the court made the rule absolute in the alternative. *Pryor v. Pettingell*, 2 D. N. S. 755; 12 L. J., Ex. 219; 7 Jur. 132.

## II. MERCHANTS' ACCOUNTS.

The exception as to merchants' accounts in 21 Jac. 1, c. 16, s. 3, was confined to cases where an action of account would lie, or an action upon the case for not accounting. *Cuttam v. Partridge*, 4 Scott, N. R. 819; 4 M. & G. 271.

An open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, did not constitute such an account as concerns the trade of merchandise between merchant and merchant within the exception of 21 Jac. 1, c. 16, s. 3. *Ib.*

Since 9 Geo. 4, c. 14, s. 1, the existence of items within six years in an open account will not operate to take the previous portion of the account out of the Statute of Limitations. *Ib.*

## III. IN OTHER CASES.

**Trespass to Mine—Accounts when working inadvertently or fraudulently—Statute of Limitations.**—The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the bonâ fide belief that he was about to obtain from them a contract authorizing him so to work, and gave to one of

the trustees notice that he was about to commence working:—Held, that the working, though no contract was afterwards entered into, and the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently, and in taking an account of the minerals gotten without authority the defendant was allowed the cost of severing them, as well as the cost of bringing them to bank. But, from the time that notice was given to the defendant that no contract would be made with him authorizing him to work, his working was treated as fraudulent, and he was allowed only the cost of bringing the minerals to bank. *Trotter v. Maclean*, 13 Ch. D. 574; 49 L. J., Ch. 256; 42 L. T. 118; 28 W. R. 244.

So long as a wrongful working is to be treated as inadvertent the Statute of Limitations applies, and the account will only be directed for six years from the issue of the writ. But the onus is on the defendant to show that minerals gotten by him were gotten before the six years. *Ib.*

### Trustee—Grant of Booty by Royal Warrant.]

—The crown, by royal warrant "granted to the Secretary of State for India in Council for the time being" certain booty taken in war "in trust for the use of" certain persons, who had been adjudged entitled to it upon a reference to the Court of Admiralty, to be distributed among them, with a further provision that in case any doubts should arise in the course of the distribution the decision of the Secretary of State should be final, unless the crown should otherwise order: Held—(1.) That the Secretary of State for India in Council could only sue or be sued as a corporation under 21 & 22 Vict. c. 106, s. 65, in proceedings which might have been taken by or against the late East India Company; (2.) That the royal warrant constituted the Secretary of State for India in Council an agent of the crown for the purpose of the distribution of the fund under the control of the crown, but did not constitute him a trustee for the persons interested subject to the control of a court of equity. *Alexander v. Wellington (Duke)* (2 Russ. & My. 35) discussed. *Brown v. Harris* (13 Ves. 552) distinguished. *Kinloch v. Secretary of State for India in Council*, 7 App. Cas. 619; 51 L. J., Ch. 885; 47 L. T. 133; 30 W. R. 845—H. L. (E.) Affirming, 15 Ch. D. 1; 49 L. J., Ch. 571; 42 L. T. 667; 28 W. R. 619—C. A. And see further TRUST and TRUSTEE.

### Executors.]—See EXECUTOR AND ADMINISTRATOR.

### Agents.]—See PRINCIPAL AND AGENT.

### In Mortgage Cases.]—See MORTGAGE.

### In Patent Cases.]—See PATENT.

### Account Stated.]—See MONEY COUNTS.

### Referring Matters of.]—See ARBITRATION.

### Falsifying.]—See CRIMINAL LAW.

### Practice relating to.]—See PRACTICE.

## ACCOUNTANT.

**Remuneration.]**—On strong evidence of general usage a jury may find that an accountant was entitled to charge at the same rate for his clerks as for himself, even during such portion of the time as he was not himself personally engaged in the work. *Price v. Hong Kong Tea Company*, 2 F. & F. 466.

**Remuneration for giving Evidence.]**—An accountant had been employed to examine books for the purpose of preparing an affidavit in a suit in chancery, and had also been employed in extracting items of profit and loss and recording them in supplemental books, and in setting up new journals and ledgers:—Held, that the taxing master was right both in making an allowance of five guineas a day to the accountant for such time as he had been employed in preparing to give evidence, and in refusing to make any allowance in respect of work done by him as an accountant. *Lafitte & Company, In re, Lafitte's Claim*, 20 L. R., Eq. 650; 44 L. J., Ch. 633; 33 L. T. 91; 24 W. R. 7.

**Costs of Preliminary Examination of Books by.]**—An action involving long accounts was referred; and it was ordered that the plaintiff, by an accountant to be named by the arbitrator, should have inspection of, and take extracts from, the defendant's books. An accountant was named, and he was engaged many days over the books, and afterwards gave evidence before the arbitrator. The award was made in the plaintiff's favour, with the costs of the action, reference, and award:—Held, that the case came within the ordinary rule, and that the plaintiff was not entitled to the costs of the preliminary examination of the books by the accountant. *Nolan v. Copeman*, 8 L. R., Q. B. 84; 42 L. J., Q. B. 44; 27 L. T. 789; 21 W. R. 263.

## ACKNOWLEDGMENT.

- I. OF DEBTS AND DEMANDS TO BAR STATUTES.—*See* LIMITATIONS (STATUTE OF).
- II. OF TITLE TO LAND.—*See* LIMITATIONS (STATUTE OF).
- III. TO BAR WIFE'S INTEREST IN PROPERTY.—*See* FINES AND RECOVERIES.

## ACQUIESCENCE.

*See* WAIVER.

## ACT OF BANKRUPTCY.

*See* BANKRUPTCY.

## ACT OF GOD.

*See* ACCIDENT.

## ACT OF PARLIAMENT.

*See* STATUTE.

## ACTION.

### I. DEFINITION.

### II. BY AND AGAINST WHAT PERSONS.

1. *Foreign Sovereigns and Governments.*
2. *Judicial Persons.*
3. *Barriaters.* *See* BARRISTER.
4. *Government Officers.*
  - a. *Contracts.*
  - b. *Other Acts in Official Capacity.*
  - c. *Torts.*
5. *Public Bodies, Commissioners, or Trustees.*
  - a. *In respect of Torts.*
  - b. *In respect of Contracts.*
6. *Charitable Bodies.*
7. *Clerks of Commissioners.*

### III. FOR WHAT MAINTAINABLE.

1. *Breaches of Contracts.*
2. *Torts.*
  - a. *Generally.*
  - b. *Committed Abroad.*
  - c. *Infringement of Legal Rights.*
  - d. *Founded on a Felony.*
  - e. *Tortious Legal Proceedings.*
3. *Breaches of Statutory Duty.*

### IV. ELECTION OF ACTION OR REMEDY.

### V. DIFFERENT FORMS OF ACTIONS.

1. *Tort or Contract.*
2. *Simple Contract or Covenant.*
3. *Case or Trespass.*

### VI. ON JUDGMENTS, ORDERS AND DECREES OF COURT.

### VII. TIME AND PLACE OF ACCRUAL.

### VIII. DEFENCES.

1. *Arising after Action.*
2. *In avoidance of Circuity.*

### IX. WHAT DESTROYS OR SUSPENDS RIGHT OF ACTION.

1. *Release and Satisfaction.*
2. *Another suit depending.*—*See* PRACTICE (STAYING PROCEEDINGS).
3. *Former Recovery.*—*See* ESTOPPEL.

### X. NOTICE OF ACTION.

1. *When necessary.*
  - a. *When acts done in pursuance of Statute.*

- b. On Apprehension of Persons injuring or stealing property.
2. *Persons entitled to.*
  - a. Justices.
  - b. County Court Judges.
  - c. Bailiffs of County or other Inferior Courts.
  - d. Constables.
  - e. Officers of the Revenue.
  - f. Boards of Health.
  - g. Surveyors of Highways.
  - h. Other persons in like position.
  - i. Guardians.
  - j. Companies generally.
  - k. Railway Companies.
  - l. Persons acting in double capacity.
3. *When and how given.*
  - a. Form and Requisites.
  - b. Service.
  - c. Proof.
4. *Pleading want of notice.*
5. *Effect of omission to give.*

#### XI. COMPROMISE OF.—See COMPROMISE.

#### XII. CONSOLIDATION AND TRANSFER OF, &c. —See PRACTICE.

##### I. DEFINITION.

"Action" is a general term which would properly include informations and other proceedings by the crown. *Bradlaugh v. Clarke*, 8 App. Cas. 354; 52 L. J., Q. B. 505; 48 L. T. 681; 31 W. R. 677; 47 J. P. 405—H. L. (E.)

An interpleader issue is not an action within the meaning of s. 100 of the Judicature Act, 1873, and the rules of court made under that Act. *Hamlyn v. Betteley*, 6 Q. B. D. 63; 50 L. J., Q. B. 1; 43 L. T. 790; 29 W. R. 275—C. A.

##### II. BY AND AGAINST WHAT PERSONS.

###### 1. FOREIGN SOVEREIGNS AND GOVERNMENTS.

A foreign sovereign state adopting the republican form of government, and recognised by the government of her Majesty, can sue in the courts of her Majesty in its own name so recognised. *United States of America v. Wagner*, 2 L. R., Ch. 582; 35 L. J., Ch. 624.

###### 2. JUDICIAL PERSONS.

**In what cases.**—No action will lie against a judge of a court of record for any act done by him in the exercise of his judicial functions. *Ward v. Freeman*, 2 Ir. C. L. R. 460—Ex. Ch. S. P., *Fray v. Blackburn*, 3 B. & S. 576.

A judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction; and a matter of fact so adjudicated by him cannot be put in issue in an action against him. *Kemp v. Neville*, 10 C. B., N. S. 523.

An action will not lie against a judge for acts judicially done by him. A warrant granted by the chief justice of the Queen's Bench in chambers, returnable into that court, to arrest a

party for a breach of the peace, is such a judicial act as will protect him against an action for false imprisonment. *Taaffe v. Downes*, 3 Moore, P. C. C. 36, n.

Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction; and it lies upon the plaintiff, in every such case, to prove that fact. *Calder v. Halket*, 3 Moore, P. C. C. 28.

A judge of a court of record is answerable in an action for an act done by his command when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends. *Houlden v. Smith*, 14 Q. B. 841; 19 L. J., Q. B. 170; 14 Jur. 598.

An action lies against a judge of an ecclesiastical court, who has acted beyond the jurisdiction of the court: as, where a party was excommunicated for refusing to obey an order of the ecclesiastical court, which it had no authority to make, or where the party had not been previously served with a citation or monition, nor had due notice of the order. *Beaurain v. Scott*, 3 Camp. 388.

An action was held not to lie against a vicar-general of a bishop for excommunicating a party for contumacy, in not taking upon him administration of an intestate's effects, to whom he was next of kin, and had intermeddled with the goods, although the citation by which he was cited was void, by reason that it required him to appear and take administration, without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, viz. the granting administration, and there was no malice. *Ackerley v. Parkinson*, 3 M. & S. 411.

No action will lie against the judge of a court of record (a coroner), for an act done by him in his judicial capacity. *Garrett v. Ferrand*, 6 B. & C. 611; 9 D. & R. 657; S. P., *Thomas v. Churton*, 2 B. & S. 475.

If the judgment of commissioners of appeal in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass. *Radnor (Earl) v. Recte*, 2 B. & P. 391.

An action will not lie against a county court judge for words spoken by him while hearing a cause, although they are alleged to be spoken falsely and maliciously, and without any reasonable or probable cause, and not bona fide in the discharge of his judicial duties. *Scott v. Stansfield*, 3 L. R., Ex. 220; 37 L. J., Ex. 155; 18 L. T. 572; 16 W. R. 911.

The steward of a hundred court, or of a court baron, is not responsible for the misfeasance in the execution of process of the bailiffs of the lord of the hundred or manor, to whom process of execution awarded by such court is usually directed. *Bradley v. Carr*, 3 M. & G. 221; 3 Scott, N. R. 523; S. P., *Hulroyd v. Breare*, 2 B. & A. 473; *Tinsley v. Massam*, M. & M. 52; 2 C. & P. 582.

Where, however, the steward directs process to persons named by the party suing out such process, taking an indemnity for such party, he is liable. *Id.*

An action will lie against a sheriff or his deputy if he refuses to sign a bill of exceptions. *White v. Hislop*, 4 M. & W. 73; 2 Jur. 470; 6 D. P. C. 693.

### 3. AGAINST BARRISTER.—*See* BARRISTER.

### 4. GOVERNMENT OFFICERS.

#### a. Contracts.

An officer appointed by government, treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. *Macbeath v. Haldimand*, 1 T. R. 172.

The principal secretary of state for war is not personally liable in an action for breach of a contract entered into by him on behalf of the war department. *O'Grady v. Cardwell*, 21 W. R. 340.

Nor even when contracting by deed, on account of government, is he personally answerable. *Unwin v. Wolery*, 1 T. R. 674. *See Thompson v. Pearce*, 1 B. & B. 25.

In one case, however, a person entering into a charter-party in his own name, on the behalf of government, was held to be personally liable. *Cunningham v. Collier*, 4 Doug. 233.

#### b. Other acts in Official Capacity.

It is clear that a suit may be maintained against a public officer, having in his hands money issued by government for the use of an individual, for the recovery of such money. *Friday v. Rose*, 3 Mer. 102.

But an action cannot be maintained against the secretary at war, by a retired clerk of the war office, for his retired allowance, on the grounds that the secretary is only chargeable in his public and official character, and that an action cannot be maintained against him as such, for anything done by him in that character, although it may amount to a breach of employment, as it would tend to expose him to an infinite number of actions, to be brought by any persons who might suppose themselves aggrieved; although he may have received the money applicable to such specific purposes. *Gidley v. Palmerston (Lord)*, 7 Moore, 91; 3 B. & B. 275.

An action is not maintainable in an Irish court against the Lord Lieutenant during his term of office for any act done by him in his political capacity. *Sullivan v. Spencer (Earl)*, 6 Ir. R. C. L. 173.

The suppression by the Lord Lieutenant of a political meeting in the Phoenix Park is an act done by him in his political capacity. *Ib.*

If such an action is brought against the Lord Lieutenant, the court will stay the proceedings without requiring him to plead his privilege. *Ib.*

No action is maintainable against a lord lieutenant of Ireland in an Irish court during his continuance in office, for any act done by him quâ Lord Lieutenant, and when such an action has been brought, the court will, on motion, direct that the writ of summons and plaint be taken off the file, without putting the Lord Lieutenant to his plea. *Luby v. Wodchouse*, 17 C. L. R. 618.

#### c. Torts.

If a public officer is guilty of a misfeasance in the exercise of the powers intrusted to him by law, and in the discharge of his duty, he is liable to an action for any damage resulting from that act, without proof of malice or want of probable cause. *Brassey v. Maclean*, 6 L. R., P. C. 398; 33 L. T. 1.

VOL. L

An action of trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for an injury committed by him in Minorca. *Mostyn v. Fabrigas*, Cowp. 161.

No action lies against a commander of a British ship of war for seizing and detaining a vessel on suspicion of her being hostile prize; though he afterwards dismiss her without libelling her in the court of Admiralty; and though he detain her partly on suspicion of matters which are merely causes of forfeiture if she is British. *Faith v. Pearson*, 6 Taunt. 439; 2 Marsh. 133; 4 Camp. 357; Holt, 113.

If a ship was seized as forfeited under the 12 Car. 2, c. 18, by a governor of a foreign country belonging to Great Britain, the owner could not maintain trespass against the party seizing, although the latter did not proceed to condemnation; for, by the forfeiture, the property was divested out of the owner. *Wilkins v. Despard* 5 T. R. 112.

In a suit against her Majesty's deputy commissary general for Natal, and as such representing her Majesty's commissariat department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employes, and for general damage:—Held, on exceptions by the defendant to the jurisdiction of the court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the commissariat department; and that there was no cause of action against him. The government revenue cannot be reached by a suit against a public officer in his official capacity. Quære, whether the court would have had jurisdiction if a petition of right had been presented and the crown had ordered that right should be done. *Palmer v. Hutchinson*, 6 App. Cas. 619; 50 L. J., P. C. 62; 45 L. T. 180—H. L.

*See also* PUBLIC OFFICER.

### 5. PUBLIC BODIES, COMMISSIONERS, AND TRUSTEES.

#### a. In respect of Torts.

**Exercise of Public function without Emolument—Freedom from Liability.**—One who, in the exercise of a public function, without emolument, which he is compellable to execute, acting without malice, and according to his best skill and diligence, and obtaining the best information he can, does an act which occasions consequential damage to a subject, is not liable to an action for such damage. *Sutton v. Clarke*, 6 Taunt. 29; 1 Marsh. 429.

By a turnpike act, trustees were appointed with authority to cut drains in lands adjoining the road, making reasonable satisfaction to the owners. It was provided that all actions for anything done in pursuance of the act, should be brought within six months after doing the thing complained of. A drain was cut by an order signed by a competent number of trustees and according to the plan of a surveyor, in land adjoining the plaintiff's, by which the latter was overflowed. An action was brought against one of the trustees only, more than six months after the act done and the first injury sustained, but within six months after a subsequent injury ac-

crued:—Held, first, that the action, if it could have been supported at all, was well brought against the defendant only; but, secondly, that the trustees, having acted to the best of their skill and with the best advice, were not answerable for the damage which had accrued. *Ib.*

In order to render commissioners, acting in the bonâ fide performance of a public duty, liable to an action for an injury to an individual resulting from an act so done by them, it must appear that they have been guilty of negligence, or want of skill in the conduct of it. *Graciers' Company v. Donne*, 3 Scott, 356; 3 Bing. N. C. 31; 2 Hodges, 120.

—**Authority not exceeded.**—Where trustees under 3 Geo. 4, c. 126, by improving the course of a public road, had effected a consequential injury to a private individual whose estate abutted on the road:—Held, that they were not liable to an action, it appearing that they had not exceeded the authority given them by the statute. *Bolton v. Crowther*, 4 D. & R. 195; 2 B. & C. 703.

Where the acts of commissioners, appointed by a paving act, occasion a damage to an individual without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, are not liable to an action. *British Cast Plate-Glass Manufacturers v. Mercedith*, 4 T. R. 794.

The principle which imposes liabilities upon a private company, as arising in consideration of the statutable powers granted to them, has no application in the case of commissioners appointed under a public act of parliament, to do, on behalf of the executive government, certain things for the benefit of the public. *Reg. v. Woods and Forrests (Commissioners)*, 19 L. J., Q. B. 497; 15 Jur. 35.

Trustees of a public road, who were empowered and required by act of parliament to place lamps along the road, if they should think necessary, and to make contracts for the cleansing of the road, and to take a night toll for the purpose of enabling them to light and watch the same, held not liable in an action for an injury suffered by an individual in crossing the road at night, by falling over a heap of scrapings left on the road side after cleaning the road, without any lights. *Harris v. Baker*, 4 M. & S. 27.

—**Negligence of Contractors.**—Trustees of a turnpike road are not liable for any injury occasioned by the negligence of contractors, or others employed under them in the performance of public works on the road, unless they personally interfere in the management of the works. *Humphreys v. Mears*, 1 M. & R. 187.

Trustees appointed under a public road act are not responsible for any injury occasioned by the negligence of the men employed in making or repairing the road. *Duncan v. Findlater*, 6 Cl. & Fin. 894.

The funds raised by such an act cannot be charged with compensation for such an injury; the persons employed on the road not being in the situation of servants to the trustees. *Ib.*

Persons intrusted with the performance of a public duty, discharging it gratuitously, and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them. *Hilliday v.*

*St. Leonard's, Shoreditch*, 11 C. B., N. S. 192; 8 Jur., N. S. 79; 4 L. T. 406.

A vestry, in whom were vested the powers and duties of surveyors of highways, under the powers conferred upon them appointed a surveyor. Workmen employed by the surveyor, and paid out of the parish funds, being directed to carry the paving stones from a public street under repair, and place them in another public street, so negligently performed that duty that a person, in driving through the last-mentioned street, was upset and injured:—Held, that the vestry was not responsible. *Ib.*

A public body appointed under a local act to discharge a public duty without reward and without funds, is responsible for the negligence of those whom they employ. *Cue v. Wiae*, 7 B. & S. 831; 1 L. R. Q. B. 711; 37 L. J. Q. B. 262; 14 L. T. 891; 14 W. R. 865—Ex. Ch.

By an act, commissioners were appointed for improving a navigation: their powers were to be executed by the majority present at a meeting of not fewer than three. They were not to be personally liable on contracts made, or for damages incurred, in relation to anything done in pursuance of the act, but might be sued in the name of their clerk. The commissioners, at a meeting held, resolved to accept a tender for executing works in pursuance of the act. Their clerk thereupon drew up a contract according to the tender, and it was afterwards signed by the contractor:—Held, that the contract made in consequence of the resolution was a contract entered into by the commissioners in execution of their office, and that they were liable and might be sued in the name of their clerk for damage negligently done by the contractor to third persons in execution of such contract. *Allen v. Haycard*, 7 Q. B. 960; 4 Railw. Cas. 104; 15 L. J., Q. B. 99; 10 Jur. 92.

**Waterworks Company acting under instruction of Commissioners.**—By a local act, a waterworks company was bound, at the request of town improvement commissioners, to fix fireplugs into their mains, and to repair and keep them in proper order, at the cost of the commissioners, in whom the property in the plugs was vested by virtue of their act. In consequence of the cap of one of the fireplugs being broken, a horse placed his foot in the plug-hole, and was lamed:—Held, that the company was, and the commissioners were not liable for the injury. *Bayley v. Wolverhampton Waterworks Company*, 30 L. J., Ex. 57.

**When special mode of compensation provided.**—If, in the execution of works authorized by an act of parliament, damage is sustained, and the act provides a special mode in which compensation for such damage may be recovered, no action will lie for it. But this only relates to works carefully and skilfully executed, and if there is a want of proper care and skill on the part of those executing the works, an action for the negligence, to recover damages for the injury thereby sustained, will lie. *Clothier v. Webster*, 12 C. B., N. S. 790; 31 L. J., C. P. 216; 10 W. R. 624.

**Personal Negligence.**—Trustees of a turnpike road converted an open ditch, which used to carry off the water from the road, into a covered drain, placing catchpits, with gratings thereon, to enable the water to enter the drain. Owing

to the insufficiency of such gratings and catch-pits, the water, in very wet seasons, instead of running down the ditch, as formerly before the alterations by the trustees, overflowed the road, and made its way into the adjoining land, and injured a colliery.—Held, that the trustees were liable for such injury, if they were guilty of negligence in respect of such gratings and catch-pits. *Whitehouse v. Fellows*, 10 C. B., N. S. 765; 30 L. J., C. P. 306; 4 L. T. 177; 9 W. R. 557.

— **Act of Harbour-Master—Neglect of Harbour by Trustees who acted gratuitously.**—By a local act for better preserving a harbour, trustees were appointed for carrying out the act. They acted gratuitously; the property in the harbour was vested in them, and they were empowered to elect a harbour-master and other officers and servants connected with the harbour, with power also to discharge them. The harbour-master was empowered to direct the situation in which a vessel entering the harbour was to be moored. The trustees were empowered to make bye-laws as to the management of the harbour, and to impose tonnage rates upon vessels using it, and to borrow money on the security of such rates, and to apply the proceeds in payment of the interest of the money borrowed, and of the expenses attending the carrying into execution the purposes of the act connected with the harbour, and also in the reduction of the capital borrowed.—Held, that the trustees were not liable, either, first, for the acts of the harbour-master, in directing a vessel to be moored in an improper place whereby it received damage, or, secondly, for an injury occasioned to a vessel by an accumulation of rubbish in the harbour. *McLarfe v. Hetherington*, 11 Ex. 257; 25 L. J., Ex. 314.

Held, also, that although the trustees had almost an absolute discretion (with certain exceptions) in the appropriation of the funds for the management of the harbour, they would not have been liable for the accident arising from the accumulation of rubbish in the harbour if they had been in possession of funds. *Ib.*

— **Corporation—Possession of Money to cleanse Docks—Liability for neglect.**—A corporation, constituted by statute for the purpose of making, maintaining, repairing and cleansing docks, which are open to the vessels of all persons upon paying tolls, duties and rates to the corporation, is liable to an action, if, having in hand funds from these sources sufficient, after defraying all other charges, they neglect to apply a part of them to cleansing the docks, and, knowing that in consequence the docks are in a state dangerous to vessels navigating them, they keep them open to the public; and a person whose vessel is injured on entering by striking on an accumulation of mud at the bottom of the docks, may recover against them damages for the injury sustained. *Gibbs v. Liverpool Docks (Trustees)*, 3 H. & N. 164; 27 L. J., Ex. 321; 4 Jur. N. S. 636—Ex. Ch.

It makes no difference that the corporation has vested in them a discretion as to the order in which they shall apply their funds to the several purposes of their constitution, nor that the tolls, duties and rates are received for a fiduciary, and not for a beneficial purpose. *Ib.*

Trustees incorporated for the purpose of constructing a dock, and who receive rates and have funds which they are bound to apply in maintaining and cleansing the dock, so that it may be in a fit state for vessels to enter, are liable for injury to a vessel caused by an accumulation of mud in the dock, of which by their servants they had the means of knowing, and were negligently ignorant. *Mercy Docks and Harbour Board v. Penhallow*, 7 H. & N. 329; 30 L. J. Ex. 329; 8 Jur. N. S. 486; 5 L. T. 112.

**Damage due to Negligence—Payment out of Rates.**—The plaintiff was owner of premises in Cheltenham, which were drained by a sewer which emptied itself into the river Chelt. At the mouth of this sewer there was a flap or penstock, which prevented any water of the river from flowing up the sewer. In 1852, an act of parliament passed for improving Cheltenham, and which directed the commissioners appointed under it to make new sewers. Accordingly the commissioners constructed a new sewer, which passed under the Chelt, near the plaintiff's premises, and removed the flap from the mouth of the old sewer and connected it with the new sewer. The plaintiff's premises were twelve feet below the summit level of the new sewer. In 1855 there was a heavy storm of rain, by which the Chelt was flooded, and in consequence the new sewer burst and the water of the river flowed into it. The commissioners erected a tank round the hole, but before the repair of the sewer was completed another extraordinary flood took place, by which the tank was washed away and the water of the river rushed into the sewer and forced the sewage matter and water into the plaintiff's premises, thereby causing great damage. The local act incorporated the 14th section of the Public Health Act, which provides that full compensation shall be made out of the general or special district rates to be levied under this act to all persons sustaining any damage by reason of the exercise of any of the powers of this act.—Held, first, that the commissioners were liable to an action for negligence, and were entitled to reimburse themselves out of the rates. *Ruck v. Williams*, 3 H. & N. 308; 27 L. J., Ex. 357.

Held, secondly, that they were guilty of negligence in not putting up a flap or penstock at the mouth of the old sewer. *Ib.*

**Neglect of Commissioners to give Notice—Consequential Damage.**—An act enabling commissioners to grant a lease of a canal contained a clause as follows:—In case the lessees during the term should permit the navigation to be out of repair, the commissioners are authorized and required to give notice thereof to such lessees, and in such notice to specify the particular repairs which ought to be done, and the commissioners may require that such repairs should be commenced, proceeded with, and finished within reasonable periods, to be named by them, and in case the lessees shall neglect to commence such repairs, it shall be lawful for the commissioners, and they are hereby authorized, to take possession of the tolls and to cause such repairs to be done under their own direction, and to pay the necessary expenses of making such repairs out of the tolls. A lease having been granted in pursuance of the act, during

its continuance one of the locks of the canal became out of repair, but the commissioners, though they knew of the want of repair, gave no notice of it to the lessee, though a sufficient time had elapsed for giving such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock:—Held, that assuming a duty in the commissioners to give notice to the lessee to repair, they were not liable in an action by the owner of the barge for neglecting to give such notice, inasmuch as the detention of the barge was not a damage naturally flowing from their neglect. *Walker v. Goe*, 4 H. & N. 350; 28 L. J. Ex. 184; 5 Jur., N. S. 737—Ex. Ch.

**Surveyor of Highways.]**—No action lies against a surveyor of highways, appointed under 5 & 6 Will. 4, c. 50, for damage resulting from an accident caused by his neglect to repair the highway. *Young v. Davis*, 2 H. & C. 197—Ex. Ch.

#### b. In respect of Contracts.

Where commissioners under a local act have power to appoint officers at a salary to be paid out of the rates to be raised thereunder, the appointment does not create a contract on the part of the commissioners to pay the salary. Therefore an action will not lie against them for salary, but a *mandamus* or an action on the case is the proper remedy. *Bogg v. Pearse*, 10 C. B. 534; 20 L. J., C. P. 99.

Commissioners were appointed to be annually elected for executing a local act. They had power to levy rates. They had power to appoint clerks and other officers, and to pay them salaries out of the money to be raised by the rates. They had power to execute many works. They might sue and be sued by their clerk, and they were exempted from personal liability for any contracts entered into by them as commissioners:—Held, that a clerk, appointed by the commissioners for one year, might maintain an action for his salary against the clerk of the commissioners in a subsequent year. *Hall v. Taylor*, 1 El. Bl. & El. 107; 27 L. J., Q. B. 311; 4 Jur., N. S. 877.

Held, also, that it was within the scope of their authority to employ an attorney; and that he might recover in an action against the clerk of the commissioners in a succeeding year. *Ib.*

#### 6. CHARITABLE BODIES.—See CHARITY.

#### 7. CLERKS OF COMMISSIONERS.

The clerk to commissioners of paving drew up a contract for paving, of which contract the contractor was, by agreement, to pay the expense; he offered to execute the contract, but refused to pay the clerk's charges, as unreasonable; the clerk refused to allow the contract to be executed until his charges were paid. Under an act authorizing the commissioners to sue by their clerk:—Held, that he could not sue as such clerk for these charges. *Curling v. Johnson*, 10 Bing. 89; 3 M. & Scott, 496.

Clerks to commissioners, under a lighting and paving act, intrusted with the conduct of public works, are not liable for an injury occasioned by

the negligence of artificers and labourers employed under their authority. *Hall v. Smith*, 9 Moore, 226; 2 Bing. 156.

### III. FOR WHAT MAINTAINABLE.

#### 1. BREACHES OF CONTRACT.

**General Principle.]**—The rule of law in respect of breach of contract confines the remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued. The exception in the case of master and servant dates from the Statute of Labourers, 25 Edw. 3, and is limited by it. *Lumley v. Gye*, 2 El. & Bl. 216; 22 L. J., Q. B. 463; 17 Jur. 827.

**Maliciously procuring Breach of Contract.]**—The rule of law which gives a remedy in case of enticing away servants applies to all cases where there is an unlawful and a malicious enticing away of any person employed to give his personal labour or service for a given time, under the direction of a master or an employer, who is injured by the wrongful act; and the service needs not be exclusive. *Ib.*

An action is maintainable in all cases for maliciously procuring a person to refuse to perform a contract into which he has entered, and by which refusal the plaintiff has sustained an injury. *Ib.*

The procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong. *Ib.*

Where a right to the performance of a contract has been violated by a breach, the remedy is upon the contract against the contracting party, and if he is made to indemnify for such breach, no further recourse is allowed; but if that remedy is inadequate, he who procured the damage maliciously is responsible beyond the liability of the contract. *Ib.*

It is no objection to the action that the contracting party had not begun the performance of the contract, or that the service had not been actually entered into, or was not actually continuing. *Ib.*

—An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed. So held by Lord Selborne, L. C., and Brett, L. J., affirming the decision of the majority of the judges in *Lumley v. Gye* (2 E. & B. 216), Lord Coleridge, C. J., dissentiente. *Bowen v. Hall*, 6 Q. B. D. 333; 50 L. J., Q. B. 305; 44 L. T. 75; 29 W. R. 367; 45 J. P. 373—C. A.

**Written Contract connected with Land—Easement.]**—An action will lie for the breach of a written contract, by which A., for a valuable consideration, agrees with B. that B. may dig and carry away cinders from a cinderpit, forming part of A.'s land, though the contract, not being under seal, is incapable of granting or passing an easement. *Smart v. Jones*, 15 C. B., N. S. 717; 33 L. J., C. P. 154; 10 Jur., N. S. 678.

**\* Right of Action by Third Party.]**—One who is no party to a contract cannot sue in respect of

the breach of duty arising out of the contract. *Alton v. Midland Railway Company*, 19 C. B., N. S. 213; 34 L. J., C. P. 292; 11 Jur., N. S. 672; 13 W. R. 918.

**Action against Two Persons for Identical Matter.]**—A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other. *Priestley v. Fernie*, 3 H. & C. 977; 34 L. J., Ex. 173.

## 2. TORTS.

### a. Generally.

An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. *Stevenson v. Newnham*, 13 C. B. 285—Ex. Ch.

The plaintiffs alleged in their statement of claim that their house had been called "Ashford Lodge" for sixty years, and the adjoining house belonging to the defendant had been called "Ashford Villa" for forty years, and that the defendant had recently altered the name of his house to that of the plaintiffs' house. The plaintiffs alleged that this act of the defendant had caused them great inconvenience and annoyance, and had materially diminished the value of their property, and they claimed an injunction to restrain the defendant from continuing to use the name of their house:—Held, that the alleged act of the defendant in calling his house by the name of the plaintiffs' house was not a violation of any legal right of the plaintiffs: and there being no allegation of malicious intention, a demurrer to the statement of claim was allowed. *Day v. Brownrigg*, 10 Ch. D. 294; 48 L. J., Ch. 173; 39 L. T. 553; 27 W. R. 217—C. A. Reversing 39 L. T. 226.

In the case of damage occasioned by a wrongful act, though such as the law esteems an injury, malice is not a necessary ingredient to the maintenance of an action. *Rogers v. Rajendra Dutt*, 13 Moore, P. C. 209; 9 W. R. 149.

It is essential to an action of tort that the act complained of should be legally wrongful as regards the party complaining, i.e., it must prejudicially affect him in some legal right. The fact that it will, however directly, do him harm in his interests is not enough. *Id.*

A summons and plaint complaining that the plaintiff, a corn merchant, was possessed of stores adjacent to a public thoroughfare and market-place, and the defendant, contriving and unjustly intending to injure the plaintiff in his business of a corn merchant, and to prevent his customers from coming to the premises and stores to sell and dispose of their corn to the plaintiff, wrongfully and injuriously prevented certain parties named, under colour of requiring from them the payment of some alleged or pretended tolls or other duties not legally demandable or payable from sellers, from disposing of their corn to the plaintiff, and stopped and detained the carts and animals laden with corn while proceeding to the premises and stores of the plaintiff, and thereby obstructed and hindered the plaintiff from carrying on his business, is bad. *Higgins v. O'Donnell*, 4 Ir. R., C. L. 91; 18 W. R. 378.

A defendant in an administration suit made an inaccurate statement in his answer as to the number of a class of beneficiaries, and an order was made on further consideration that the fund in court should be divided among the class in the proportion in which it would have been divisible if the statement had been correct:—Held, that the person aggrieved by the error could not maintain an action against the defendant who had made the mistake. *Laing v. Harle*, 34 L. T. 728; 24 W. R. 728.

### b. Torts committed Abroad.

Where, by the law of a foreign country, compensation or damages may be recovered in such country for an assault there committed, an action is maintainable in England by a British subject for such assault, although proceedings taken at his instance are pending in the foreign court in respect of the same assault. *Seymour (Lord) v. Scott*, 1 H. & C. 219; 32 L. J. Ex. 61; 9 Jur. N. S. 522; 8 L. T. 511; 11 W. R. 169.

The rule as to property and civil contracts, that an act, unless intended to take effect elsewhere, shall, as regards its effects and incidents, if a conflict of law arises between the *lex loci* and the *lex fori*, be governed by the former, applies also to the case of an act causing a personal injury. If such an act is either enjoined or rendered lawful by the law of the country where it is done, an action cannot be maintained here in respect of it. *Phillips v. Eyre*, 4 L. R., Q. B. 225; 38 L. J., Q. B. 113; 19 L. T. 770; 17 W. R. 375; 9 B. & S. 343. Affirmed, 6 L. R., Q. B. 1; 40 L. J., Q. B. 28; 10 B. & S. 1004—Ex. Ch.

Where a wrongful act inflicting personal injury is committed in a colony, an act of the Colonial legislature rendering legal the wrongful act done, subsequently passed before an action has been brought in this country, takes away the right of action, not only in the courts of the colony, but also in those of this country. *Id.*

Where the tort has been committed by the governor of the colony, it is no objection to the validity of the act of the Colonial Legislature, legalising the wrongs committed, that the assent of the governor was necessary to the passing of the act. *Id.*

### c. Infringement of Legal Rights.

Where a person would have, at common law, a right of action grounded upon an interference with a given public right, when such interference had operated to his individual injury, if the public right is taken away by statute, and vested in a body of conservators to be exercised or controlled for a specified object, e.g., the benefit of trade and commerce, then, the right being thus resigned by the public, the individual right of action is lost also, and there can be no redress by action on account of any interference, duly authorized by such body, with private rights, of the nature of those to which the powers of the body relate. *Kearns v. Cordwainers' Company*, 6 C. B., N. S. 388; 28 L. J., C. P. 285; 5 Jur., N. S. 1216.

An inhabitant householder of a district may maintain an action against one who infringes a customary right to the flow of water common to the inhabitant householders of such district,



without proving actual damage to himself personally by reason of such infringement, where the acts done by the person infringing such right would, if repeated and continued, be evidence of the existence of a right in such person, in derogation of the right of the inhabitants of the district. *Harrop v. Hirst*, 4 L. R., Ex. 43; 38 L. J., Ex. 1; 19 L. T. 426; 17 W. R. 164.

#### d. Torts founded on a Felony.

An action cannot be maintained where a declaration alleges a case of felony; secus where the declaration alleges only a misdemeanour. *Friarington v. Hutchinson*, 15 L. T. 390.

In an action by a woman for assaulting her and forcibly violating her person, whereby she was delivered of a child, the judge, upon her evidence, directed a nonsuit:—Held, that the direction was right, for if a rape had been committed no action would lie until after the defendant had been prosecuted; and if the plaintiff had consented she could not maintain an action for the assault. *Wollock v. Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285; 9 Jur. N. S., 232; 7 L. T. 751. *S. P. Quinlan v. Barber*, Batty's Ir. Rep. 47.

In an action for the recovery of a brooch, the pleas being not guilty and not possessed, the jury found a verdict for the plaintiff. A rule for a new trial having been obtained, on the ground that it appeared that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, and that the judge ought, therefore, to have non-suited:—Held, that the judge was bound to try the issues on the record, and that he was right in not having non-suited the plaintiff. *Wells v. Abrahams*, 7 L. R., Q. B. 554; 41 L. J., Q. B. 306; 26 L. T. 433; 20 W. R. 659.

An insurance company granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife:—Held, first, that the action could not be maintained, as the insurer has no rights other than those of his assured, and can enforce those only in his name and after admitting the claim on the policy. Secondly, that the action for the felony if it were maintainable was maintainable without shewing that the felon had been prosecuted. *Midland Insurance Company v. Smith*, 6 Q. B. D. 561; 50 L. J., Q. B. 329; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.

Seemingly, that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy. *Ib.* See also CRIMINAL LAW (Felony).

#### c. Tortious Legal Proceedings.

Where an attorney has brought an action or issued execution against a wrong party purely through mistake, and without being actuated by any improper motive, though substantial injury may have resulted, it is *damnum absque injuria* and no action will lie. *Darvis v. Jenkins*, 11 M. & W. 745; 1 D. & L. 321; 12 L. J., Ex. 386.

But where the attorney of a plaintiff, in an action in which judgment had been recovered, issued a *fi. fa.* thereupon, which he indorsed with a direction, by means of which the house of a

wrong person was entered:—Held, that such person could maintain trespass against the plaintiff in the original action. *Jarmain v. Hooper*, 1 D. & L. 769; 7 Scott, N. R. 663; 6 M. & G. 827; 8 Jur. 127.

Seemingly, that no action will lie against a party for inciting a third person to bring a civil action against a plaintiff without reasonable or probable cause. *Piraz v. Nicholls*, 2 C. B. 501.

No action lies for commencing and prosecuting an action maliciously and without reasonable cause in the name of a third party, without an allegation, shewing that legal damage has been sustained. *Cotterell v. Jones*, 11 C. B. 713; 21 L. J., C. P. 2; 16 Jur. 88.

An action is not maintainable against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause. *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 App. Cas. 186.

A declaration in an action against A. and B. alleged that the plaintiff was employed by the contractors of some proposed buildings to cart and convey away the earth dug out of the excavations and sites of the buildings with the horses and cart of the plaintiff; that an action was depending in the Queen's Bench, wherein B. was the plaintiff, and C. the defendant, in which action C. allowed judgment to go by default, and a *fi. fa.* issued against the goods of C., directed to A., as sheriff, to be put in execution by him as such sheriff; yet he, as sheriff, by and with the aid, counsel, and assistance of B., by him wrongfully and maliciously given, seized, took, and carried away, in execution of the writ, the goods of the plaintiff, under the pretence that the same belonged to C., and afterwards sold the goods as an execution under the writ against the goods of C. By means of the premises, and for want of the use of the goods, the plaintiff was unable to carry on his employment and business, and thereby lost great gains:—Held, that the declaration shewed no cause of action against B. *Sedman v. Walker*, 1 Ex. 589.

#### 3. BREACH OF STATUTORY DUTY.

##### Whether Remedy Exclusive or Cumulative.]

—Where a statute confers a right, and annexes certain penalties for its infringement, an action for damages will not lie against a party infringing the right, by the party aggrieved. *Stevens v. Jeacocke*, 11 Q. B. 731; 17 L. J., Q. B. 163; 12 Jur. 477.

By a fishery act it was enacted that stems or stations shall be bounded as there defined, and that in cases of interference by one boat with another, under certain circumstances, the fish taken by the party interfering shall be forfeited to the party interfered with, and the interfering party shall forfeit 50*l.* A plaintiff declared, setting forth that, after the statute passed, he was proceeding to take fish in his proper turn and station, and would have taken them, but that the defendant prevented him from so doing by unlawfully and wrongfully throwing a net; and the declaration described the proceeding so as to bring it within the statutory prohibition:—Held, that the declaration shewed no cause of action, the plaintiff stating no interference with any common law right, and the statute having only imposed a particular penalty for the act

done, and having therefore given no general right of action. *Id.*

By 6 & 7 Vict. c. 79, s. 1, articles of a convention between her Majesty and the King of the French, for the guidance of the fishermen of the two countries in the seas between the British Islands and France, are to have the force of law. By the articles all transgressions of the regulations, and all disputes between the fishermen, are to be submitted to the exclusive jurisdiction of and settled by the tribunal or magistrates designated by law, which tribunal may summarily impose penalties for such transgressions, and award compensation to parties injured; sect. 11 declares such tribunal in England to be any magistrate or justice of the peace having jurisdiction in the place in which, or in waters adjacent to which, the offence shall have been committed, or to which the offender shall be brought. Such magistrate may impose penalties, and award and enforce compensation to parties injured:—Held, that no action can be maintained for the breach of any article of the convention, or for damage caused by such breach, the remedy provided by the act being exclusive. *Marshall v. Nicholls*, 18 Q. B. 882; 21 L. J., Q. B. 343; 16 Jur. 1155.

The 1 & 2 Vict. c. 43, and the rules made under it, regulate the use of adjoining mines in the Forest of Dean. By s. 29, compliance with the rules may be enforced by injunction of the Court of Exchequer, or otherwise, in such manner as that court shall on application think fit. The plaintiff and the defendant were holders of adjoining mines, and the former brought an action for injury sustained by him through the stopping of the engines in the defendant's mine contrary to one of the rules:—Held, that the specific remedy provided by s. 29 for enforcing the rules did not exclude the right of action for injuries caused by a breach of them. *Ross v. Rugge-Price*, 1 Ex. D. 269; 45 L. J., Ex. 777; 34 L. T. 535; 24 W. R. 786.

A railway act enacted, that any penalty imposed thereby, the recovery of which was not otherwise provided for, might be recovered by summary proceeding, upon complaint before two or more justices:—Held, that this did not bar the party entitled from his remedy by action. *Collinson v. Newcastle and Darlington Railway Company*, 1 C. & K. 546.

Action for obstruction by a railway company of a private right of way. No special damage was alleged. Plea, justifying under the private act of the company, and other acts therewith incorporated. Replication, that the way was a road within the Railways Clauses Act (8 & 9 Vict. c. 20), and that the company had interfered with the same within the meaning of that act:—Held, that 8 & 9 Vict. c. 20 takes away the common law right of action for an interference under the powers of a railway company with a private right of way, except when special damage has been sustained. *Watkins v. Great Northern Railway Company*, 16 Q. B. 961; 20 L. J., Q. B. 391.

Where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted. *St. Pancras (Vestry) v. Batterbury*, 2 C. B., N. S. 477; 26 L. J., C. P. 243; 3 Jur., N. S. 1106.

By an act, incorporating the Railways Clauses Act, 8 & 9 Vict. c. 20, and the Towns Clauses Act, 10 & 11 Vict. c. 34, certain expenses in-

curred by the Commissioners in paving streets might be recovered as damages. An action having been brought to recover expenses so incurred:—Held, that such action was not maintainable, for that the proper construction of the several acts was that the expenses were to be recovered as damages, upon a proceeding before justices. *Blackburn (Mayor, &c.) v. Parkinson*, 28 L. J., M. C. 7; 5 Jur., N. S. 572.

The 2 Geo. 1, c. 17 (Ir.), s. 4, requires a master to give a discharge (if required) to a servant on leaving his employment; in case of refusal, s. 5 enables the servant to obtain a discharge from a magistrate:—Held, that the statutory remedy was exclusive. *Handley v. Moffat*, 7 Ir. R. C. L. 104.

A private enclosure act gave the commissioners power by their award to direct by whom and in what manner certain necessary drainage works were to be made and maintained. The commissioners having directed by their award that the expenses of the works should be paid by a rate to be levied and recovered by certain surveyors in the same manner as parish rates were by law recoverable in the parish:—Held, that the rate must be recovered by distress and not by action. *Danby v. Watson*, 46 L. J., M. C. 179; 36 L. T. 412; 25 W. R. 464.

The 5 & 6 Will. 4, c. 76, s. 60, which gives a summary remedy against a corporate officer, who refuses to comply with the provisions of the act as to giving up to the town council of the borough all documents in the custody of such officer and paying over moneys, does not take away the right of action which the corporation has against such officer for the breach of duty so imposed by that section. *Lichfield (Mayor, &c.) v. Simpson*, 8 Q. B. 65; 15 L. J., Q. B. 78.

By 7 & 8 Vict. c. 112, s. 18, every ship navigating between the United Kingdom and any place out of the same shall keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, and the owner of the ship shall incur a penalty of 20*l.* for every default. By sect. 62 all penalties shall be recovered either in the superior courts at the suit of the attorney-general, or at the suit of any person by summary proceeding, and not exceeding one moiety shall be paid to the informer, and the residue to the Seamen's Hospital Society:—Held, that the penalty was recoverable for a breach of the public duty created by the statute, and that the common law right to maintain an action in respect of a special damage resulting from the breach of that duty was not taken away. *Cowth v. Steel*, 3 El. & Bl. 402; 2 C. L. R. 940; 23 L. J., Q. B. 121; 18 Jur. 515.

When an act of parliament imposes a statutory duty, an action does not necessarily lie for the breach of such duty at the suit of any person injured by such breach. *Atkinson v. Newcastle and Gateshead Water Company*, 2 Ex. D. 441; 46 L. J., Ex. 775; 36 L. T. 761; 25 W. R. 794—C. A. Reversing 6 L. R., Ex. 404; 20 W. R. 35.

Whether such a right of action exists, depends upon the general scope and object of the particular statute. *Id.*

By the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 42, the undertakers are at all times to keep charged with water at a certain pressure all their pipes to which fire plugs shall be affixed, and to allow all persons at all times

to take and use such water for extinguishing fire without making compensation for the same. By s. 43, if the undertakers neglect to keep their pipes charged at the statutory pressure, they are to be liable to a penalty of 10*l.* for each offence, to be recovered by a common informer. In an action to recover damages against a water company, for not keeping its pipes supplied with water at the statutory pressure, whereby a house was burnt down:—Held, that the action would not lie. *Ib.*

An act of parliament empowered a company to make and maintain a canal, and provided that the owners of lands within the distance of twenty yards from the canal should make a communication by pipes, between the water therein and any steam-engine, and draw from the canal such quantities of water as should be sufficient to supply the engine with cold water, for the sole purpose of condensing the steam, and for working any such engine as aforesaid; and for no other use or purpose; and there was a proviso, that if any dispute should arise between the company and any person who should be desirous of taking water out of the canal for the purposes of any such engine, or who should be in the use of taking the same, such dispute should be finally settled by the commissioners appointed under the act. In an action the declaration alleged that the defendant, the owner of a steam-engine, who had laid down a pipe communicating with the canal, used the water which had been drawn off by means of the pipes, for other purposes than for condensing the steam, and more than was necessary for condensing:—Held, that the special power of adjudication conferred upon the commissioners did not take away the right of action. *Rockdale Canal Company v. King*, 14 Q. B. 122; 18 L. J., Q. B. 293; 14 Jur. 16.

To an action by an incorporated company for calls, the defendant pleaded that the shares had been declared by the company to be forfeited:—Held, that the plea was bad, as the right of action and the power to forfeit shares on non-payment of calls conferred by 8 & 9 Vict. c. 16, were not alternative but cumulative remedies. *Great Northern Railway Company v. Kennedy*, 7 D. & L. 197; 4 Ex. 417; *S. P., Inglis v. Great Northern Railway Company*, 1 Macq. H. L. Cas. 112; 16 Jur. 895.

#### IV. ELECTION OF ACTION OR REMEDY.

**In what Cases.**—The court will not compel a party, who has proceeded both by indictment and action for the same assault, to make his election upon which he will rely. *Jones v. Clay*, 1 B. & P. 191; *S. P., Murphey v. Cadell*, 2 B. & P. 137.

A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and has received from the Treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant, to recover more than nominal damages. *Jacks v. Bell*, 3 C. & P. 316.

After an acquittal of a defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if not shewn to have colluded in procuring such acquittal. *Crosby v. Leng*, 12 East, 409.

In an action by a woman for assaulting her

and forcibly violating her person, whereby she was delivered of a child, the judge, upon her evidence, directed a nonsuit:—Held, that the direction was right, for if a rape had been committed no action would lie until after the defendant had been prosecuted, and if the plaintiff had consented she could not maintain an action for the assault. *Wellock v. Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285; 9 Jur., N. S. 232; 7 L. T. 751.

A plaintiff, having sued at law and in equity for the same cause of action, was, after issue joined, ordered by a court of equity to elect in which suit he would proceed, and he elected to proceed in equity, and withdrew the record. An order was afterwards made by the same court for the defendant to pay the plaintiff his costs at law, which order was, on appeal, rescinded by the Lord Chancellor, who directed that the defendant should be at liberty to proceed at law. A judge's order having been made for the plaintiff to pay the defendant's costs in the action:—Held, that this order was wrong, for that the plaintiff's election to proceed in equity did not amount to a discontinuance, and the defendant, if entitled to his costs at all, must apply to the court of equity. *Simpson v. Sadd*, 16 C. B. 26; 3 C. L. R. 917; 24 L. J., C. P. 156; 1 Jur., N. S. 736.

Where a plaintiff has proceeded at law and in equity for the same subject-matter, and after issue joined has, under an order of a court of equity, elected to proceed in equity, the court will not, under 15 & 16 Vict. c. 76, s. 226, prevent the defendant from proceeding to obtain judgment in the action for his costs. *Mortimore v. Soares*, 1 El. & El. 399; 5 Jur., N. S. 574.

A. filed a bill in equity against B. for the cancellation of bills of exchange drawn by B. and accepted by A. in part performance of a contract, of which B. failed to perform his part, and for an injunction to restrain B. from parting with or suing on the bills; and, pending the suit, A. commenced an action against B. for damages for breach of the contract:—Held, that the suit and action were not for the same matter, and an order to elect obtained by B. was discharged. *Anglo-Danubian Steam Navigation and Colliery Company v. Hogerson*, 4 L. R. Eq. 3; 36 L. J., Ch. 667; 16 L. T. 262; 15 W. R. 729.

When a rule nisi, obtained for a criminal information for a libel in the Queen's Bench, is discharged on shewing cause, the applicant may bring an action in another court for publication of the libel. *Wakley v. Cooke*, 16 M. & W. 822; 4 D. & L. 702.

#### V. DIFFERENT FORMS OF ACTION.

##### 1. TORT OR CONTRACT.

A party entitled to sue in contract has his election to sue in tort only where a duty ultra the contract is imposed by law on the defendant. *Legge v. Tucker*, 1 H. & N. 500; 26 L. J., Ex. 71; 2 Jur., N. S. 1235.

The forms of action have been taken away, but their substance remains. *Ib.*

An action against a carrier for the breach of his duty to carry safely goods delivered to him, as such, to be carried for hire, whereby the goods are lost, is an action not of contract but of tort, as well in substance as in form; the duty being imposed upon him by the custom of the realm, and

being distinct from and independent of his obligation under the contract of carriage, in respect of which latter he may also be sued in an action of contract. *Tuttan v. Great Western Railway Company*, 2 El. & El. 844; 29 L. J., Q. B. 184; 6 Jur., N. S. 800; 8 W. R. 606.

Whenever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract. *Brown v. Boorman*, 11 C. & F. 1; 3 Q. B. 511.

Where the liability to do an act arises merely from an agreement to do it upon a good consideration, and there is no such relation between the contracting parties as would involve a common law duty in the performance, the non-performance of the act is not such a breach of duty as can be made the subject of an action of tort. *Courtenay v. Earle*, 10 C. B. 73; 20 L. J., C. P. 7; 15 Jur. 15.

An action on the case will not lie for every neglect to perform a contract. *Wood v. Finnis*, 7 Ex. 363; 21 L. J., Ex. 138; 16 Jur. 936.

In an action against three, wherein the plaintiff declared that they had the loading of a hogshead of his, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that they so negligently conducted themselves in the loading, that the hogshead was damaged:—Held, that the gist of the action was the tort, and not the contract out of which it arose; and, therefore, that on a plea of not guilty, the two being acquitted, judgment might be against the third, who was found guilty. *Goett v. Radnidge*, 3 East, 62.

In an action for a deceit in a warranty made by two upon a joint sale by both of sheep their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only, as of his separate property; the action, though laid in tort, being founded on the joint contract alleged. *Weall v. King*, 12 East, 452.

In an action against proprietors of a stage coach, to recover damages for an injury sustained by a passenger, in consequence of their coachman having upset the coach on which he was riding, the declaration may be framed, for a breach of duty by the negligence of the proprietors' servants; and proof of a contract is not necessary to support such action, as against common carriers, as they may be sued for the injury, as arising ex delicto; and such actions are not necessarily to be considered quasi ex contractu, or founded on contract. *Brotherton v. Wood (in error)*, 6 Moore, 141; 3 B. & B. 54; 9 Price, 408.

## 2. SIMPLE CONTRACT OR COVENANT.

**Contracts by Deed.**—A servant who has contracted with a married woman by deed, and performed the stipulated services, may maintain an action of assumpsit against the husband. *White v. Cuyler*, 6 T. R. 176; 1 Esp. 200.

Where parties contract by deed, but the defendant does not execute it, the plaintiff might sue in assumpsit, notwithstanding the deed. *Sutherland v. Lishnan*, 3 Esp. 42.

A tenant under a lease cannot maintain an action on an implied promise for money paid under a distress by a superior landlord: the

remedy is covenant on the express contract. *Schlenker v. Moxey*, 5 D. & R. 747; 3 B. & C. 789.

A lessee of premises granted and assigned them by indenture to the plaintiff, who, having been distrained upon for rent in arrear to the superior landlord before the assignment, brought an action to recover the money paid under the distress, and relied upon an express promise by the lessee to repay it:—Held, that as covenant would lie on the covenant implied in the word "grant," assumpsit would not lie on any implied contract to indemnify the plaintiff, nor on the express promise which was not founded on a new consideration. *Baber v. Harris*, 1 P. & D. 360; 9 A. & E. 532; 2 W. W. & H. 1.

Three persons were owners of some property, and they employed the plaintiff to let it for them, and two of them executed a mortgage deed securing to him the amount of his bill; in an action against the three for the amount of his bill:—Held, that the action would lie, as the specialty liability not being co-extensive with the simple contract liability, the latter was not merged in the former. *Sharp v. Gibbs*, 16 C. B., N. S. 527; 12 W. R. 711.

## 3. CASE OR TRESPASS.

Trespass, and not case, was the proper form of action for detaining a person after the detainer has ceased to be lawful. *Magnay v. Burt*, 5 Q. B. 381; D. & M. 652; 7 Jur. 1116—Ex. Ch.

Trespass will not lie against a plaintiff who, without notice, takes a defendant in execution for a debt in respect of which the latter has been discharged under the Irish Insolvent Act. *Ewart v. Jones*, 3 D. & L. 252; 14 M. & W. 774.

But if the plaintiff maliciously sued out the writ, he was liable to an action on the case. *Id.*

Trespass was a proper form of action for continuing on the plaintiff's premises to keep possession of goods distrained after the distress had ceased to be lawful. *Ladd v. Thomas*, 12 A. & E. 117; 4 P. & D. 9.

Under 6 & 7 Vict. c. 86, s. 8, the registrar is authorized to grant licences to drivers of hackney carriages, which licences the proprietors of the carriages are required to procure to be delivered to them, and to retain whilst the drivers remain in their service, to return on demand. A declaration stated, that the plaintiff, a driver of a hackney carriage, having procured such licence, delivered it to the defendant, as his employer, and that whilst he retained it in his custody he wrongfully and unjustly wrote in ink in and upon the licence words purporting to give, and being intended to give, a character of the plaintiff as an unfit and improper person to act as driver of hackney carriages, whereby it was defaced and became useless:—Held, that the possession being in the defendant, the form of action was properly in case, and that it was unnecessary to state the act to have been done maliciously; and that the declaration was good. *Murrell v. Ellis*, 2 C. B. 295; 15 L. J., C. P. 18; 9 Jur. 1013.

Case was the proper form of action for pledging property delivered by the plaintiff under an agreement to the defendant for a specific purpose. *Smith v. White*, 8 Scott, 483; 6 Bing. N. C. 218; 8 D. P. C. 255.

Action for false imprisonment. A., having obtained a warrant to search the plaintiff's house,

to take and use such water for extinguishing fire without making compensation for the same. By s. 43, if the undertakers neglect to keep their pipes charged at the statutory pressure, they are to be liable to a penalty of 10*l.* for each offence, to be recovered by a common informer. In an action to recover damages against a water company, for not keeping its pipes supplied with water at the statutory pressure, whereby a house was burnt down :—Held, that the action would not lie. *Id.*

An act of parliament empowered a company to make and maintain a canal, and provided that the owners of lands within the distance of twenty yards from the canal should make a communication by pipes, between the water therein and any steam-engine, and draw from the canal such quantities of water as should be sufficient to supply the engine with cold water, for the sole purpose of condensing the steam, and for working any such engine as aforesaid; and for no other use or purpose; and there was a proviso, that if any dispute should arise between the company and any person who should be desirous of taking water out of the canal for the purposes of any such engine, or who should be in the use of taking the same, such dispute should be finally settled by the commissioners appointed under the act. In an action the declaration alleged that the defendant, the owner of a steam-engine, who had laid down a pipe communicating with the canal, used the water which had been drawn off by means of the pipes, for other purposes than for condensing the steam, and more than was necessary for condensing :—Held, that the special power of adjudication conferred upon the commissioners did not take away the right of action. *Rochdale Canal Company v. King*, 14 Q. B. 122; 18 L. J., Q. B. 293; 14 Jur. 16.

To an action by an incorporated company for calls, the defendant pleaded that the shares had been declared by the company to be forfeited :—Held, that the plea was bad, as the right of action and the power to forfeit shares on non-payment of calls conferred by 8 & 9 Vict. c. 16, were not alternative but cumulative remedies. *Great Northern Railway Company v. Kennedy*, 7 D. & L. 197; 4 Ex. 417; *S. P., Inglis v. Great Northern Railway Company*, 1 Macq. H. L. Cas. 112; 16 Jur. 895.

#### IV. ELECTION OF ACTION OR REMEDY.

**In what Cases.**—The court will not compel a party, who has proceeded both by indictment and action for the same assault, to make his election upon which he will rely. *Jones v. Clay*, 1 B. & P. 191; *S. P., Murphy v. Cadell*, 2 B. & P. 137.

A person who has preferred an indictment for an assault, from which he did not suffer any personal injury, and has succeeded in it, and has received from the Treasury a portion of the fine imposed upon the defendant, is not entitled, in an action against the same defendant, to recover more than nominal damages. *Jacks v. Bell*, 3 C. & P. 316.

After an acquittal of a defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if not shewn to have colluded in procuring such acquittal. *Crosby v. Leng*, 12 East, 409.

In an action by a woman for assaulting her

and forcibly violating her person, whereby she was delivered of a child, the judge, upon her evidence, directed a nonsuit :—Held, that the direction was right, for if a rape had been committed no action would lie until after the defendant had been prosecuted, and if the plaintiff had consented she could not maintain an action for the assault. *Wellock v. Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285; 9 Jur., N. S. 232; 7 L. T. 751.

A plaintiff, having sued at law and in equity for the same cause of action, was, after issue joined, ordered by a court of equity to elect in which suit he would proceed, and he elected to proceed in equity, and withdrew the record. An order was afterwards made by the same court for the defendant to pay the plaintiff his costs at law, which order was, on appeal, rescinded by the Lord Chancellor, who directed that the defendant should be at liberty to proceed at law. A judge's order having been made for the plaintiff to pay the defendant's costs in the action :—Held, that this order was wrong, for that the plaintiff's election to proceed in equity did not amount to a discontinuance, and the defendant, if entitled to his costs at all, must apply to the court of equity. *Simpson v. Sadd*, 16 C. B. 26; 3 C. L. R. 917; 24 L. J., C. P. 156; 1 Jur., N. S. 736.

Where a plaintiff has proceeded at law and in equity for the same subject-matter, and after issue joined has, under an order of a court of equity, elected to proceed in equity, the court will not, under 15 & 16 Vict. c. 76, s. 226, prevent the defendant from proceeding to obtain judgment in the action for his costs. *Mortimore v. Soares*, 1 El. & El. 399; 5 Jur., N. S. 574.

A. filed a bill in equity against B. for the cancellation of bills of exchange drawn by B. and accepted by A. in part performance of a contract, of which B. failed to perform his part, and for an injunction to restrain B. from parting with or suing on the bills; and, pending the suit, A. commenced an action against B. for damages for breach of the contract :—Held, that the suit and action were not for the same matter, and an order to elect obtained by B. was discharged. *Anglo-Danubian Steam Navigation and Colliery Company v. Rogerson*, 4 L. R. Eq. 3; 36 L. J., Ch. 667; 16 L. T. 262; 15 W. R. 729.

When a rule nisi, obtained for a criminal information for a libel in the Queen's Bench, is discharged on shewing cause, the applicant may bring an action in another court for publication of the libel. *Wakley v. Cooke*, 16 M. & W. 822; 4 D. & L. 702.

#### V. DIFFERENT FORMS OF ACTION.

##### 1. TORT OR CONTRACT.

A party entitled to sue in contract has his election to sue in tort only where a duty ultra the contract is imposed by law on the defendant. *Legge v. Tucker*, 1 H. & N. 500; 26 L. J., Ex. 71; 2 Jur., N. S. 1235.

The forms of action have been taken away, but their substance remains. *Id.*

An action against a carrier for the breach of his duty to carry safely goods delivered to him, as such, to be carried for hire, whereby the goods are lost, is an action not of contract but of tort, as well in substance as in form; the duty being imposed upon him by the custom of the realm, and

being distinct from and independent of his obligation under the contract of carriage, in respect of which latter he may also be sued in an action of contract. *Tuttan v. Great Western Railway Company*, 2 El. & El. 844; 29 L. J., Q. B. 184; 6 Jur., N. S. 800; 8 W. R. 606.

Whenever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract. *Brown v. Boorman*, 11 C. & F. 1; 3 Q. B. 511.

Where the liability to do an act arises merely from an agreement to do it upon a good consideration, and there is no such relation between the contracting parties as would involve a common law duty in the performance, the non-performance of the act is not such a breach of duty as can be made the subject of an action of tort. *Courtenay v. Earle*, 10 C. B. 73; 20 L. J., C. P. 7; 15 Jur. 15.

An action on the case will not lie for every neglect to perform a contract. *Wood v. Finnis*, 7 Ex. 363; 21 L. J., Ex. 138; 16 Jur. 936.

In an action against three, wherein the plaintiff declared that they had the loading of a hog-head of his, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that they so negligently conducted themselves in the loading, that the hog-head was damaged:—Held, that the gist of the action was the tort, and not the contract out of which it arose; and, therefore, that on a plea of not guilty, the two being acquitted, judgment might be against the third, who was found guilty. *Gorett v. Radnidge*, 3 East, 62.

In an action for a deceit in a warranty made by two upon a joint sale by both of sheep their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only, as of his separate property; the action, though laid in tort, being founded on the joint contract alleged. *Wells v. King*, 12 East, 452.

In an action against proprietors of a stage coach, to recover damages for an injury sustained by a passenger, in consequence of their coachman having upset the coach on which he was riding, the declaration may be framed, for a breach of duty by the negligence of the proprietors' servants; and proof of a contract is not necessary to support such action, as against common carriers, as they may be sued for the injury, as arising ex delicto; and such actions are not necessarily to be considered quasi ex contractu, or founded on contract. *Brotherton v. Wood (in error)*, 6 Moore, 141; 3 B. & B. 54; 9 Price, 408.

## 2. SIMPLE CONTRACT OR COVENANT.

**Contracts by Deed.**—A servant who has contracted with a married woman by deed, and performed the stipulated services, may maintain an action of assumpsit against the husband. *White v. Cuyler*, 6 T. R. 176; 1 Esp. 200.

Where parties contract by deed, but the defendant does not execute it, the plaintiff might sue in assumpsit, notwithstanding the deed. *Sutherland v. Lishnan*, 3 Esp. 42.

A tenant under a lease cannot maintain an action on an implied promise for money paid under a distress by a superior landlord: the

remedy is covenant on the express contract. *Schlenker v. Mosey*, 5 D. & R. 747; 3 B. & C. 789.

A lessee of premises granted and assigned them by indenture to the plaintiff, who, having been distrained upon for rent in arrear to the superior landlord before the assignment, brought an action to recover the money paid under the distress, and relied upon an express promise by the lessee to repay it:—Held, that as covenant would lie on the covenant implied in the word "grant," assumpsit would not lie on any implied contract to indemnify the plaintiff, nor on the express promise which was not founded on a new consideration. *Baber v. Harris*, 1 P. & D. 360; 9 A. & E. 532; 2 W. W. & H. 1.

Three persons were owners of some property, and they employed the plaintiff to let it for them, and two of them executed a mortgage deed securing to him the amount of his bill; in an action against the three for the amount of his bill:—Held, that the action would lie, as the specialty liability not being co-extensive with the simple contract liability, the latter was not merged in the former. *Sharp v. Gibbs*, 16 C. B., N. S. 527; 12 W. R. 711.

## 3. CASE OR TRESPASS.

Trespass, and not case, was the proper form of action for detaining a person after the detainer has ceased to be lawful. *Magnay v. Burt*, 5 Q. B. 381; D. & M. 652; 7 Jur. 1116—Ex. Ch.

Trespass will not lie against a plaintiff who, without notice, takes a defendant in execution for a debt in respect of which the latter has been discharged under the Irish Insolvent Act. *Ewart v. Jones*, 3 D. & L. 252; 14 M. & W. 774.

But if the plaintiff maliciously sued out the writ, he was liable to an action on the case. *Id.*

Trespass was a proper form of action for continuing on the plaintiff's premises to keep possession of goods distrained after the distress had ceased to be lawful. *Ladd v. Thomas*, 12 A. & E. 117; 4 P. & D. 9.

Under 6 & 7 Vict. c. 86, s. 8, the registrar is authorized to grant licences to drivers of hackney carriages, which licences the proprietors of the carriages are required to procure to be delivered to them, and to retain whilst the drivers remain in their service, to return on demand. A declaration stated, that the plaintiff, a driver of a hackney carriage, having procured such licence, delivered it to the defendant, as his employer, and that whilst he retained it in his custody he wrongfully and unjustly wrote in ink in and upon the licence words purporting to give, and being intended to give, a character of the plaintiff as an unfit and improper person to act as driver of hackney carriages, whereby it was defaced and became useless:—Held, that the possession being in the defendant, the form of action was properly in case, and that it was unnecessary to state the act to have been done maliciously; and that the declaration was good. *Hurrell v. Ellis*, 2 C. B. 295; 15 L. J., C. P. 18; 9 Jur. 1013.

Case was the proper form of action for pledging property delivered by the plaintiff under an agreement to the defendant for a specific purpose. *Smith v. White*, 8 Scott, 483; 6 Bing. N. C. 218; 8 D. P. C. 255.

Action for false imprisonment. A., having obtained a warrant to search the plaintiff's house,

and to apprehend him on a charge of felony, the warrant being headed, "To the constable of D. in the county of W.," delivered it to B., a county constable, appointed under 2 & 3 Vict. c. 93, who executed it within the parish of D., by apprehending the plaintiff. The action was not brought until the expiration of six months from the time of the act committed:—Held, that trespass was the proper form of action. *Freegard v. Barnes*, 7 Ex. 827; 21 L. J., Ex. 320.

Where servants, in the performance of their ordinary work for their master, use the implements of another person, without the leave of the owner or any direction from their master, and injure them, and the owner seeks a compensation from the master for the wrongful act of his servants, the proper form of action is case, not trespass. *Gordon v. Rolt*, 4 Ex. 365; 18 L. J., Ex. 432.

An action on the case was held to be maintainable against the grantors of a licence to mine, for unlawfully expelling the assignees and their workmen, and forcibly preventing them from having access to or working the mine. *Muskett v. Hill*, 7 Scott, 855; 5 Bing. N. C. 694.

A railway train, driven at the rate of forty miles an hour, according to the general directions of the railway company to the driver, ran over and killed some sheep, which had strayed on the line in consequence of the defective fences of the company:—Held, that, the train being under the direction and control of a rational agent, the company was not liable in trespass for the injury, but that the proper form of action was by action on the case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Sharrod v. London and North-Western Railway Company*, 4 Ex. 580; 20 L. J., Ex. 185.

Case per quod servitium amisit might be maintained by the master, although the injury done to the servant was not direct, but consequential, and the servant could not have maintained an action of trespass for such injury, but must have sued in case. *Martinez v. Gerber*, 2 M. & G. 88; 3 Scott, N. R. 86.

## VI. ON JUDGMENTS, ORDERS AND DECREES OF COURTS.

*Of Superior Courts.*—See JUDGMENT.

*Irish and Scotch Courts.*—See INTERNATIONAL LAW.

*Colonial Courts.*—See INTERNATIONAL LAW.

*On Foreign Judgments.*—See INTERNATIONAL LAW.

*County Courts.*—An action lay upon a judgment of the ancient common law county courts. *Williams v. Jones*, 13 M. & W. 628; 2 D & L. 680; 14 L. J., Ex. 145.

But an action does not lie on a judgment recovered in a county court established under 9 & 10 Vict. c. 95. *Berkeley v. Elderkin*, 1 El. & Bl. 805; 22 L. J., Q. B. 281; 17 Jur. 1153.

Although an action will not lie in a superior court on a judgment of such county court, yet such judgment may be pleaded in bar to an action for the consideration on which it was founded. *Austin v. Mills*, 9 Ex. 288; 23 L. J., Ex. 40; 18 Jur. 16.

## VII. TIME AND PLACE OF ACCRUAL.

Where trustees of a turnpike road negligently made and continued improper catchpits for water, so that on some occasions the water flowed over and injured land:—Held, that the continuing the catchpits was a new cause of action, every time such damage was caused, and that a three months' limitation for commencing an action against them for such damage ran from the time the damage was effected. *Whitthouse v. Fellows*, 10 C. B., N. S. 765; 30 L. J., C. P. 306; 4 L. T. 177; 9 W. R. 557.

In working a mine under a house a party left insufficient support to the house, but no actual damage resulted until some years after the workings had ceased. Held, that the cause of action accrued when the damage actually occurred, and not at the time when the act was done. *Backhouse v. Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181; 7 Jur., N. S. 809; 9 W. R. 769.

A. resided and carried on business at M., and B., who had various places of business elsewhere, agreed with A. to carry on a partnership business in certain transactions at M., where the books were kept, and where the advances were made by A. At the close of the partnership affairs, which were attended with loss, a balance was struck, showing a debt due by B. to A.:—Held, that the cause of action accrued at M. *Luchmeechund v. Mull*, 3 L. T. 603.

## VIII. DEFENCES.

### 1. ARISING AFTER ACTION.

In trespass in taking the plaintiff's goods, the defendant having pleaded only the general issue, cannot, even in mitigation of damages, give in evidence a repayment by him, after action brought, of money produced by the sale of the goods. *Rundle v. Little*, 6 Q. B. 174.

Matter of defence arising after action cannot be pleaded in bar of the action, and therefore cannot be given in evidence under the general issue. *Lee v. Lery*, 6 D. & R. 475; 4 B. & C. 399; 1 C. & P. 553, 675.

A breach by a plaintiff of the contract sued upon since action brought cannot be pleaded or given in evidence in reduction of damages to avoid circuity of action. *Bartlett v. Holmes*, 13 C. B. 630; 1 C. L. R. 159; 22 L. J., C. P. 182; 17 Jur. 858.

### 2. IN AVOIDANCE OF CIRCUITY.

To constitute a good plea in avoidance of circuity of action, it must shew that the sum which the defendant is entitled to recover from the plaintiff is necessarily the same as that in respect of which the plaintiff is suing. *Charles v. Altin* or *Alton*, 15 C. B. 46; 23 L. J., C. P. 197; 18 Jur. 1105; *S. P.*, *Alston v. Herring*, 11 Ex. 822; 25 L. J., Ex. 177.

To make a defence available on the ground of the avoidance of circuity of action, the damages must necessarily be the same in character and amount. *Speeding v. Young*, 16 C. B., N. S. 824.

Action by payees of a note, against the makers. Plea, that the note was made by the plaintiff, R. S., the defendant, and T. S. (the plea set out the note, which appeared to be a joint and several note), and that R. S. a payee and a maker, was

and is the plaintiff, R. S.; and the note, at the time it was made, was one upon and by virtue whereof the defendant, in case he paid it, or more than one-third part, would be entitled to call upon the plaintiff, R. S., to pay a contribution to the defendant; and that in case the plaintiff, R. S., recovered against the defendant the amount of the note, the defendant would be entitled to sue for and to recover from the plaintiff, R. S., one-third part of the amount so recovered against the defendant:—Held, that the plea was bad. *Beecham v. Smith*, 1 El. Bl. & El. 442; 27 L. J., Q. B. 257; 4 Jur., N. S. 1018.

A declaration contained counts for work done, money paid by, and on an account stated with A., and a similar set of counts by and with the plaintiffs as executors of A. A plea stated, that A., being the projector of a railway company, agreed, in consideration of the defendant consenting to act as a member of the provisional committee, to indemnify him from any professional or other charges on account of the railway; that the defendant accordingly consented and became a member of the committee; that the work, moneys and accounts were done, paid and stated by A., and by the plaintiffs, as his executors, in the surveying the line of the railway, and after the agreement to indemnify; that the defendant became liable to the professional and other charges, and made the promises in the declaration only in his character of member of the provisional committee; that, afterwards, the railway was abandoned, and the work done and money paid became wholly useless, and of no value to the defendant; and that any money paid by or damage recovered from the defendant, in respect of the work or payments, will be wholly lost to the defendant:—Held, that the plea was a bar to avoid circuity of action. *Connosop v. Levy*, 11 Q. B. 769; 5 Railw. Cas. 124; 17 L. J., Q. B. 125; 12 Jur. 306.

Declaration on a charterparty, whereby a ship, being tight, and every way fitted for the voyage, should load a cargo of coals, and proceed to C., being paid freight on the quantity delivered, one-fourth of the freight to be advanced to the owner's agent on the ship having sailed, less 5l. per cent. thereon for assurance, interest and commission. That the defendant caused the ship to be loaded with a cargo of coals, and that the ship, being so loaded, sailed pursuant to the charterparty, and breach, that the charterer had not paid the one-fourth of the freight. Plea, that the ship was not at the commencement of the voyage tight, and every way fitted for the voyage, and that by reason thereof the ship and cargo were lost:—Held, not a good plea in avoidance of circuity of action, as the damages sustained by the defendant were not necessarily identical in amount with the sum claimed; and that it was a bar to the action, on the ground that the advance of the freight had never become payable. *Thompson v. Gillespy*, 5 El. & Bl. 209; 24 L. J., Q. B. 340; 1 Jur., N. S. 779.

## IX. WHAT DESTROYS OR SUSPENDS A RIGHT OF ACTION.

**Release and Satisfaction.**—A right of action, once vested, can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done. *Willoughby v. Backhouse*, 4 D. & R. 539; 2 B. & C. 821; *S. P.*,

*Sells v. Hoare*, 8 Moore, 451; 1 Bing. 401; 1 C. & P. 28.

When a wrongful act has been completed without the knowledge or assent of the party injured, his right of action is not ordinarily barred by mere submission to the injury, or even by a voluntary promise not to seek redress; some conduct amounting to release or accord and satisfaction must be shown; although, on account of laches, relief may be refused under special circumstances. *De Bussche v. Alt*, 8 Ch. D. 286; 47 L. J., Ch. 381; 38 L. T. 370—C. A.

**Suspension of Right.**—To an action by payee against maker of a note, a plea that, after it had become due, it was agreed between the plaintiff, the defendant and A., that A. should pay to the plaintiff in trust for C. 200l. for her sole use, or 25l. per annum so long as the 200l. should remain unpaid, and that the rights and causes of action of the plaintiff upon and in respect of the note should be suspended so long as A. should continue to pay the 25l.: and that A. had paid that sum:—Held, that the plea was bad, the legal effect of the agreement being not to suspend the plaintiff's right of action upon the note, but only to subject him to an action if he sued contrary to the terms of the agreement. *Ford v. Beech*, 11 Q. B. 852; 17 L. J., Q. B. 114; 12 Jur. 310—Ex. Ch.

The doctrine of a right of action being gone by suspension, applies only to the case where there has once been a subsisting right of action, and not to a case where the objection is that if it had accrued earlier, it could not have been enforced from the fact of the same person then being the party both to sue and to be sued. *Badeley v. Vigners*, 4 El. & Bl. 71; 2 C. L. R. 1627; 23 L. J., Q. B. 377; 1 Jur., N. S. 159.

A rule of court giving specific relief in a case where, by law, the party is not entitled to two different remedies, is a bar to an action for the same cause. *Cameron v. Reynolds*, Cowp. 406.

A written agreement to secure a debt, by a mortgage on lands, which was to be paid with interest by instalments, is no extinguishment or suspension of the right of action for the debt. *Allies v. Probyn*, 2 C. M. & R. 408; 4 D. P. C. 153; 1 Gale, 255; 5 Tyr. 1097.

**Deposit of Negotiable Instrument—Action upon it.**—If a plaintiff deposits a negotiable instrument on which he is suing, at the same time giving notice of the action, he does not thereby part with his right of action; and, if the depository sues on the same instrument, the court will not, at the instance of the defendant, stay the proceedings in the first action. *Marsh v. Newell*, 1 Taunt. 109. See *Deuters v. Townsend*, 33 L. J., Q. B. 301; 10 Jur. N. S. 1072.

**Waiver of Tort no Bar to Action.**—In an action by assignees of a bankrupt to recover the value of goods, it appeared at the trial that, after the bankruptcy, eighty-five bundles of yarn had been delivered by the bankrupt to the defendant to meet an accommodation bill which he was about to give the bankrupt. The goods were accompanied by an invoice, which stated them to be bought by the defendant of the bankrupt:—Held, that the assignees might waive the tort, and bring an action for goods sold and delivered. *Russell v. Bell*, 10 M. & W. 340.



The plaintiff's mother had for some time received parochial relief; but there being ground to suspect that her poverty was feigned, an overseer and a constable went to her house for the purpose of searching for money. The overseer alone entered, and found in a cupboard a sum of money, which he took away, and it was subsequently paid into a bank by the overseer and constable to their joint account. The money was proved to belong to the plaintiff:—Held, that he might waive the trespass, and recover it in an action against both as money had and received to his use. *Neate v. Harding*, 6 Ex. 349; 20 L. J., Ex. 250.

If an owner of goods, after a tortious sale of them, waives the conversion and claims the proceeds after sale, part of which is paid to him, he cannot afterwards treat the seller as a wrongdoer and maintain trover against him. *Lythgoe v. Vernon*, 5 H. & N. 180; 29 L. J., Ex. 164.

A master of an apprentice who has been seduced from his service to work for another person, may waive the tort, and bring an action for work and labour done by his apprentice against the person who tortiously employed him. *Lightly v. Clouston*, 1 Taunt. 112; *S. P.*, *Foster v. Stewart*, 3 M. & S. 191.

## X. NOTICE OF ACTION.

### 1. WHEN NECESSARY.

#### a. When Acts done in pursuance of Statute.

##### General Rule—Reasonable Ground of Belief.]

—A statute enacted that no plaintiff should recover in any action commenced against any person, for anything done or performed in execution or under the authority of the act, unless notice thereof, in writing, should be previously given twenty-eight days before the commencement of the action:—Held, that a notice was necessary in those cases only in which the party against whom the action was brought had reasonable grounds for supposing that the thing done by him was done in execution of or under the authority of the act. *Cook v. Leonard*, 6 B. & C. 351; 9 D. & R. 339.

Where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed, *bonâ fide*, that he was so acting. There must be reasonable ground for the belief. *Cann v. Clipperton*, 10 A. & E. 582; 2 P. & D. 560.

If the party acted under a reasonable, though mistaken persuasion, from appearances, that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification. *Ib.*

Trustees of a paving act were entitled to notice of action for anything done in pursuance of the act. They were authorised to abate any hog-stye, necessary house, or nuisance in the parish, on complaint of any inhabitant:—Held, that whether a brothel was a nuisance within the meaning of this provision or not, if the trustees took steps to put down such a house, *bonâ fide*, they were entitled to notice of action. *Norris v. Smith*, 2 P. & D. 353; 10 A. & E. 188.

By a local act persons were compelled, under a

penalty, to perform the duties of overseers; and no action was to be commenced against any person for anything done in pursuance of the act, until notice, in writing, had been given. Overseers appointed under the act had assented to the imprisonment of a party in a workhouse, who was incorrectly supposed to have been a pauper and a lunatic. They had intended to act under 9 Geo. 4, c. 40, s. 38, but had not complied with its provisions:—Held, that this was not a thing done in pursuance of the local act, and that the overseers were not, therefore, entitled to notice. *Elliot v. Allen*, 1 C. B. 18; 14 L. J., C. P. 136.

To give a defendant the benefit of a provision in a statute, requiring notice of action, it is sufficient that the jury find that he intended to act in pursuance of such statute. *Cox v. Reid*, 13 Q. B. 558; 18 L. J., Q. B. 216; 13 Jur. 563.

A party entitled to notice of action, where the acts complained of are done by him in a particular character or under a particular authority, is entitled to such notice, if he has acted under a *bonâ fide* belief that he filled that character or had that authority, and the absence of reasonable grounds for such belief is only evidence of the non-existence of such *bonâ fide* belief. *Booth v. Clive*, 10 C. B. 827; 2 L. M. & P. 283; 20 L. J., C. P. 151; 15 Jur. 563.

The question on which the right to notice of action turns is, whether a defendant acted in honest ignorance, or belief that he was acting by reason of his office, and this question is entirely for the judge; and to enable him to decide it, he must receive so much of the evidence as will raise that question. *Arnold v. Hamel*, 9 Ex. 405; 2 C. L. R. 499; 23 L. J., Ex. 137.

In order to entitle a party to notice of action for a thing done in pursuance or in the execution of an act of parliament, it is not necessary that he should, at the time of doing the act, be cognizant of the existence of the act giving him such protection, or that he should be acting strictly in the execution of it. *Read v. Coker*, 13 C. B. 850; 1 C. L. R. 746; 22 L. J., C. P. 201; 17 Jur. 990; *S. P.*, *Danvers v. Morgan*, 1 Jur., N. S. 1051.

In order to entitle a party to a notice of action for a thing done in pursuance of 24 & 25 Vict. c. 99, s. 33, consolidating the law against offences relating to the coin, it is enough that he honestly and *bonâ fide* believes he is acting in pursuance of the act, whether there is reasonable ground for such belief or not. *Herman v. Seneschal*, 13 C. B., N. S. 392; 32 L. J., C. P. 43; 6 L. T. 646; 11 W. R. 184.

The proper question for the jury is, whether the defendant *bonâ fide* believed in the existence of a state of facts which, if they had existed, would have afforded a defence to the action. *Roberts v. Orchard*, 2 H. & C. 769; 33 L. J., Ex. 65; 9 L. T. 727; 12 W. R. 253—Ex. Ch.

Therefore, where 24 & 25 Vict. c. 96, s. 103, provided that any person found committing any offence punishable either upon indictment or upon summary conviction, by virtue of that act, might be immediately apprehended without a warrant, and s. 113 also required notice of action for anything done in pursuance of the act; in an action by the plaintiff, a shop-woman of the defendant, for giving her into custody on the charge of stealing a florin:—Held, that it would not have been sufficient to leave to the jury the question whether the defendant honestly believed

that the plaintiff had wrongfully taken the florin, and that in giving the plaintiff into custody, he was executing a legal power, but the question ought also to be left to the jury whether the defendant believed that the plaintiff had been found committing the offence. *Ib.*

To entitle a defendant to notice of action under a statute, he must honestly intend to put the law in motion, and really believe in the existence of a state of facts which, if they existed, would have justified him in doing as he did. *Heath v. Brewer*, 15 C. B., N. S. 803; 9 L. T. 653.

Where a statute provides that before an action is commenced against any person for anything done in pursuance of the statute, notice of action shall be given, in order to entitle a defendant to such notice, on the ground that "he honestly believed in the existence of those facts which, if they had existed, would have afforded a justification under the statute," the facts of the case must at least be such that he could so honestly believe, and such as to afford evidence to go to the jury that he did so. *Leete v. Hart*, 3 L. R., C. P. 322; 37 L. J., C. P. 157; 18 L. T. 292; 16 W. R. 676.

The defendant hearing at night a noise, and seeing a man at the back door of his house, believed that an attempt was being made to break into it, and acting on that belief, and on his wife telling him that the plaintiff was the man, he gave the plaintiff, a respectable neighbour, who happened to be passing the front of the house at the time, into custody. In an action for this false imprisonment, the defendant pleaded not guilty by statute 24 & 25 Vict. c. 96, which by s. 113 requires, in actions for anything done in pursuance of the act, notice of action to be given:—Held, that an attempt to break into a house not being an offence within the act, the defendant did not believe in a state of facts, which, if it had existed, would have afforded a justification under the act, and was therefore not entitled to notice. *Ib.*

The omission to do something which ought to be done in order to the complete performance of a duty imposed on a public body by act of parliament, amounts to "an act done or intended to be done in pursuance of the act" within the meaning of the clause requiring notice of action to be given to the public body. *Wilson v. Halifax (Mayor, &c.)*, 3 L. R., Ex. 114; 37 L. J., Ex. 44; 17 L. T. 660; 16 W. R. 707.

The defendant was a contractor engaged in making a sewer for a vestry; one of his men who was employed to take care of a horse and cart, and who had no right to go home to dinner or leave the horse and cart, took them to his house and left them outside whilst he was having his dinner; the horse ran away and damaged the plaintiff's railings:—Held, first, that there was evidence to warrant the jury in finding that the man was in the defendant's employ at the time of the negligence and accident. *Whitman v. Pearson*, 3 L. R., C. P. 422; 37 L. J., C. P. 156; 18 L. T. 290; 16 W. R. 649.

Held, secondly, that the defendant was not entitled to notice of action under 25 & 26 Vict. c. 102, s. 106. *Ib.*

The 24 & 25 Vict. c. 96 (The Larceny Consolidation Act), s. 113, requiring a month's notice in writing to be given before the commencement of any action or prosecution against any person "for anything done in pursuance of the act," has

no application to the ordinary case of a private individual prosecuting another for a felony, and such a person is liable for malicious prosecution without the safeguard of notice provided by that section. *Mercer v. Gooch*, 15 L. T. 219.

#### b. On Apprehension of Persons injuring or stealing Property.

**In what Cases.**—Where a plaintiff, under a claim of right, had taken forcible possession of premises, and committed several outrageous acts, the attorney of the owner of the premises having been sent for on the following day, gave the plaintiff, whom he found still on the premises, in charge, under 7 & 8 Geo. 4, c. 30:—Held, that although not justified in so doing, he was entitled to notice of action. *Cann v. Clipperton*, 2 P. & D. 560; 10 A. & E. 582; *S. P.*, *Berechey v. Sidra*, 9 B. & C. 806; 4 M. & R. 634.

A fenreeve, having the care of lands over which the plaintiff was making a road, asked him by what authority he acted; the plaintiff said, by authority of the magistrates, but did not exhibit any warrant; whereupon the defendant apprehended and took him before a magistrate:—Held, that he was entitled to notice of action under 7 & 8 Geo. 4, c. 30, s. 41, although the plaintiff was not committing a malicious injury. *Wright v. Wales*, 5 Bing. 336; 2 M. & P. 613; 3 C. & P. 96.

Under 24 & 25 Vict. c. 96, ss. 103 and 113, the two questions to be answered in the affirmative, in order to entitle a defendant to notice of action, are, first, did he honestly believe that the person whom he has given in charge had committed a felony; and, secondly, that the same person had been found committing it. *Wynyard v. Marks*, 15 L. T. 591.

The defendant purchased some fruit of the plaintiffs, itinerant vendors, and directed them to take it to his residence, where it would be paid for. The fruit was accordingly taken to his house, and there paid for by his butler on the plaintiffs' presenting the defendant's order to that effect. The defendant returned home about three hours afterwards, when, being under the impression that he had himself paid the plaintiffs, and that they had been paid twice, as soon as he learnt that the butler had paid them, he sent a constable after them, who found them seven hours later in the same day at a town five miles from the defendant's residence, and there arrested them on a charge of obtaining money under false pretences. Any person found committing such offence may, by 24 & 25 Vict. c. 96, s. 103, be immediately apprehended without warrant, and s. 113 gives the protection of notice before action for anything done in pursuance of that act:—Held, that the defendant, though he acted *bonâ fide*, could not believe that he was arresting the plaintiffs immediately they had been found committing the offence with which they were charged, and that, therefore, he was not entitled to the protection of s. 113. *Downing v. Capel*, 2 L. R., C. P. 461; 36 L. J., M. C. 97; 16 L. T. 323; 15 W. R. 745.

A robbery having been committed at the government stores, K., an inspecting officer of the coast-guard having charge of the stores, suspecting that S. was guilty of the felony in question, gave him into custody and prosecuted him before the magistrates on the charge of feloniously taking the said government stores. The magis-

trates dismissed the charge, and S., without giving K. a month's notice of action, brought an action against him for false imprisonment and malicious prosecution:—Held, that he was entitled to notice of action under 16 & 17 Vict. c. 107, s. 313, and that, in acting as he did, he acted in the execution of or by reason of his office. *Spitty v. Kitchin*, 15 W. R. 903.

A., by the direction of his tenant, arrested on a Sunday two men, one of whom had just before wilfully broken one of his windows, and locked them up for two hours in a room of the house. The man who had committed the damage afterwards brought an action against A. for false imprisonment:—Held, that A. was entitled to notice of action under the 7 & 8 Geo. 4, c. 30, s. 41. *Jones v. Howell*, 29 L. J., Ex. 19; 8 W. R. 151.

A party having apprehended another, and proceeded against him before a justice, under 7 & 8 Geo. 4, c. 30, s. 24, for a malicious injury to property, the justice dismissed the complaint, being of opinion that the party charged had acted under a reasonable supposition of right. An action being brought for the arrest:—Held, that the defendant, if he acted under a bona fide belief that the case fell within the statute, was entitled to notice of action; and that, in default of notice, the jury might properly be directed to find for the defendant, if they thought that he had acted bona fide. *Reed v. Cowmeadow*, 6 A. & E. 661; 7 C. & P. 821.

A plaintiff, who was lessee for an unexpired term of years, of a house, of which the defendant was the reversioner, being in prison, and a quarter's rent being in arrear, the defendant took possession of the house, whereupon the plaintiff's wife broke some of the windows, for the purpose of obtaining admission. The defendant gave her into custody, and charged her, under 7 & 8 Geo. 4, c. 30, s. 24, with breaking four panes of glass. No notice of action had been given, and the question of bona fides was not submitted to the jury:—Held, that the defendant was entitled to notice of action, if he bona fide believed himself entitled to give the wife into custody; and that as the question of bona fides had not been left to the jury, there ought to be a new trial. *Horn v. Thornborough*, 3 Ex. 846; 18 L. J., Ex. 349.

In an action by a tenant against his landlord for a malicious charge of felony, under sect. 45, for stealing fixtures let to him, it is not necessary to give a notice of action. *Dowell v. Benningfield*, Car. & M. 9.

In an action for imprisoning a party upon a charge of felony under 7 & 8 Geo. 4, c. 29, s. 44, in pulling down part of a house, and selling the materials:—Held, that the defendant was within the protection of sect. 75, if he bona fide thought he was acting in pursuance of the act; and that the jury was properly directed to find whether or not he did so think. *Rudd v. Scott*, 2 Scott, N. R. 631.

Where A., who was fishing very near a private fishery, had his nets seized, and was taken into custody by the owner of the fishery, under 7 & 8 Geo. 4, c. 29, ss. 35 and 63, who, in so doing, acted under a bona fide and reasonable belief that the spot where the arrest and seizure took place was within the limits of his fishery:—Held, that he was entitled to notice of action. *Hughes v. Buckland*, 15 M. & W. 346; 3 D. & L. 702; 15 L. J., Ex. 233; 10 Jur. 884.

**Nuisance.**—The Metropolitan Police Act, 2 & 3 Vict. c. 47, having created several acts misdemeanours, inflicts a penalty, on summary conviction, in various other offences, and among them the laying shells on a thoroughfare. It likewise enacts, that any person found committing any offence punishable either upon indictment or as a misdemeanour upon summary conviction by virtue of the act, may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and detained until he can be delivered to a constable; and notice in writing must be given of all actions against any person for anything done in pursuance of the act. A person employed by the owner to keep clean a thoroughfare, finding that another person was in the habit of laying oyster-shells upon it, consulted an inspector of police, and by his advice gave that party into custody. An action having been brought:—Held, that the defendant was entitled to notice of action, this being an act done in pursuance of the statute. *Dancers v. Morgan*, 1 Jur. N. S. 105.

An owner of property is not justified in giving a person into custody found (popularly speaking) committing a nuisance against his premises, nor is he entitled to notice of action for having done so, unless he is fairly justified in believing that the person had the intention to soil or deface them, within the 2 & 3 Vict. c. 47, s. 54, or the intention to commit damage or injury or spoil to them within the 24 & 25 Vict. c. 97, s. 52. *Bayley v. Aldred*, 10 L. T. 523.

A. had communicated to B. & C. who were distillers, a method of rectifying spirits, and they were to pay him an annuity, and sixpence a gallon on all spirits rectified by his method, and to keep an account. A. having a sum due to him, B. & Co. offered to pay it at their solicitor's office, and to produce the account there. A. sent B. & Co. a letter, stating that he should come to the distillery for a sight of the account and for payment; to which G., one of the firm of B. & Co., replied by letter, stating that if A. came to the distillery, and either rang or knocked, he would be punished. A. went to the distillery (which was within the metropolitan police district), and gently rang the gate bell, when H., who was the cashier of the firm, gave A. into the custody of a policeman, on a charge of having rung the bell, contrary to the 2 & 3 Vict. c. 47, s. 54:—Held, in an action for false imprisonment by A. against G. and H., that this was not a case within that act, and that G. and H. were not justified under that act, and that they were not entitled to notice of action. *Horne v. Grimble*, Car. & M. 17.

#### **Servant claiming to have Authority of Owner.]**

—Where a defendant claims the protection of 7 & 8 Geo. 4, c. 30, as having acted within sect. 28, as the owner's servant, or by the owner's authority, in arresting the plaintiff, the jury should be asked not only whether the defendant acted bona fide, but also whether he had a reasonable belief that he was servant of, or had the authority of, the owner. *Kine v. Eccrashed*, 10 Q. B. 148; 16 L. J., Q. B. 271 11 Jur. 673.

#### **Bona fide Belief without Knowledge of Law.]**

—By 7 & 8 Geo. 4, c. 30, s. 41, in all actions for anything done in pursuance of the act, notice in

writing of such action shall be given to the defendant one month before action brought. The 7 & 8 Geo. 4, c. 29, s. 75, is to the same effect. The defendant was sued for having given the plaintiff into custody on a charge of doing wilful damage to his property, and for having given him into custody on a charge of larceny. The jury found that the plaintiff had not on either occasion committed the offence with which he was charged, but that the defendant, on both occasions, *bonâ fide* believed that he did:—Held, that the defendant was entitled to notice of action, but that it was not necessary for him to shew that he knew of these acts of parliament. *Read v. Coker*, 13 C. B. 850; 22 L. J., C. P. 201; 17 Jur. 990.

**Private Person distinguished from Constables, etc.]**—A private person who gives another into custody on a charge of having committed an offence against 7 & 8 Geo. 4, c. 29, is not entitled to notice of action under section 75, as that section only applies to constables and other officers, and persons of that kind. *Brooker v. Field*, 9 C. & P. 651.

**Immediate Apprehension—Necessity of.]**—In an action for false imprisonment for giving the plaintiff into custody on a charge of larceny, the defendant set up as a defence that he had had no notice of action, to which he was entitled under s. 113 of 24 & 25 Vict. c. 96; for that he had caused the plaintiff to be arrested under s. 103, believing he had found her committing a felony. The jury found that she had not committed the felony, but that the defendant *bonâ fide* believed, and on reasonable grounds, in the existence of facts which would have justified him in acting as he had done. On this finding, the verdict was entered for the defendant. The plaintiff had not been apprehended on the spot where the defendant believed he had found her committing the felony, and the question, whether or not she had been “immediately apprehended,” had not been left to the jury:—Held, that this was a question of fact for the jury which ought to have been left to them, and that there must therefore be a new trial. *Griffith v. Taylor*, *Thatcher v. Taylor*, 2 C. P. D. 194; 46 L. J., C. P. 15; 36 L. T. 5; 25 W. R. 196—C. A.

**Reasonable Ground not for the Jury.]**—By the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 103, any person found committing a theft may be immediately apprehended without a warrant, and by s. 113, notice of action must be given before anyone can be sued for anything done in pursuance of the act:—Held, that to entitle a person to such notice of action, it is sufficient if he honestly believed that the person whom he apprehended was found by him committing a theft, and that if he might have so believed, it is no reason for disentitling him to such notice that a jury might think there was no reasonable ground for his so believing. *King v. Chamberlain*, 6 L. R., C. P. 474; 40 L. J., C. P. 273; 24 L. T. 736; 19 W. R. 931.

**Doctor acting upon an Improper Order of a Magistrate.]**—A woman having been taken into custody on a charge of concealing the birth of her illegitimate child, a justice of the peace made an order for the examination of her

person, under which order she was examined by a medical man. In an action against him for an assault, there being no authority at common law or by statute to make the order:—Held, that he was not entitled to notice of action under 11 & 12 Vict. c. 44, s. 9 (which provides for the giving of notice before any action against a justice of the peace for anything done by him in the execution of his office), inasmuch as though he might have acted *bonâ fide*, in the belief that he had authority to make the order for her examination, there was nothing in fact on which he could ground such belief. *Agnew v. Jobson*, 47 L. J., M. C. 67; 13 Cox, 625.

## 2. PERSONS ENTITLED TO.

### a. Justices.

**General Rule.]**—In an action against a magistrate, for having, in the execution of his office, acted maliciously, and without reasonable and probable cause, he is entitled to notice of action, as required by 11 & 12 Vict. c. 44, s. 9. *Kirby v. Simpson*, 10 Ex. 358; 2 C. L. R. 1286; 23 L. J., M. C. 165; 18 Jur. 983.

In such case, the question whether he acted *bonâ fide*, or used his office colourably, does not arise. *Ib.*

In an action against a magistrate for acts done in the execution of his office, the judge is to decide whether notice of action is necessary, and the jury is not to decide the question of *bona fides*. *Ib.*

Whether a magistrate acts *bonâ fide* is a question for the jury: and if the plaintiff seeks to maintain his action, on the ground that the magistrate acted so illegally as to have disentitled himself to any notice of action, it lies on the plaintiff to cause this question to be put to the jury. *Hazeldine v. Grove*, 3 Q. B. 997; 3 G. & D. 210; 12 L. J., M. C. 54; 7 Jur. 262.

A magistrate is entitled to notice of action when he acts as a magistrate, though what he does is not strictly within the scope of his office. *Bird v. Gunston*, 2 Chit. 459; 4 Dougl. 275.

So, where he acts upon a subject-matter of complaint, over which he has authority, but which arises out of his jurisdiction. *Prestdige v. Woodman*, 2 D. & R. 43; 1 B. & C. 12. *S. P.*, *Graves v. Arnold*, 3 Camp. 242.

A magistrate, sued for detaining goods on a suspicion of felony, is entitled to notice of action, if he proceeded under a *bonâ fide* belief that he was executing his duty, although it is proved that he had no reasonable ground of suspicion. *Wedge v. Berkley*, 6 A. & E. 663; W. W. & D. 271; 1 N. & P. 665.

So, if he does an unjustifiable act (as in person unjustifiably arresting an individual), but really believes that he has a right to do the act, in his capacity of justice, he is entitled to notice of action. *Ib.*

If a justice acts, believing that his jurisdiction extends to the subject-matter in question, he is entitled to notice of action, though it may turn out, on investigation, to be a case over which no justice of the peace has jurisdiction. *Jones v. Williams*, 5 D. & R. 654; 3 B. & C. 762; 1 C. & P. 459, 669.

If a person claims a right to act as a justice, he is entitled to notice of action, although the ground on which the plaintiff goes is a denial of such right. *Ib.*

But a magistrate is not entitled to notice of action for a trespass committed by him, where, from the circumstances, the jury think he was not acting *bonâ fide* under an impression that what he did was within the scope of his duty as a magistrate. *James v. Saunders*, 4 M. & Scott, 316; 10 Bing. 429.

A disturbance took place in C. upon the liberation of a prisoner. A magistrate seized the plaintiff because he was going towards the prison. The plaintiff was not concerned in the disturbance, which was going on out of sight of the place where he was seized by the magistrate:—Held, that he was not entitled to notice of an action of trespass brought against him by the plaintiff for the assault. *Id.*

So, in an action against a person for the penalty given for acting as a magistrate without a proper qualification, the defendant is not entitled to notice of action. *Wright v. Horton*, Holt, 458; 1 Stark. 400; 2 Chit. 25; 6 M. & S. 50.

A lord of the manor, being also a justice of the peace, is entitled to notice of an action brought against him for taking away a gun in the house of an unqualified person; for it will be presumed that he acted as a justice. *Briggs v. Ecelyn*, 2 H. Bl. 114.

Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4s. from a publican resident within the borough for renewing his annual licence; although it appeared that for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to have a licence:—Held, that such fee was illegal, and that the mayor was not entitled to notice of an action to recover it back, as the fee could not be taken by him by virtue or in execution of his office as a justice of the peace. *Morgan v. Palmer*, 4 D. & R. 283; 2 B. & C. 729.

One magistrate committing the mother of a bastard to custody for not affiliating the child, was entitled to notice of action, though, by 18 Eliz. c. 3, s. 2, jurisdiction over the subject-matter was committed to two magistrates. *Weller v. Toke*, 9 East, 364. See further JUSTICE OF THE PEACE.

#### b. County Court Judges.

(9 § 10 Vict. c. 95, s. 138.)

In an action against a judge of a county court for making an order for committing a party to gaol for disobedience of an order for payment of instalments, after due service upon him of a writ of prohibition, the jury was told, that if the judge acted under a *bonâ fide* belief that his duty as judge of the county court rendered it incumbent on him to do so, notwithstanding the prohibition, the act must be considered as done in pursuance of the 9 & 10 Vict. c. 95, and he was entitled to notice of action. Held, no misdirection. *Booth v. Clive*, 10 C. B. 827; 2 L. M. & P. 283; 20 L. J., C. P. 151.

#### c. Bailiffs of County or other Inferior Courts.

(7 & 8 Vict. c. 19; 9 § 10 Vict. c. 95, s. 138; 13 § 14 Vict. c. 61, s. 19; 15 § 16 Vict. c. 34, s. 6.)

The receiving an indemnity from the execution creditor does not deprive the bailiff of a

county court of his right, under the 9 & 10 Vict. c. 95, s. 138, to notice of action. *White v. Morris*, 11 C. B. 1015; 21 L. J., C. P. 185; 16 Jur. 500.

Where a bailiff of a county court, under a warrant against the goods of A., by mistake takes those of B., this is an act done in pursuance of the act which entitles the bailiff to notice of action under 9 & 10 Vict. c. 95, s. 138, 13 & 14 Vict. c. 61, s. 19, and 15 & 16 Vict. c. 34, s. 6. *Burling v. Harley*, 3 H. & N. 271; 27 L. J., Ex. 258; 4 Jur., N. S. 789.

By a local act, a borough court was empowered to try "actions of assumpsit, covenant and debt, and actions of trespass and trover, provided the sum or damages sought to be recovered shall not exceed 50*l.*" And in actions commenced "for anything done in pursuance of that act," notice of action must be given. In an action against an officer of the court for neglecting to levy, and making a false return to a *fiaci facias*, issued on a judgment for 50*l.*, and 6*l.* 15*s.* 8*d.* for damages:—Held, that notice of action was necessary, part of the cause of action being for a misfeasance in making a false return. *Joule v. Taylor*, 7 Ex. 58; 2 L. M. & P. 615; 21 L. J., Ex. 31.

The 7 & 8 Vict. c. 19, after reciting that "courts are holden in and for sundry counties, hundreds and wapentakes, honours, manors, and other lordships, liberties and franchises, having by custom or charter jurisdiction for the recovery of debts and damages in personal actions," provides that the judge of every such court shall have power to appoint persons to act as bailiffs of the court, and in the execution of the process thereof; and that one month's notice of action is to be given before any action is commenced against any bailiff of any such court for anything done in pursuance of his duty as such bailiff. The defendant acted as bailiff of a borough court in executing the process of such court, in aid of the sergeant-at-mace of the borough. Neither the defendant nor the sergeant-at-mace was appointed as bailiff of such court by the judge of the court:—Held, that the defendant was, therefore, not a bailiff entitled to notice of action within 7 & 8 Vict. c. 19. *Tarrant v. Baker*, 14 C. B. 199; 2 C. L. R. 78; 23 L. J., C. P. 21; 18 Jur. 15.

#### d. Constables.

A local act for watching a town empowered the commissioners therein named to appoint a constable and assistant constables, "for executing all such warrants, as the justices of the peace acting for the counties palatine of Lancaster and Chester, or either of them, shall from time to time direct to them to be executed within the town." Another section enacted that no plaintiff should recover for anything done in pursuance of the act:—Held, that a constable appointed under the act, and directed by a warrant of a justice acting for the counties palatine to enter a house and seize goods under 11 Geo. 2, c. 19, s. 7, was not entitled to notice of action. *Shatwell v. Hall*, 10 M. & W. 523; 2 D., N. S. 567; 12 L. J., Ex. 74.

A declaration that the defendant on the plaintiff's land took his goods and detained them against sureties and pledges. Plea, that the goods were taken under a warrant issued by a justice of the peace to enforce an order of quarter

sessions for payment of costs of an appeal against a poor rate:—Held, that this was an action of replevin, and that no notice of action or demand of the perusal of the warrant was necessary. *Gay v. Matthews*, 32 L. J., Q. B. 58; 9 Jur., N. S. 716; 7 L. T. 504; affirmed on appeal, 4 B. & S. 425—Ex. Ch.

A constable who takes a party into custody, *bonâ fide* believing that he has committed an offence against 7 & 8 Geo. 4, c. 30 (Malicious Trespass Act), is entitled, under sect. 41, to notice of action, although he did not see the trespass committed, and there is no proof of any complaint made to him by the owner of the property injured. *Ballinger v. Ferris*, 2 Gale, 111; 1 M. & W. 628.

See further, MALICIOUS PROSECUTION — POLICE.

### e. Officers of the Revenue.

(16 & 17 Vict. c. 107, s. 313.)

An excise officer was entitled to notice under 23 Geo. 3, c. 70, s. 30, before an action was brought against him for an act not warranted by his official capacity, if done *bonâ fide* in the supposed execution of his duty. *Daniel v. Wilson*, 5 T. R. 1.

It is necessary in an action for money had and received against an excise officer, to recover duties received by him after the act imposing them was repealed, and he had paid them over to his superior. *Greenway v. Hurd*, 4 T. R. 553.

To an action against a defendant, who was a land-tax commissioner, for authorising a seizure of the plaintiff's goods, for land-tax, which had been previously redeemed, but without his knowledge, he pleaded not guilty by statute, and stated in his particulars that he relied upon 38 Geo. 3, c. 5, and 21 Jac. 1, c. 12. The plaintiff, being unable to prove that he had given notice of action under 5 & 6 Will. 4, c. 20, s. 19, and being also unable to prove the particulars, to show that the defendant had waived the benefit of that statute, was nonsuited.—Held, that the defendant was entitled to notice of action, and that the nonsuit was right. *Thomas v. Williams*, 1 D. & L. 624; 13 L. J., Ex. 87.

Upon the trial of an action against an officer of the customs, it is the duty of the judge, unless the facts are admitted, to hear the evidence, and decide whether the officer did the act complained of honestly believing that his duty called upon him to do it, in which case the provisions as to notice of action would be applicable. *Arnold v. Hamel*, 9 Ex. 405; 23 L. J., Ex. 137.

### f. Boards of Health.

(11 & 12 Vict. c. 63, s. 139.)

In what Cases.]—A. contracted by deed with a local board of health to execute works according to a specification, and that the works should be begun, proceeded with, and completed to the satisfaction of their surveyor. Payment was to be made by instalments, upon the certificate of the surveyor. It was provided that if A., from bankruptcy, insolvency, or any cause whatsoever, should not proceed with the works according to the satisfaction of the surveyor, it should be lawful for the board of health, after three days' notice, to employ other persons to complete the works, and that the deed should, at the ex-

piration of the notice, be void at the option of the board of health, and the amount already paid to A. should be considered the full value of the works which should up to that time have been executed, and the materials on the premises should become their property without any further payment:—Held, that in an action by A. against the board of health for not allowing him to complete his contract, no notice of the action was requisite under 11 & 12 Vict. c. 63, s. 139, which enacts that no writ shall be sued out against the local board of health, or the clerk or other person acting under the direction of the board, for anything done or intended to be done under the provisions of the act, until one month after notice. *Davies v. Swansea (Mayor, &c.)*, 8 Ex. 808; 22 L. J., Ex. 297.

The defendant contracted with a local board of health to dig wells for them according to a specification prepared by the surveyor, the works to be done to the satisfaction of such surveyor, and the digging to be done entirely under his direction; the surveyor to have power, if he considered the materials or works improper, of making the contractor remove them, or of removing them at the contractor's expense, and of ordering the dismissal of workmen with whom he should be dissatisfied, or of dismissing them himself; the board to have the power of making alterations and additions. The defendant was sued for having left a hole, excavated in working one of the wells in a highway, without light by night, whereby a party, who was driving a carriage along the highway, fell into the hole, and was bruised, and his carriage injured:—Held, that the defendant was entitled to notice of action, under the 11 & 12 Vict. c. 63, s. 139. *Newton v. Ellis*, 5 El. & Bl. 115; 24 L. J., Q. B. 337; 1 Jur. N. S. 850.

By the 25 & 26 Vict. c. 102, s. 106, no writ or process shall be sued out against or served upon . . . the Metropolitan Board of Works, or any vestry or district board, or their clerk, or any clerk, surveyor, contractor, officer, or person whomsoever, acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the metropolitan acts, until one month after notice:—Held, that the section intended only some act done by virtue of the powers vested in the board or vestry and under their authority, and that, therefore, a person who had received notice from a district board to drain into a sewer, and in doing so committed a trespass, was not entitled to notice of action. *Doust v. Slater*, 10 B. & S. 400; 38 L. J., Q. B. 159; 20 L. T. 525.

The defendant contracted with the Metropolitan Board of Works to make a new sewer to the satisfaction of the engineer of such board, and in the course of carrying out such contract, he made a dam across the old sewer to keep back the sewage, and unintentionally neglected sufficiently to pump out the sewage, so that on three separate occasions it entered the plaintiff's house and injured it:—Held, that the defendant was entitled to notice of action, under 25 & 26 Vict. c. 102, s. 106, as the injury complained of was the result of "an act done or intended to be done under the powers of such board," by a contractor acting under their direction, within the meaning of such section. *Poulsum v. Thirst*, 2 L. R., C. P. 449; 36 L. J., C. P. 225; 16 L. T. 324; 15 W. R. 766.

See further, HEALTH.

**Injunction granted without Notice.]**—The court of Chancery will grant an injunction to restrain a nuisance being committed or continued by a metropolitan local board, notwithstanding a month's notice of the proceeding has not been given in accordance with the Metropolitan Local Management Acts Amendment, 1862, s. 106. *Att.-Gen. v. Hackney Board of Works*, 20 L. R., Eq. 626; 44 L. J., Ch. 545; 33 L. T. 244.

A plaintiff filed a bill to restrain a nuisance without giving the defendants notice of his intention to take proceedings. They by their answer justified the nuisance, and insisted on their legal rights. The court on the evidence considered the nuisance proved, and held that the nature of the answer precluded the defendants from objecting to want of notice, and entitled the plaintiff to the costs of the suit. *Ib.*

Where the principal object of an action against a local board of health is an injunction to restrain an immediate injury, it is not necessary to give a month's notice of the cause of action under s. 264 of the Public Health Act, 1875. And it makes no difference that damages are claimed by way of subsidiary relief. *Flower v. Local Board of Low Leyton*, 5 Ch. D. 347; 46 L. J., Ch. 621; 36 L. T. 760; 25 W. R. 545—C. A. Reversing the decision of Malins, V.-C., 36 L. T. 236; 25 W. R. 423.

#### g. Surveyors of Highways.

(5 & 6 Will. 4, c. 50, s. 109.)

**In what Cases.]**—A surveyor of highways having been appointed by the inhabitants in vestry, but informally, cut down, in the supposed exercise of his duty as surveyor, a tree which was overhanging the highway so as to be a nuisance to it:—Held, that he was entitled to the protection of 5 & 6 Will. 4, c. 50, s. 109. *Huggins v. Wayday*, 15 M. & W. 357; 16 L. J., Ex. 136.

An action was brought against a surveyor of highways for allowing and causing a heap of gravel, which had been placed for the purposes of the repair of the highway, to remain upon it, without taking any care or precaution to guard against damage to persons passing along it, contrary to his duty in that behalf:—Held, that the action was brought for a thing done in pursuance of, or under the authority of, 5 & 6 Will. 4, c. 50, and, therefore, that he was entitled to notice of action. *Davis v. Curling*, 8 Q. B. 287; 15 L. J., Q. B. 56; 10 Jur. 69. See *Young v. Davis*, 2 H. & C. 197.

A board for repair of the highways of a parish, by a resolution, referring to a previous resolution of the inhabitants that a footway should be open to the public, ordered the surveyor to open the same, and remove all obstructions there might be to the enjoyment of the road by the public. Sect. 69 of 5 & 6 Will. 4, c. 50, gives a summary power to remove encroachments on carriage-ways. Sect. 72 imposes a penalty on persons who obstruct footways; and sect. 73 gives a power, by order of a justice, to remove any matter or thing laid upon any highway, so as to be a nuisance. In an action against the members of the board and the surveyor for breaking a gate of the plaintiff across the footway, the bona fides of the defendants was admitted:—Held, that they might reasonably believe that they were acting in execution of the power to remove obstructions in public roads, and, therefore, were entitled to notice of action.

*Smith v. Hopper*, 9 Q. B. 1005; 16 L. J., Q. B. 93; 11 Jur. 302.

In pursuance of a resolution at a vestry, that it would be advantageous if a weighing-machine were erected to check the weight of materials purchased by the highways, the surveyors caused a machine to be placed in the highway:—Held, that although the 5 & 6 Will. 4, c. 50, gave no express power to erect weighing machines, the surveyors were acting in pursuance of the act, so as to entitle them to notice of an action for injuries sustained by a party in driving over a heap of earth excavated for the weighing machine. *Hardwick v. Moss*, 7 H. & N. 136; 31 L. J., Ex. 205; 7 Jur., N. S. 804; 4 L. T. 802.

The surveyors of highways of a parish received payment from an inhabitant of an assessment upon a highway rate which was neither signed, allowed, nor published according to 5 & 6 Will. 4, c. 50, s. 27, but which appeared to have been made under an earlier repealed act. In making the rate and receiving payment, the surveyors intended to act in the performance of the duties of their office. In an action brought to recover back the money paid:—Held, that they were entitled to notice of action, pursuant to s. 109. *Selmes v. Judge*, 6 L. R., Q. B. 724; 40 L. J., Q. B. 287; 24 L. T. 905; 19 W. R. 1110.

#### h. Other persons in like position.

**Definition of.]**—By the Metropolitan Building Act, 18 & 19 Vict. c. 122, s. 108, no writ or process shall be sued out against any district surveyor or other person for anything done or intended to be done under the provisions of the act till one month after notice of action:—Held, that the words "or other person" were restricted to a class, and intended to protect persons of the same class as a district surveyor or persons who had official duties cast upon them by the act, and did not include a builder, who while building a house adjoining the plaintiff's had negligently underpinned the party-wall and thereby caused damage to his house. *Williams v. Golding*, L. R., C. P. 69; 35 L. J., C. P. 1; 11 Jur., N. S. 51; 13 L. T. 291; 14 W. R. 60.

**— Vestry Officer, Directions by.]**—By the directions of an officer of the vestry board, the defendant, in the honest belief that such officer was authorized by the board to give such directions, erected a urinal on the wall of the plaintiff, such a work being a thing within the powers of the vestry board to erect, under 18 & 19 Vict. c. 120, s. 88. The officer had no express orders from the board to erect this particular work, but the parish afterwards paid the expenses of it:—Held, that the defendant, as he acted bona fide under the direction of an officer of the board, in the erection of works which the board was empowered to order by virtue of 18 & 19 Vict. c. 120, s. 88, was a person within the meaning of 25 & 26 Vict. c. 102, s. 106, entitled to notice of action. *Chambers v. Reid*, 13 L. T. 703; 14 W. R. 370.

Held also, that the words in 25 & 26 Vict. c. 102, s. 106, "their or any of their directions," are not to be limited to the "board or vestry," but to be extended to the words following, "clerk, surveyor, contractor, officer," &c. *Ib.*

**Improvement Commissioners—Negligence of Paviers.]**—An act for paving a town enacted,

that no plaintiff shall recover in any action against the commissioners for anything done or to be done in pursuance or under the authority of the act, unless notice in writing shall have been given to them. The commissioners were sued for an injury occasioned by the negligence of some paviors, their servants:—Held, that they were entitled to notice of action. *Mason v. Birkenhead Improvement Commissioners*, 6 H. & N. 72; 29 L. J., Ex. 406.

**Applicable to Constables and Watchmen.**—By an act for improving a town, commissioners were appointed, and were authorized to appoint, by writing, a clerk, and also such surveyors, constables, watchmen, and other officers, deputies, or assistants, for the execution of the purposes of the act, as they should from time to time think proper. The commissioners were also empowered to appoint such a number of able-bodied men as they should think proper, to be employed as watchmen during the night-time; and it should be lawful for such watchmen, and they were required in their stations, to apprehend and secure all malefactors, and all suspected persons who should be found wandering and misbehaving themselves during the hours of keeping watch. The watchmen were to be sworn in as constables, and were to be invested with the like powers and authorities, as any constables were invested with or enjoyed by law. No action should be commenced against any person or persons for anything done or to be done under or by virtue of the act, until a month's notice should have been first given in writing to the clerk of the commissioners of the cause of action:—Held, first, that the section requiring notice to be given was not confined to acts done, or directed to be done, by the commissioners, but applied to acts done by constables and watchmen; secondly, that evidence of the defendants acting as constables and watchmen under the commissioners in the town, was *prima facie* sufficient to entitle them to the protection, without proof of their appointment; and, thirdly, that where the watchmen had reasonable ground of suspicion that a felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him, and used much more violence than was necessary for effecting his apprehension, they were protected by the section requiring notice. *Butler v. Ford*, 1 C. & M. 662; 3 Tyr. 677.

### 1. Guardians.

A local act directed that the guardians of a parish should be sued in the name of their vestry clerk, and required notice to be given of any action for anything done in pursuance of the act. Notice was not necessary in an action for work and labour. The direction only applied to actions of tort. *Fletcher v. Greenwood*, 4 D., P. C. 166; 1 Gale, 34.

When poor law guardians are acting in discharge of their public duty they are entitled to notice of action in respect of anything done by them in the discharge of such duty, unless it is shown that they have acted *malâ fide*; and it is to be assumed, in the absence of proof to the contrary, that they have acted *bonâ fide*. *Walker v. Nottingham Board of Guardians*, 28 L. T. 308.

A husband, at the instance of his wife, was,

on the 14th April, taken as a dangerous lunatic to the workhouse of the Nottingham Union, upon the certificates of two medical men, and was placed in the lunatic ward of that establishment, and there kept from the 14th to the 25th April. Upon his admission into the ward on the 14th, he was inspected by the resident medical officer, who found him "not to be suffering from any form of insanity," and made an entry to that effect in the ordinary course of his official duty, in a book provided by the guardians, and kept at the workhouse for that purpose. On the 16th April there was the usual weekly meeting of the board of guardians, when this book was before them, but the entry in question was not, as it ought to have been, seen by them or brought to their notice; nor was the fact of the husband's detention in the lunatic ward known to any of the guardians until the 25th April, when the report of the case for the first time came before them, whereupon the husband was immediately discharged from the house by order of the visiting committee. An action having been brought by him against the board of guardians for false imprisonment:—Held, that the board was entitled to notice of action under 5 & 6 Will. 4, c. 76, s. 104. *Id.*

An omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an act of parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done," within the meaning of a clause requiring a notice of action. *Jolliffe v. Wallasey Local Board*, 9 L. R., C. P. 62; 43 L. J., C. P. 41; 29 L. T. 582.

### j. Companies Generally.

The 6 & 7 Will. 4, c. 105, s. 8, which requires notice to be given one calendar month before bringing any action in any of his Majesty's courts against the City of Dublin Steam Packet Company, has reference merely to actions in personam against the company, and not to actions in rem against the company's vessels. *The Mullingar*, 26 L. T. 326.

To an action for slander, the defendant pleaded that the words were spoken while he was acting as clerk of the markets of Dublin, and in pursuance of statutes entitling him to a month's notice of action for any act done in pursuance of them, and that no notice was given:—Held good, and that words spoken whilst acting in pursuance of the statutes were as much within their protection as acts done. *Murray v. McSwiney*, 9 Ir. R., C. L. 545.

The 39 & 40 Geo. 3, c. 69, s. 184, directed that the West India Dock Company should be sued in the name of their treasurer, and extended the protection of the 24 Geo. 2, c. 44, for privileging justices of the peace in actions brought against them as such, to the Lord Mayor and Aldermen of London, acting under the act beyond the limits of the city; and directed that no action should be commenced against any person or persons for anything done in pursuance or under colour of the act, until after notice in writing:—Held, that the treasurer of the company was a person within the protection of the clause, and, being sued for an act done by the company which induced an injury to the plaintiff, was entitled to such notice before action. The notice



is necessary in actions for trespasses or torts. *Wallace v. Smith*, 5 East, 114; 1 Smith, 346.

### k. Railway Companies.

By a railway act, a company was empowered to make and maintain a railway; all persons were to have liberty to use the same, with carriages properly constructed, upon payment of tolls; and the company was empowered to provide locomotive engines and carriages for the conveyance of goods and passengers. It enacted, that no action should be brought against any person for anything done or omitted to be done in pursuance of the act, without notice:—Held, that the company was not entitled to notice where an action was brought against them for negligence in carrying a passenger, as they were sued merely as carriers, and not for anything done or omitted under the act. *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747; D. & M. 608; 3 Railw. Cas. 692; 13 L. J., Q. B. 133; 8 Jur. 464.

A railway company was empowered to divert a canal; and it was enacted that, if by any accident or in the execution of any works authorized by the act (otherwise than from the neglect or mismanagement of the canal company), or by reason of the bad state of repair of the railway company's works, the canal should be so obstructed that boats could not pass, the railway company should pay the canal company, by way of ascertained damages, 10l. at least for every hour during which the obstruction should continue; and if it should continue beyond seventy-two consecutive hours, or should have been occasioned by any wilful act of the railway company, then at 20l. per hour at least by way of ascertained damages; and that, in default of payment, on demand on the railway company's treasurer, the canal company might recover the sum by action. It was also enacted that no action should be brought for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it, without twenty days' notice:—Held, that an action for liquidated damages incurred by obstructing the canal was an action for something done in pursuance of the act, and that the limitation clause applied. *Kennet and Avon Canal Navigation v. Great Western Railway Company*, 7 Q. B. 824; 4 Railw. Cas. 90; 14 L. J., Q. B. 325; 9 Jur. 788.

**Excessive Charges.**—By a railway act it was enacted, that no action should be brought for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers or authorities given by the act, unless twenty days' previous notice in writing should be given. The company having, contrary to the provisions of the act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff:—Held, that, in an action for money had and received, to recover the sums so extorted, the company was entitled to notice of action. *Kent v. Great Western Railway Company*, 3 C. B. 714; 4 Railw. Cas. 699; 4 D. & L. 481; 16 L. J., C. P. 72.

Action against a railway company for money received by the company for the use of the plaintiff. Plea, no notice of action. The action was

for overcharges. By a section of the company's act, no action shall be brought for anything done in pursuance of the act, unless notice in writing is given to the company. After verdict for the company,—Held, that the plea was bad for not averring that the action was for a thing done in pursuance of the act; and that the section did not apply to such an action. *Garton v. Great Western Railway Company*, El. Bl. & El. 837; 28 L. J., Q. B. 321; 5 Jur., N. S. 1244—Ex. Ch.

### 1. Persons acting in a Double Capacity.

A party making a distress for two causes, as to one of which he is justified and entitled to notice of action, is, nevertheless, liable in trespass as to the other. *Lamont v. Southall*, 5 M. & W. 416.

### 3. WHEN AND HOW TO BE GIVEN.

#### a. Form and Requisites.

**Action against Justice—Notice before Quashing of Order.**—A notice of an action against a justice for an act done by him in execution of his office, under an order, in a matter in which he has no jurisdiction, may be given before the quashing of the order, the act itself being the cause of action, and such cause of action being complete before the quashing, although the action itself cannot be brought until after the quashing. *Haylook v. Sparkes*, 1 El. & Bl. 471; 22 L. J., M. C. 67; 17 Jur. 731.

#### Notice of one Writ—actual Service of Another.]

—Where the notice stated the nature of the writ intended to be sued out, and also the cause of action; and a writ was sued out and served, but afterwards discontinued; and within the time allowed by the statute, another writ ejusdem generis was sued out and served, in which another person was joined as defendant: the court, after verdict, held that the notice was sufficient. *Jones v. Simpson*, 1 C. & J. 174; 1 Tyr. 32.

**Length of Notice.**—In an action against a justice of the peace for anything done by him in the execution of his office, the day both of delivering the notice and that of bringing the action must be excluded. *Young v. Higgon*, 4 Jur. 125; 6 M. & W. 49; 8 D. P. C. 212.

The 5 & 6 Will. 4, c. 50, s. 109 (Highway Act), requiring 21 days' notice of action against justices or others for anything done under the act, does not impliedly repeal the privilege of justices to have a month's notice under the 24 Geo. 2, c. 44, s. 1. *Rex v. Barton*, 12 A. & E. 470; 4 P. & D. 182; 4 Jur. 987.

**Indorsements.**—The name and place of abode of the plaintiff's attorney should appear on the back of the notice of action (when the notice of action has been served by the attorney): and it is not sufficient that they should appear in the body or at the foot of it. *Collins v. Hungerford*, 7 Ir. C. L. R. 581.

Where a notice of action was signed by the plaintiff himself, but indorsed by his attorney:—Held, that the notice was sufficient, the indorsement by the attorney being all that the statute requires. *Morgan v. Leach*, 10 M. & W. 558; 2 D. N. S. 522; 12 L. J., M. C. 4.

It is sufficient, in indorsing the attorney's name,

to put the initial only of his christian name. *Mayhew, v. Look*, 2 Marsh, 377; 7 Taunt. 63.

It is sufficient, if signed by a firm of two attorneys who are partners, and are employed by the plaintiff; and if signed T. & W. A. W. this is good, though the christian name of one is T. A., and of the other W. A., if there was no other firm of the same surname in the same place at which the notice bore date. *James v. Swift*, 6 D. & R. 625; 4 B. & C. 681; 2 C. & P. 237.

A notice was indorsed by Messrs. England and Shackles, as attorneys for the plaintiff; but before the action brought the partnership was dissolved, and the action was brought by Mr. England alone:—Held to be no ground of objection. *Hollingworth v. Palmer*, 4 Ex. 267; 18 L. J., Ex. 409.

A description of the attorney, as of a place in London, when in fact the place is in Westminster, is bad. *Shears v. Smith*, 6 Esp. 138.

When signed thus—"Given under my hand at Durham, the 11th day of, &c. Richard Ratcliffe, attorney for, &c.:" held insufficient. *Taylor v. Fenwick*, 3 B. & P. 553, n.; 7 T. R. 635, n.; 3 Dougl. 178.

An indorsement by an attorney of the place of his office is an indorsement of his place of abode. *Roberts v. Williams*, 4 D. P. C. 483; 5 Tyr. 583; 1 Gale, 315.

An indorsement with the name of the plaintiff's attorney, and the words, "of Birmingham," as describing the place of his abode, is sufficient. *Osborn v. Gough*, 3 B. & P. 551.

**In wrong Court.]**—A notice of an action in the Common Pleas is insufficient to support an action in the Queen's Bench. *Elstob v. Wright*, 3 C. & K. 31.

**Description of Occupation.]**—A party may describe himself by the addition of what he really is, e.g. "dealer," although, in the commitment, he is described as a labourer. *Mason v. Barker*, 1 C. & K. 100.

**Form of Action.]**—The notice need not state the form of action; it is sufficient to state the cause of action. *Prickett v. Gratrea*, 2 New Sess. Cas. 429; 8 Q. B. 1020; 1 C. & K. 651; 15 L. J., M. C. 145; 10 Jur. 566.

**Cause of Action.]**—In an action against a justice of the peace for an act done within his jurisdiction, the notice of action must state that the act was done maliciously, and without reasonable and probable cause, or it will not be sufficient within sect. 9 of 11 & 12 Vict. c. 44. *Taylor v. Nesfield*, 3 El. & Bl. 725; 2 C. L. R. 1312; 23 L. J., M. C. 169; 18 Jur. 747.

A notice of action must state the substantial cause of action intended to be relied on, clearly and explicitly, and in such a manner as will not be likely to mislead the justice of the peace, and so probably prevent his tendering amends. *Id.*

**Place and Time.]**—A notice of action does not clearly and explicitly contain the cause of action, if it omits to mention the place where the act complained of was done. *Martins v. Uppeher* or *Upcher*, 1 D., N. S. 555; 2 G. & D. 716; 3 Q. B. 662; 11 L. J., Q. B. 291; 6 Jur. 582

A tender of amends does not cure such a defect. *Id.*

A notice to a special constable stated the grievances to be, that he, on the 30th January, at S., arrested and imprisoned the plaintiff on a charge of felony, and took him then in custody to D., detained him twelve hours in custody, and caused him to be taken before certain justices of the peace at D. on the 31st of the said month:—Held, that the time and place of committing the grievances were sufficiently specified. *Jones v. Nicholls*, 1 New Sess. Cas. 524; 13 M. & W. 361; 2 D. & L. 425; 14 L. J., Ex. 42; 8 Jur. 989.

A notice of action against an officer of the Metropolitan Police, under 10 Geo. 4, c. 44, s. 41, must specify the time and place of the act complained of. *Breece v. Jerdein*, 4 Q. B. 585; 2 G. & D. 720; 12 L. J., Q. B. 234; 7 Jur. 490.

Where a statute requires a month's notice of action to be given before the commencement of an action, a letter written to the defendant six weeks before action, threatening proceedings unless an apology was made and certain costs were paid, is not such a notice as the statute requires. *Wynyard v. Marks*, 15 L. T., 591.

Under the Metropolitan Works Act, 25 & 26 Vict. c. 102, s. 106, a notice of action left with the foreman of a contractor, at a yard of his where there was an office, on the day from which a calendar month expired the day before action, is sufficient, although it did not come to the hands of the defendant until the day afterwards. *Moody v. Delick*, 4 F. & F. 938.

Where notice of action was given on the 28th of a month, and an action commenced on the 29th of the following month.—Held, sufficient. *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 226; 10 Jur., N. S. 149; 8 L. T. 468; 11 W. R. 802.

A notice stated the cause of action thus:—"For that you on the 10th day of May, 1844, with force and arms, caused an assault to be made upon me, and then caused me to be beaten, and to be forced and compelled to go along divers public streets and roads, to a prison, to wit, at Louth, in &c., and to be unlawfully imprisoned and kept in prison there for forty days then next following." At the trial, the proof was confined to the imprisonment in the gaol at Louth, under an invalid warrant:—Held, that the notice sufficiently stated the place of the injury, so as to enable the plaintiff to recover in respect of such imprisonment. *Jacklin v. Fyche*, 14 M. & W. 381; 15 L. J., Ex. 102.

Justices convicted A. under 6 & 7 Vict. c. 68, in his absence, of keeping an unlicensed theatre. Immediately after the conviction, he, being in the presence of the justices, asked leave to go to his home. One of the justices said if he went he must go in custody. He was detained for a day and a night. A warrant not returnable on a day certain was issued by the justices. It recited a conviction, adjudging A. to pay a penalty of 5*l.* and 12*s.* costs, and directed the sums to be levied by distress. Under this warrant his goods were seized and sold. A conviction was drawn up, adjudging him to pay a penalty, but silent as to costs: and there was no evidence that in fact the justices had adjudicated on the costs. The conviction was quashed. Notice of action was given to the justices for that they, "at H., on the 1st day August," &c., imprisoned A., and also for that they "on the said 1st day," &c., seized his goods:—Held, that the notice was

sufficiently certain as to averment of place. *Leary v. Patrick*, 15 Q. B. 266; 4 New Sess. Cas. 258; 19 L. J., M. C. 21; 14 Jur. 932.

**Amount Recoverable.**—In an action against a justice for taking goods, the plaintiff cannot recover more than the value stated in his notice. *Stringer v. Martyr*, 6 Esp. 134.

**Variance in.**—A notice to a constable, in pursuance of 10 Geo. 4, c. 44, s. 41, mentioned apprehension, detention in custody, and imprisonment, as the cause of action. The declaration contained two counts—one for the cause of action stated in the notice, and the other for taking the goods of the plaintiff. A verdict was given for him upon the first count only.—Held, that the variance was not material. *Breese v. Bradley or Jordan*, 4 Q. B. 585; 2 G. & D. 720; 12 L. J., Q. B. 234; 7 Jur. 490.

**Construction of Notices.**—In construing notices of action under the various statutes requiring them, the court will not subject them to too nice and narrow an examination; the object being that they should be plain and intelligible to plain men. *Jones v. Nicholls*, 1 New Sess. Cas. 524; 13 M. & W. 361; 2 D. & L. 425; 14 L. J., Ex. 42; 8 Jur. 989.

A notice is not vitiated by being in the form of a declaration, and unnecessarily ample, if it expresses the cause of action with sufficient clearness. *Gimbert v. Coyney*, M. C. L. & Y. 469. And see *Robson v. Spearman*, 3 B. & A. 493.

A notice of action, against bricklayers, for negligence in repairing a public sewer, is not to be construed with the same strictness as is generally required in pleading, provided there is a sufficient cause of action shewn upon the face of it; therefore, a notice under a local act, "that the defendant made, altered, repaired, cut, dug, worked, and enlarged the sewer in so negligent, incautious, unskilful, improvident, and improper a manner, that the plaintiff's premises fell, and were greatly damaged, weakened, and destroyed," is a sufficient notice, though the proof was, first, that the defendant had not propped and shored up the house in the progress of the work: and, secondly, that the immediate cause of the injury was the falling of other houses, which drew the plaintiff's after them. *Jones v. Bird*, 1 D. & R. 497; 5 B. & A. 837.

But a notice, against a toll-gate keeper, "for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll in and by an act of parliament intituled, &c.," is too uncertain, and bad. *Freeman v. Line*, 2 Chit. 673.

A notice of an action for breaking and entering the plaintiff's house, and seizing goods, which goods were "lying and being in and upon my dwelling-house," will not support a charge in the declaration of taking the plaintiff's goods. *Elstob v. Wright*, 3 C. & K. 31.

But a notice of action given to the high bailiffs of a county court under 9 & 10 Vict. c. 95, s. 138, which stated that the action would be brought "to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 3rd day of December, 1863, by selling and disposing of certain goods and chattels in and upon the premises," is not bad for, not stating whose goods were seized, nor

the amount of damages sought to be recovered. *Burton v. Le Gros*, 34 L. J., Q. B. 91; 11 L. T. 270; 13 W. R. 46.

A notice of action against a magistrate for acts done in the exercise of his office, not stating the place in which the acts complained of had been committed, is insufficient. *Furber v. Lloyd*, 10 Ir. R., C. L. 552—Ex. Ch.

In an action against a local board acting under the Public Health Act, 1848 (11 & 12 Vict. c. 63), for not having properly filled up a trench which the board had caused to be made in a road for laying down a sewer, by reason of which that part of the road gave way, and the plaintiff's horse was injured, the notice of action given in compliance with sect. 139 stated that the board did by their "labourers, servants, and others on or about the 13th of May last negligently, carelessly and improperly leave a certain portion of the road or highway in an insufficient and improper state of repair, whereby a horse" of the plaintiff "sank into the road or highway, and was thrown therein," and injured.—Held, that the notice was not limited to a complaint of an injury from non-repair of the road, but was applicable to a cause of action arising from an act of misfeasance, and was therefore a sufficient notice of the cause of action. *Smith v. West Derby Local Board*, 3 C. P. D. 423; 47 L. J., C. P. 607; 38 L. T. 716; 27 W. R. 137.

A notice stated that a writ would be issued against the defendant, for that he had caused a distress to be levied at the plaintiff's office of business. The declaration was for breaking and entering, and seizing the plaintiff's goods.—Held, that the notice was sufficient. *Hollingworth v. Palmer*, 4 Ex. 267; 18 L. J., Ex. 409.

**When in the Name of a Party who was Dead.]**

—A notice in these words:—"I do hereby, as attorney for A. P. and E. P. (the plaintiff), and in pursuance of the statute, give you notice that an action will be commenced against you for recovery of compensation in damages for an illegal seizure and distraint, and for the value of the property seized." A. P. was dead at the time of the service of the notice.—Held, that the notice, being in the name of a party who was dead, was insufficient. *Pilkington v. Riley*, 6 D. & L. 628; 3 Ex. 739; 18 L. J., Ex. 323.

**Statement of Names.**—If a notice of action against a magistrate for wrongful distress under a conviction, states the person to whom the warrant is directed, it must state it correctly. *Aked v. Stocks*, 4 Bing. 509; 1 M. & P. 346.

**One Notice to Several Persons.**—A separate notice to each of several persons intended to be sued, is sufficient to found a joint action against all for acts committed in pursuance of an act of parliament, which provided that no plaintiff shall recover in an action for anything done in pursuance thereof, without notice to the defendant or defendants of such intended action, although none of the other persons who are afterwards joined in the action are named in the notice to either of them. *Agar v. Morgan*, 2 Price, 126.

A notice of action against a magistrate is sufficient to warrant a writ and proceeding against the magistrate and a constable jointly. *Jones v. Simpson*, 1 C. & J. 174; 1 Tyr. 32.

**Sufficiency of Notice.]**—A letter from the plaintiff's attorney, declaring that he is instructed to take legal proceedings unless goods are delivered up, is not a sufficient notice of action. *Lewis v. Smith*, Holt, 27. *S. P.*, *Mason v. Birkenhead Improvement Commissioners*, 6 H. & N. 72; 29 L. J., Ex. 406.

Where trustees of a paving act were entitled to a certain number of days' notice of action, for anything done in pursuance of the act, a notice that, unless the name of the party on whose information they had taken certain steps were given up, proceedings would be taken against them, is bad, because conditional; and, because it should have specified that the action would be commenced at the expiration of the number of days mentioned in the act. *Norris v. Smith*, 2 P. & D. 353; 10 A. & E. 188.

One person acted as clerk to two bodies of public officers. A notice of action was given him, addressed to him as clerk to the one body, the cause of action arising under the authority of the other body:—Held, insufficient. *Hider v. Dorrell*, 1 Taunt. 383.

A notice signed by "A. E. P., solicitor, acting on the behalf and as the procchein amy of the plaintiff," who was an infant:—Held, sufficient, where notice was required to be given "by the attorney or agent." *De Gondouin v. Lewis*, 2 P. & D. 283; 10 A. & E. 117; 3 Jur. 1168.

A notice of action to a bailiff of a county court is not bad because it describes him as having acted under a statute which does not relate at all to county courts, or to the matter in question; if it gives him notice of the action and of the cause thereof it is sufficient, and such a reference to a wrong statute may be rejected. *Macgregor v. Galaworthy*, 3 C. & K. 8.

A plaintiff having, after notice of action for extortion by a railway company in carrying his goods, served the company with a demand of interest under 3 & 4 Will. 4, c. 42, s. 28:—Held, that an arbitrator, under a submission of all matters in difference, might award the plaintiff interest, notwithstanding the notice of action did not contain a demand of interest. *Edwards v. Great Western Railway Company*, 11 C. B. 588; 21 L. J., C. P. 72.

Particulars of demand in a plaint in a county court were, first, for unlawfully entering premises and seizing cattle under colour of a distress; secondly, for unlawfully selling three other cattle not distrained; thirdly, for not having the cattle so sold appraised before selling them; and fourthly, for continuing on the premises, and proceeding to sell the cattle after an abandonment of the distress. A notice of action given as under 5 & 6 Vict. c. 54, s. 19 (Tith Commutation Act), stated that the plaintiff would bring his plaint against the defendant for having on the 11th of March entered his premises and seized three heifers there, and for having continued there several days, and also for that the defendant against the plaintiffs will on the 17th March did seize, sell, and remove from the plaintiffs' premises three heifers belonging to him:—Held, that the plaintiff was entitled to go into evidence in support of the fourth item, as it was one for which no notice of action was necessary; or, if necessary, the notice given was large enough to apply to it. *Hocard v. Remer*, 2 El. & Bl. 915; 23 L. J., Q. B. 60.

A notice of action signed by B., under 9 & 10 Vict. c. 95, s. 138, against the bailiff of a county

court, as follows: "It is my intention at the end of one calendar month from the date hereof to commence an action against you in the court of Queen's Bench, to recover compensation in damages for a trespass and excessive levy committed by you and your officers on the 3rd of December, 1863, by selling and disposing of certain goods upon the premises, No. 80, Derbyshire-street, &c., to satisfy debt and expenses under an order recovered against me in the S. county court," is sufficient. *Barton v. Le Gros*, 34 L. J., Q. B. 91; 11 L. T. 270; 13 W. R. 46.

By 25 & 26 Vict. c. 102, s. 106, no action or proceeding shall be commenced against the Metropolitan Board of Works for anything done or intended to be done under the powers of that board, under certain statutes, until after one month's notice, and "every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards."—Held, that a notice of claim and demand of arbitration for damage done to buildings by the Metropolitan Board of Works, acting under their statutory powers, is not such a proceeding against the Metropolitan Board of Works as to render it necessary that it should be made within six months after the damage is caused. *Delany v. Metropolitan Board of Works*, 2 L. R., C. P. 532; 36 L. J., C. P. 227; 16 L. T. 386; 15 W. R. 841. Affirmed on appeal, 3 L. R., C. P. 111; 37 L. J., C. P. 59; 17 L. T. 262; 16 W. R. 137—Ex. Ch.

#### b. Service.

Service of a notice of action to a magistrate by a clerk of the attorney is sufficient, and the notice need not be served by the attorney himself. *Morgan v. Leach*, 10 M. & W. 558; 2 D., N. S. 522; 12 L. J., M. C. 4.

#### c. Proof.

**Necessity for.]**—A witness, who served a notice of action, did not know the handwriting of the plaintiff whose signature the notice purported to bear, and no evidence was given of his handwriting:—Held, sufficient without such proof, as it was enough that the notice should have been served on his behalf. *Forman v. Daves*, Car. & M. 127.

**Waiving.]**—The mere act of a magistrate cannot waive the necessity of proving a notice of action. *Martins v. Upcher or Upcher*, 1 D., N. S. 555; 2 G. & D. 716; 3 Q. B. 662; 6 Jur. 582.

Therefore, where a magistrate had sent to the plaintiff a paper writing, reciting the notice that had been served on him, and tendering amends in respect of the matter contained in such notice, proof of such notice was still required. *Id.*

In an action against a justice of the peace for acts done in the execution of his office, the proof of notice of action is a necessary part of the plaintiff's case, and must be given by him, though the want of it is not relied upon in pleading by the defendant. *Lawrenson v. Hill*, 10 Ir. C. L. R. 498.

#### 4. PLEADING WANT OF NOTICE.

**Necessity of.]**—Where an act provided that a

plaintiff should not recover in any action for anything done in pursuance of the act, unless twenty-one days' notice of action should be given :—Held, that the defendant must plead the want of such notice, or he could not avail himself of it. *Dacey v. Warner*, 14 M. & W. 199; 15 L. J., Ex. 253; *S. P., Law v. Dodd*, 1 Ex. 845; 17 L. J., M. C. 65.

Under the 9 & 10 Vict. c. 95 (County Courts Act), to take advantage of want of notice of action, it must be specially pleaded. *Smith v. Pritchard*, 2 C. & K. 699.

**Sufficiency of.]**—To an action against a clerk of the pasture-masters of a borough, under a local act, for money received by the pasture-masters to the plaintiff's use, he pleaded, that the debt arose out of the sale of a heifer of the plaintiff by the pasture-masters after the passing of the local act and 5 & 6 Vict. c. 97; that the sale of the heifer was a thing done in pursuance of the first-mentioned act; and that no notice of action had been given to the defendant, or to the pasture-masters :—Held, that the plea contained no sufficient averment that the thing complained of was a thing done in pursuance of the powers and authorities given by the local act. *Peck v. Boyes*, 7 Scott, N. R. 436; 6 M. & G. 726.

In trover, a defendant pleaded that the grievance was committed after the passing of 7 & 8 Vict. c. 19, for regulating bailiffs of inferior courts, that he had been duly appointed to act as bailiff in execution of the process of the Tolzey Court of Bristol, which court has, by charter, jurisdiction for the recovery of debts, and that he at the time of committing the grievance was a bailiff of the court, and that the grievance was a thing done in pursuance of his duty as such bailiff, and that no notice of action was given :—Held, sufficient, and that he was justified, on the ground that he was bailiff de facto. *Braham v. Watkins*, 4 D. & L. 42; 16 M. & W. 77; 16 L. J. Ex. 9.

#### 5. EFFECT OF OMISSION TO GIVE.

**Bars Right of Action as well as Costs.]**—The proviso in sect. 143 of the Turnpike Act, 3 Geo. 4, c. 126, is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section; and, therefore, if a party seeking to recover the penalties imposed by that act omits to give the requisite notice or to commence his action within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether. *Cobbett v. Warner*, 1 H. & N. 388; 26 L. J., Ex. 11—Ex. Ch.

### XI. COMPROMISE OF ACTION.

*See COMPROMISES.*

### XII. CONSOLIDATION, TRANSFER, &c.

*See PRACTICE.*

## ACTUARY.

*See EVIDENCE (WITNESSES).*

## ADJUDICATION OF BANKRUPTCY.

*See BANKRUPTCY.*

## ADJUSTMENT.

*See INSURANCE.*

## ADMINISTRATION.

*See EXECUTOR AND ADMINISTRATOR.*

## ADMIRALTY.

**Contracts with Lords of.]**—C. contracted with the commissioners of the Admiralty to convey the mails from Calais to Dover during the continuance of the contract, and the commissioners for and on behalf of her Majesty agreed to pay to him from and out of the moneys to be provided by parliament, 18,000*l.* per year; the contract to continue from the date until A.D. 1870 :—Held, that there was no obligation on the part of the commissioners to employ C. under the contract, parliament not having provided moneys for the payment. *Churchward v. Reg.*, 1 L. R., Q. B. 173; 14 L. T. 57.

**Consent of, to Obstruction to Navigation.]**—Where the Metropolitan Board of Works carried a pipe connected with a sewer some distance into the Thames, and protected the mouth of it by driving piles into the bed of the river; which piles damaged a vessel :—Held, that as the Board had not obtained the approval of the Board of Admiralty of the works as required by 21 & 22 Vict. c. 104, s. 27, they were liable in an action for obstructing the free navigation of the river, and that although the act gave them power to erect works on the soil or bed of the river Thames, yet nevertheless it was a condition precedent to the erection of such works that they should obtain the approval of the Board of Admiralty, and that the approval of the conservators of the Thames was not sufficient. *Brounlow v. Metropolitan Board of Works*, 13 C. B., N. S. 768; 31 L. J., C. P. 140; 8 Jur. N. S. 891; 6 L. T. 187; 10 W. R. 384.

**Actions against.]**—The Lords Commissioners of the Admiralty are empowered to sue and be sued in respect of certain matters under a collective name; an action lies against them in respect of some of such matters. A writ of summons directed to them in that name having been served upon one of the commissioners, the court refused to set aside the writ, although it appeared upon the plaintiff's affidavit, on shew-

ing cause, that the cause of action was one for which the defendants were not suable in their collective name. *Williams v. Admiralty (Lords Commissioners)*, 2 L. M. & P. 456; 12 C. B. 420; 20 L. J., C. P. 245; 16 Jur. 42.

**Droits.**—During the Russian war, one of the Queen's ships of war, on her passage to Odessa, fell in with and took possession of a raft of timber, having the Russian Imperial mark painted on the several spars composing the same:—Held, that such timber must be condemned as a droit of the Crown and not a droit of Admiralty. *Anon.* 5 Jur., N. S. 1109.

**Jurisdiction of Court of.**—See SHIPPING.

## ADMISSIONS.

See EVIDENCE.

## ADULTERATION.

See HEALTH.

## ADULTERY.

See HUSBAND AND WIFE.

## ADVERSE POSSESSION.

In Ejectment.]—See EJECTMENT.

**Statute of Limitations.**—See LIMITATIONS (STATUTE OF).

## ADVERTISEMENT.

**Evidence—Notice.**—An advertisement published in several daily newspapers is not evidence of notice to any individual who is not proved to have taken in or to have been in the habit of reading one of the newspapers in which it appeared. *Boydell v. Drummond*, 2 Camp. 157.

Evidence that an advertisement was inserted in a country newspaper, circulated at the residence of a party, is not admissible as proof of notice to the party of the facts contained in the advertisement, unless it is shown that he took the newspaper in. *Norwich and Lowestoft Navigation v. Theobald, M. & M.* 153. And see EVIDENCE.

**Contract by.**—A circular sent out, as follows:—"We are instructed to offer to the wholesale trade for sale by tender the stock in trade of A., amounting as per stock book to 2,503l. 13s. 1d., and which will be sold at a discount in one lot: payment to be made in cash: the tenders will be received and opened at our offices," does not amount to a contract or a promise to sell to the person who makes the highest tender. *Spencer v. Harding*, 5 L. R., C. P. 561; 39 L. J., C. P. 332; 23 L. T. 237; 19 W. R. 48.

The liability of a party who advertises generally a reward for information to any one not named in the advertisement who shall give the information asked for, is a liability at common law, and not a contract within the Statute of Frauds. *Williams v. Byrne*, 1 Moore, P. C. C., N. S. 154; 8 L. T. 69.

After a reward offered, a constable provided the information required:—Held, a good consideration for a promise to pay. *England v. Davidson*, 11 A. & E. 856.

**Reward for Apprehending a Felon.**—G. having been guilty of forgery, absconded. The defendants published a handbill offering a reward of 200l. "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G." Afterwards G. presented himself at the police office, Exeter, and said there was a warrant against him. The plaintiff, who was chief constable, on searching the police-gazette and finding the notice therein, telegraphed to Dewsbury, and being informed that there was a warrant against G., apprehended and charged him, and he was ultimately convicted. In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent:—Held, that the plaintiff was not entitled to claim the reward,—the apprehension of G. not being the consequence of the plaintiff's information, but of the criminal surrendering himself to justice. *Bent v. Wakefield Bank*, 4 C. P. D. 1; 39 L. T. 576; 27 W. R. 168.

**Tenders.**—A company advertised for tenders for the supply of stores for a period of twelve months. The defendant sent in a tender to supply the stores required for the period named, at certain fixed prices, "in such quantities as the company's storekeeper might order from time to time:" and the company accepted his tender:—Held, that there was a sufficient consideration for the defendant's promise to supply the goods, although there was no binding contract on the part of the company to order any. *Great Northern Railway Company v. Witham*, 9 L. R., C. P. 16; 43 L. J., C. P. 1; 29 L. T. 471; 22 W. R. 48. And see CONTRACT.

**Auction.**—An auctioneer advertised in newspapers that a sale by auction would take place on a particular day in a country town. He also circulated catalogues specifying the articles to be sold. A person attended the sale intending to buy certain articles specified in the catalogue, but on the day of sale they were withdrawn by the auctioneer:—Held, that there was no implied contract by him to indemnify the intended

purchaser against the expense and inconvenience which he had incurred. *Harris v. Nickerson*, 8 L. R., Q. B. 286; 42 L. J., Q. B. 171; 28 L. T. 410; 21 W. R. 635.

An advertisement of sale of real estate, stating that to treat for and view the property applications are to be made to certain named persons, does not hold them out as authorised to enter into a contract of sale. *Godwin v. Brind*, 5 L. R., C. P. 299; 39 L. J., C. P. 122; 17 W. R. 29.

**Expenses Incurred.**—When a representation is made to the public by means of an advertisement, the advertiser knowing the representation to be untrue, one of the public who has reasonably incurred expense by reason of such representation will have his action against the advertiser. *Richardson v. Silvester*, 9 L. R., Q. B. 34; 43 L. J., Q. B. 1; 29 L. T. 395; 22 W. R. 74.

A plaintiff's particulars in a county court action alleged that the defendant caused to be inserted in a newspaper an advertisement for the letting by tender, with immediate possession, of a farm and sheepwalk. And the plaintiff believing in the bona fides of such advertisement, was induced to inspect the farm, and employ persons to value it with a view to his becoming tenant, whereas the defendant knew at the time he caused such advertisement to be published that he had not power to let the farm, and that the farm was not to be let:—Held, that these particulars disclosed a *prima facie* cause of action, and that the judge was not justified in nonsuiting the plaintiff without hearing his evidence. *Id.*

**Contract to Insert.**—A proprietor of a railway guide book gave to the defendant a written order to insert an advertisement "to last two years from date, to be renewed on the same terms at the end of that period, provided a second edition shall be printed." The defendant, after the advertisement had continued two years, brought out a second edition:—Held, that the meaning of the contract was to give the defendant the option of renewing in the second edition; but not to bind him to renew. *Mcason v. Finnigan*, 11 W. R. 439—Ex. Ch.; and see *Metzler v. Gounod*, 32 L. T. 656.

## ADVOWSON.

See ECCLESIASTICAL LAW.

## AFFIDAVIT.

See EVIDENCE.

## AFFILIATION.

See BASTARDY.

## AFFIRMATION.

See EVIDENCE.

## AGE.

See EVIDENCE.

## AGENT.

See PRINCIPAL AND AGENT.

## AGREEMENT.

See CONTRACT.

## AIR.

See EASEMENT.

## ALDERMAN.

See CORPORATION.

## ALE AND BEER-HOUSE.

See INTOXICATING LIQUORS.

## ALIEN.

See INTERNATIONAL LAW.

**ALIMONY.***See* HUSBAND AND WIFE.**ALLOCATUR.***See* COSTS.**ALLOTMENT OF SHARES.***See* COMPANY.**AMBASSADOR.****I. RIGHTS AND PRIVILEGES.**

1. *Exemptions.*
2. *Actions by.*

**II. AMBASSADORS' SERVANTS.****III. OTHER MATTERS.****I. RIGHTS AND PRIVILEGES.****1. EXEMPTIONS.**

**From Arrest.**—Where a foreign minister had been dismissed, and a successor had been appointed several months before his arrest, held, that the privilege did not apply, notwithstanding he had not received any official notification of his dismissal. *Marshall v. Critico*, 9 East, 447.

The 7 Ann, c. 12, s. 2, does not extend to consuls, who are therefore liable to arrest. *Vircash v. Becher*, 3 M. & S. 284. And see *Clarke v. Critico*, 1 Taunt. 106.

**From Actions.**—A councillor of legation of a foreign sovereign, who has the charge of the executive of the legation, subject to the directions of the minister plenipotentiary, and who acts as chargé d'affaires in the absence of such minister, is entitled as such to the privileges of an ambassador. *Taylor v. Best*, 14 C. B. 487; 2 C. L. R. 1717; 23 L. J., C. P. 89; 18 Jur. 402.

An ambassador, who voluntarily appears to an action against him and others in this country as joint contractors, and who thus submits to the jurisdiction of the court, is not entitled to have the proceedings set aside or the action stayed, on the ground of his being privileged as an ambassador, if no step has been taken to interfere with his person or property. *Ib.*

A public minister of a foreign state, accredited to and received by the sovereign of this country, having no real property in England, and having done nothing to disentitle him to the general privileges of such public minister, cannot while he remains such public minister, be sued against his will, in this country, in an action; although such action may arise out of commercial

transactions by him here, and although neither his person is nor his goods are touched by the suit. *Magdalena Steam Navigation Company v. Martin*, 2 El. & El. 94; 28 L. J., Q. B. 310; 5 Jur., N. S. 1260; 7 W. R. 598.

Securities were deposited by the plaintiffs in the Bank of England in the name of the ambassador of a foreign state, in order to secure the performance of a contract between the plaintiffs and the foreign government. The ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by the plaintiffs, which they denied under the circumstances to be such breach:—Held, that it was not competent for the plaintiffs to move against the ambassador; but that an interim injunction might be granted against the bank, to restrain them from parting with the fund, and that, under this order, the bank would be protected against any proceedings by the ambassador. *Gladstone v. Mururus Bey*, 1 H. & M. 495; 33 L. J. Ch. 155; 9 Jur. N. S. 71.

**2. ACTIONS BY.**

**Bringing Action on Behalf of Foreign Government.**—To a bill filed by the chargé d'affaires of the Brazilian government in this country, in his own name, to restrain judgment creditors from issuing execution against certain furniture, upon which a sum of money had been advanced by the Brazilian government, secured by an unregistered bill of sale of the furniture, a demurrer on the ground that the minister could not sue in his own name was allowed. *Penedo (Baron) v. Johnson*, 29 L. T. 452; 22 W. R. 103.

**II. AMBASSADORS' SERVANTS.**

**Privileges.**—The privilege from arrest of an ambassador's servant is the privilege of the ambassador and not of the servant. *Fisher v. Begrez*, 2 C. & M. 240; 3 Tyr. 184; 2 D. P. C. 279; 4 Tyr. 35.

A person claiming privilege as servant to an ambassador must be really and bonâ fide his menial and domestic servant at the time of the arrest. *Ib.*

Although an ambassador's servant may be privileged as to his person, it does not follow that all his goods are privileged also, so as to enable the sheriff to apply to set aside a fi. fa. issued against them: and a clear case of privilege must be made out to the satisfaction of the court, or else they will not interfere, either on behalf of the sheriff or the person privileged. *Fisher v. Begrez*, 1 D. P. C. 588; 1 C. & M. 117.

It is not sufficient to show that the servant's name is in the list transmitted by the secretary of state to the sheriff's office, of persons privileged as attached to an embassy, but it must be clearly shewn that the person is in the actual and bonâ fide service of the ambassador. *Ib.*

In an action against a sheriff for a false return, the plaintiff may shew that the appointment was merely colourable. *Delcalle v. Plomer*, 3 Camp. 47.

**Who Entitled.**—A land-waiter at the custom-house cannot claim protection as such domestic servant. *Masters v. Manby*, 1 Burr. 401.

Privilege denied to a domestic physician to a public foreign minister, where it appears to be a mere scheme to screen him from his debts. *Lockwood v. Coyegarne*, 3 Burr. 1676.



A chaplain to an ambassador is not protected from arrest if he does no duty in the house. *Seacombe v. Bownley*, 1 Wils. 20.

Nor is an ambassador's interpreter, who does not live in the house. *Malachi Carolino's case*, 1 Wils. 78.

Protection to the English secretary of an ambassador was disallowed, because it appeared he was purser of a ship of war. *Darling v. Atkins*, 3 Wils. 33.

But in another case it was allowed, although formerly he had been a trader, and the case arose under very suspicious circumstances. *Triquet v. Bath*, 3 Burr, 1478; 1 W. Bl. 471.

The secretary of a foreign minister is privileged, though his name is not registered at the office of either of the secretaries of state. *Hopkins v. De Roebeck*, 3 T. R. 79.

Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the court refused to quash the writ, though the husband swore that before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him, in writing despatches and other official documents. *English v. Cubalero*, 3 D. & R. 25.

A British-born subject employed as first chorister at the Portuguese ambassador's chapel is not protected. *Nucello v. Toogood*, 2 D. & R. 833; 1 B. & C. 554.

But semble, that a chorister, bonâ fide employed by an ambassador in the performance of religious worship in his chapel, is privileged. *Fisher v. Begrez*, 1 C. & M. 117; 1 D. P. C. 588; *S. C.*, 2 C. & M. 240; 3 Tyr. 184; 2 D. P. C. 279.

### III. OTHER MATTERS.

**Evidence.**—The certificate of a foreign ambassador under the seal of the legation is sufficient evidence of the law of the country by which he is accredited. *Klingemann, In goods of*, 3 S. & T. 18; 32 L. J., P. 16; 8 L. T. 172; 11 W. R. 218.

**Domicil.**—A foreigner having gained a British domicil does not lose it by becoming chargé d'affaires in this country for his own sovereign. *Att.-Gen. v. Kent*, 1 H. & C. 12; 31 L. J., Ex. 391; 10 W. R. 722.

## AMENDMENT.

See PRACTICE—PLEADING.

## AMICUS CURIÆ.

**Who may be.**—As amicus curiæ any person may make suggestions to the court. *Tollemache v. Tollemache*, 30 L. J., Mat. 115.

## ANCIENT DEMESNE.

**Exemption from Parliamentary Taxes.**—The exemption of tenants in ancient demesne from parliamentary taxes and tallages is limited to taxes granted by parliament to the crown, and does not extend to local taxation levied, under the authority of an act of parliament, upon and for the benefit of particular portions of the community. Tenants in ancient demesne are not, therefore, as such, exempt from payment of county rates. *Reg. v. Aylesford*, 2 El. & El. 538.

## ANCIENT LIGHTS.

See EASEMENT.

## ANIMALS.

### I. PROPERTY IN.

1. *Reclaimed and Domesticated.*
2. *Animals feræ naturæ.*

### II. LIABILITY FOR INJURIES BY.

#### A. Animals damage feasant.

1. *Who may Distrain.*
  - a. Under Agreements.
  - b. When Mischief caused by Distrainer.
2. *Evidence to support Distress.*
  - a. Position of Person Distraining.
  - b. Actual Damage being done.
3. *Liability for Cattle passing along Highway.*
4. *What Animals may not be Distrained.*
  - a. Animals in Actual Use.
  - b. Exceptions.
5. *Tender of Amends.*
  - a. Time for.
  - b. To whom made.
6. *Defence to Action for.*
7. *Pound and Poundage.*
  - a. Rights and Liabilities of Parties.
  - b. Sufficiency of Pound.
  - c. Pound Breach.
  - d. Liability of Poundkeeper.
  - e. Escape and Rescue.
  - f. Actions.

#### B. Mischievous Animals.

1. *Liability for Injuries to Human Beings.*
  - a. General Principles.
  - b. Proof of Knowledge of Mischievous Propensities.
    - i. As to Nature of Animal.
    - ii. As to Knowledge of Owner.
  - c. Negligence without Proof of Scienter.
  - d. Persons not entitled to sue.
2. *For Injuries to Animals.*
  - a. Principle of Res Scienter.
3. *Justifying Shooting or Destroying.*
  - a. Protection of Property.

b. Protection of Person.

c. Poisoning.

4. *Pleadings in Actions before the Judicature Acts.*

**C. Animals causing Infection.**

1. *Principle of Liability.*

2. *Evidence for.*

3. *Warranty of.*

4. *Jurisdiction.*

**III. CRUELTY TO ANIMALS.**

1. *Offences under the Acts.*

2. *Apprehension of Offenders.*

a. *At Request of Private Person.*

b. *Notice of Action for.*

3. *Procedure.*

a. *Appeals.*

b. *Jurisdiction of Superior Courts.*

**IV. BEQUEST FOR THE BENEFIT OF ANIMALS.**

**V. CARRIAGE OF ANIMALS.—See CARRIER.**

**I. PROPERTY IN.**

**1. RECLAIMED AND DOMESTICATED.**

Reclaimed animals, *feræ naturæ*, are the subject of civil remedies for property: therefore where a cat of A. strayed from his premises, and was shot at and killed by B.:—Held, that A. having a property in the cat, an action would lie to recover damages for killing it, the measure of such damages being something beyond the market value of the thing destroyed, if the destruction were attended by circumstances of aggravation. *Whittingham v. Ideson*, 8 U. C. L. J. 14.

Trover will lie for a dog that is lost, and which the defendant refuses to deliver, unless paid for his keeping. *Binstead v. Buck*, 2 W. Bl. 1117.

**2. ANIMALS FERÆ NATURÆ.**

The property in animals *feræ naturæ* is in the owner of the land on which they are started and captured, and not in the captor. *Blades v. Higgs*, 12 C. B., N. S. 501; 8 Jur., N. S. 1012; 5 L. T. 752; 10 W. R. 318; affirmed on appeal in the Ex. Ch. 32 L. J., C. P. 182; 7 L. T. 834; and in the House of Lords, 34 L. J., C. P. 286; 13 W. R. 927.

A grant of land in fee by the crown, and also a licence to depasture cattle on crown lands (which is in substance a lease), carries with it the right to capture and appropriate all wild animals found on such land. *Falkland Islands Company v. Reg.*, 2 Moore, P. C. C., N. S. 266; 10 Jur., N. S. 807; 11 L. T. 9; 13 W. R. 57.

Where cattle had been introduced into an island, and in course of time many escaped and lived in a wild state:—Held, in construing a grant by the crown of the lands that these wild cattle were to be treated as animals *feræ naturæ*. *Ib.*

**II. LIABILITY FOR INJURIES BY.**

**A. ANIMALS DAMAGE FEASANT.**

**1. WHO MAY DISTRAIN.**

**a. Under Agreements.**

A. being possessed of a quantity of land in a

common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they enter into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If, during the term, the cattle of B. come upon the land of A., he may distrain them damage feasant. *Whiteman v. King*, 2 H. Bl. 4.

A tenant holding over after the expiration of his term, cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. *Taunton v. Costar*, 7 T. R. 431.

A. demised to B. the milk of twenty-two cows to be provided by A., and to be fed at A.'s expense on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be fed there:—Held, that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there. *Burt v. Moore*, 5 T. R. 329.

If two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the rights of the other—*Quære*, whether either is bound to guard against casual damage, which during and by the fair enjoyment of his right may happen to the other. *Churchill v. Evans*, 1 Taunt. 529.

But clearly the one cannot distrain the cattle of the other damage feasant. *Ib.*

**b. When Mischief due to Distrainer.**

A person into whose field cattle have strayed through defect of fences which he was bound to repair, cannot distrain them damage feasant in another field, into which they have got by breaking through a hedge which he kept in good repair, since his neglect was the original cause of the mischief. *Singleton v. Williamson*, 7 H. & N. 410; 31 L. J. Ex. 17; 8 Jur., N. S. 60; 5 L. T. 664; 10 W. R. 174.

Where cattle have escaped from an adjoining close into that of the defendant, through defect of fences which he is bound to repair, he is not justified in driving them out into the highway, and leaving them there, although it may be their best way back; and trespass will lie. *Curruthers v. Hollis*, 8 A. & E. 113; 3 N. & P. 246; 1 W., W. & H. 264; 2 Jur. 871.

**2. EVIDENCE TO SUPPORT DISTRESS.**

**a. Position of Person Distraining.**

To support a distress for damage feasant, it must appear that the party distraining had actually got into the locus in quo before the cattle had got out of it. *Clement v. Milner*, 3 Esp. 95.

**b. Actual Damage being Done.**

Semble, that an animal doing damage to the freehold is doing such a damage as will justify the distraining of the animal damage feasant, provided that the animal is then actually doing the damage, or having done some damage, it is necessary to detain the animal in order to prevent its doing further damage. *Wormer v. Biggs*, 2 C. & K. 31.

But if the owner of the freehold seizes an

such goods is sufficient, though it discloses no right of distress. *Parrett Navigation Company v. Stower*, 6 M. & W. 564; 8 D. P. C. 405.

#### d. Liability of Pound-keeper.

A declaration on 1 & 2 Ph. & M. c. 12, s. 2, stated, that C. distrained a horse of the plaintiff damage feasant, and impounded it in a public pound, in the county of Surrey, of which the defendant was keeper, and took from the plaintiff for keeping in the pound the distress, to wit, 3s., being more than 4d. for one whole distress, "whereby, and by force of the statute in such case made and provided, an action accrued to the plaintiff, being the party grieved, to demand and have from the defendant 5l." :—Held, on motion in arrest of judgment, that the declaration was bad for want of an allegation, that the act done by the defendant was "against the form of the statute." *Fife v. Bousfield*, 8 Q. B. 100; 2 D. & L. 481; 13 L. J., Q. B. 306; 8 Jur. 734.

An action by the party grieved, on 1 & 2 Ph. & M. c. 12, s. 2, is not within 31 Eliz. c. 5, or 21 Jac. 1, c. 4, s. 2, and, therefore, the venue may be laid in any county. *Id.*

#### e. Escape and Rescue.

**Rescue.**—The plaintiff distrained the defendant's cattle damage feasant, and went to apprise the defendant; during his absence the cattle escaped for half an hour into the defendant's ground, whence the plaintiff, on his return, drove them to his own yard. The defendant having taken them thence :—Held, no rescue, as the leaving the cattle in the defendant's ground was an abandonment of the distress. *Knowles v. Blake*, 5 Bing. 499; 3 M. & P. 214.

If a hayward takes cattle which are straying in a common or a lane, and they are rescued as he is taking them to the pound, this rescue is indictable; but if the hayward takes cattle which are damage feasant in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; as in the latter case, till the cattle get to the pound, the hayward is to be considered the mere servant of the occupier. *Rex v. Bradshaw*, 7 C. & P. 233.

A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit. *Rich v. Woolley*, 7 Bing. 965; 5 M. & P. 663.

**Escape without fault of Distrainer.**—Where cattle are distrained damage feasant, and put into a sufficient pound, and escape without default or neglect of the distrainer, he may bring pound-breach. *Smith v. Wright*, 6 H. & N. 821; 30 L. J., Ex. 313; 7 Jur., N. S. 1169.

#### f. Actions.

**Pleadings in.**—An action on 2 Will. & M., sess. 1, c. 5, s. 4, to recover trouble damages for pound-breach, is not a penal action within 21 Jac. 1, c. 4, s. 4, and since the new rules of pleading the defendant cannot dispute the matters alleged in the declaration by way of inducement without a special plea. *Castleman v. Hicks*, 2 M. & Rob. 422; Car. & M. 266.

In an action for pound-breach, founded upon 2 Will. & M., sess. 1, c. 5, and 11 Geo. 2, c. 19, s. 8, the allegations in the declaration, that the premises on which the goods were seized and impounded were held of the plaintiff as landlord, and that rent was in arrear, are material allegations, because they shew how the plaintiff was the person grieved by the pound-breach. *Berry v. Huchstable*, 14 Jur. 718.

**Venue.**—In an action on the 1 & 2 Ph. & M. c. 12, for driving a distress out of the hundred into another county, the venue may be in either county. *Pope v. Davis*, 2 Taunt. 252; 2 Camp. 266.

### B. MISCHIEVOUS ANIMALS.

#### 1. LIABILITY FOR INJURIES TO HUMAN BEINGS.

##### a. General Principles.

**Generally.**—A person who keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it. *May v. Burdett*, 9 Q. B. 101; 16 L. J., Q. B. 64; 10 Jur. 692.

The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. *Id.*

**Ownership, Necessity of.**—In an action against a party for keeping a dog accustomed to bite mankind, it is not essential that the dog should be his; if he harbours the dog, or allows it to resort to his premises, that is sufficient. *McKone v. Wood*, 5 C. & P. 1.

**Dog Properly Secured.**—If an owner of a dog keeps him properly secured, but another person improperly lets him loose, and urges him to mischief, the owner is not liable. *Fleming v. Orr*, 2 Macq. H. L. Cas. 14; 1 W. R. 339.

Proof, therefore, that the dog of A. has killed the sheep of B., will not entitle B. to recover compensation from A., for, consistently with such proof, the dog may have been kept properly secured by A., and may have been improperly let loose and urged to mischief by a third person, without the knowledge and even against the express prohibition of A. *Id.*

**Dog for Protection at Night.**—No action lies for an injury arising from the defendant letting loose a dog in his own premises for their protection at night. *Brock v. Copeland*, 1 Esp. 203.

**Animals Naturally Fierce.**—A person keeping an animal of a fierce nature is bound so to keep it that it shall not commit injury; when, therefore, such an animal does an injury, the owner is liable, though shewn that it had never evinced any fierceness; but evidence of its tameness was received, under particular circumstances, in reduction of damages. *Besozzi v. Harris*, 1 F. & F. 92.

**Accidental Injury—Scienter.**—Where a horse strays on a highway, and, without apparent

reason, kicks a child, no action will lie against the owner of the horse, unless he knew that the horse was likely to commit such an act. *Cox v. Burbidge*, 17 C. B., N. S. 245; 32 L. J., C. P. 89; 9 Jur., N. S. 970; 11 W. R. 435.

### b. Proof of Knowledge of Mischievous Propensities.

#### i. As to Nature of Animal.

In an action for keeping a mischievous dog, by which the plaintiff's child was bitten, a report that it had been before bitten by a mad dog is evidence that the defendant knew him to be mischievous. *Jones v. Perry*, 2 Esp. 482.

It is not sufficient to shew that the dog was of a savage disposition, and usually tied up, and that the defendant promised to make a pecuniary satisfaction to the plaintiff after he had been bitten by the dog. *Beck v. Dyson*, 4 Camp. 198.

In an action for negligently keeping a dog, proof that the defendant had warned a person to beware of the dog, lest he should be bitten, is evidence to go to a jury, of the allegation that the dog was accustomed to bite mankind. *Judge v. Cox*, 1 Stark. 285.

Proof that the dog is of a furious disposition, and had bitten cattle, is no evidence of the defendant's scienter; but a promise by the owner of the dog, on being informed of the injury it had done, to make compensation, is some evidence of it, to go to the jury, but of the slightest degree. *Thomas v. Morgan*, 2 C. M. & R. 496; 4 D. P. C. 223; 1 Gale, 172; 5 Tyr. 1085.

An averment in a declaration that the defendant's dogs were accustomed to worry and bite sheep and lambs, is not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men. *Hartley v. Harriman*, 1 B. & A. 620; *N. C. nom. Hartley v. Halliwell*, 2 Stark. 212; Holt. 617.

Action for an injury done to the plaintiff by the defendant's bull. The plaintiff whilst walking along the public street, wearing a red handkerchief, was attacked and injured by the bull, which was being driven along the street. The defendant stated, after the accident, that the red handkerchief was the cause of the injury, for that he knew the bull would run at anything red. He also stated on another occasion that he knew that a bull would run at anything red:—Held, that this was evidence for the jury in support of the averment of the scienter. *Hudson v. Roberts*, 6 Ex. 679; 20 L. J. Ex. 299.

In an action to recover damages for an injury sustained from the bite of a dog, it is not necessary to shew that the dog was accustomed to run about, and shew a disposition to snap at and bite everybody; but it will be sufficient if the dog was accustomed from time to time to bite people under circumstances which would not provoke a dog of good temper. *Charlwood v. Greig*, 3 C. & K. 46.

In an action for knowingly keeping a fierce and mischievous dog, which had bitten or wounded the plaintiff, it is necessary to prove that he has injured the plaintiff, and is used to injure people, and a mere habit of bounding upon and seizing persons, not so as to hurt or injure them, though causing some annoyance and trivial accidental damage to clothes, would not sustain the action; and the dog may be brought

into court, and shewn to the jury to assist them in judging of his temper and disposition. *Line v. Talyor*, 3 F. & F. 731.

#### ii. As to Knowledge of Owner.

**Knowledge of Servant, is Knowledge of Master.**—If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master. *Baldwin v. Casella*, 7 L. R., Ex. 325; 41 L. J., Ex. 167; 26 L. T. 707; 21 W. R. 16.

**Sufficiency of.**—In order to fix a defendant with knowledge of the ferocious nature of a dog of which he was the owner, and which had bitten the plaintiff, two persons who had upon previous occasions (one of them twice) been attacked by it were called to prove that they had gone to the defendant's public-house and made complaint to two persons who were behind the bar serving customers, and that one of them had also complained to the barmaid. There was, however, no evidence that these complaints were communicated to the defendant; nor was it shewn that either of the two men spoken to had the general management of the defendant's business or had the care of the dog:—Held, by Lord Coleridge, C. J., and Keating, J. (Brett, J., dissentiente), that there was evidence of scienter to go to the jury. *Applebee v. Percy*, 9 L. R., C. P. 647; 43 L. J., C. P. 365; 30 L. T. 785; 22 W. R. 704.

In an action for an injury inflicted by the bite of a dog, in order to establish the scienter, it was proved that the wife of the defendant (who was a milkman) occasionally attended to his business, which was carried on upon premises where he kept the dog, and that a person had gone there and made a formal complaint to the wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew:—Held, that there was evidence of the husband's knowledge of the dog's propensity to bite. *Gladman v. Johnson*, 36 L. J., C. P. 153; 15 L. T. 476; 15 W. R. 313.

Although, in an action for injuries resulting from the bite of a dog, notice to the wife of the savage nature of the dog will be sufficient evidence of the scienter to fix the husband; yet the converse does not hold, and a notice to the husband will not, taken alone, be sufficient proof of the scienter to render the wife liable after her husband's death. *Miller v. Kimbray*, 16 L. T. 360.

A person using a railway station, through which there was a public right of way, was bitten by a dog which was not the property of the company, and there was no evidence that it was seen by the servants of the company till immediately before the accident, when it went into the signal-box, and was kicked out by the signal-man. There was evidence that a dog was on the platform, and attempted to bite a lady about an hour previously; but though this was mentioned to a porter, it did not appear that the dog was pointed out to him, or that he saw it:—Held, that there was no evidence of negligence on the part of the company or their servants. *Smith v. Great Eastern Railway Company*, 2 L. R., C. P. 4; 36 L. J., C. P. 22; 15 L. T. 246; 15 W. R. 131.

A passenger by a steam-boat company having gone to their premises for the purpose of inquiring for his luggage, found them closed, but was directed to inquire at other premises of the

company close at hand; whither he went, and while there was bitten by a dog of the company, chained up round an angle of the building, so as to be previously out of sight of the passenger. The dog had, to the knowledge of persons in the employ of the company (but who had no control over their business, or authority with respect to the dog), previously bitten another person:—Held, that assuming the company to be aware of the dangerous nature of the dog, they were liable in damages, but that there was no evidence of a scienter to enable the passenger to maintain his action. *Stiles v. Cardiff Steam Navigation Company*, 33 L. J., Q. B. 310; 10 Jur., N. S. 1199; 10 L. T. 844; 12 W. R. 1080.

**Corporations.**—With respect to questions of scienter, there is no difference between a corporation and an individual; and whatever is notice to a person competent to receive it, is notice to the corporation. *Id.*

#### c. Negligence without Proof of Scienter.

**Sufficiency of.**—Upon a reference of all matters in difference without pleadings, the arbitrator found that the defendant had been guilty of negligence in that his two greyhounds, coupled together, rushed against the plaintiff on a high road, knocked him down, and broke his leg:—Held, that this finding was good in law, although there was no evidence of a scienter. *Jones v. Owen*, 24 L. T. 587.

In an action by the plaintiff for injuries sustained by the kick of a horse while the plaintiff was, by the defendant's invitation, attending a sale in the defendant's yard, which was used for the sale of horses by auction, the only evidence to charge the defendant was as follows: the plaintiff was walking up the yard behind a row of spectators who were watching a horse then on sale. The horse was being led with a halter by a servant of the defendant's down a lane formed by the line of spectators on one side, and a blank wall on the other, there being no barrier between the spectators and the horse, and when the horse was about ten yards from the plaintiff (the crowd of spectators then being between them) another servant of the defendant's standing on the wall side of the lane, suddenly whipped the horse to make him trot and shew his paces, the consequence being that the horse swerved into and through the crowd, who made way for him, and, lashing out, kicked the plaintiff. No evidence beyond this was given as to the nature of the blow, of the character of the horse, or of the manner in which he was led, nor was any evidence given to shew that it was usual, in the case of horse sales of this description, to erect a barrier between the horses and the spectators:—Held, that there was no evidence of negligence on the part of the defendant's servants which should have been submitted to the jury. *Abbott v. Freeman*, 35 L. T. 783—C. A. Reversing 34 L. T. 544.

#### d. Persons not Entitled to Sue.

**Trespassers.**—A party, who is bitten by a dog in consequence of being himself on the owner's land on which he is not entitled to go, can maintain no action for the injury. *Sarch v. Blackburn, M. & M.* 505; 4 C. & P. 297.

**Contributory Negligence.**—Nor, if the injury arises from his own carelessness, with knowledge of the danger. *Id.*

**Evidence of.**—But if he has no means of knowing the danger, and is not otherwise in fault, he may recover, although the owner has attempted to give notice; therefore, it is no answer to such action, that a printed notice was put up, if it appears that the plaintiff could not read. *Id.*

If no suspicion is thrown upon the plaintiff by the defendant in such a case, it may be taken that he had good cause for being on the defendant's premises, provided the dog is put in a place forming one entrance to the house of the defendant, although there may be other entrances to the house of a more public description, by which the plaintiff might have proceeded. *Id.*

In an action for not sufficiently securing a fierce dog kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury thinks that the accident was not occasioned by the plaintiff's own carelessness and want of caution. *Curtis v. Mills*, 5 C. & P. 489.

In an action for an injury by a vicious bull, the plaintiff recovered, although it appeared that the bull was attracted by a cow in a particular state, which the plaintiff was driving past the field in which the bull was, and that the plaintiff first struck the bull on the head to drive him away from the cow. *Blackman v. Simmons*, 3 C. & P. 138.

## 2. FOR INJURIES TO ANIMALS.

### a. Principle of.

**Extension to Horses.**—The 28 & 29 Vict. c. 60, s. 1, which makes the owner of a dog liable in damages for injury done to any cattle or sheep by his dog without proof of a previous mischievous propensity in the dog, includes horses in the term "cattle." *Wright v. Pearson*, 4 L. R., Q. B. 582; 38 L. J., Q. B. 312; 20 L. T. 849; 17 W. R. 1099; 10 B. & S. 723.

**Trespass by Horse—Damages.**—The defendant's horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendant's:—Held, that there was a trespass by the act of the defendant's horse, for which the defendants were liable, apart from any question of negligence on their part:—Held, secondly, that the damage to the plaintiff's mare was not too remote. *Ellis v. Loftus Iron Company*, 10 L. R., C. P. 10; 44 L. J., C. P. 24; 31 L. T. 483; 23 W. R. 246.

**Liability in Agisting Cattle.**—A man who receives beasts to agist on a contract to take reasonable care, which beasts are afterwards injured by an animal mansuetæ naturæ, is not exempt from liability merely on the ground that he did not know the animal to be ferocious. All the circumstances taken together may shew a want of reasonable care nevertheless, and if so, he will be liable. *Smith v. Cook*, 1 Q. B. D. 79; 45 L. J., Q. B. 122; 33 L. T. 722; 24 W. R. 206.

The rule requiring proof of scienter in cases

of injuries by animals *mansuetæ naturæ*, is an artificial rule which ought not to be extended. *Ib.*

**Damages.**—But if a horse, through the neglect of the owner in not keeping his fences properly repaired, strays out of the field in which it is feeding into the field of an adjoining occupier, and there gets amongst his horses and kicks one in such a way as to cause its death, such owner is liable for the injury which his horse has done, and it is not a too remote consequence of the owner's negligence; neither is it incumbent on the plaintiff to shew that the defendant knew his horse to be vicious. *Lee v. Riley*, 34 L. J., C. P. 212; 11 Jur., N. S. 527; 12 L. T. 388; 13 W. R. 751.

**Worrying Game Birds, reared as Tame Ones.]**

—An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog, in consequence, goes into the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens. *Read v. Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P. 31; 11 L. T. 311.

**3. JUSTIFYING SHOOTING OR DESTROYING.**

**a. Protection of Property.**

If a defendant justifies shooting a dog, because the dog was worrying his fowl, and could not otherwise be prevented, he must prove that the dog was in the act of worrying the fowl at the very moment he shot him. *Janson v. Brown*, 1 Camp. 41.

The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off:—Held, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in the protection of his property. *Wells v. Head*, 4 C. & P. 568.

In an action for shooting the plaintiff's dog, the defence was that the defendant had put up a notice that dogs trespassing on his land would be shot:—Held, that such notice did not warrant the defendant in shooting the dog. *Corner v. Champneys*, 2 Marsh. 584.

The servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may have not been chasing deer at the moment when it was shot, if the chasing of the deer and the shooting the dog were all one and the same transaction. *Protheroe v. Mathews*, 5 C. & P. 581.

**b. Protection of Person.**

To justify shooting another's dog, it is not sufficient to shew that the dog was of a ferocious disposition, and was at large. To justify shooting him he must be actually attacking the party at the time; therefore, where the defendant was passing the plaintiff's house, and the plaintiff's dog ran out and bit the defendant's gaiter, and on the defendant turning round and raising his gun, the dog ran away, and he shot the dog as he was running away:—Held,

that he was not justified in so doing. *Morris v. Nugent*, 7 C. & P. 572.

A., a hawker, went to the house of B. to sell goods, and a dog of B.'s coming out of the house, A. knocked out one of its eyes, for which B.'s wife caused A. to be apprehended:—Held, that it was for the jury to say whether A. struck the dog for his own preservation and fairly to protect himself, or whether it was a wilful and malicious trespass on his part. *Hanway v. Boulton*, 4 C. & P. 350; 1 M. & Rob. 15.

**c. Poisoning.**

The placing of poisoned flesh in an enclosed garden, for the purpose of destroying a dog which was in the habit of straying there, is not an offence punishable under 24 & 25 Vict. c. 97, s. 41. But semble, that it is within 27 & 28 Vict. c. 115, s. 2. *Daniel v. Jones*, 2 C. P. D. 351.

**4. PLEADINGS IN ACTIONS BEFORE THE JUDICATURE ACTS.**

**Necessary Allegations.]**—A declaration for an injury to plaintiff's wife by a ram, alleged that the defendant wrongfully and injuriously kept it, knowing it to be prone and used to attack and injure mankind:—Held, that the declaration was not bad, for not averring that the defendant negligently kept the ram. *Jackson v. Smithson*, 15 M. & W. 563; 4 D. & L. 45; 15 L. J., Ex. 311.

**Effect of "Not Guilty."]**—In an action for injury done to the plaintiff's sheep by a ferocious dog, kept by the defendant, he knowing it to be of ferocious and mischievous disposition, not guilty puts in issue the ferocity of the dog and the scienter, these matters forming the substance of the charge. *Curd v. Case*, 5 C. B. 622; 5 D. & L. 509; 17 L. J., C. P. 124; 12 Jur. 247; *S. P.*, *Hogan v. Sharpe*, 7 C. & P. 755.

The allegation of duty in the defendant to use due and reasonable care and precaution in keeping the animal is an immaterial allegation. *Ib.*

**Material Pleas.]**—The allegations in a plea to an action for shooting a dog, that he attacked the defendant, and was accustomed to attack and bite mankind, are both material, and must be proved. *Clark v. Webster*, 1 C. & P. 104.

Where the defendants justified the shooting the plaintiff's dog, by pleading that he attacked them, and that "he was accustomed to attack and bite mankind," the plaintiff may call witnesses to prove the general quietness of the dog. *Ib.*

**C. ANIMALS CAUSING INFECTION.**

**1. PRINCIPLE OF LIABILITY.**

A declaration stating that the defendant knowingly delivered a glandered horse to the plaintiff to be put with his horse without telling him it was glandered; whereby the plaintiff, not knowing it was glandered, was induced to and did put it with his horse, per quod his horse died, is a good declaration, though no concealment or fraud or breach of warranty is averred. *Penton v. Murdock*, 22 L. T. 371; 18 W. R. 382.

An action will lie to recover damages sus-

tained by the negligence of servants having the care of cattle which they know to be suffering from an infectious disease in allowing such cattle to intermingle with other cattle. *Earp v. Faulkner*, 34 L. T. 284; 24 W. R. 774.

## 2. EVIDENCE OF SCIENTER.

Upon the trial of such an action it was proved that the condition of the cattle was known to the servants of the defendants at the time the cattle came into contact with those of the plaintiff, and that shortly before the defendants had been convicted at the petty sessions for allowing their cattle, infected with the foot and mouth disease, to be at large in a field insufficiently fenced. The certificate of such conviction was tendered and received, and the jury found in favour of the plaintiff:—Held, that the knowledge of their servants was sufficient to make the defendants responsible, and that there was evidence of negligence; that the certificate was improperly received in evidence, but this was cured by Ord. XXXIX. r. 3, of the Judicature Act, 38 & 39 Vict. c. 77, as no substantial miscarriage of justice had been thereby caused. *Earp v. Faulkner*, 34 L. T. 284; 24 W. R. 774.

A. bought a cow of B. on the assurance of the latter that he would warrant her, and that she had come off his father's farm. It proved to be a foreign cow; and a few days after the purchase she fell ill, and died, of what proved to be the cattle plague. Five other cows, which had been in the same shed, were attacked the same week, and eventually A. lost them as well. The symptoms in all the cases were alike:—Held, that as A. was induced to buy the cow through B.'s misrepresentation, the latter was answerable for the consequences which ensued by her coming in contact with other cattle. *Mullett v. Mason*, 1 L. R., C. P. 559; 35 L. J., C. P. 209; 12 Jur., N. S. 547; 14 L. T. 558; 14 W. R. 898; 1 H. & R. 779.

A.'s sheep, being diseased, got into B.'s field, where his sheep were grazing, and infected them with the disease. It did not appear how they got there. A., on being told of it, used expressions indicating knowledge that his sheep were diseased. In an action against him for suffering his sheep to go at large:—Held, that in the absence of negligence, proof of a scienter was necessary, and there was no sufficient evidence of it. *Cooke v. Waring*, 2 H. & C. 332; 32 L. J. Ex. 262; 9 L. T. 257.

## 3. WARRANTY OF.

The defendant sent pigs, infected with a contagious disease, for sale to a public market, which is an offence under s. 57 of the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70, repealed). The plaintiff bought the pigs, which infected other pigs in his possession, causing him great loss and expense. In an action for breach of warranty and false representation:—Held, that the mere act of exposing the pigs for sale in a public market was no evidence of an implied representation by the defendant that they were free from infection, or that he did not know them to be infected. *Ward v. Hobbs*, 3 Q. B. D. 150; 47 L. J., Q. B. 90; 37 L. T. 654; 26 W. R. 151—C. A. Affirmed by the House of Lords, 4 App. Cas. 13; 48 L. J., Q. B. 281; 40 L. T. 73; 27 W. R.

114. Reversing the judgment of the Queen's Bench Division, 2 Q. B. D. 331; 46 L. J., Q. B. 473; 36 L. T. 511; 25 W. R. 585.

## 4. JURISDICTION.

**Justices.**—On the hearing of an information, under 11 & 12 Vict. c. 107, s. 4, for removing cattle without a licence, the magistrates, on the production of a licence, had no jurisdiction to inquire into the sufficiency of the evidence upon which it was granted. *Stanhope v. Thoraby*, 1 L. R., C. P. 423; 35 L. J., M. C. 182; 14 L. T. 332; 1 H. & R. 459.

The removal of an infected animal from one county to another county does not give the justices of the latter county jurisdiction to deal with the case. The offence is complete as soon as the animal has been removed from its place of location, and therefore the justices of the former county alone have power to hear the cause, or to punish the offender. *Reg. v. Williams*, 15 L. T. 290.

A. removed a load of horse litter from Middlesex into Hertford, and the justices of Hertford convicted him of the offence of removing dung likely to propagate infection:—Held, that the justices had exceeded their jurisdiction, inasmuch as the horse litter was not dung likely to propagate infection. *Youngman v. Morris*, 15 L. T. 276.

**Construction of Order of Justices.**—By an order of quarter sessions it was declared, that after a certain date no sheep, &c., should be "removed from any one farm or place in the county of Buckingham, to any other farm or place therein," except upon certain conditions:—Held, that the word "place" must be construed ejusdem generis with the word "farm," and that no violation of the order was committed by the removal of sheep from one part of a farm to another part of the same farm, even though in such removal a public highway had to be crossed. *Eustace v. Sargent*, 14 L. T. 552.

**Orders in Council.**—By an order in council made under 11 & 12 Vict. c. 107, s. 4, every inspector had power to cause to be cleansed and disinfected premises in which animals labouring under the cattle plague had been or might be, and every owner or occupier of such premises was to obey any order given by the inspector for that purpose, under a penalty of 20l. An inspector gave an order to the foreman of S., who resided at a distance, to disinfect certain premises, which order was disobeyed:—Semble, that he was not liable for the disobedience of the order by his foreman. *Searle v. Reynolds*, 7 B. & S. 704; 14 L. T. 518.

—**Injury caused by Compliance with.**—The statement of claim alleged that the plaintiff delivered certain pigs to the defendants, a railway company, to be carried from M. to L. for reward to the defendants, and first, that at the M. station the defendants placed the pigs in a certain pen, and that the defendants had so negligently kept the said pen, and so negligently permitted it to be covered with lime or some preparation thereof, that the pigs were injured; secondly, that it was the duty of the defendants to provide fit and proper pens, or other accommodation at the said station for keeping the said pigs until they

should be carried by the defendants, and that the defendants neglected to provide fit and proper pens or other fit and proper accommodation during the period aforesaid, whereby the said pigs were injured; and thirdly, that at the request, and by the invitation of the defendants, the plaintiff, pending the delivery to and the receipt of the said pigs by the defendants for the purpose of being carried by them, placed the said pigs in a pen of the defendants at the said station at M., pending such delivery and receipt, and that the defendants so negligently kept the said pen for the reception and penning of the said pigs, and so negligently permitted the same to be covered with lime, or some preparation thereof, that by reason of the said pigs coming and being in contact with the said pen while so confined therein, they were injured. The statement of defence stated an order of the Lord Lieutenant in council, made on the 20th of September, 1878, under the provisions of the Contagious Diseases (Animals) Act, 1878, duly published in the Dublin Gazette, whereby it was inter alia ordered that every loading pen of a railway company should be disinfected before the using thereof, by the application to all parts of the loading pen, with which animals or their droppings had come in contact, of a coating of limewash, as in said order prescribed; and alleged that it was necessary for the defendants in the due and ordinary course of traffic, to pen the plaintiff's pigs, and that the defendants, in accordance with the provisions of the said order, carefully, and within a reasonable and proper time for the purpose of carrying out the provisions of the said order, before using the pen in the statement of claim mentioned for the plaintiff's pigs, disinfected the said pen, and duly and carefully applied to the said parts thereof the said preparation of chloride of lime, and that the said pigs were injured by coming in contact with the said preparation, and not otherwise, and that, save by reason of the application of the said lime-wash, the said pen was in a fit and proper condition for the reception of and penning the said pigs; similar defences, mutatis mutandis, were pleaded to the second and third causes of action:—Held, on demurrer, that the statement of defence was bad. *Shaw v. Great Southern & Western Railway Company*, 8 L. R., Ir. 10—C. A.

### III. CRUELTY TO ANIMALS.

#### 1. OFFENCES UNDER THE ACTS.

**Using Animals sent to Slaughter-house.**—The 12 & 13 Vict. c. 92, s. 9, which imposes a penalty on any person who, having the management of any place for the purpose of slaughtering horses or other cattle, not intended for butcher's meat, shall use or permit to be used any horse or other cattle brought to such place for the purpose of being slaughtered, applies to private as well as to licensed slaughter-houses. *Colam v. Hall*, 6 L. R., Q. B. 206; 40 L. J., M. C. 100; 23 L. T. 802; 19 W. R. 563.

A man had the management of the kennels of a hunt, where there was a place used solely for the purpose of slaughtering horses sent as food for the hounds. He received a horse for that purpose and permitted him to be worked:—

Held, that he was guilty of an offence under this section. *Id.*

**Working—Mens Rea.**—In a colliery certain horses were worked while suffering from raw wounds. T. was an owner, and S. was the certificated manager, but neither was proved to be present or to have any notice or knowledge of the state of the horses:—Held, that the justices were wrong in convicting S. of illtreating the horses under 11 & 12 Vict. c. 92, s. 2, merely because he was certificated manager, and that some knowledge of the matter was an essential ingredient of that offence. *Small v. Warr*, 47 J. P. 20.

**Baiting Animals—Coursing Rabbits.**—A match took place between the owners of two dogs as to which could kill the greatest number of rabbits by coursing them. The match took place in a field containing an area of three acres, walled in so that the rabbits could not escape:—Held, that this was not baiting animals within the meaning of 12 & 13 Vict. c. 92, s. 3. *Pitts v. Millar*, 9 L. R., Q. B. 380; 43 L. J., M. C. 96; 30 L. T. 328.

**Neglecting to Provide Food and Water—Railway Company—Jurisdiction.**—By 32 & 33 Vict. c. 70, s. 64 (repealed), a railway company is to provide food and water for cattle carried by them on the request in writing of the consignor or any person in charge thereof, and "if in the case of any animal such request is not made, so that the animal remains without a supply of water for thirty consecutive hours . . . the consignor and the person in charge of the animal shall each be deemed guilty of an offence against this act." By s. 103 a penalty is imposed on any person guilty of an offence, but it is not said how the penalty is to be recovered. By s. 109, for the purposes of proceedings under this act . . . every cause of complaint . . . shall be deemed to have arisen either in the place in which the same was actually committed or arose, or in any place in which the person charged or complained against happens to be. The appellant was the consignor of cattle from Kirby Stephen in Westmoreland to Colchester, to be carried over a railway upon a journey which lasted more than thirty hours. He did not make any request that the cattle should be supplied with water. The justices of Colchester issued a summons against him, he then being in Westmoreland, and, on his appearing to the summons, convicted him of an offence against s. 64:—Held, first, that the offence was within the summary jurisdiction of the justices. *Johnson v. Colam*, 10 L. R., Q. B. 544; 44 L. J., M. C. 185; 32 L. T. 725; 23 W. R. 697.

Held, secondly, that the conviction could not be sustained, for that the offence was completed before the cattle reached Colchester, the thirty hours having then expired; and the appellant, by appearing before the justices in obedience to their summons did not "happen to be" at Colchester, and within their jurisdiction. *Id.*

The appellant, a foreman to a dealer in foreign birds, sent some parrots from L. to D. by railway in a box without water. They were found at H., a station on the route, after ten hours' journey, suffering, as the respondent alleged, from want of water, which they drank eagerly



when offered to them. Upon these facts the magistrate convicted the appellant, under 12 & 13 Vict. c. 92, s. 2, of torturing or causing to be tortured "domestic animals:"—Held, that the conviction was bad, on the grounds that there was no evidence of cruelty or that the parrots in question were "domestic animals" within the meaning of the statute. *Swan v. Sanders* (or *Saunders*), 50 L. J., M. C. 67; 44 L. T. 424; 29 W. R. 538; 45 J. P. 522; 14 Cox, C. C. 566.

— **Continuing Offence.**—Quære, whether, if an offence had been committed, such offence would have been a continuing one. *Id.*

— **Impounding Animals.**—The keeper of a common pound is not as such within the words of s. 5 of 12 & 13 Vict. c. 92, "a person who impounds or confines, or causes to be impounded or confined," animals brought to his pound; he is, therefore, not under an obligation to provide such animals with food and water, nor subject to the penalty for neglecting to do so. *Dargan v. Davies*, 2 Q. B. D. 118; 46 L. J., M. C. 122; 35 L. T. 810; 25 W. R. 230.

**Cruelty to Cocks.**—A cock is a domestic animal within the 2nd and 29th sections of 12 & 13 Vict. c. 92; and to ill-treat a cock is an offence within the 2nd section. *Bridge v. Parsons*, 3 B. & S. 382; 32 L. J., M. C. 95; 9 Jur., N. S. 796; 7 L. T. 784; 11 W. R. 424.

**Cockfighting, what is.**—To assist at a cock-fight elsewhere than in a place "kept or used for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature," is no offence under 12 & 13 Vict. c. 92, s. 3. *Morley v. Greenhalgh*, 3 B. & S. 374; 32 L. J., Q. B. 93; 9 Jur., N. S. 745; 7 L. T. 624; 11 W. R. 263; *S. P., Clarke v. Haguer*, 8 Cox, C. C. 324; 29 L. J., M. C. 105; 6 Jur., N. S. 273; 8 W. R. 363; 2 El. & El. 281; *S. P., Coyne v. Brady*, 12 Ir. C. L. R. 577.

**Assisting at—Offence of.**—The 12 & 13 Vict. c. 92, s. 2, deals with offenders who, if the offence were a felony, would be principals in the first degree; s. 3, with those who would be accessories before the fact or principals in the second degree. *Bates v. McCormick*, 12 Ir. C. L. R. 577; 9 L. T. 174.

**Cutting Cocks' Combs.**—To perform an operation upon an animal which causes pain, is to cruelly ill-treat, abuse, or torture the animal within the meaning of 12 & 13 Vict. c. 92, s. 2, unless that act is justified by showing that it was done for some lawful purpose, for some purpose legalised by custom, for the benefit of the animal itself, or for making it more servicable for the lawful use of man. *Murphy v. Manning*, 2 Ex. D. 307; 46 L. J., M. C. 211; 36 L. T. 592; 25 W. R. 540.

Cutting off the combs of cocks, which does in fact cause great pain, cannot be justified either on the ground that it is done for the purpose of cockfighting, or of winning prizes at an exhibition. *Id.*

**Omitting to Kill.**—The omission to kill an animal which has been lawfully wounded,

is in great pain and incurable, is not an offence within s. 2 of the Prevention of Cruelty to Animals Act, 1847 (12 & 13 Vict. c. 92). *Powell v. Knights*, 38 L. T. 607; 26 W. R. 721.

And the owner of a horse who, knowing it to be incurably diseased and in pain, merely omits to have it slaughtered, commits no offence within s. 2, and cannot be convicted of "cruelly ill-treating, abusing, or torturing" such animal by reason of such omission only. But if he keeps the animal in such a manner as that it is inevitably put to intense pain in moving about a field, in its efforts to graze in order to support its life, he thereby commits an act of cruelty and an offence under the act, and is guilty of "torturing or causing the animal to be tortured," as much as if he had actually tortured it with his own hand. *Everitt v. Davies*, 38 L. T. 360; 26 W. R. 332.

## 2. APPREHENSION OF OFFENDERS.

### a. At request of Private Person.

If a constable is required by another person to take a third party into custody, for cruelty to a horse, not committed in the constable's own view, the constable, before taking the party into custody, should either enquire into all the particulars, or see the animal, so as to form a judgment as to what has really occurred. *Hopkins v. Crowe*, 7 C. & P. 373.

### b. Notice of Action for.

If a person who had ill-treated a horse was apprehended by the direction of one who was neither the owner of the horse nor a peace officer, the person so causing the apprehension was not entitled to notice of action under the section of the repealed act. *Hopkins v. Crowe*, 7 C. & P. 373; 4 A. & E. 774; 2 H. & W. 21.

## 3. PROCEDURE.

### a. Appeals.

By 12 & 13 Vict. c. 92, s. 25, an appeal is given in all cases where the sum adjudged to be paid on any conviction shall exceed 2*l.* By sect. 14, the party convicted shall pay such penalty, damage or compensation as the justice shall adjudge, order or award, together with the costs of conviction, to be settled by such justice. A party was convicted, and adjudged to pay a penalty of 2*s.* 6*d.*, and 2*l.* 7*s.* 6*d.* costs:—Held, that the sum adjudged to be paid on conviction referred to the penalty, and did not include the costs; and that, therefore, the party had no right of appeal. *Reg. v. Warwickshire (Justices), Ward, In re*, 25 L. J., M. C. 119; 2 Jur., N. S. 930; 6 El. & Bl. 837.

### b. Jurisdiction of Superior Court.

By the Prevention of Cruelty to Animals Act, 12 & 13 Vict. c. 92, s. 26, no conviction under the authority of the act, nor any order, judgment or proceeding relative thereto, shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior courts of record:—Held, that this enactment precluded the court from entertaining a case stated by justices for the opinion of the court.

*Reg. v. Chantrell*, 10 L. R., Q. B. 587; 32 L. T. 305.

#### IV. BEQUEST FOR THE BENEFIT OF ANIMALS.

**Validity.]**—A bequest for founding and upholding an institution for investigating, studying, and curing maladies of quadrupeds or birds useful to man, and for providing a superintendent or professor to give free lectures to the public, is good as a charitable legacy. *University of London v. Farrow*, 23 Beav. 159; 25 L. J. Ch. 70; 2 Jur., N. S. 1125. Affirmed on appeal, 1 De G. & J. 72; 26 L. J., Ch. 430; 3 Jur. N. S. 421.

### ANNUITY.

1. *Nature and Validity of.*
2. *Consideration for.*
3. *Forfeiture of.*
4. *Proceedings to set aside.*
5. *Assignment of.*
6. *Charging.*
7. *Registration.*
8. *Involment.*
9. *Stamping.*
10. *Proceedings to enforce Payment.*
  - a. *By Action.*
  - b. *By Administration.*
  - c. *By Distress.*
  - d. *By other means.*
11. *Payment.*
12. *Recovery of Arrears.*
13. *Merger and Extinction.*
14. *Redemption.*
15. *Apportionment.*—See APPORTIONMENT.

#### 1. NATURE AND VALIDITY OF.

**Satisfaction by Periodical Payments.]**—An annuity can only be where the principal is irrevocably gone, and is to be satisfied by periodical payments. *Winter v. Mousley*, 2 B. & A. 802.

**When Determinable upon the Death of a Grantee—Rights of Administrator.]**—Devises in tail male granted an annuity for twenty-one years, if they should so long live, to the remainderman, and in case of his death to his children, or if he had none to his wife. The remainderman, his wife and child, died during the term:—Held, that the deed was not an absolute grant of an annuity for twenty-one years, but was determinable by the death of the remainderman, his child and wife; and, therefore, that the administrator of the remainderman and his child could not recover the arrears of the annuity in respect of either of his intestates. *Barford v. Snuckey*, 5 D. & R. 118; 8 Moore, 88; 2 R. & B. 333; 1 Bing. 225.

A grant of an annuity for life, charged upon land in which the grantor has only a chattel interest, will enure as a grant during the term if the cestui que vie shall so long live. *Saffery v. Elgood*, 3 N. & M. 346; 1 A. & E. 191.

A grantee, by deed of settlement on marriage, of an annuity charged upon lands, in which deed

the grantor (there being no fraud) declares himself entitled in fee simple to the lands charged, may treat such declaration as a covenant, and on it afterwards appearing that the grantor had really only a life estate, may proceed against his estate to obtain payment of the arrears of this annuity. *Monypenny v. Monypenny*, 9 H. L. Cas. 114; 31 L. J., Ch. 269.

**By Commissioners out of Rates—Personal Liability.]**—A grant of an annuity by five commissioners named in a local act, in these words: "We, five, &c., do grant unto A. an annuity of £—, out of the rates granted and to arise by virtue of this act," according to the form prescribed in the act, does not raise any personal liability in the grantors, as on a contract, the act empowering any five to be a quorum. *Cano v. Chapman*, 1 N. & P. 104; 5 A. & E. 647; 2 H. & W. 355.

**Duration of—Fund set apart—Liability of Grantor.]**—By a marriage settlement, property of the wife was settled upon the usual trusts for the wife for life, with remainder to the husband for life, with remainder to the children of the marriage. By articles of agreement of even date, which recited the settlement, the father of the husband agreed to pay 350*l.* every year during the life of his son, and in case the wife should survive the husband, "then to continue the yearly payment to the trustees of the settlement for the purposes thereof:"—Held, that this created a liability on the part of the father to pay a perpetual annuity of 350*l.*; and 11,666*l.* consols which had been set apart out of the father's estate to answer the annuity, were ordered (on the death of the son leaving his wife surviving) to be transferred to the trustees of the settlement to be held upon the trusts thereof. *Dawson v. Robinson*, 25 L. T. 486.

By a marriage settlement three denominations of land—one a freehold and the other two chattels real—were charged, without any words of limitation, with the yearly sum of 70*l.* for E. W. (the intended wife) and her assigns, in case she should survive her husband, with power of distress; and if the settlor and E. W. should die leaving one or more sons of the marriage, charged, without any words of limitation, with 70*l.* for the elder son, "payable in like manner, &c., as it ought to be paid to E. W.," with like power of distress; the freehold estate having expired and the chattel interest in one denomination having been evicted:—Held, that the annuity created for the elder son was for the life of the annuitant only. *Gillman, In re*, 10 Ir. R., Eq. 92.

**Death of Cestui que Trust—Liability of Devisee in Trust.]**—An obligor of a bond without penalty, conditioned for payment to A. during her life of 20*l.* a year, bequeathed to his wife 30*l.* a year for her life, and devised to the defendant all his freehold messuages in trust, to educate his son until twenty-one, and to account for profits at that time; provided that if his wife should be living when his son attained full age, the devisee should retain and hold in trust such of his estates as would secure to his wife the 30*l.* a year. The wife died during his lifetime, and he afterwards died, leaving his son surviving, who afterwards died under age:—Held, that the estate of the devisee ceased on the death of the son, and that the devisee was not liable to A. for any arrears

of her annuity which had accrued due since his death, although the rents and profits exceeded the annuity. *Morrant v. Gough*, 1 M. & R. 41; 7 B. & C. 206.

**Determination of Value.**—A. granted a life annuity of 139*l.* for five years secured on fee simple lands, and after that period the annuity was to be increased in value to 199*l.* :—Held, that in determining the annual value, under 53 Geo. 3, c. 141, s. 10, the land must be considered as charged with the larger annuity. *Thompson v. Cartwright*, 33 Beav. 178; 33 L. J. Ch. 234; 9 Jur., N. S. 940; 9 L. T. 138; 11 W. R. 1091. Affirmed on appeal, 2 De G., J. & S. 10; 9 Jur., N. S. 1215; 9 L. T. 431; 12 W. R. 116.

An owner of the land, for the purpose of raising money for another, charged it with payment of the annuity, but did not make himself personally liable :—Held, that he was a grantor of the annuity. *Id.*

**Reduction of—When Trustees entitled to.**—By the Lee River Navigation Improvement Act, 1850 (13 & 14 Vict. c. 109), s. 76, it is enacted, that "it shall be lawful for the trustees from time to time to pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case, may, in the judgment of the trustees, be reasonable and proper," and to pay the same out of moneys in their hands by virtue of their special acts : under this section the trustees, by resolution not under seal granted to their clerk, upon his resignation of his office, an annuity of 300*l.* a year :—Held, that the trustees were entitled afterwards to reduce the amount of the annuity. *Marchant v. Lee Conservancy Board*, 9 L. R., Ex. 60; 43 L. J., Ex. 44; 30 L. T. 367—Ex. Ch.

**Valuation of—Provable in Liquidation—Annuity payable to Wife under Separation Deed.**—By a separation deed between a husband and wife the husband covenanted with trustees to pay to them an annuity of 350*l.*, during the joint lives of himself and his wife, for her benefit. The annuity was made determinable in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of anything done, committed, or suffered by the other party after the date of the deed. The annuity was to be proportionally diminished in the event of the wife becoming entitled to any income independent of the husband exceeding 350*l.* a year. After the execution of the deed the husband filed a liquidation petition :—Held, that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation. *Neal, Ex parte, Batey, In re*, 14 Ch. D. 579; 43 L. T. 264; 28 W. R. 875—C. A.

**Principal Grantor—and Surety—distinguished.**—By a deed, in consideration of a sum of money therein stated to be paid to L., E., M., and M., L. granted to D. and H. an annuity for three lives, charged upon his estate; and L., E., M. and M. covenanted to pay the annuity, with a proviso for

repurchase by them or any or either of them. And they executed a joint and several bond and warrant of attorney to confess judgment on the bond, the judgment to be as a further security for the annuity, and to be entered forthwith against L. and E. but not against M. and M. until default in payment, and execution not to be entered on the judgment against L. and E. until the annuity should be forty days in arrear; and E., for further securing the annuity, agreed, in the event of not becoming the purchaser of L.'s estate in twelve months, to assign, at L.'s expense, a mortgage which E. held on it, and also to procure the guarantee of a competent person for payment of the annuity :—Held, that E. was a principal grantor of the annuity, and not a surety. *Hollier v. Eyre*, 9 C. & Fin. 1.

The question, whether the person is principal or surety in the grant of an annuity, is to be determined on the terms of the instruments; no extraneous evidence is admissible for that purpose. *Nichols v. Jones*, 36 L. J., Ch. 554.

**Infancy of Grantor—Effect of.**—The several covenant of a grantor of an annuity is not avoided by the infancy of another who grants in the same deed. *Haw v. Ogle*, 4 Taunt. 10; *S. P.*, *Gillow v. Lillie*, 1 Scott, 597; 1 Bing. N. C. 695; 1 Hodges, 160.

**Cesser on Married Man living apart from Wife.**—A proviso annexed to the grant of an annuity for its cesser on the annuitant, a married man, living apart from his wife, is void. *Nicholl v. Jones*, 36 L. J., Ch. 554.

**Nature of, under a Will—Legacy Duty.**—A lady, who was entitled to one-third share of an annuity charged on land in England for the lives of herself and her two sisters, and the longest liver of the three, died domiciled in Hungary, having by her will given all her personal estate to trustees upon trust :—Held, that the annuity was an estate "pur autre vie, applicable by law in the same manner as personal estate," within the Legacy Duty Act, 36 Geo. 3, c. 52, s. 20, but that though applicable by law in the same manner as personal estate, it continued to be, by the common law of England, real estate, and therefore was not exempted from the payment of legacy duty by the fact of the testatrix having had a foreign domicile. *Chatfield v. Berchtoldt*, 7 L. R., Ch. 192; 41 L. J., Ch. 255; 26 L. T. 267; 20 W. R. 401.

**Liability to Attachment.**—A plaintiff had recovered judgment against the defendant in an action of detinue, which judgment still remained unsatisfied. The defendant, under the will of her deceased husband, was entitled to an annuity for the maintenance of herself and her infant son :—Held, that the annuity was attachable in the hands of the trustees in whom it was vested, subject to an inquiry as to the proportion to be allowed for the maintenance of the son. *Nash v. Pease*, 47 L. J., Q. B. 766.

## 2. CONSIDERATION FOR.

Money lent and paid at different times for the education and advancement of the defendant, is a good consideration for the grant of an annuity. *Kelf v. Ambrose*, 7 T. R. 551.

A covenant by a husband to secure his wife an

annuity during her life, in case she should survive him, is a sufficient consideration for a grant of an annuity from her father. *Draycott, Ex parte*, 2 Glyn & J. 283.

But past seduction and cohabitation are not a good consideration to support an annuity. *Braumont v. Reece*, 8 Q. B. 483; 15 L. J., Q. B. 141; 10 Jur. 284.

A contract to grant an annuity, in consideration of the discontinuance of cohabitation and of the release of an alleged promise of marriage, is enforceable in equity. *Keenan v. Handley*, 2 De G., J. & S. 283; 10 Jur., N. S. 906; 10 L. T. 800; 12 W. R. 1021.

A., having seduced B., and she being enceinte by him, and living with him, he executed to her a deed whereby, in consideration of the release of a debt due by him to her uncle, he granted to her an annuity payable out of lands. The cohabitation continued for fourteen years, when they separated, and A. by testamentary papers alleged (as the fact was) that the consideration stated in the deed was fictitious, and endeavoured to deprive her of her annuity. B. swore that no agreement or stipulation for any future cohabitation was entered into or promised at the date of the deed, which was prepared solely by the solicitor of A., and without her knowledge or solicitation, and without her being aware of the intention of A.—Held, that the onus was on those impeaching the instrument, which was *prima facie* valid, to shew that it was given *ex turpi causa*; and the case being one in which B. would clearly be entitled to a premium *pudicitiae*, the deed was allowed to prevail over volunteers claiming under the will. *Mowell v. Priece*, 1 Jur., N. S. 494.

To an action for arrears of an annuity, it is no answer that it was granted in consideration of cohabitation with the plaintiff, unless she knew of the arrangement. *Daniel v. Landen*, 1 F. & F. 289.

Where a lunatic purchased of an insurance society and paid for two annuities for his life, the society at the time having no knowledge of his lunacy, and the purchase being a transaction in the ordinary course of human life, fair and of good faith on the part of the society, and in the usual course of their business:—Held, that the purchase money could not be recovered from the society by the personal relatives of the deceased lunatic. *Molton v. Camroux*, 4 Ex. 17; 18 L. J., Ex. 356.

### 3. FORFEITURE OF.

**For Return of Consideration—under 53 Geo. 3, c. 141.**—To make the grant of an annuity void under 53 Geo. 3, c. 141, s. 6, there must be such a return of consideration as to shew that the transaction was merely colourable; and therefore where a grantor, having received the consideration money, went with the grantee's son to his (the grantee's) bankers, and took up certain bills, that did not render the transaction void; nor would it have been void if a further sum had been paid for expenses. *Foster v. Bonner*, 8 L. T. 530; 11 W. R. 742.

Where a solicitor purchased an annuity from a person not previously his client, but was himself the only solicitor employed in the transaction, and charged the vendor with the costs of the deed, which were paid out of the purchase-money immediately after the completion of the pur-

chase:—Held, that there was no such retainer or return of any portion of the purchase-money as avoided the annuity. *Edwards v. Williams*, 32 L. J., Ch. 763; 8 L. T. 477; 11 W. R. 561—L. J.

A covenant for payment of an annuity to a feme sole until she should do any act whereby the same, or any part thereof, should be vested, or become liable to be vested, in any other person:—Held, that marriage did not work a forfeiture of the annuity. *Bonfield v. Hassall*, 32 Beav. 217; 32 L. J., Ch. 475; 9 Jur., N. S. 453; 7 L. T. 776; 11 W. R. 297.

**Misstatement as to Age—though not Intentional.**—In 1843, a grant of an annuity was made by the Commissioners for the Reduction of the National Debt, under 10 Geo. 4, c. 24, to a life assurance company on the life of C., who was certified by the company to be of the age of sixty-four years. After his death, in 1869, it was discovered that a misrepresentation of his age had been made by the company:—Held, that the commissioners were entitled to have the contract declared void *ab initio*, although the misrepresentation was not intentional; and the money paid on both sides was ordered to be repaid with interest at 4 per cent. *Att. Gen. v. Ray*, 9 L. R., Ch. 397; 43 L. J., Ch. 478; 29 L. T. 373; 22 W. R. 498; affirming the decision of Hall, V.-C., 43 L. J., Ch. 321; 22 W. R. 361.

The 10 Geo. 4, c. 24, contained a clause empowering the commissioners to rectify any contract in case of the discovery of an accidental error:—Held, that this clause was not compulsory, and that the court had no jurisdiction to interfere with the discretion of the commissioners if they declined to exercise their power of rectification, and claimed to have the contract set aside. *Id.*

**By charging Annuity with Debts—What Amounts to.**—Under a settlement, O. was entitled to a life interest in an annuity, with a clause of forfeiture if he should enter into a composition with his creditors, or charge, assign, or in any manner by way of anticipation, dispose of the annuity, or until anything should happen whereby it should vest or become liable to be vested in another person. O., being indebted to his bankers to a large amount, in pursuance of an agreement with them, gave the trustees a written authority to pay the annuity, as it should become due, to his bankers, who were to apply it partly in payment of interest and in reduction of the debt. It was alleged there was an agreement with the bankers that the authority should be revocable:—Held, that this occasioned a forfeiture of the life interest. *Oldham v. Oldham*, 3 L. R., Eq. 404.

**By Association with a Person specially prohibited.**—Under a proviso that an annuity should cease if a lady should associate, continue to keep company with, or cohabit, or criminally correspond with F.; all intercourse whatever, though the most innocent, is within the terms of the deed. *Dormer (Lord) v. Knight*, 1 Taunt. 417.

**For Defective Memorial—Statute of Limitations.**—The Statute of Limitations is no bar to an action to recover the consideration paid for an annuity, notwithstanding more than six years

have elapsed since the date of the grant, where the grantor (having for some years paid the annuity without objection) has, within six years from the commencement of the action, elected to avoid the annuity by reason of a defective memorial. *Cowper v. Godmond*, 3 M. & Scott, 219; 9 Bing. 748.

A grantee of an annuity, which had been avoided for a defective memorial by the administratrix of the grantor, brought an action against the administratrix to recover the balance of the consideration money:—Held that the consideration money did not become money had and received until the avoidance of the annuity by the administratrix, and that it was therefore not money had and received by the intestate at all. *Churchill v. Bertrand*, 3 Q. B. 568; 2 G. & D. 548; 6 Jur. 855.

**Action by Grantee—When Statute of Limitations no bar to.]**—An annuity was granted in 1826, and paid regularly down to 1829. In 1842, a warrant of attorney by which it was secured was set aside by rule of court, but it did not appear on what ground it was so set aside:—Held, that the grantee was entitled to recover the consideration in an action for money had and received; and that the Statute of Limitations was no bar to such an action. *Huggins v. Coates*, 5 Q. B. 432; D. & M. 433; 13 L. J., Q. B. 46; 8 Jur. 334.

Action for money had and received. Plea, that the defendant granted an annuity in satisfaction. Replication, that it was not duly inrolled; that in an action to recover arrears of the annuity, the defendant pleaded the non-involment, and that the plaintiff elected to make it null and void, and thereupon discontinued:—Held, that the replication answered the plea, as it shewed that the deed had become null by the defendant's act, and consequently the plaintiff might recover the consideration for the annuity. *Turner v. Brown*, 4 D. & L. 201; 3 C. B. 157; 15 L. J., C. P. 223; 10 Jur. 811.

**Conditional Grant—What is a Condition subsequent.]**—A testator bequeathed an annuity or a yearly rent charge to the wife of his son "during her life, or so long as her conduct and behaviour should be discreet, and meet with the approbation of the testator's widow, or which, in case of her death, should be approved of by the survivor or survivors of his trustees." Semble, that this is a condition subsequent, the performance of which need not be averred by the party claiming to be entitled to the annuity. *Wynne v. Wynne*, 2 Scott, N. R. 278; 2 M. & G. 8; 9 D. P. C. 901.

**On Insolvency.]—See BANKRUPTCY.**

#### 4. PROCEEDINGS TO SET ASIDE.

**Application—How made.]**—An application to set aside an annuity must be made *bonâ fide* on behalf of the grantor. *Fuireloth v. Gurney*, 1 D. P. C. 724; 9 Bing. 456, 622; 2 M. & Scott, 822, 827.

To induce the court to set aside a warrant of attorney given to secure an annuity, on the ground of an improper returning or retaining of part of the consideration money, the fact of such returning or retaining must be distinctly and unequivocally sworn to. *Barber v. Thomas*, 7 C. B. 612.

On a bill filed in equity to set aside a deed securing an annuity as being void by reason of the return of the consideration:—Held, that the burthen of proof was on the party to make out that there was a return of the consideration; and that if the consideration was actually paid to the grantor, the application of it by him in discharge of debts really due from him to the grantee would not be a return. *Prenell v. Smith*, 5 De G., Mac. & G. 167; 24 L. J., Ch. 750; 1 Jur., N. S. 1213.

#### 5. ASSIGNMENT OF.

A testator bequeathed an annuity to his son A., payable quarterly, charging it upon his personal estate only, which, subject to the annuity, he bequeathed to his son B., whom he appointed his executor. The will proceeded, "I declare that the receipt of my son A., signed with his own hand after each of the payments shall have become due, shall be the only discharge which my executor shall be bound to accept for each of such payments; and that it shall be lawful for my executor to require that my son shall attend at the Town-hall in Nottingham to receive and give receipts for the annuity, and to suspend the payment until such requisition shall be complied with, from time to time, as my executor shall think proper:—Held, that, assuming the condition to be valid, there was nothing to prevent A. from assigning the annuity to a third person. *Arden v. Goodacre*, 11 C. B. 883; 21 L. J., C. P. 129.

#### 6. CHARGING.

A judge, having made an order, under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, charging an annuity, payable out of the Suitors' Fund by order of the Lord Chancellor, under 46 Geo. 3, c. 128, the court, considering it doubtful whether the order might not be enforced, left the question of its validity open, and discharged a rule nisi to set aside the order. *Witham v. Lynch*, 1 Ex. 391; 17 L. J., Ex. 13.

A judgment debtor was entitled, as sole executor and legatee under the will of B, to the arrears of a government annuity granted for the life of D. He was also entitled, as such executor and legatee, to a government annuity in the name of D., but granted for his own life:—Held, that neither were the arrears, nor was the annuity, chargeable under 1 & 2 Vict. c. 110, s. 14. *Taylor v. Turnbull*, 4 H. & N. 495.

#### When attachable in the hands of Trustees.

—A plaintiff had recovered judgment against the defendant in an action of detinue, which judgment still remained unsatisfied. The defendant, under the will of her deceased husband, was entitled to an annuity for the maintenance of herself and her infant son:—Held, that the annuity was attachable in the hands of the trustees in whom it was vested, subject to an inquiry as to the proportion to be allowed for the maintenance of the son. *Nash v. Pease*, 47 L. J., Q. B. 766.

#### 7. REGISTRATION.

**Effect on Incumbrancer with Notice.]**—A landowner, by deed in February, 1872, charged his land with two life annuities. He subsequently made several mortgages of the property by deeds,

some of which recited the annuity deed. The annuity deed had not been registered as required by 18 & 19 Vict. c. 15, s. 12:—Held, by the Master of the Rolls, that the annuity deed, not being registered, was void as against all the subsequent incumbrancers, whether they had notice of it or not. But held, by the Court of Appeal, that as the 18 & 19 Vict. c. 15, s. 12, was in similar terms to the clauses in the Registry Acts, which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice of it, the legislature must be taken to have used the words in the later act in the sense given to them by those decisions, and that the annuities therefore were valid as against all the subsequent incumbrancers who took with notice of them, and against the trustee in bankruptcy of the grantor, *Greaves v. Tufield*, 14 Ch. D. 563; 43 L. T. 100; 28 W. R. 840—C. A.

### 8. INROLMENT.

It was the duty of the grantee of an annuity to inrol it, and he could not set up the want of inrolment against the grantor, although the statute declared that in case of non-inrolment the deed shall be void to all intents and purposes. *Molton v. Camroux*, 4 Ex. 17; 18 L. J., Ex. 356—Ex. Ch.

A deed did not require inrolment, as a grant of an annuity, unless the alleged grantor was a party to the instrument. *Humphreys v. Jenkinson*, 8 Ex. 684; 22 L. J., Ex. 250.

In an action on a bond for payment of 300*l.*, it appeared that before the marriage of A. with the defendant, the plaintiff, being entitled to the interest of 300*l.* for her life, to which principal A. was entitled on the plaintiff's death, and the plaintiff was entitled in the event of her surviving A., paid the 300*l.* to A. on condition that the defendant and A. would secure to her an annuity equal to the amount of such annual interest, at 4*l.* per cent.; and that, in pursuance of that agreement, they executed the bond as a security for the same:—Held, that this was not an annuity within 53 Geo. 3, c. 141, and therefore the grant of it did not require to be inrolled. *Eratt v. Hunt*, 2 El. & Bl. 374; 22 L. J., Q. B. 348; 17 Jur. 1028.

### 9. STAMPING.

A deed recited that B., who was beneficial lessee of salt works, in order to raise money for carrying them on, had contracted with C. to grant him an annuity of 1,050*l.* in consideration of 14,500*l.*; and that C. being unable to provide the sum himself, had entered into sub-contracts with seven other persons to take portions of the annuity, each advancing a part of the consideration-money; and reciting all these contracts and the payment by the different parties of their proportions of the 14,500*l.*, the deed contained a grant by B. to D. & E. of eight several annuities, making an annuity of 1,050*l.*, in trust for the persons advancing the money, with powers of distress:—Held, that the deed only required a stamp in respect of the aggregate sum paid to B. for the annuity of 1,050*l.*; and that it need not be the aggregate of the stamps required on each of the annuities into which it was divided. *Hogarth v. Penny*, 14 M. & W. 495; 14 L. J., Ex. 346.

### 10. PROCEEDINGS TO ENFORCE PAYMENT.

#### a. By Action.

**For Service.**—An action will lie for an annuity granted by the defendant to the plaintiff in consideration of faithful services for life. *Hope v. Coleman*, 2 Wils. 221.

**When Annuity charged on Lands—Claim for Arrears no Action for Debt.**—An action of debt does not lie for the arrears of an annuity issuing out of lands, and payable to the annuitant for life, although it is not stated in the declaration that the grantor had a freehold in the premises out of which it was payable; as it must be inferred that he had such an interest where nothing appears to the contrary. *Kelly v. Clubbe*, 6 Moore, 336; 3 B. & B. 130.

An action does not lie at common law, nor by 8 Ann. c. 14, for the arrears of an annuity or yearly rent devised payable out of lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout, so long as the estate of freehold continues. *Webb v. Jiggs*, 4 M. & S. 113.

By deed certain lands were granted to H. and the defendant to the use and intent that the plaintiff should receive out of the land a clear yearly rent of 63*l.*, and H. and the defendant covenanted that they would well and truly pay the rent to the plaintiff:—Held, that an action of debt could not be maintained for arrears of the annuity, but that covenant was the proper remedy. *Randall v. Rigby*, 6 D. P. C. 630; 4 M. & W. 130.

#### — Action for Ejectment—when allowed.

Lands were devised in fee, charged with an annuity; and power was given to the annuitant to distrain, if the annuity was in arrear for twenty days after the day of payment, being lawfully demanded; power was also given, if it should be in arrear for forty days, to enter and enjoy the lands, and to take the profits, until the annuitant should be thereby paid and satisfied all the arrears, with all costs, or until the person entitled to immediate possession should pay all the arrears and costs:—Held, that upon the annuity being forty days in arrear, the annuitant might bring ejectment without any demand. *Doe d. Blass v. Horsley*, 1 A. & E. 766.

In ejectment, an annuity deed was relied on; it was not inrolled, but it contained a declaration or covenant by the grantor, that premises on which the annuity was secured were of more than sufficient annual value to answer and pay the annuity over and above all charges:—Held, that it was open to the grantor, notwithstanding, to give evidence that the premises were not of sufficient value to answer and pay the annuity, in order to avoid the deed. *Doe d. Chandler v. Ford*, 5 N. & M. 209; 1 H. & W. 378; 3 A. & E. 649.

**When collusive—Defence of Executors.**—In an action upon an annuity deed:—Held, that executors were estopped from pleading that the deed was made fraudulently and collusively between their testator and the plaintiff for the purpose of multiplying votes; and, subject to a secret trust and condition, that no estate or interest should pass beneficially to the plaintiff by the deed. *Phillpotts v. Phillpotts*, 10 C. B. 85; 20 L. J., C. P. 11.

— **Effect of Right to Distrain.**—The owner of an annuity charged upon land which is sufficient to answer the annuity has a right to distrain for it, and no other remedy. *Sollory v. Leaver*, 40 L. J., Ch. 398.

— **Claim for a Receiver.**—A bequest of an annuity to A. for life, followed by a general devise and bequest of real and personal estate, subject to the testator's debts and legacies, and "the annuity thereinbefore mentioned:"—Held, that the annuity was a legal rent-charge on the real estate, and that A. having his distress at law was not entitled to a receiver for the recovery of arrears. *Sollory v. Leaver*, 39 L. J., Ch. 72.

In **Equity.**—A settlor purported to grant an annuity out of land, and to grant a term of 100 years to a trustee to secure the annuity. At that time the settlor had not the legal estate, which was outstanding in mortgagees. The settlor died, devising to his three sons, who paid off the mortgage, and the mortgagees conveyed the estate to the uses of the will. The devisees then sold to a purchaser without notice of the annuity. The annuitant filed a bill against the trustee of the term and the purchaser to recover the annuity:—Held, that the annuitant had no remedy in equity against the purchaser, but might compel the trustee to proceed at law and establish his title, if any, against the purchaser. *Clemow v. Geach*, 6 L. R., Ch. 147; 40 L. J., Ch. 44.

A father bequeathed his business to trustees, to permit and suffer his son to carry on and manage the business upon condition that he should pay an annuity. The annuity was not paid, and the annuitant filed a bill against the son for the purpose of enforcing the performance of the condition. To this bill the son demurred for want of equity, on the grounds that he was not a trustee for the annuitant, but the beneficial owner of the business, and also for want of parties, submitting that the executor ought to be a party to the suit:—Held, that the condition was equivalent to a trust, and that the executor was not a necessary party. *Rees v. Engelback*, 12 L. R., Eq. 225; 40 L. J., Ch. 382; 24 L. T. 417; 19 W. R. 809.

#### b. By Administration.

**Right of Annuitant to Administer.**—An annuity was by will charged upon the general residue of the testator's estate. The annuity was not in arrear, but accounts, though asked for, had not been supplied until after the issue of the writ, and were still insufficient:—Held, that the annuitant was entitled to administration. *Wollaston v. Wollaston*, 7 Ch. D. 58; 47 L. J., Ch. 117; 37 L. T. 631; 26 W. R. 77.

**Penalties.**—An arbitrator awarded an annuity of 1,200*l.* to be paid by A. to B., and to be secured by the purchase of a government annuity; and in case it should not be secured within two months, a further sum of 100*l.* to be paid monthly until it was secured, as a penalty. A. paid the annuity and penalty for two years until his death. He died insolvent, and a creditors' suit had been instituted for the administration of his estate:—Held, that the annuitant could prove for the annuity and the penalty until the annuity should be secured.

*Parfit v. Chambre*, 15 L. R., Eq. 36; 42 L. J., Ch. 6; 27 L. T. 750; 21 W. R. 50.

The testator had procured some evidence as to the annuitant's age, but it was not perfect. The annuitant was formally required to perfect the evidence, but would not incur the expense unless it was shewn that the annuity would thereupon be purchased:—Held, that this was no default such as to prevent the penalty from running. *Ib.*

#### c. By Distress.

**When right of, joined with other remedies.**—Where an annuity is secured not only by a right of entry and distress, and by a right of entry and perception of the profits given to the grantee, but also by a term limited by the same deed to a trustee for him to raise arrears by devise, sale or mortgage, the rights of entry will not destroy the term, nor will the term defeat the right of entry: both kinds of remedies may co-exist. *Doe d. Butler v. Kensington (Lord)*, 8 Q. B. 430; 15 L. J., Q. B. 153; 10 Jur. 153.

**What may be seized.**—A grantee of an annuity, charged by deed on premises, was empowered, if the annuity should be unpaid for twenty days, to enter upon the premises and distrain, and the distresses there found "to take, lead, seize, drive, carry away and impound, detain and keep, and sell and dispose of the same, in the same manner as the law directs in cases of rent in arrear:"—Held, that the grantee might, under this power, distrain hay and corn in the stack. *Johnson v. Faulkner*, 2 Q. B. 925; 2 G. & D. 184; 6 Jur. 833.

Where, in an avowry, a seisin by the grantor of the annuity of the premises at the time of the grant is stated, if the plaintiff relies on exemption from the distress by virtue of a demise prior to the grant, he must plead it. *Ib.*

**Where not barred by a Demise.**—T., seised for life, granted an annuity to W., and, to secure the annuity, in consideration of money granted, bargained, sold and demised to F. premises for a term of years, upon trust, in case the annuity should be in arrear, to raise the annuity by distress, or by sale or mortgage of the premises: afterwards T. granted another annuity to H., with a power of distress upon the same premises. H. distrained and avowed the taking for arrears of the annuity under his deed: the tenant set up the demise to F., but did not shew under whom he, the tenant, was in possession, or that F. had entered upon the premises, or had elected to treat the demise as operating by the Statute of Uses:—Held, that the demise to F. operated as at common law, and without an entry was no bar to the distress by H. *Miller v. Green*, 2 C. & J. 142; 8 Bing. 92.

**Avowry for Rent—When Condition subsequent—Defence.**—A defendant having avowed for rent in arrear, the plaintiff pleaded, that before the defendant had anything in the premises, F. was seised in fee, and by will gave to his wife an annuity (with power of distress) issuing out of the premises for life, if she should so long continue his widow, and should not live with any other man except a father, or brother or brothers. The plea alleged the death of F., without altering his will, whereby his widow became seised of the annuity, and continued so seised until the

plaintiff, in order to avoid a distress for arrears of the annuity, paid her the rent:—Held, that the condition annexed by the will to the gift of the annuity was a condition subsequent, and therefore it was not necessary that the plea should aver the continuance of the widowhood. *Brooke v. Spong*, 15 M. & W. 153; 15 L. J., Ex. 74.

**Grantee of a Rent-charge—Division of a Demand.**—*Replevin.* Avowry that the avowant was entitled to a rent-charge payable half-yearly, and avows for one half-yearly payment. Plea, that before the seizure the avowant distrained in another part of the lands from which the rent issued for the same half-yearly payment, and took goods enough to satisfy the whole. Replication, that the first distress was for the half-yearly payment distrained for. Held, that the grantee of the rent-charge could not divide the demand, and distrain for part on one part of the land and part on the other. *Owens v. Wynne*, 4 El. & Bl. 579.

**Statute of Limitations.**—An annuity charged upon land by a devise must, since 3 & 4 Will. 4, c. 27, s. 2, be sued or distrained for within twenty years. *James v. Salter*, 3 Bing., N. C. 544; 4 Scott, 168.

#### d. By other Means.

A rent-charge was secured on a house, with power, when in arrear, to enter and receive the rents until all arrears and all costs, charges and expenses occasioned by non-payment should be satisfied. The rent-charge being in arrear, the grantee entered, and the house being greatly dilapidated and untenanted, he repaired and let it:—Held, that the question whether the grantee of the rent-charge was entitled to be allowed the moneys expended by him in repairing the property, was one to be determined at law, and that if he was not entitled thereto at law, neither was he in equity. *Hooper v. Cooke*, 20 Beav. 639; 25 L. J., Ch. 62; 1 Jur., N. S. 949. Affirmed on appeal, 25 L. J., Ch. 467.

#### 11. PAYMENT.

**By Surety for Grantor.**—Where A., as surety for the grantor of an annuity, executed a warrant of attorney to confess judgment, as a collateral security for the payment of the annuity, subject to a defence, that, after any default should be made by the grantor in payment of the annuity, the grantee might sue out execution upon such judgment against A. for such part of the annuity as should be due; and the annuity being in arrear, and the rents of the estates of the grantor, on which it was secured, being unpaid, the agent and trustee of the estates, who negotiated the annuity as between the grantor and grantee, advanced to the latter a sum of money in anticipation of the accruing rents, and deducted and retained a commission charged by him on the receipt and payment of annuities:—Held, that such advance must be considered as a payment on account of the grantor, as the principal; and that, on the insolvency of the latter, and the rents of his estates proving insufficient to satisfy the amount, the grantee could not resort to the surety to recover the whole of the arrears of the annuity due; as, whatever sum he

had received from the agent on account of the annuity, operated to that extent to the extinguishment of the liability of the surety. *Williamson v. Gould*, 7 Moore, 579; 1 Bing. 234.

So where, upon the grant of an annuity, the agent who negotiated it as between the grantor and grantee, was appointed trustee and receiver of the rents of the estates of the grantor on which it was charged, and afterwards advanced money to the grantee out of his own funds, in anticipation of the receipt of the arrears from such estate, and debited the grantee with the usual commission charged by him on annuity payments:—Held, that, upon the eventual failure of the securities and insolvency of the grantor, the agent could not treat such an advance as a mere loan; but that it must be taken as a payment to the grantee in liquidation of the arrears of the annuity. *Carroll v. Gould*, 7 Moore, 621; 1 Bing. 191; *Williamson v. Gould*, 1 Bing. 190; 8 Moore, 109.

**Assignment of Annuity by Grantor—no Release of Sureties.**—Where a grantor of an annuity assigned it to A., together with all the securities, for a valuable consideration, part of which belonged to B., one of the co-sureties for payment of the annuity; and it was agreed by deed, between A. and B., that the former should retain out of the annual payments sufficient to pay him the principal advanced, with interest, and that when he should have been paid principal and interest the annuity should be for the benefit of B.:—Held, that the annuity did not thereby become extinguished, and that the co-sureties remained liable to contribution to A., although B. had assigned stock for further securing the payment of the annuity. *Broune v. Lee*, 9 D. & R. 701; 6 B. & C. 689.

**By Surety—Action for Damages against Grantor—Amount of.**—Where a grantor of an annuity had covenanted with his surety to pay the annuity, but had failed to do so, and the surety had in consequence been compelled to make the payments of the annuity as they fell due:—Held, that in action on the covenant by the surety against the grantor, the jury was at liberty to award as damages for the breach of covenant, not only the amount of the principal sums so paid, but also interest on such principal sums, and that, as the grantor had stated an account allowing interest on some previous payments, at the rate of 5l. per cent., the jury was at liberty to calculate the interest at the same rate. *Petre v. Duncombe*, 20 L. J., Q. B. 242; 15 Jur. 86.

**Interest.**—Interest on arrears of an annuity is valid since the repeal of the usury laws. *Forde v. Tynte*, 2 H. & M. 287; 10 Jur., N. S. 93.

**To Husband of an Annuitant—Invalidity of.**—An annuity was payable under a will to a woman during her life, and a proportionate part computed from the last day of payment to the date of her death was payable to her executors and administrators:—Held, that payment of this proportionate part to the husband of the annuitant, who never took out letters of administration to his wife, was not a good payment in law, and that the amount could therefore be recovered by the son of the annuitant, in administering her estate after the death of the hus-



band, whose executor he also was. *Mitchell v. Holmes*, 8 L. R., Ex. 119; 42 L. J., Ex. 98; 28 L. T. 72; 21 W. R. 412.

**Restraining Payment.**—Under 5 Vict. c. 5, s. 4, an injunction may be obtained in a summary way to restrain the payment of a government annuity. *Watts, Ex parte*, 19 W. R. 400.

## 12. RECOVERY OF ARREARS.

**When not Allowed—Right of Entry Unexercised.**—In order to recover the arrears of an annuity, or of an apportioned part of it, upon the death of a tenant for life who has granted it during his life, with a power of entry, the right of entry must have been actually exercised; and a petition claiming against the estate of the tenant for life, payment of the arrears, and an apportioned part from the date of the death was, in the absence of such entry, dismissed. *Paget v. Anglesey (Marquis)*, 17 L. R., Eq. 283; 43 L. J., Ch. 437; 29 L. T. 721; 22 W. R. 507.

**Action upon a Bill—When right of Distress.**—An uncle bequeathed leasehold property to his nephew, upon condition that he should pay out of the rents and profits an annuity of 70*l*. The annuity was paid for sixteen years, but for the half-yearly sum of 35*l*., due on the 15th of August, 1872, the nephew gave a cheque which was dishonoured, and the annuitant filed a bill on the 25th of November, 1872, for the sale of the property and for a receiver:—Held, that as the estate was amply sufficient to answer the annuity, he might have recovered the arrears by distress, or might have brought an action upon the dishonoured cheque; and the bill was dismissed. *Kelsey v. Kelsey*, 17 L. R., Eq. 495; 30 L. T. 82; 22 W. R. 433.

**Appointment of a Receiver—Discretion of Court.**—The court, in the exercise of its concurrent jurisdiction, decreed the appointment of a receiver to raise the arrears of an annuity charged on lands held for a term of years, where there were questions which could at least be raised in a court of law, which might interfere with the right of the plaintiff to recover. *Beamish v. Austen*, 9 Ir. R., Eq. 361.

**Claim by cestui que trust—Lapse of Time no bar—Pension.**—The Bombay Civil Fund was founded for the purpose of giving retiring annuities and pensions to the families of civil servants; it consisted of a government grant and a compulsory levy on the salaries of members. The contributions were received by government, and constituted a floating debt from the government; the fund was managed by a committee. In 1826, resolutions were passed, subject to the approval of the East India Company, giving further benefits to the widows and children of annuitants upon payment of one per cent. on the annuities. The approval of the East India Company was given in January, 1830. F., a subscriber to the fund, retired on an annuity in May, 1830, and paid what was necessary under the old rules to entitle him to the annuity. In June, 1830, the resolutions were again suspended. In February, 1834, F.

died, without having made any payment in respect of, or claim to be entitled to the benefit of, the resolutions. The resolutions were afterwards approved. In 1867, a bill was filed by his daughter and representative of his widow against four of the committee, their secretary, and the Secretary of State for India, seeking to have the benefit of the resolutions of 1826, and of an annuity under the old rules:—Held, that they were not entitled to the benefit of the resolutions of 1826, F. never having paid anything in respect of or claimed to be entitled to the benefit of them. *Edwards v. Warden*, 1 App. Cas. 281; 45 L. J., Ch. 713; 35 L. T. 174. Affirming 9 L. R., Ch. 495; 43 L. J., Ch. 644; 30 L. T. 540; 22 W. R. 669.

But held (reversing the Court below), that they were not mere trustees for the association, but trustees properly so called, and that the members of the fund were the beneficiaries, so that the defence of the Statute of Limitations could not be set up against a claimant on the fund merely on account of lapse of time. *Id.*

**Charge on Land—Payment of Rent, when to be made.**—When a testator charges an annuity on land with the ordinary power of distress and entry in the event of the annuity being in arrear, the annuitant must wait for payment of the annuity until the first rent day which occurs after the day fixed by the testator for payment of an instalment of the annuity, and is not entitled to require that any prior rent should be kept in hand in order to answer the instalment. *Masluck v. Pedley*, 19 L. R., Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155.

A testator charged his estate in Jamaica with the payment of an annuity. The estate fell into a ruinous condition in the annuitant's lifetime, and yielded no income till seventeen years after her death, at which time the sum of 2,150*l*. was due to her in respect of arrears of the annuity:—Held, that the first receipts, when the estate began again to be productive, were payable to the legal personal representative of the annuitant in respect of such arrears. *Pitt v. Lord Daer*, 3 Ch. D. 295; 45 L. J., Ch. 796; 24 W. R. 943.

By the law as established before the Judicature Acts, 1873, 1875, no action was maintainable in the courts at Westminster to enforce payment of arrears of a freehold rent-charge issuing out of lands situate abroad, although both parties were resident in the jurisdiction. *Whitaker v. Forbes*, 1 C. P. D. 51; 45 L. J., C. P. 140; 33 L. T. 582—C. A.

**Interest on Arrears.**—Arrears of an annuity charged on corpus do not carry interest, and there is no difference between annuities charged on corpus and annuities charged on income in this respect. *Wheatley v. Davies*, 24 W. R. 818.

## 13. MERGER AND EXTINGUISHMENT.

### Devise to Annuitant—Merger not Presumed.]

—A. devised to B., a married woman, a reversionary interest in an estate, and bequeathed to her for life and for her separate use, an annuity charged on the same estate, and to commence immediately. A. also bequeathed other annuities similarly charged. At the death of the testatrix, the prior limitation having failed, B. became tenant for life in possession. She afterwards became discoverte, and the property having

become insufficient to pay all the annuities :—Held, that a merger of her annuity in her life interest, by operation of law, would not be presumed. *Byam v. Sutton*, 19 Beav. 556.

**When Annuity a Satisfaction of Debt.]—**A husband, on separating from his wife, covenanted by the deed of separation to pay to a trustee for her an annuity of 52*l.* per annum, payable on the 1st May, the 1st August, the 1st November, and the 1st February in every year, such annuity to be for her separate use, &c. He afterwards devised specific real estate to trustees, upon trust, out of the rents, to pay his wife 52*l.* per annum, by equal quarterly payments on the 1st February, the 1st May, the 1st August, and the 1st November in each year. The will contained no direction for payment of debts :—Held, that the annuity given by the will was a satisfaction of the debt created by the deed of separation. *Atkinson v. Littlewood*, 18 L. R., Eq. 595 ; 31 L. T. 225.

#### 14. REDEMPTION.

**Insurance of Grantor's Life—Re-purchase—Right to Policy.]—**The grantee of an annuity for the life of the grantor, made in consideration of money, and repurchaseable on repayment, insured the grantor's life in the amount of the purchase-money, the annuity having apparently been calculated so as to cover the amount of premium, as well as interest at 5*l.* per cent. on the purchase-money, and the grantor covenanted to repay to the grantee any additional rate of premium which might be required by reason of his going beyond the limits of the policy. On the repurchase of the annuity :—Held, that the policy belonged to the grantee and not to the grantor. *Knor v. Turner*, 5 L. R., Ch. 515 ; 39 L. J., Ch. 750 ; 23 L. T. 227.

Held, also, that the transaction did not constitute the relation of debtor and creditor between the parties. *Ib.*

The grant of an annuity with a right of repurchase on payment of the consideration money, and all arrears of the annuity, does not create the relation of debtor and creditor so as to give the grantor, upon repurchase of the annuity, the right to a policy effected by the grantee on the life of the grantor as a security or indemnity ; or, after the death of the grantor, to entitle his representatives to the surplus proceeds of the policy after satisfaction of the consideration money and all arrears of the annuity. *Preston v. Neale*, 12 Ch. D. 760 ; 40 L. T. 303 ; 27 W. R. 642.

In 1822, in consideration of 600*l.*, A., and B., his wife, granted to C. an annuity of 64*l.* 7*s.* 6*d.* for ninety-nine years if B. should so long live. By the same deed the rents of copyhold property to which B. was entitled, were granted during her life to C., with a covenant to surrender from and after B.'s death to the use of C., and power to C. to sell in case the annuity should be in arrear. The deed contained provisions that any extra premiums to become payable at the office where B.'s life should be insured, should be paid by A., and a power to A. to repurchase the annuity at any time after three years on payment to C. of 600*l.* and all arrears of the annuity. On the day before the date of the deed by which the annuity was granted, C. insured B.'s life for 600*l.*

at an annual premium of 16*l.* 7*s.* 6*d.* The copyholds were surrendered, and C., by himself or his representatives since his death, had been in possession since 1828. A. died in 1858, and B. in 1869 :—Held, as between the representatives of C. and B., that the surplus proceeds of the policy effected by C. on B.'s life, after satisfaction of the 600*l.* and all arrears of the annuity, belonged to the representatives of C. and not of B. *Ib.*

A., in consideration of 200*l.*, granted to B. an annuity of 21*l.* 9*s.* 2*d.*, being 8*l.* per cent. upon the loan, and 5*l.* 9*s.* 2*d.* for the premium on an insurance of A.'s life. To secure the annuity, A. and three sureties gave a bond for the payment of the same, and of any additional premiums which might be occasioned by A.'s going abroad ; and in the bond provision was made for the repurchase of the annuity on notice. The insurance was effected in B.'s name. Upon the repurchase of the annuity :—Held, that the policy belonged to B. *Gottlieb v. Cranch*, 4 De. G., Mac. and G. 440 ; 1 Eq. R. 341.

But where a grantee of an annuity insured the lives for which the annuity was granted, without there being any stipulation on the subject between him and the grantor :—Held, that the grantor, on redeeming, had no right to have the policy delivered to him. *Lancaster, Ex parte*, 4 De G. & S. 524.

**What Amounts to—Bond given by a Wife.]—**Action upon a deed dated in April, 1797, by which a husband covenanted with A. to pay his wife, during her life, into her own proper hands, for her separate use, or to such persons as she should, by note in writing signed by her, appoint, an annuity of three guineas per week, with a proviso for redemption, upon payment to her for separate use of 1,000*l.*, and all arrears. In November, 1797, a bond and warrant of attorney for 1,000*l.* were given to B. by the husband ; and, in his answer to a bill filed by him in 1860, to restrain proceedings upon them, the covenantee admitted, that, as to 1,000*l.*, the consideration was the sum agreed to be paid for redemption of the annuity ; and upon his death a bond and warrant of attorney were found in the husband's possession. The husband having pleaded that the annuity was redeemed and the arrears paid, the judge told the jury that the absence of proof of any payment or demand for thirty-nine years was evidence to support this plea ; and that, if the bond and warrant of attorney were given by the authority of the wife for the 1,000*l.*, for her own use, then the payment of them was a sufficient payment. Upon a bill of exceptions tendered by the plaintiff, on the ground that the wife had not power to give legal effect to the giving of such bond by her concurrence ; and that the giving such concurrence and the subsequent payment would not be a redemption of the annuity :—Held, that the direction was right. *Bostock v. Hume*, 8 Scott, N. R. 590 ; 7 M. & G. 893 ; 13 L. J., C. P. 225.

## APOTHECARY.

See MEDICAL PRACTITIONER.

## APPEAL.

- I. TO HOUSE OF LORDS.
- II. TO COURT OF APPEAL.
- III. FROM JUDGE IN CHAMBERS.
- IV. FROM MASTER TO JUDGE IN CHAMBERS.
- V. FROM CHIEF CLERK TO JUDGE.
- VI. FROM INFERIOR COURTS.
- VII. FOR COSTS.—*See post*, COSTS.
- VIII. BANKRUPTCY APPEALS.—*See post*, BANKRUPTCY.
- IX. FROM ADMIRALTY COURTS TO PRIVY COUNCIL.—*See post*, SHIPPING.
- X. TO PRIVY COUNCIL.—*See post*, COLONY.
- XI. FROM WRECK COMMISSIONER.—*See post*, SHIPPING.
- XII. UNDER COMPANIES ACTS.—*See* COMPANY.
- XIII. TO LOCAL GOVERNMENT BOARD.—*See* HEALTH.
- XIV. BEFORE JUDICATURE ACTS.—*See* ERROR.

### I. APPEAL TO HOUSE OF LORDS.

**Unaltered by Judicature Act.**—The practice with regard to appeals to the House of Lords is unaltered by the Judicature Acts and Rules. *Justice v. Mersey Steel and Iron Company*, 1 C. P. D. 575; 24 W. R. 955—C. A.

**Staying Execution.**—Therefore, on an appeal from a decision of the Court of Appeal in an action attached to one of the common law divisions of the High Court, the appellant cannot obtain a stay of execution of the judgment pending the appeal, unless he gives bail in error, as provided by the C. L. P. Act, 1852, s. 151; and on doing that he is entitled to a stay of execution as a matter of right. *Ib.*

An application to enlarge the time for giving bail in error must be made, not to the Court of Appeal, but to that division of the High Court to which the action is attached. *Ib.*

**Point of Law—Staying Trial of Issues of Fact pending Appeal.**—When an appeal upon a point of law is allowed, and the case is remitted to the court below for trial on the issues of fact, the Court of Appeal will not, as a general rule, stay the trial of the issues of fact pending an appeal to the House of Lords on the point of law. *Palmer's Application*, *In Re*, 22 Ch. D. 88; 52 L. J., Ch. 224; 48 L. T. 52; 31 W. R. 33—C. A.

**General Rule.**—Where an unsuccessful party appeals, the court will in ordinary cases stay execution pending the result of the appeal,

if the court sees that the application is made bona fide, and that no damage can result, on the appellant's lodging in court the amount due under the judgment, and paying the respondent's costs, with an undertaking from the respondent's solicitor to recoup the appellant if the appeal prove successful. But where an order was made in an English court for alimony, and an action was brought in Ireland for 880*l.* arrears thereof, and the validity of the order was not questioned, but only the right to bring the action on it, and 2,200*l.* further arrears of alimony was due, the court refused an application to stay execution. *Nunn v. Nunn*, 8 L. R., Ir. 304—C. A.

Proceedings on an order to pay money and costs stayed pending an appeal, on payment of the money by the defendant to the plaintiff, the plaintiff giving security for repayment, or if the plaintiff preferred it, on payment into court, the costs to be paid to the plaintiff's solicitor on his undertaking to repay them if directed. *Merry v. Nickalls*, 8 L. R., Ch. 205; 42 L. J., Ch. 479; 28 L. T. 296; 21 W. R. 305.

When a decree has been made for the payment of money, it is the general rule to stay proceedings pending an appeal, when the party against whom the decree is made pays the money into court, and the appeal is not frivolous. *Truche v. Metropolitan Railway Warehouse Company*, 40 L. J., Ch. 496—L. J.

A decree was made for the payment to two plaintiffs of 2,000*l.* One was abroad. The defendants appealed from the decree, and stated that a queen's counsel had advised that the appeal would succeed:—Held, that it was a matter of course to stay proceedings upon the defendants paying the money in court. *Ib.*

**Staying Execution to give Party opportunity of deciding as to Appeal.**—An application to stay execution will not be granted by the Court of Appeal in order to give a party who is dissatisfied with the amount of damages assessed by a jury an opportunity to decide whether he will appeal or not to the House of Lords. *Webber v. London, Brighton and South Coast Railway Company*, 51 L. J., Q. B. 154—C. A.

**Conditions—Costs of Sale and Re-investment.**—An order was made by the Court of Appeal directing a sum of consols in court to be sold and the proceeds paid to B. Y. appealed to the House of Lords, and after sale but before payment out applied to stay proceedings pending the appeal, asking to have the proceeds of the sale of the fund re-invested and retained in court:—Held, that, as a condition of obtaining the order, Y. must undertake that in case his appeal was unsuccessful, he would make good the difference between the income actually produced by the fund and interest at 4*l.* per cent. per annum, and would also pay the costs of the sale and re-investment. *Brewer v. Yorke*, *Yorke v. Brewer*, 20 Ch. D. 669; 31 W. R. 109—C. A.

**Preventing Appeal from being Nugatory, if Successful.**—Where unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the court, in ordinary cases, to make such order for staying proceedings under

the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the court will not interfere if the appeal appears not to be *bonâ fide*, or there are other sufficient exceptional circumstances. And when the court makes an order to stay proceedings pending an appeal it will put the appellants on terms to speed the appeal; and it will not interfere with the execution of the order of the court below respecting costs, except to put the solicitor who is to receive the costs upon an undertaking to refund them if required to do so. *Wilson v. Church*, 12 Ch. D. 454; 28 W. R. 284—C. A.

—**Special Circumstances.**—In a suit by a bondholder of a railway company, on behalf of himself and other bondholders, against the company, claiming that the money advanced should be returned, instead of its being applied in the undertaking, judgment was given for the plaintiff with costs, and it was ordered that the money should be forthwith distributed among the bondholders. The bonds were payable to bearer, and the bondholders were very numerous and many were residing abroad. On the other hand the defendant company was insolvent, and it was very doubtful whether, if the undertaking was carried on, the shareholders would get any benefit from it. The defendants appealed, and moved to stay proceedings pending the appeal:—Held (dissentiente, James, L. J.), that there were sufficient grounds to induce the court to stay the distribution of the fund pending the appeal; and that the special circumstances of the company were not sufficient to prevent the court from interfering. *Id.*

The holder of a life policy filed a bill against the company to recover the amount insured. The Master of the Rolls decided in his favour, but ordered the money to be paid into court, pending an appeal by the company. The Court of Appeal in Chancery reversed the decree, and dismissed the bill with costs. The plaintiff then appealed to the House of Lords. The court refused to order the money to be retained in court pending the appeal. *Atherton v. British National Assurance Company*, 5 L. R., Ch. 720; 39 L. J., Ch. 726; 18 W. R. 1012.

A decree was made that accounts should be taken, and that the defendants should pay what should be found due to the plaintiffs, and also the costs of the suit. The defendants moved to stay the execution of the decree pending an appeal to the House of Lords, on the ground that the plaintiffs were out of the jurisdiction. The court refused to stay the taking of the accounts or the taxation of the costs, and directed that the costs, when taxed, should be paid to the plaintiffs' solicitor on his giving satisfactory security for their repayment in case of a reversal of the decree; but the plaintiffs not being able to give security for the repayment of the money due to them, it was ordered that the amount should be paid into court, the defendants undertaking to abide by such order as might be made as to interest; the costs to abide the result of the appeal. *Burdick v. Garrick*, 5 L. R., Ch. 453; 39 L. J., Ch. 661; 22 L. T. 502; 18 W. R. 530.

**Decree Nisi—Appeal direct to the House of Lords no Stay of Proceedings.**—A respondent appealed from a decree nisi direct to the House of Lords, on the ground that it was against the weight of evidence. While the appeal was still

undisposed of, the decree nisi was, after the requisite lapse of time, pronounced absolute, notwithstanding the appeal. The latter being an improper course, is not to be allowed to operate as a stay of the proceedings in the court below. *Robertson v. Robertson and Favagrossa* (No. 1), 44 L. T. 253.

—**For Recovery of Costs incurred in Court below.**—The court will not, pending an appeal to the House of Lords, stay proceedings for the recovery of costs already awarded to the respondents, although the appellant offer to lodge the amount of such costs in court, on an allegation of the insolvency of the respondents, but will require the respondents' solicitors to give an undertaking to refund any costs paid in the event of the further appeal proving successful. *Att.-Gen. (Ireland) v. Bray Township Commissioners*, 5 L. R., Ir. 523.

—**Undertaking as to Costs.**—On motion to restrain the defendants and their solicitors from enforcing payment of costs, unless and until such solicitors should have given their personal undertaking to return to the plaintiff's solicitor the amount of any such costs which might be paid in case an appeal to the House of Lords proved successful; the Court of Appeal ordered the personal undertaking to be given. *Polini v. Gray, Sturla v. Freccia*, 28 W. R. 360—C. A. See *Wilson v. Church*, *supra*.

A plaintiff, whose bill had been dismissed with costs, applied for an order to stay proceedings pending an appeal by him to the House of Lords, and that the sheriff, who had seized his furniture at the instance of the defendant in part payment of the costs, might be ordered to withdraw, the plaintiff offering to pay the value of the furniture into court at once and the balance of the costs within ten days:—Held, that the whole costs must be paid to the defendant's solicitor on his personal undertaking to refund them if the appeal should succeed, and that the plaintiff must also pay the costs of the sheriff and of the application to stay proceedings. *Morgan v. Elford*, 4 Ch. D. 352; 25 W. R. 136—C. A.

The recovery of costs payable under an order will not be stayed pending an appeal to the House of Lords, if the solicitors to whom they are payable give their personal undertaking to refund in case of the order being reversed. Payment of costs will not be stayed on the ground that another proceeding in the same action is pending under which costs may become payable to the applicant. *Grant v. Banque Franco-Egyptienne*, 3 C. P. D. 202; 47 L. J., C. P. 455; 38 L. T. 622; 26 W. R. 669—C. A.

#### **Injunction pending Appeal to House of Lords.]**

—A decree was made in three suits for the administration of the personal estate of an intestate, directing the usual inquiry as to her next of kin. A certificate was made finding five persons of the name of F., who were resident abroad, to be the next of kin, and an order was made for distribution of the fund in court among them. S., who had not been a party to the proceedings, applied by motion to stay the distribution of the fund, alleging herself to be next of kin. The Vice-Chancellor suspended the giving out of the order, and directed his chief clerk to inquire whether S. had made out a *prima facie* case, and the chief

clerk finding that she had not, the Vice-Chancellor directed the order to be given out without prejudice to any independent proceeding by S. Four of the five shares were at once transferred to four of the persons found entitled; the fifth remained in court. Two of the shares which had been transferred were sold out, and the proceeds received by the vendors. S. then commenced an action, and obtained in it an order granting an injunction to restrain any dealing with the three shares which had not been sold, and directing an inquiry who were the next of kin, and this order was subsequently directed to be taken as made in the three suits as well as in the action. The chief clerk again found the F. family to be the next of kin. The action and a summons to vary the certificate were heard before the Vice-Chancellor, who dismissed the summons and the action, but continued the injunction in the three causes until further order. S. appealed, and the Court of Appeal affirmed the decision of the Vice-Chancellor dismissing her bill, but S. being about to appeal to the House of Lords:—Held, that as, if S. ultimately succeeded in the House of Lords, her success would be useless unless the fund was protected in the meantime, the injunction ought to be continued pending the appeal. *Polini v. Gray, Sturla v. Freccia*, 12 Ch. D. 438; 49 L. J., Ch. 41; 40 L. T. 861; 28 W. R. 360—C. A.

**Staying Proceedings pending Appeal—Application should be made to Court of Appeal.**—An application to stay proceedings under an order of the Court of Appeal, pending an appeal to the House of Lords, must be made to the Court of Appeal, and not to the division of the High Court to which the action is attached. *The Khedive*, 5 P. D. 1; 41 L. T. 392; 28 W. R. 364—C. A.

**Costs of Application to Stay.**—The costs of an application to stay the execution of a decree pending an appeal are in the discretion of the court. The proper rule is, that they should ordinarily abide the result of the appeal. *Burdick v. Garrick*, 5 L. R. Ch. 453; 39 L. J., Ch. 661; 22 L. T. 502; 18 W. R. 530.

But in another case the applicant was ordered to pay the costs of the application. *Merry v. Nickalls*, 8 L. R., Ch. 205; 42 L. J., Ch. 479; 28 L. T. 296; 21 W. R. 305.

Compare cases *post*, APPEAL TO COURT OF APPEAL.

**Interfering with Discretion of Court below.**—In a question arising on orders and rules made under the Judicature Acts in matters where courts or judges are to exercise a discretion, the house is unwilling to disturb the orders made, unless for strong substantial reasons; but the principle on which such orders ought to be made, may furnish those reasons. *Wallingford v. Mutual Society*, 5 App. Cas. 685; 50 L. J., Q. B. 49; 43 L. T. 258; 29 W. R. 81—H. L. (E.)

When a plaintiff, after an order to file the usual affidavit as to documents, persisted in not filing a sufficient affidavit, the house sustained the decree of the Court of Chancery, fixing a time at which the bill should be dismissed, and the money in court repaid to the defendant who had paid it in. The house will not interfere with the discretion of the judges who have had the administration of the suit in such a matter as the time to be fixed for dismissal under cir-

cumstances like the above. *Republic of Liberia v. Roy*, 1 App. Cas. 139; 45 L. J., Ch. 297; 34 L. T. 145; 24 W. R. 967—H. L. (E.)

**Alteration in Decree—Applicant not Appellant.**—The House of Lords will not, on the application of a person not an appellant against a decree, make an alteration in it. If a change in the details of the decree should be necessary, his application for it should be made in the court below. *Yates v. University College, London*, 7 L. R., H. L. 438; 32 L. T. 43; 23 W. R. 408.

**Evidence.**—The House of Lords will not, on appeal, admit evidence not presented in the court below. *Banco de Portugal v. Waddell*, 5 App. Cas. 161; 49 L. J. Bk. 33; 42 L. T. 698; 28 W. R. 477—H. L. (E.)

**Printing Evidence.**—Suggestions as to printing the evidence when a point of law has previously to be considered. *Metropolitan Asylum District v. Hill*, 5 App. Cas. 582—H. L. (E.)

**Decree of House of Lords made an Order of Chancery Division.**—An application to have an order of the House of Lords, reversing a decision of the Court of Appeal, made an order of the Chancery Division, should be made to the court of first instance, where the decree appealed from was originally made. *British Dynamite Company v. Krebs*, 11 Ch. D. 448; 48 L. J., Ch. 800; 40 L. T. 514; 27 W. R. 575.

**Leave to Appeal—When Granted.**—The power given to the Court of Appeal to give leave to appeal to the House of Lords should be exercised in proper cases. Where a trustee in bankruptcy wants to appeal at the cost of the estate, and thereby the division of the estate is delayed, an appeal should not be encouraged unless there is a very difficult question of general law which it is desirable that the House of Lords should settle. *Allen, Ex parte, Funnell, In re*, 20 Ch. D. 350; 51 L. J., Ch. 728; 47 L. T. 68—C. A.

I have often said that the jurisdiction to give leave to appeal is given to be exercised. Leave is to be given if the case is one of such difficulty that the court think it proper that it should be carried to the House of Lords. We ought to protect the House of Lords from appeals on the construction of an Act of Parliament, where the construction of the Act of Parliament is tolerably plain. *Medley v. Medley*, 51 L. J. P. 77; 47 L. T. 559—*per* Jessel, M. R., and Lindley, L. J.

If nothing new has been decided, leave will not be given. *Dyke, Ex parte, Morrish, In re*, 22 Ch. D. 429; 52 L. J., Ch. 576.

**Leave to Appeal to House of Lords in Bankruptcy Cases.**—*See post*, BANKRUPTCY.

**Jurisdiction of High Court.**—The rule of the House of Lords being that in default of papers being lodged by an appellant, "the case stands dismissed," a case can only be reinstated in the list by special application to the House of Lords. The High Court has no jurisdiction in the matter of a particular issue so disposed of by the rules of the House of Lords, although the original cause of action may still be within the jurisdiction of the High Court. *Mercier v. Williams, Williams v. Mercier*, 32 W. R. 152.

**Costs, when Allowed.]**—Where an appellant merely contends for the point on which he eventually succeeds, he has a fair case to ask for his costs of the appeal. But where an appellant launches an appeal asking for a much wider measure of relief than that to which he is entitled, the House of Lords will leave each party to bear their own costs. *Elliot v. Rokeby* (Lord), 7 App. Cas. 46; 51 L. J. Ch. 249; 45 L. T. 769; 30 W. R. 249—H. L. (E.)

Although the rule of the House of Lords, where the decree appealed from is reversed or varied, is that the respondent is not fixed with the costs of the appeal, yet where an appellant had offered to withdraw the appeal and to pay the respondent's costs on condition that the respondent submitted to a variation in the decree to which the house held that he was entitled, and the respondent refused to consent to the proposal, the house marked its disapproval of the respondent's conduct by directing him to pay all the costs incurred after the date of the making of the offer by the appellant. *De Vitre v. Betts*, 6 L. R., H. L. 319; 42 L. J. Ch. 841; 21 W. R. 705.

When the decision of the court below is confirmed on appeal to the House of Lords the respondent is entitled to costs, although the ground of the decision on appeal is different from that in the court below. *Peck v. Gurney*, 6 L. R., H. L. 377; 43 L. J., Ch. 19; 22 W. R. 29.

The practice in the House of Lords and in the Exchequer Chamber is never to give a successful appellant his costs. In the Privy Council the rule is the opposite way. In appeals from sessions the costs are given, because in such small matters, unless the successful appellant could get his costs, his right of appeal would practically be taken away. The principle, however, upon which costs are not awarded, is that a suitor ought not to pay for the errors of a judge. *Denny v. Hancock*, 40 L. J., Ch. 193, 194.

The House of Lords having reversed, without saying anything as to costs, a judgment of the Exchequer Chamber which affirmed a decision of the Court of Common Pleas in favour of the defendant, that court refused an application by the plaintiff to have his costs in the Exchequer Chamber granted to him. *Gann v. Johnson*, 6 L. R., C. P. 461; 40 L. J., C. P. 227; 24 L. T. 753; 19 W. R. 952.

**—Prolix Appendix.]**—The costs of the shorthand writer's notes of the argument contained in an appendix, and all allowances for drawing an appendix were disallowed where the introduction of them was considered to be decidedly unnecessary and improper. *Singer Manufacturing Co. v. Loog*, 8 App. Cas. 27—H. L. (E.)

**Practice where Appeal dismissed without Costs.]**—If security has been given, the persons who gave the security will have to pay the costs, and they must get them in the best way they can. If a petition presented by an appellant prays that the usual security for costs may be dispensed with, and the agent of the respondent consents thereto and the order is made as prayed, the order of the House will be without costs. *Harvey v. Farnie*, 8 App. Cas. 64; 52 L. J. P. 42; 48 L. T. 279; 31 W. R. 438—H. L. (E.)

**—When Respondents not entitled to.]**—Respondents are not entitled to their costs in an appeal, if the alteration made in the interlocutor of the court below was wanted to give complete security to the interests represented by the appellants, and if the attitude of both sets of respondents before action brought was such as to justify the institution of some action for the purpose of obtaining the declaration obtained. *Paterson v. St. Andrews (Proctor)*, 6 App. Cas. 833—H. L. (Sc.)

**—When Votes equal.]**—In cases of appeal to the House of Lords, there are always two motions before the House, one, that the judgment under appeal be reversed; the other, that the judgment under appeal be affirmed and the appeal dismissed with costs. When the votes are equal upon the first motion, the motion is lost. The second motion is not put as it is assumed that it would be lost also. The judgment appealed from is therefore affirmed, but no costs are given. *Pryce v. Monmouthshire Railway & Canal Company*, 4 App. Cas. 197; 49 L. J., Ex. 130; 40 L. T. 630; 27 W. R. 666—H. L. (E.)

**—Interest on.]**—When the judgment of a superior court is affirmed with costs, in the Exchequer Chamber and such decision of the Exchequer Chamber is subsequently affirmed on appeal by the House of Lords, who order the costs incurred by the successful party, in respect of the appeal, to be paid to him, "the amount thereof to be certified by the clerk of parliament," the superior court has power to allow interest only on the sum for which judgment was originally signed in such superior court, for such time as execution has been delayed by the proceedings in the appeals to the Exchequer Chamber and the House of Lords, that is, for the period between the date of the original judgment and its final affirmance by the House of Lords; but it has no jurisdiction or power to give interest on the costs incurred in such appeal. *Lancashire and Yorkshire Railway Company v. Gidlow*, 9 L. R., Ex. 35; 43 L. J., Ex. 1; 29 L. T. 399; 22 W. R. 17.

**—Right to Recover.]**—To an action for a debt, the defendants pleaded as a set-off that the plaintiffs were the promoters of a private bill within 28 & 29 Vict. c. 27; that the defendants were petitioners against the bill before a committee of the House of Lords; that the committee decided that the preamble of the bill was not proved; that the defendants were vexatiously subjected to expense in defending their rights proposed to be interfered with by the bill, and awarded costs, and that the taxing-officer duly delivered a certificate, and averred generally performance of conditions precedent:—Held, that the moment the costs were taxed, in pursuance of the report, a debt from the defendants to the plaintiffs was created; that it was not necessary to aver a demand, in pleading the debt as a set-off; and that, even if it was necessary, it was sufficiently averred in the allegation of performance of conditions precedent; that the plea implied averred all the matters necessary to sustain it, such as the unanimity of the report of the committee, and that the certificate was conclusive evidence of the defendant's right to recover the amount named in it. *Newry and Armagh Railway Company v. Ulster Railway Company*, 4 Ir. R., C. L. 62.

— **Staying Payment of, pending Appeal.**—The rule that the payment of costs ordered to be paid will not be stayed, pending an appeal to the House of Lords, if the solicitors receiving such costs personally undertake to repay the same in case the order be reversed, will also be applied to cases where there is a bona fide intention to appeal to the House of Lords, and an undertaking is given to present an appeal within a short date. *Grant v. Banque Franco-Egyptienne*, 3 C. P. D. 202; 47 L. J., Ch. 455; 38 L. T. 662; 26 W. R. 669—C. A.

The fact that there are other proceedings pending in the same action under which costs might become payable to the party ordered to pay costs, and might be set off against the costs ordered to be paid, is no ground for staying the order directing payment of costs. *Ib.*

When a bill has been dismissed with costs the court will not stay taxation and payment of costs pending an appeal to the House of Lords. *Beattie v. Ebury (Lord)*, 28 L. T. 458.

**Action on Judgment of House of Lords for Costs.**—An action lies on the judgment of the House of Lords ordering the appellant in an unsuccessful appeal to that House to pay the costs of such appeal to the respondent. *Marbella Iron Ore Company v. Allen*, 47 L. J., C. P. 601; 38 L. T. 815.

## II. APPEAL TO COURT OF APPEAL.

1. *Jurisdiction of Court of Appeal.*
2. *In what Cases Appeal lies.*
3. *Parties to Appeal.*
4. *Time within which Appeal must be brought.*
  - a. *In what Cases.*
  - b. *From what Period Time Runs.*
  - c. *Extension of Time.*
  - d. *Other Points.*
5. *Notice of Appeal.*
6. *Setting down Appeal for Hearing.*
7. *Security for Costs.*
8. *Staying Proceedings pending Appeal.*
9. *Evidence on Appeal.*
  - a. *Fresh Evidence.*
  - b. *In other Cases.*
10. *Hearing of the Appeal.*
11. *Costs of the Appeal.*
12. *In Chancery before Judicature Acts.*

### 1. JURISDICTION OF COURT OF APPEAL.

**Original Petition.**—The Court of Appeal has no jurisdiction to hear an original petition. *Dunraven and Aberdare Coal and Iron Company, In re*, 33 L. T. 371; 24 W. R. 37—C. A.

**Transfer of Action.**—The Court of Appeal has no jurisdiction to order the transfer of a suit instituted in the Court of Chancery before the Judicature Acts came into operation from the court of one vice-chancellor to that of another. The Lord Chancellor alone has jurisdiction to make such an order. *Hutley, In re, Deards v. Putt*, 33 L. T. 337—C. A.

The Court of Appeal has no jurisdiction to make an order for the transfer of a matter commenced by petition under the statutory jurisdiction of the Court of Chancery before the

Judicature Act, 1873, came into operation, from one judge to another. *Boyd, In re*, 1 Ch. D. 12—C. A.

**No Real Question in Dispute—Interlocutory Application.**—Where there is no real question at issue between a plaintiff and defendant, the Court of Appeal will, on an interlocutory application, make such an order as will determine the rights of the parties in the action. *Ellis v. Munson*, 35 L. T. 585—C. A.

**Vexatious Appeal.**—Where an appeal is vexatious the Court of Appeal can make an order staying the proceedings. *Tale v. Oppert*, 5 Ch. D. 969—C. A.

**Power to re-hear—Insertion of Evidence accidentally Omitted from Order.**—Whether the Court of Appeal has jurisdiction to re-hear a bankruptcy appeal, *quære*. But if there be such a jurisdiction the court will not, while an appeal to the House of Lords from an order made by it on a bankruptcy appeal is pending, re-hear the appeal pro forma, for the purpose of inserting in its order evidence which was not before it when the appeal was heard, leaving the date of the order unaltered, or for the purpose of making a new order bearing a date subsequent to the date of the presentation of the appeal to the House of Lords with the new evidence inserted in it, but in other respects unaltered. But *semble*, that if by an accidental slip evidence which was really before the court on the hearing of the appeal had been omitted from the order, the court could rectify the error notwithstanding the pendency of an appeal to the House of Lords. *Banco de Portugal, Ex parte, Hooper, In re*, 14 Ch. D. 1; 49 L. J., Bk. 21; 42 L. T. 210; 28 W. R. 433—C. A.

**Addition as to Costs made to Decree.**—An addition made to a decree upon motion giving directions as to costs as to which the decree itself was silent, is a portion of the decree, and therefore can be examined in an appeal from the decree, and is not an interlocutory order within the meaning of Ord. LVIII. r. 15. *The City of Manchester*, 5 P. D. 221; 49 L. J., P. 81; 42 L. T. 521—C. A.

**Appeal, the Creature of Statute.**—An appeal never lies unless expressly given by statute. *Rea v. Cashiobury (Justices)*, 3 D. & R. 35.

**Order according to Laws existing at time of hearing.**—The Court of Appeal, on hearing an appeal, may make such an order as is justified by the law as then existing, although the effect will be to vary a decision of the court below which was according to the then existing state of the law. *Quilter v. Mapleson*, 9 Q. B. D. 672; 52 L. J., Q. B. 44; 47 L. T. 562; 31 W. R. 75—C. A.

The 14th section of the Conveyancing Act, 1881, which enables the court to relieve against forfeiture of a lease on breach of a covenant by the lessee, applies, not only to leases made before the 1st of January 1881 (when the act came into operation), and breaches of covenant occurring before that date, but also to cases in which an action to recover possession for such a breach has been commenced before that date, even where judgment has been recovered prior to the commencement of the act, if the lessor has not

obtained possession. A lessee having committed breaches of covenants in his lease in respect of insuring the property, an action to recover possession of the property demised was brought by the lessor, and at the trial the judge held that the defendant was not entitled under the existing statute (22 & 23 Vict. c. 35) to relief against forfeiture. The defendant appealed, and before the appeal was finally determined, the Conveyancing Act came into operation:—Held, that the court had power to relieve the defendant, and that the proper terms to impose were that the defendant should insure to the full amount, pay all insurance moneys and rent in arrear, with interest, and pay rent in advance to the next quarter-day, and also all the costs of the action and the appeal. *Id.*

**To Register Bills of Sale.**—The Court of Appeal has no jurisdiction to rectify the register of bills of sale under s. 14 of the Bills of Sale Act, 1878. *Webster, Ex parte, Morris, In re*, 22 Ch. D. 136; 52 L. J., Ch. 375; 48 L. T. 295; 31 W. R. 111—C. A.

**To Decide in first instance.**—The Court of Appeal has no jurisdiction to decide a case in the first instance at the request of the judge below. *Brown v. Collins*, 49 L. T. 329.

## 2. IN WHAT CASES APPEAL LIES.

**Agreement "not to bring Error."**—By an order of reference made by consent, and before the coming into operation of the Judicature Acts, it was ordered that neither the plaintiff nor the defendant should bring any writ of error against each other concerning the matters referred. The arbitrator made an award dependent on the opinion of the court upon a special case stated by him. The court gave judgment for the plaintiff. The defendant appealed:—Held, that no appeal could be brought. *Jones v. Victoria Graving Dock Company*, 2 Q. B. D. 314; 46 L. J., Q. B. 219; 36 L. T. 347; 25 W. R. 501—C. A.

**Undertaking not to Appeal.**—A claim under a winding-up having been refused by the Master of the Rolls, the counsel for the liquidator asked the counsel for the claimant whether he intended to carry the case further, and on being informed that he did not, said that he should not ask for costs. An order was drawn up dismissing the claim without costs and not containing any undertaking not to appeal:—Held, that as no undertaking not to appeal was embodied in the order, an appeal would lie. *Hull and County Bank, Trotter's Claim, In re*, 13 Ch. D. 261; 41 L. T. 537; 23 W. R. 125—C. A.

**Undertaking to be bound by Result of another Appeal.**—There were two actions brought by the plaintiff against the defendant, one in the Chancery Division and the other in the Queen's Bench Division, and some of the points were common to both cases. The defendant appealed, but before the hearing of the appeal from the Queen's Bench Division the parties agreed, "so far as the points in the appeal were the same," to be bound in the appeal by the decision of the Court of Appeal in the action in the Chancery Division:—Held, that the defendant by his undertaking had precluded himself from

raising any point raised in the other appeal. *Gathercole v. Smith*, 7 Q. B. D. 626; 50 L. J., Q. B. 681; 45 L. T. 106; 29 W. R. 577—C. A.

**Agreement that Rights should be determined by Judge.**—Questions having arisen between the official liquidator of a company and a mortgagee with whom the trustees had deposited deeds belonging to the company, with respect to the validity of the security, the parties signed an agreement that their rights should be determined in a summary way by the judge acting in the matter of the winding-up:—Held, that this was a submission to the judge personally, and that no appeal could be brought to the Court of Appeal in Chancery. *Durham County Permanent Benefit Building Society, In re, Wilson, Ex parte*, 7 L. R., Ch. 45; 41 L. J., Ch. 164.

An information by way of bill of complaint was by consent amended by the introduction of the words, "That the rights, if any, of the several defendants may be ascertained and declared by decree of the court, and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that the court will give such further directions in the premises as shall be necessary." There was no stipulation that the right of appeal should be given up, and it appeared that the parties never contemplated that they were ceasing to keep the cause in curia, or that the judge was to hear it otherwise than as a judge, or that it was not to go on subject to all the incidents of a cause regularly heard in court:—Held, that the right to appeal had not been waived. *Pisani v. Att.-Gen. (Gibraltar)*, 5 L. R., P. C. 516; 30 L. T. 729; 22 W. R. 900.

**Taxation on Higher or Lower Scale.**—An appeal will lie from a decision by a judge under rules of the Supreme Court (Costs), August, 1875, Ord. VI. r. 3, as to the taxation of costs on the higher or lower scale; but where he has exercised his discretion the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip. *Terrell, In re*, 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208—C. A.

## In Criminal Cases—Criminal matter, what is.]

—The operation of s. 47 of the Judicature Act, 1873, in prohibiting appeals in criminal matters, extends to all orders of the High Court in criminal cases, even where the original criminal proceedings were not in the High Court. *Reg. v. Fletcher, Birnie, Ex parte*, 2 Q. B. D. 43; 46 L. J., M. C. 4; 35 L. T. 538; 25 W. R. 149; 13 Cox, C. C. 358—C. A.

Where the Queen's Bench Division was applied to for a certiorari to quash a conviction for trespassing in pursuit of game, on the ground that there was a bonâ fide claim of right, ousting the jurisdiction of the magistrates, and that court refused the order:—Held, that this was a proceeding in a criminal matter, and that no appeal lay to the Court of Appeal. *Id.*

Under the Judicature Acts, 1873 and 1875, there is no appeal to the Court of Appeal in a criminal case except for error on the record. *Reg. v. Steel*, 2 Q. B. D. 37; 46 L. J., M. C. 1; 35 L. T. 534; 25 W. R. 34; 13 Cox, C. C. 354—C. A.

When, upon the trial of an information under 6 & 7 Vict. c. 96, costs have been given under s. 8, the Court of Appeal has no jurisdiction to



hear an appeal from the High Court on a question of taxation of such costs. *Ib.*

A judgment of the Court of Appeal from an inferior court, against the validity of a conviction, under 16 & 17 Vict. c. 119, s. 3, for keeping a common gaming-house, on a case stated under 20 & 21 Vict. c. 43, is a judgment of the High Court in a criminal matter from which, by s. 47 of the Judicature Act, 1873, there is no appeal. *Blake v. Beech*, 2 Ex. D. 335; 36 L. T. 723—C. A.

The Court of Appeal has no jurisdiction to hear an appeal from a decision of the High Court of Justice upon a case stated by justices as to an information for contravening the bye-laws of a school constituted under the Elementary Education Act, 1874; for the information relates to a criminal matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47. *Mellor v. Denham*, 5 Q. B. D. 467; 49 L. J., M. C. 89; 42 L. T. 493; 44 J. P. 472—C. A.

An order was made by justices directing the defendant to fill up an ashpit, so as to be no longer a nuisance. The Queen's Bench Division made absolute an order for a certiorari to quash this order, on the ground that it was not warranted by the Public Health Act, 1875, ss. 94, 96:—Held, that the order of the justices was made in a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and that an appeal from the judgment of the Queen's Bench Division could not be entertained. *Mellor v. Denham* (5 Q. B. D. 467) followed. *Reg. v. Whitechurch or Whitechurch, Ex parte* (No. 2), 7 Q. B. D. 534; 50 L. J., M. C. 99; 45 L. T. 379; 29 W. R. 922; 45 J. P. 617; 46 J. P. 134—C. A.

The decision of a divisional court discharging a rule for a mandamus to election commissioners to grant a certificate, which certificate, if given, would be a protection to a witness against criminal proceedings for bribery, does not relate to a criminal cause or matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and the Court of Appeal is not therefore deprived of jurisdiction to hear an appeal against such decision. *Reg. v. Holl*, 7 Q. B. D. 575; 50 L. J., Q. B. 763—C. A.

— **Refusal of Divisional Court to issue Habeas Corpus.**—Whether the Court of Appeal has any jurisdiction to entertain an appeal from the refusal of a divisional court to issue a writ of habeas corpus, on the application of a person who has been arrested for an alleged extradition crime, *quere*. *Reg. v. Weil*, 9 Q. B. D. 701; 47 L. T. 630; 31 W. R. 60; 15 Cox, C. C. 189—C. A.

— **Bail.**—A prisoner applied for bail to a divisional court of the Queen's Bench Division but was refused; he then appealed to the Court of Appeal:—Held, that the decision of the divisional court was a judgment of the High Court in a criminal matter, and therefore that the Court of Appeal had no jurisdiction to entertain the appeal. *Reg. v. Foote*, 10 Q. B. D. 378; 52 L. J., Q. B. 528; 48 L. T. 394; 31 W. R. 490; 15 Cox, C. C. 240—C. A.

— **Striking Solicitor off Rolls.**—An appeal lies to the Court of Appeal from a judgment of a divisional court striking a solicitor off the rolls, as it is not a judgment "in a criminal cause or matter" within the meaning of s. 47 of the

Judicature Act, 1873. *Hardwick, In re*, 49 L. T. 584; 32 W. R. 191—C. A.

**In Actions pending when Judicature Acts came in force.**—In an action pending when the Judicature Acts came into operation, leave was given to appeal from an order on demurrer, the issues of fact not having been tried, and the time for appealing was extended. *Fitzgerald v. Dawson*, 45 L. J., C. P. 152—C. A.

When no petition of appeal from a decree has been presented before the Judicature Act came into operation, an appellant must proceed under the new practice. *Bartlam v. Yates*, 1 Ch. D. 13; 33 L. T. 338; 24 W. R. 19—C. A.

A decree was made upon motion for decree by a vice-chancellor before the Judicature Acts came into operation. No petition of appeal had been presented:—Held, that there was no cause, matter, or proceeding pending within the Judicature Act, 1873, s. 22; that the appeal must be prosecuted in accordance with the new practice, and that no direction of the court as to the form and manner of proceeding was necessary. *Ib.*

**Default of Appearance in Court below.**—Whether a plaintiff, in whose absence the defendant has, after argument, obtained judgment in a special case, can appeal from such judgment, *quere*. *Allum v. Dickenson*, 9 Q. B. D. 632; 47 L. T. 493; 30 W. R. 930—C. A.

Seemingly, if, however, judgment on the special case had gone simply by default without argument, there could (by analogy to the case of a similar judgment obtained in an ordinary action) be no appeal. *Ib.*

A person against whom an order is made on his default in appearing may appeal from the order on its merits. *Streete, Ex parte, Morris, In re*, 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127—C. A.

If a party appealing from the decision of a judge at chambers does not appear in the High Court to support the motion, and judgment is thereupon pronounced against him in his absence, he cannot afterwards appeal to the Court of Appeal against the judgment of the High Court; the Court of Appeal has no jurisdiction to afford him relief. *Walker v. Budden*, 5 Q. B. D. 267; 49 L. J., Q. B. 159; 28 W. R. 665—C. A.

**Trial by Judge without a Jury.**—In an action for an injunction to restrain the defendant from building so as to interfere with a right of way claimed by the plaintiff, which came on for trial before the Master of the Rolls, with witnesses, the Master of the Rolls found a verdict for the plaintiff as to the right of way, and directed the action to stand over in order to give the parties an opportunity of coming to an arrangement. Upon the action coming on again, a mandatory injunction was granted. The defendant, after the expiration of twenty-one days from the time when the verdict had been given, appealed from the order:—Held, that the finding that the plaintiff was entitled to the right of way was an interlocutory order, which can only be appealed from within twenty-one days. *Kreil v. Burrell*, 10 Ch. D. 420; 48 L. J., Ch. 252; 39 L. T. 461; 27 W. R. 234—C. A.

When in an action in the Chancery Division, tried by a judge of that division without a jury, definite issues of fact are settled at the commencement of the trial, then, whether the judge

delivers his finding on the facts and his judgment on the whole case on separate days or at one time, his finding of fact is an interlocutory order, and must be appealed from within twenty-one days. But if no definite issues of fact are settled at the commencement of the trial, the finding of fact as well as the judgment on the whole case may be appealed from at any time within a year. *Krehl v. Burrell*, explained. *Lowe v. Lowe*, 10 Ch. D. 432; 48 L. J., Ch. 383; 40 L. T. 236; 27 W. R. 309—C. A.

Where an action has been tried by a judge without a jury, if the unsuccessful party is dissatisfied with the judgment either on the ground that the judge has misdirected himself as to the law, or that his findings as to the facts are against the weight of evidence, the proper mode of obtaining relief is by appeal to the Court of Appeal, and not by motion for a new trial.—*Krehl v. Burrell* (10 Ch. D. 420) commented on. *Potter v. Cotton*, 5 Ex. D. 137; 49 L. J., Q. B. 153; 41 L. T. 460; 28 W. R. 160.—C. A.

Where an action has been tried by a judge of one of the Common Law Divisions without a jury an appeal lies direct to the Court of Appeal. It is not proper in such a case to move for a new trial. *Pannell v. Nunn*, 28 W. R. 940—C. A.

—**Motion for New Trial for Rejection of Evidence.**—Where, on a trial in the Chancery Division, the judge has not found a separate verdict on a question of fact, but has decided the case as a whole according to the old practice of the Court of Chancery, a motion for a new trial on the ground of improper rejection of evidence cannot be made, the remedy of the unsuccessful party being by appeal from the order, and the Court of Appeal having power at the hearing of the appeal to admit any evidence which may have been improperly rejected. *Krehl v. Burrell* (10 Ch. D. 420) distinguished. *Dollman v. Jones*, 12 Ch. D. 553; 27 W. R. 877—C. A.

#### **Appeal against Judgment at Trial with Jury.]**

—During the trial of an action before a jury the judge was asked by the defendants' counsel to nonsuit the plaintiffs, or to direct a finding for the defendants, upon the ground that no evidence had been given in support of the plaintiffs' case; this the judge refused to do, and the jury found the issue left to them in favour of the plaintiffs. Upon the following day the judge directed judgment to be entered for the plaintiffs, and stated his reasons for holding that there was evidence to support the finding of the jury. The defendants appealed to the Court of Appeal against the judgment directed to be entered:—Held, that the appeal would not lie; for the judgment was upon the face of it correct, so long as the finding stood unreversed, and the Court of Appeal has no power, in the first instance, to review the finding of a jury; and the defendants' grounds of complaint being for misdirection, they ought to have applied to the Exchequer Division for a new trial under Ord. XXXIX. r. 1. *Yettis v. Foster*, *infra*, followed. *Davies v. Felix*, 4 Ex. D. 32; 48 L. J., Ex. 3; 39 L. T. 322; 27 W. R. 108—C. A.

When it is desired to appeal to the Court of Appeal against a judge's direction to a jury, the proper mode is to give ordinary notice of appeal from his ruling. *Cheese v. Lovejoy*, 37 L. T. 294; 25 W. R. 453—C. A.

When a judge directs the jury to find a ver-

dict for one of the parties, and gives judgment the other party cannot appeal to the Court of Appeal, but must apply to the divisional court for a new trial. *Yettis v. Foster*, 3 C. P. D. 437; 38 L. T. 742; 26 W. R. 745—C. A.

When a judge directs a nonsuit, and the facts are disputed, the plaintiff cannot appeal to the Court of Appeal, but must apply to the divisional court for a new trial. *Ettv v. Wilson*, 3 Ex. D. 359; 47 L. J., Ex. 664; 39 L. T. 83—C. A. See also cases, *post*, PRACTICE (NEW TRIAL).

**From Refusal to Nonsuit.]**—A motion to set aside a judgment refusing to nonsuit must be made to the divisional court, and not to the Court of Appeal. *Clarke v. Midland Railway Company*, 44 L. T. 131—C. A.

**From Order at Trial depriving of Costs.]**—The plaintiffs, after a trial with a jury, recovered 5*l.* beyond the amount paid into court. The judge at the trial gave judgment for 5*l.*, but without costs. The divisional court reversed this decision as to costs:—Held, that the appeal (if any) from the order of the judge was to the Court of Appeal, and not to the divisional court. *Marsden v. Lancashire and Yorkshire Railway Company*, 7 Q. B. D. 641; 50 L. J., Q. B. 318; 44 L. T. 239; 29 W. R. 580—C. A.

**From Decision of Judge after hearing Witnesses.]**—Although the Court of Appeal, when called on to review the conclusion of a judge of first instance who had heard the witnesses, will give great weight to the consideration that the demeanour and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet it will, in a proper case, act upon its own view of conflicting evidence. *Bigsby v. Dickinson*, 4 Ch. D. 24; 46 L. J., Ch. 280; 35 L. T. 679; 25 W. R. 122—C. A.

**Power to review Findings as to Facts.]**—Where a trial has taken place before a judge without a jury, the Court of Appeal, in all cases except that of surprise, has jurisdiction upon an appeal to review the findings as to the facts, without a rule for a new trial having been obtained. *Jones v. Hough*, 5 Ex. D. 115; 49 L. J., Ex. 211; 42 L. T. 108—C. A.

**From Compulsory Order to refer.]**—An appeal from a compulsory order of reference, made under s. 57 of the Judicature Act, 1873, by a judge, sitting at nisi Prius or assizes, must be brought direct to the Court of Appeal. *Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 425—C. A.

**Special Case stated by Arbitrator—Opinion of Court on.]**—An action having been referred, with power to the arbitrator to state a special case, he stated a case for the opinion of the court on a point of law. The case was to be sent back to the arbitrator if the court was in favour of the plaintiff, and judgment was to be entered for the defendant if the court decided in favour of the latter. The court decided in favour of the plaintiff, and referred the matter back to the arbitrator:—Held, that the order was appealable. *Shubrook v. Tynnell*, 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740—C. A.

**Judge settling Form of Conveyance.]**—In a sale by the court, one of the conditions was

that, in case of dispute, the form of the covenants was to be settled by the judge. On disputes arising, the judge settled the covenants:—Held, that the order of a judge settling the form of a conveyance is subject to appeal. *Pollock v. Rabbits*, 21 Ch. D. 466; 47 L. T. 637; 31 W. R. 150—C. A.

**Refusal to Commit for Contempt.**—Where a judge has refused to commit for contempt, an appeal lies from such refusal, although where that refusal has been simply an exercise of judicial discretion, the Court of Appeal, while entertaining an appeal, will be slow to alter the decision of the court below. *Ashworth v. Outram* (5 Ch. D. 943) must not be treated as laying down a general rule that no appeal lies from a refusal to commit. *Jarmain v. Chatterton*, 20 Ch. D. 493; 51 L. J., Ch. 471; 30 W. R. 461—C. A.

A refusal by a judge at chambers to make an order to commit a defendant to prison for default of payment of a judgment debt is a matter within s. 50 of the Judicature Act, 1873, and therefore subject to appeal. *Debenham v. Wardroper*, 48 L. T. 235; 15 Cox, C. C. 207.

**Interpleader Order in Bankruptcy.**—Any order in interpleader made by the chief Judge in bankruptcy can be appealed from. *Streeter, Ex parte, Morris, In re*, 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127—C. A. *Dodds v. Shepherd* (1 Ex. D. 75) considered. *Id.*

— **Summary Decision—Reference by Judge at Chambers to the Court—Appeal.**—A judge at chambers referred an interpleader summons to a divisional court. The court barred the claimant and decided the case without ordering an interpleader issue:—Held, that such decision was given in exercise of the summary jurisdiction of a court or judge under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 14, and was therefore final and without appeal. *Turner v. Bridgett*, 9 Q. B. D. 55; 51 L. J., Q. B. 377; 46 L. T. 517; 30 W. R. 586—C. A.

**Election Petition—Interlocutory Matter.**—From an order of a divisional court upon an interlocutory matter arising in an election petition, an appeal lies to the Court of Appeal. *Harmon v. Park*, 6 Q. B. D. 323; 50 L. J., Q. B. 227; 44 L. T. 81; 29 W. R. 750; 45 J. P. 436—C. A.

**Order in Excess of Jurisdiction.**—If a court acting in assumed exercise of a jurisdiction belonging to it, makes an order which, under the particular circumstances of the case, is beyond that jurisdiction, the order must, until it be discharged, be treated as a subsisting order, and can only be discharged upon an appeal. *Padstow Total Loss and Collision Assurance Association, In re, Bryant, Ex parte*, 20 Ch. D. 137; 51 L. J. Ch. 344; 45 L. T. 774; 30 W. R. 326—C. A.

Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create any necessity for an appeal. *Att.-Gen. v. Hotham (Lord)*, 1 Turn. & Russ. 219; 3 Russ. 415.

• **Order for Custody of Infant “until further Order”—Subsequent Application to vary.**—When an order is made under s. 1 of the Infants

Custody Act, 1873, on the petition of a mother, giving the custody of an infant child to her “until further order,” an application to vary the order by reason of something subsequent to its date should be made, not by way of appeal, but by motion before the judge of first instance. Such a motion can be made by the respondent to the original petition. The provision of s. 1 of the act, that the application shall be made by the mother by her next friend, applies only to the original petition. *Holt, In re*, 16 Ch. D. 115; 29 W. R. 341—C. A.

**From Order on Appeal from Judge at Chambers.**—When a motion has been made under the Judicature Act, 1873, s. 50, to a divisional court or judge in Court, to discharge an order made by a judge in chambers, an appeal lies within twenty-one days to the Court of Appeal from an order refusing such motion. *Dickson v. Harrison*, 9 Ch. D. 243; 47 L. J., Ch. 761; 38 L. T. 794; 26 W. R. 730—C. A.

**From Divisional Court on Appeal from Inferior Court.**—An appeal lies to the Court of Appeal from the decision of a divisional court on appeal from a county court under 13 & 14 Vict. c. 61, s. 14, where the divisional court has given special leave to appeal under the Judicature Act, 1873, s. 45, notwithstanding s. 20 of the Appellate Jurisdiction Act, 1876. *Crush v. Turner*, 3 Ex. D. 303; 47 L. J., Ex. 639; 38 L. T. 595; 26 W. R. 673—C. A.

No appeal lies to the Court of Appeal from a decision of a divisional court on an appeal from the Mayor's Court, unless leave to appeal is given by the divisional court under the Judicature Act, 1873, s. 45. *Appleford v. Jenkins*, 3 C. P. D. 489; 47 L. J., C. P. 615; 38 L. T. 801; 26 W. R. 734—C. A.

**From Registrar sitting as Judge.**—An order made by a registrar sitting as judge under Ord. LIV. is not, for the purposes of the Judicature Act, 1873, s. 50, an order made by a judge in chambers, and hence, where such an order has been reviewed by a judge in court, an appeal from the judge's decision will lie without special leave. *The Virar*, 2 P. D. 29; 35 L. T. 782; 25 W. R. 453—C. A.

**Rule for a Certiorari.**—An appeal from an order of the Queen's Bench Division, discharging a rule for a certiorari to bring up an order of justices in petty sessions, is not an appeal from an inferior court within s. 45 of the Judicature Act, 1873, and no leave to appeal is required. *Reg. v. Pemberton, Reg. v. Smith*, 5 Q. B. D. 95; 49 L. J., M. C. 29; 41 L. T. 664; 28 W. R. 362; 44 J. P. 184—C. A.

**Rule for a Mandamus.**—The decision of a divisional court discharging a rule for a mandamus to election commissioners to grant a certificate, which certificate, if given, would be a protection to a witness against criminal proceedings for bribery, does not relate to a criminal cause or matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and the Court of Appeal is not therefore deprived of jurisdiction to hear an appeal against such decision. *Reg. v. Holl*, 7 Q. B. D. 575; 50 L. J., Q. B. 763—C. A.

An appeal lies from a rule for a mandamus.

*Reg. v. Bishopscarmouth Burial Board*, 5 Q. B. D. 67—C. A.

**Suspension of Certificate by Court of Inquiry into Shipping Casualty.**—*See post*, SHIPPING.

**From Mayor's Court.**—Where the judge of the Mayor's Court, London, does an act beyond his jurisdiction, an appeal lies to the Court of Appeal. *Pryor v. City Offices Company*, 10 Q. B. D. 504; 52 L. J., Q. B. 362; 48 L. T. 698; 31 W. R. 777—C. A.

**From Mayor's Court—Error.**—The Court of Appeal, and not the Court of Appeal from inferior Courts, has succeeded to the jurisdiction of the Court of Exchequer Chamber in cases of error on proceedings in the Mayor's Court, London. *Le Blanch v. Reuter's Telegram Company*, 1 Ex. D. 408; 34 L. T. 691; 25 W. R. 115.

**In other Cases.**—No appeal lies to the Court of Appeal from a decision of a divisional court on an appeal from the Mayor's court, unless leave to appeal is given by the divisional court under the Judicature Act, 1873, s. 45. *Appleford v. Jenkins*, 3 C. P. D. 489; 47 L. J., C. P. 615; 38 L. T. 801; 26 W. R. 734—C. A.

**Upon Cases stated by Quarter Sessions.**—By s. 19 of the Judicature Act, 1873, the Court of Appeal has jurisdiction and power to hear and determine appeals from any judgment or order (with certain exceptions) of the High Court of Justice, or of any judges or judge thereof. By the interpretation clause (s. 100) "order" includes "rule." Held, that under this section the Court of Appeal had jurisdiction to entertain an appeal from a decision of the Queen's Bench Division upon a rule for quashing an order of quarter sessions as to the validity of a rate. *Walsall (Overseers) v. London and North Western Railway Company*, 4 App. Cas. 30; 48 L. J., Q. B. 65; 39 L. T. 453; 27 W. R. 189—H. L. (E.). Reversing 3 Q. B. D. 457; 47 L. J., Q. B. 711; 38 L. T. 665; 26 W. R. 705—C. A.

The Public Health Act, 1875, provides in certain cases for an appeal from petty sessions to quarter sessions, and provides that the quarter sessions may state the facts specially for the determination of a superior court. In a case under this act an appeal was brought to quarter sessions, which quashed the order appealed from, subject to a case reserved. A certiorari issued, a rule calling on the prosecutor to shew cause was granted, was argued in, and discharged by the Queen's Bench Division. Leave to appeal was not given:—Held, that the case so reserved fell within the provisions of s. 45 of the Judicature Act, 1873, and that no appeal could be brought from the decision of the divisional court upon it unless special leave to appeal were granted. *Reg. v. Swindon New Town Local Board*, 49 L. J., Q. B. 522; 42 L. T. 614; 28 W. R. 80; 44 J. P. 505—C. A.

Where the Queen's Bench Division, in the exercise of its original common law jurisdiction, affirms or quashes an order of sessions, an appeal lies to the Court of Appeal, although no leave to appeal be given. *Reg. v. Savin*, 6 Q. B. D. 309; 29 W. R. 638—C. A.

**County Court—Order of Divisional Court dis-**

**charging Rule for Order to Judge.**—The right to appeal from an order of a divisional court, discharging a rule for an order on a county court judge to hear an action, is not taken away because s. 44 of 19 & 20 Vict. c. 108, which substitutes such rule for a mandamus to the county court judge, enacts that, where any superior court shall have refused such rule, no other superior court shall grant it. *Morgan v. Rice*, 6 Q. B. D. 508—C. A.

**Prohibition to Judge.**—An appeal lies from the decision of a divisional court making absolute a rule for a prohibition to a county court judge. *Barton v. Titchmarsh*, 49 L. J., Ex. 573; 42 L. T. 610; 28 W. R. 821—C. A.

**From Divisional Court, in Action remitted for Trial under 30 & 31 Vict. c. 142, s. 10.**—Where a cause has been remitted for trial before a county court under sect. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), it becomes a county court cause, and the determination of a divisional court, on appeal from the decision of the county court judge, is within sect. 45 of the Judicature Act, 1873, and therefore final, unless special leave to appeal be given. *Bowles v. Drake*, 8 Q. B. D. 325; 51 L. J., Q. B. 66; 45 L. T. 576; 30 W. R. 333—C. A.

**19 & 20 Vict. c. 108, s. 26.**—Where an action brought in the superior court has, after issue joined, been remitted for trial to a county court under 19 & 20 Vict. c. 108, s. 26, the action still remains in the superior court, and an appeal to the Court of Appeal will lie without special leave from the refusal of a divisional court to grant a new trial. *Babbage v. Coulburn*, 52 L. J., Q. B. 50; 46 L. T. 515—C. A.

**Appeals from Discretion.**—Sect. 19 of the Judicature Act, 1873, does not give the Court of Appeal jurisdiction to entertain an appeal from the judge of the High Court with reference to a matter which before the passing of the Judicature Acts was in the absolute discretion of the judge. *The Amstel*, 2 P. D. 186; 47 L. J., P. 11; 37 L. T. 138; 26 W. R. 69—C. A.

Where a judge has exercised his discretion, the Court of Appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip. *Terrell, In re*, 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208—C. A. *S. P., Moor-daff, In re, Burgoine v. Moordaff*, 8 P. D. 205; 52 L. J., P. 77; 48 L. T. 504; 31 W. R. 735—C. A.

There must be a plain and clear case to justify the Court of Appeal in interfering with the discretion of the judge below. But the Court of Appeal will review the discretion if it be exercised in consequence of an opinion on a point of law which is wrong. *Martin, In re, Hunt v. Chambers*, 20 Ch. D. 369; 51 L. J. Ch. 683; 46 L. T. 399; 30 W. R. 527. *S. P., Ormerod v. Todmorden Mill Company*, 8 Q. B. D. 664; 51 L. J., Q. B. 348; 46 L. T. 669; 30 W. R. 805—C. A.; *Gilder v. Morrison*, 30 W. R. 815, and *Mark, Ex parte, Amor, In re*, 31 W. R. 101—C. A.

A case of miscarriage must be shewn. It is not sufficient for the appellant to convince the judges of the Court of Appeal that the order is one which they would not in the first instance have made, but he must shew that the judge

had gone wrong in his law or made a mistake of fact, or ordered something so utterly unreasonable that the Court of Appeal is obliged to say there has not been a reasonable exercise of his discretion. *Wigney v. Wigney*, 7 P. D. 182; 51 L. J., P. 62; 46 L. T. 442; 30 W. R. 722.

As a general rule the court will not interfere unless a wrong principle has been applied in exercising the discretion, or there has evidently been some serious miscarriage. *Berdan v. Greenwood*, 20 Ch. D. 767, n.; 46 L. T. 524, n.

By the Supreme Court of Judicature Acts, 1873, 1875, power to review the exercise of judicial discretion is given; and the Court of Appeal must ascertain whether the discretion has been properly exercised. *Reg. v. Maidenhead (Mayor)*, 9 Q. B. D. 503; 51 L. J., Q. B. 448.

The exercise of the discretion by a judge is subject to appeal, but the Court of Appeal ought not to interfere unless it is clearly shewn that the judge has exercised his discretion wrongly. *Merchant Banking Company of London, Ex parte, Durham, In re*, 16 Ch. D. 623; 50 L. J., Ch. 606; 44 L. T. 358; 29 W. R. 363—C. A.; *S. P., Hayter v. Beall*, 44 L. T. 131—C. A.; *Sheard, Ex parte, Pooley, In re (No. 1)*, 16 Ch. D. 107; 44 L. T. 259—C. A.; and *Silkstone, &c. Company, In re*, 45 L. T. 449; 30 W. R. 33—C. A.

— **Before Judicature Acts.**—The conduct of a suit is a matter entirely within the discretion of the judge in whose court the suit has been instituted, and the Court of Appeal will not entertain an appeal on such a matter. *Dowbiggin v. Trotter, Trotter v. Trotter*, 27 L. T. 731.

When a matter is left by the legislature as a pure matter of discretion in a vice-chancellor, the Court of Appeal will not interfere with his exercise of that discretion, unless it is apparent that he has gone very clearly wrong. *Land and Sea Telegraph Construction, In re*, 25 L. T. 236—L. J.

The making of an order to dismiss a bill for want of prosecution is a matter within the discretion of the judge to whose court the cause is attached, and his refusal to make such an order ought not to be made the subject of an appeal. *Sheffield v. Sheffield*, 10 L. R., Ch. 206; 44 L. J., Ch. 304; 23 W. R. 378.

An appeal will lie from an order of a judge of the Court of Chancery directing an issue before a jury; but if the Court of Appeal is of opinion that there is really a conflict of evidence, it will not interfere with the discretion of the judge in directing an issue. *Williams v. Guest*, 10 L. R., Ch. 467; 44 L. J., Ch. 559; 33 L. T. 291; 23 W. R. 822.

— **Leave to Appeal when Granted—No Doubt as to Correctness of Decision.**—It is against the spirit of the Judicature Act, 1873, s. 45, which gives the divisional court power to allow an appeal in certain cases, to accede to an application for leave to appeal where the court can entertain no doubt as to the correctness of the decision. *Cottam v. Guest*, 6 Q. B. D. 75; *S. P., Barber v. Stone*, 50 L. J., Q. B. 297; and *Hollingbourn Guardians v. West Ham Guardians*, 6 Q. B. D. 593.

The same rule applies if there be very little doubt. *Grainger v. Aynsley*, 29 W. R. 244.

— **Where general Question could not be**

**decided.**—The court refused leave to appeal, because the peculiar facts of the case were so mixed up with the broad and general question that the latter could not be decided so as to constitute a general authority for the future. (*Guiger v. St. Mary (Ventry), Islington*, 29 W. R. 539.

— **Important Question raised.**—In cases raising important points of law, the court will give leave to appeal to the Court of Appeal where, on a proper construction of the acts governing appeals, such leave is necessary. *The Rona*, 46 L. T. 601.

— **In Criminal Matter—Bastardy.**—The divisional court cannot give leave to appeal to the Court of Appeal in bastardy, which is a criminal matter. *Daries v. Ecanis*, 9 Q. B. D. 244; 51 L. J., M. C. 136.

— **Staying Proceedings when vexatious.**—A defendant against whom a decree for payment of a sum of money had been made filed a petition for liquidation. A resolution for liquidation by arrangement was passed and registered, and a trustee appointed. After these proceedings the debtor, who had not obtained his discharge, appealed against the decree. The plaintiff moved to stay proceedings under the appeal:—Held, that an order ought to be made staying the proceedings, as being vexatious. *Vale v. Oppert*, 5 Ch. D. 969—C. A.

— **From Order as to Costs.**—See COSTS.

### 3. PARTIES TO APPEAL.

— **Appeal by one of several Plaintiffs.**—Two of the three trustees of a settlement brought an action to have the trusts administered under the direction of the court. *Malins, V.-C.*, dismissed the action with costs. One of the plaintiffs having declined to concur in an appeal, the other appealed alone. The Court of Appeal held that such an appeal was regular, and must be allowed to proceed; and, being of opinion that a sufficient ground had been shewn for asking the direction of the court, a decree for administration of the trusts was made. *Beckett v. Attwood*, 18 Ch. D. 54; 50 L. J., Ch. 687; 44 L. T. 660; 29 W. R. 796—C. A.

— **Death of Appellant after Appeal set down—Order of Revivor.**—A defendant, P., gave notice of appeal from a judgment, and set it down. After this he died, and his executrix obtained an order of course at the Rolls that the appeal might be carried on and prosecuted by her in like manner as it might have been carried on and prosecuted by P. if he had not died:—Held, that the order was sufficient, and that the executrix was entitled to proceed with the appeal. *Ransom v. Patton*, 17 Ch. D. 767; 44 L. T. 688—C. A.

— **Before Judicature Acts.**—On a bill by P. against R. and A., who all separately claimed the same property, a decree was made in favour of P. On appeal by A. alone, the court being of opinion that R. was entitled, dismissed the bill against both defendants. *Vaughan v. Halliday*, 9 L. R., Ch. 561; 30 L. T. 741; 22 W. R. 886.

An appeal by a person not a party to the record, but who appeared without filing a supple-

mental bill in order to save expense, was allowed to be set down for hearing. *Nickisson v. Cuckill*, 3 De G., J. & S. 622.

**Leave to Appeal to Person not Party, how Obtained.**—Leave to appeal from an order to a person interested in, but not a party to an action, may be obtained by an ex parte application to the Court of Appeal. *Markham, In re, Markham v. Markham*, 16 Ch. D. 1; 29 W. R. 228—C. A.

— **When Granted.**—In an action commenced by a bondholder on behalf of himself and all other bondholders, the plaintiff obtained an order for a receiver. One of the bondholders represented by the plaintiff, being dissatisfied with the order, applied for leave to appeal:—Held, that the order having been made in favour of the class to which the applicant belonged, and having been obtained by the plaintiff, who represented him in the action, he could not appeal against it. *Watson v. Cure* (No. 1), 17 Ch. D. 19; 44 L. T. 40; 29 W. R. 433—C. A.

Semble, the proper course for the dissentient shareholder to pursue was to apply to the court below to be made a defendant to the action. *Ib.*

Leave will not be given to a person to appeal from an order made in an action to which he is not a party, unless his interest is such that he might have been made a party by service. *Cruicour v. Salter*, 30 W. R. 329—C. A.

**Application by Liquidator for Leave to Appeal.**—*See post*, COMPANY.

#### 4. TIME WITHIN WHICH APPEAL MUST BE BROUGHT.

- a. *In what Cases.*
- b. *From what Period Time Runs.*
- c. *Extension of Time.*
- d. *Other Points.*

##### a. In what Cases.

**Time within which Appeals should be brought.**]

—Observations on the change of opinion in the legislature and the judges as to the period during which orders should be appealable. *Curtis v. Sheffield* (No. 2), 21 Ch. D. 1; 51 L. J., Ch. 535; 46 L. T. 177; 30 W. R. 581—C. A.

**Time Limit does not apply to Notice by Respondent.**—A notice given by the respondent to an appeal under r. 6 of Ord. LVIII. of the rules of Court, 1875, need not be given within the time limited by r. 15. *Bishop, Ex parte, For, In re*, 15 Ch. D. 400—C. A.

**From Refusal of Ex parte Application.**—A creditor claimed to prove against the estate of a testator which was being administered by the court, and his proof was in part allowed and in part rejected by the chief clerk, whose decision was on the 2nd of June affirmed by the vice-chancellor. The order of the vice-chancellor was passed and entered on the 2nd of August following, and on the 9th of August the creditor gave notice of appeal:—Held, that the order appealed from was a refusal of an application within the meaning of Ord. LVIII. r. 15, and that the appeal was consequently brought too late. *Trail v. Jackson*, 4 Ch. D. 7; 46 L. J., Ch. 16; 25 W. R. 36—C. A.

**Simple Refusal, what is.**—Whenever an order contains a declaration as such, or as an expression of the opinion of the court, so as to bind the rights of the parties, it does not amount to a simple refusal of the application within the rule of Ord. LVIII., so as to compel the bringing of an appeal within twenty-one days from the pronouncing of the order. *Clay and Tetley, In re*, 16 Ch. D. 3; 50 L. J., Ch. 164; 43 L. T. 402; 29 W. R. 5—C. A.

**Disallowance of Claim of Creditor under Administration Judgment.**—Where a creditor has brought in a claim in answer to advertisements for creditors issued under a judgment for administration, and that claim is disallowed, such disallowance is a refusal within the meaning of Ord. LVIII. r. 15, and an appeal can be brought from it without any order being drawn up. *Clagett, In re, Fordham v. Clagett*, 20 Ch. D. 134; 51 L. J., Ch. 461; 46 L. T. 70; 30 W. R. 374—C. A.

**Pending Appeal.**—Two actions brought by A. and B. respectively, against C., in respect of injuries sustained by them in an accident that occurred through his negligence, resulted in verdicts for C. Final judgment was signed in July, 1874, and in September, 1874, A. paid the costs in his action. A. and B. both gave due notice of appeal, but A. did not proceed with his appeal until after B.'s appeal had been heard in November, 1875. On January 18, 1876, he gave notice of appeal, and his appeal came on for hearing in the form prescribed by the Judicature Act, 1875:—Held, that although a year had elapsed since judgment had been signed, the plaintiff's right to appeal was not barred by the Judicature Act, 1875, Ord. LVIII. r. 15, as under the special circumstances of the case it was a pending appeal within the meaning of the Judicature Act, 1873, s. 22. *Taylor v. Greenhalgh*, 24 W. R. 311—C. A.

**Interlocutory or Final—Demurrer.**—An order overruling a demurrer which goes to the whole cause of action is not an interlocutory order within Ord. LVIII. r. 15. *Trouell v. Shenton*, 8 Ch. D. 318; 47 L. J., Ch. 738; 38 L. T. 369; 26 W. R. 837—C. A.

**Judgment under Order XIV.**—An order empowering a plaintiff to sign judgment upon a specially indorsed writ is an interlocutory, and not a final proceeding, for it does not become effectual against the defendant until it has been perfected by the further step of signing the judgment; and, therefore, an appeal upon an order of this kind made by one of the divisions of the High Court, must be brought before the expiration of twenty-one days. *Standard Discount Company v. La Grange*, 3 C. P. D. 67; 47 L. J., C. P. 3; 37 L. T. 372; 26 W. R. 25—C. A.

**Interpleader Issue.**—Two actions having been brought relating to a cargo, an interpleader issue was directed to try the question to whom it belonged. It was tried by the Master of the Rolls, who made an order finding in favour of the defendants, and declaring them to be entitled to the cargo. Subsequently an order was made in the actions directing the proceeds of the cargo, which were in court, to be paid to the defendants:—Held, that the former order was an

interlocutory order from which an appeal could not be brought after twenty-one days. *McAndrew v. Barker*, 7 Ch. D. 701; 47 L. J., Ch. 340; 37 L. T. 810; 26 W. R. 317—C. A.

— **Trial without Jury—Facts separate from Judgment.**—In an action in the Chancery Division tried by a judge without a jury, if the judge takes upon himself the trial of specific questions of fact and finds his verdict upon them as a matter separate from the judgment which he gives upon that verdict, the judge's verdict upon the questions of fact is an interlocutory order and cannot be appealed from after the expiration of twenty-one days. *Krehl v. Burrell*, 10 Ch. D. 420; 48 L. J., Ch. 383; 39 L. T. 461; 27 W. R. 234—C. A. See *cases ante*, col. 141.

An action in the Chancery Division to restrain the obstruction of a right of way claimed by the plaintiff over land belonging to the defendant, was tried by a Judge of the Chancery Division without a jury on the 4th and 6th December, and the judge having stated that he would first try the issue of fact whether the plaintiff was entitled to the alleged right of way, found that the plaintiff was entitled to the alleged right of way, and reserved his judgment on the finding to a future day. On the 28th January, upon motion for judgment by the plaintiff, the judge gave judgment in his favour, granting a mandatory injunction. In April the defendant gave notice of appeal from the order, which embodied both the finding of fact and the judgment:—Held, that the appeal from the finding of fact ought to have been brought within twenty-one days from the 6th of December, and that the appeal could only proceed upon the footing that the plaintiff was entitled to the right of way. *Id.*

— **Order partly Final and partly Interlocutory.**—When an order on an interlocutory application and an order on further consideration are made at the same time and are included in one order, an appeal from the order on the interlocutory application must nevertheless be brought within twenty-one days, although such order in effect determines the issue in the cause. *Cummins v. Herron*, 4 Ch. D. 787; 46 L. J., Ch. D. 423; 36 L. T. 41; 25 W. R. 325—C. A.

— **Rule Absolute for New Trial.**—An order absolute for a new trial is an interlocutory order, an appeal from which must be brought within twenty-one days from the date thereof, under Ord. LVIII. r. 15. *Highton v. Treherne*, 48 L. J., Ex. 167; 39 L. T. 411; 27 W. R. 245—C. A.

— **To vary Certificate.**—Goods seized in execution were claimed by the trustees of a settlement made by the debtor. A decree was made in an interpleader suit directing an inquiry whether the settlement was a valid settlement of the goods, and who were entitled to them. The chief clerk certified that the settlement was invalid, and the judgment creditor entitled. By an order made on further consideration and on adjourned summons to vary the certificate, the court declared the settlement valid, and ordered the certificate to be varied accordingly, and directed the proceeds of the goods to be paid to the trustees:—Held, that the substantial part of this order was an order to vary the certificate, which was an interlocutory order, and that an

appeal brought after twenty-one days was too late. *White v. Witt*, 5 Ch. D. 589; 46 L. J., Ch. 560; 37 L. T. 110; 25 W. R. 435—C. A.

— **Special Case stated by Arbitrator—Opinion of Court on.**—An action having been referred, with power for the arbitrator to state a special case, he stated a case for the opinion of the court on a point of law. The case was to be sent back to the arbitrator if the court was in favour of the plaintiff, and judgment was to be entered for the defendant if the court decided in favour of the latter. The court decided in favour of the plaintiff, and referred the matter back to the arbitrator:—Held, that it was a final and not an interlocutory order. *Shubbrook v. Tufnell*, 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740—C. A.

An arbitrator to whom an action had been referred stated a case for the opinion of the court, asking for its decision upon certain points; the case was to go back to the arbitrator whichever way the court decided; on an appeal from the decision of the court:—Held, to be an interlocutory order within the meaning of Ord. LVIII. r. 15, and that it must be brought within twenty-one days. *Collins v. Paddington (Vestry)*, 5 Q. B. D. 368; 49 L. J., Q. B. 264, 612; 42 L. T. 573; 28 W. R. 588—C. A.

— **Order depriving of Costs.**—The plaintiffs after a trial with a jury recovered 5*l.*, and the judge at the trial ordered judgment for that sum, but without costs. The divisional court reversed this judgment as to costs:—Held, that the appeal from the order of the divisional court was not an appeal from an interlocutory order. *Maraden v. Lancashire and Yorkshire Railway Company*, 7 Q. B. D. 641; 50 L. J., Q. B. 318; 44 L. T. 239; 29 W. R. 580—C. A.

— **Addition as to Costs made to Decree.**—An addition made to a decree upon motion giving directions as to costs as to which the decree itself was silent, is a portion of the decree, and therefore can be examined in an appeal from the decree, and is not an interlocutory order within the meaning of Ord. LVIII. r. 15. *The City of Manchester*, 5 P. D. 221; 49 L. J., P. 81; 42 L. T. 521—C. A.

— **Against Order on Summons in Administration Suit.**—After an action had been brought for the administration of a testator's estate the executrix carried on the testator's trade with his assets, and incurred a trade debt for which the creditor brought an action and obtained judgment and execution, under which he seized some of the testator's assets. The sheriff interpleaded, and the proceeds of the sale were paid into court in the administration action. The creditor took out a summons in the administration action claiming the proceeds of the sale, but his claim was refused:—Held, that the order, although finally determining the rights of the parties, was an interlocutory order under Rules of Court, 1875, Ord. LVIII. r. 15, and that an appeal must be brought within twenty-one days. *Phrycey v. Phrycey*, 12 Ch. D. 305; 41 L. T. 607—C. A.

— **Petition under Lands Clauses Act.**—A petition having been presented for payment out of court of a fund paid in under the Lands Clauses Act as the purchase-money of a devised

estate, the court, on the 18th of June, made an order declaring the construction of the will and directing inquiries as to the persons interested. An application was made on behalf of some of the parties who were resident in America to extend the time for appealing to four weeks from the 8th of July, in order to allow time for the persons acting for them under a power of attorney to consult them as to appealing:—Held, that the order was a final one. *Jacques, In re, Carlisle Corporation, Ex parte*, 18 Ch. D. 392; 45 L. T. 297; 30 W. R. 394—C. A.

— **Order under Vendor and Purchaser Act, 1874.**—The time within which an appeal can be brought from an order under the Vendor and Purchaser Act, 1874, s. 9, is twenty-one days. *Blyth and Young, In re*, 13 Ch. D. 416; 41 L. T. 746; 28 W. R. 266—C. A.

— **Order under Trustee Relief Act.**—Under Ord. LVIII. rr. 9, 15, an appeal from an order made upon a petition under the Trustee Relief Act must be brought within twenty-one days. *Baillie, In re*, 4 Ch. D. 785; 46 L. J., Ch. 330; 35 L. T. 917; 25 W. R. 310—C. A.

— **Order in Winding-up and in an Action.**—An action was brought by a debenture holder of a company on behalf of himself and the other debenture holders to enforce their securities. After this an order was made for winding-up the company. An arrangement was proposed for the making over the undertaking to the Secretary of State for India on certain terms, and an order was made in the winding-up and in the action sanctioning the arrangement and declaring that no moneys payable by the Secretary of State to the stockholders and debenture holders of the company under the arrangement should be treated as assets of the company. An unsecured creditor of the company, who did not know of this order at the time when it was made, applied after a lapse of more than twenty-one days from his receiving a copy of the order, but within the time for appealing from a final order in an action, for leave to appeal against it:—Held, that as the applicant had no such interest that he could have been a party to the action the order must, as regarded him, be treated as an order made only in the winding-up, that Ord. LVIII. r. 9, applied, and that he was out of time. *Madras Irrigation and Canal Company, In re; Wood v. Madras Irrigation and Canal Company*, 23 Ch. D. 248; 49 L. T. 228—C. A.

**From Winding-up Order.**—See *post*, COMPANY.

**In Bankruptcy.**—See *post*, BANKRUPTCY.

**In Divorce Matters.**—See HUSBAND AND WIFE.

**Before Judicature Acts.**—The defendant leased a coal mine to the plaintiffs, reserving royalties and a dead rent. They covenanted to work the coal in a fair, honest, and workmanlike manner, and to use all reasonable diligence, . . . accidents or other unavoidable causes excepted. After a time they discontinued working the coal, being prevented from doing so by an influx of water which drowned the mine. They continued to pay the dead rent for several

years, but at length the defendant refused to receive it, and commenced an ejectment against the plaintiffs for breach of the covenant to work the mine. The plaintiffs then filed a bill to restrain the action. The defendant demurred on the ground that the remedy was at law. The demurrer was overruled. The defendant put in an answer, and thereby claimed the benefit of the demurrer. He afterwards died, and the suit was revived against his representative. The suit came on to be heard, and an injunction was granted to restrain the action. An appeal was brought from the decree, and also from the order overruling the demurrer:—Held, that the defendant was not too late in appealing from the order overruling the demurrer, and the demurrer was allowed with costs. *Simpson v. Ingleyby*, 27 L. T. 695; 20 W. R. 993—L. J.

A person against whom a decree was made by the Court of Appeal was at the date of the decree residing out of the jurisdiction, and suffering from softening of the brain, of which disease he died, nearly three years after the date of the decree:—Held, that these were not such peculiar circumstances as to render it just and expedient to enlarge the time for enrolment of the decree under the Gen. Ord. XXIII. r. 28. *Hooper v. Gumm*, 26 L. T. 537—L. J.

#### b. From what Period Time Runs.

**Several Distinct Claims in One Application.**—When several distinct claims are joined in one application, and an order is made allowing some of them and making no mention of the others, an appeal asking that all the claims should be allowed, must be brought within twenty-one days from the hearing of the application. *Berdan v. Birmingham Small Arms and Metal Company*, 7 Ch. D. 24; 47 L. J., Ch. 96; 37 L. T. 588; 26 W. R. 89—C. A.

On a summons specifying five distinct matters in regard to which the defendant desired better particulars, the application was granted with regard to two, and the order contained no express reference to the other three. On appeal by the defendant from such order:—Held, that the appeal not having been brought within twenty-one days from the refusal of the application, was too late. *Id.*

When several claims are joined in one application, and some of the claims are allowed and some refused, an appeal from the refusal must be brought within twenty-one days from the date of the refusal, not from the date of perfecting the order. *Trail v. Jackson*, 4 Ch. D. 7; 46 L. J., Ch. 16; 25 W. R. 36—C. A.

**Refusal—Order as to Costs.**—When an interlocutory motion is refused, and the court at the same time makes an order as to the costs of the motion, this addition does not enlarge the time for appealing, which still begins to run from the time of the refusal of the order, and not from the time of its being perfected by entry. *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127; 45 L. J., Ch. 756; 35 L. T. 111; 24 W. R. 911—C. A.

**Signing not Pronouncing Order.**—When an order has been made, the twenty-one days allowed for appealing run from the signing of the order and not from the day when it was pronounced. *Lewer, In re, Garrard, Ex parte*, 5 Ch. D. 61;



46 L. J., Bk. 70; 36 L. T. 42; 25 W. R. 364—C. A.

**Dismissal of Action — Pronouncing Judgment.**—The time for appealing from the dismissal of a suit at the hearing dates from the time of pronouncing the judgment; the word "application" in Ord. LVIII. r. 15, being applicable to the hearing of a suit as well as to an interlocutory proceeding. Where a suit in Chancery was brought to an issue on replication filed and heard under the old practice, it was held that the appeal must be regulated by the new practice, and the bill having been dismissed, the time for appealing was calculated from the pronouncing of the decree. *International Financial Society v. City of Moscow Gas Company*, 7 Ch. D. 241; 47 L. J., Ch. 258; 37 L. T. 736; 26 W. R. 272—C. A.

**Payment out of Court—Refusal of Part.**—A petitioner applied for payment out of court of the whole of a fund, his title to one moiety of which was not disputed. The court below ordered payment to him of one moiety only:—Held, that an appeal from this order was not an appeal from the refusal of an application, and that the time for appealing did not begin to run till the order was drawn up. *Mitchell, In re*, 9 Ch. D. 5—C. A.

#### c. Extension of Time.

**Application not Ex parte.**—After the expiration of the time limited for bringing an appeal, special leave to appeal will not be given upon an ex parte application. *Lawrence, In re, Erennett v. Lawrence*, 4 Ch. D. 139; 46 L. J., Ch. 119; 25 W. R. 107—C. A.

**Grounds for Granting.**—The grounds for allowing an extension of time for appeal considered. *Blyth and Young, In re*, 13 Ch. D. 416; 41 L. T. 746; 28 W. R. 266—C. A.

By Baggallay and Theisger, L.J.J., that although before judgment applications for extension of time should be freely granted, yet after judgment applications of that kind ought to be allowed only with caution. *Collins v. Paddington (Vestry)*, 5 Q. B. D. 368; 49 L. J. Q. B. 264, 612; 42 L. T. 573; 28 W. R. 588—C. A.

By Bramwell, L.J., that an application for extension of time ought to be granted at any stage of an action, whenever an unintentional mistake has been committed, and the damage to the opposite party may be repaired by payment of costs or otherwise. *Id.*

**Correctness of Decision Doubted.**—After the expiration of the time allowed by Ord. LVIII. r. 15, for appealing from a final decree, the court will not, without special circumstances, enlarge the time for appealing. The mere fact that the Court of Appeal has in a subsequent case thrown doubt upon the correctness of the decision, is not a sufficient ground. *Craig v. Phillips*, 7 Ch. D. 249; 47 L. J., Ch. 239; 37 L. T. 772; 27 W. R. 293—C. A.

**Mistake.**—The mere fact that an appellant has misconstrued one of the rules, and by reason of such mistake has omitted to bring his appeal in time, is not a sufficient ground for enlarging the time for appeal. *International*

*Financial Society v. City of Moscow Gas Company*, 7 Ch. D. 241; 47 L. J., Ch. 258; 37 L. T. 736; 26 W. R. 272—C. A.

A misapprehension of the meaning of the rules of court by counsel or solicitor is not sufficient ground to induce the court to extend the time for setting down the appeal. *Mansel, In re, Rhodes v. Jenkins*, 7 Ch. D. 711; 47 L. J., Ch. 870; 38 L. T. 403; 26 W. R. 361—C. A.

The Court of Appeal will not enlarge the time for appealing where, owing to the mistake, made bonâ fide, by the appellant's legal advisers, the time within which the appeal should have been brought has been allowed to run out. *Highton v. Treherne*, 48 L. J., Ex. 167; 39 L. T. 411; 27 W. R. 245—C. A.

A contributory, on the 29th of March, being twenty-one days from the pronouncing of a refusal to remove his name from the list, gave fourteen days' notice of appeal. On the 1st of April, conceiving that he ought to have given only a four days' notice, he withdrew his notice of appeal, and on the following day gave a four days' notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:—Held, that the time ought to be extended. *Ambrose Lake Tin and Copper Company, In re, Taylor's case*, 8 Ch. D. 643; 47 L. J., Ch. 696; 38 L. T. 587; 26 W. R. 602—C. A.

A petition for winding-up a company having been dismissed, the petitioner's solicitor wrote a letter to the company's solicitor urging him to get the order drawn up, adding, "as we are advised and intend to give notice of appeal." No formal notice of appeal was given till more than twenty-one days had elapsed from the dismissal of the petition, when the petitioner gave a supplemental notice of appeal:—Held, that there was no such mistake or accident as would justify the court in extending the time for appeal. Mistake by appellant may be a ground for extending the time for appeal, without misconduct by respondent. Observations of James and Baggallay, L.J.J., in *Blyth and Young, In re* (13 Ch. D. 416) upon *McAndrew v. Barker* (7 Ch. D. 701) respecting the grounds for extension of time for appeal, approved. *New Cullao, In re*, 22 Ch. D. 484; 52 L. J., Ch. 283; 48 L. T. 251; 31 W. R. 185—C. A.

**Fresh Parties Interested.**—Where an order was made in 1861 which had been acted on until 1882, some of the property affected by the order had been incumbered, and fresh parties had become interested in the question who relied on the order of the court:—Held, that extension of time to appeal would not be granted. *Peareth v. Marriott*, 22 Ch. D. 182; 48 L. T. 170—C. A.

**Special Grounds—Company—Order on Winding-up Petition.**—The shareholders in a company passed an extraordinary resolution to wind up the company voluntarily, but the resolution was void, the majority of members who voted not being entitled to vote. A creditor filed a petition in the Chancery Court of the Duchy of Lancaster for a supervision order, or for a compulsory winding-up order, and as the court and the petitioner were ignorant of the fact that the resolution was invalid, a supervision order was made. Five months afterwards the petitioner discovered the invalidity of the resolution, and then moved before the Vice-Chancellor that the supervision order might be discharged, and a

compulsory winding-up order made. This motion having been refused by the Vice-Chancellor on the ground of want of jurisdiction to rehear the petition, the petitioner appealed from the refusal of the motion, and also applied to the Court of Appeal for leave to appeal against the original order notwithstanding the lapse of time. The application for leave to appeal was opposed by the executors of a previous member, who had transferred their testator's shares to escape liability less than twelve months before the presenting of the original petition, but more than twelve months before the case came before the Court of Appeal, on the ground that if an order were now made on the original petition they would be made liable under the 38th section of the Companies Act, 1862:—Held, that leave to appeal, notwithstanding the lapse of time, ought to be given, the mistake as to the validity of the resolution forming a special ground for the application, and the respondents having no equity to resist it. Observations on the principle on which the court grants extension of time for appeal. *New Callao, In re* (22 Ch. D. 484), approved. *Manchester Economic Building Society, In re*, 24 Ch. D. 488—C. A.

— **Administration Suit.**—After an action had been brought for the administration of a testator's estate the executrix carried on the testator's trade with his assets, and incurred a trade debt for which the creditor brought an action and obtained judgment and execution, under which he seized some of the testator's assets. The sheriff interpleaded, and the proceeds of the sale were paid into court in the administration action. The creditor took out a summons in the administration action claiming the proceeds of the sale, but his claim was refused:—Held, that the order, although finally determining the rights of the parties, was an interlocutory order under Rules of Court, 1875, Ord. LVIII. r. 15, and that an appeal must be brought within twenty-one days and enlargement of time refused. *Phycsey v. Phycsey*, 12 Ch. D. 305; 41 L. T. 607—C. A.

— **No Equity against Respondents.**—Leave to appeal notwithstanding the lapse of time was refused, the respondents not having done anything to raise an equity against them. *McAndrew v. Barker*, 7 Ch. D. 701; 47 L. J., Ch. 340; 37 L. T. 810; 26 W. R. 317—C. A. *S. P., Mansel, In re, Rhodes v. Jenkins*, 7 Ch. D. 711; 47 L. J., Ch. 870; 38 L. T. 403; 26 W. R. 361—C. A.

— **Fund still in Court.**—In the winding-up of a company, Jessel, M. R., following a reported decision of his own, ordered a certain fund, claimed by a creditor as against the liquidator, to be paid to the liquidator. The creditor allowed the time for appealing to expire. Afterwards the decision which had been followed was overruled by the Court of Appeal. The creditor then applied for leave to appeal against the order of the Master of the Rolls:—Held, that as the fund in question was still within the control of the court, leave to appeal should be given. *Normanton Iron and Steel Company, In re*, 50 L. J., Ch. 223; 29 W. R. 300—C. A.

— **Appeal from Decree declaring Future Rights.**—A testator gave, after the death of his wife, a legacy to his son E. S. for life and after

his death to his children, and if he died without issue it was to be divided among the testator's "surviving children." Six other legacies were given in a similar way. All the seven children survived the testator. A suit for administration was instituted to which all were parties. In 1836 an order on further consideration was made, at which time six of the children were living, and it was declared, that on the death of the widow, E. S. would become entitled to the interest on the legacy for life; that on his death it would be divisible among his children then living, but if he died without leaving issue, then among the children of the testator who were living at the testator's decease. The testator's widow died in 1838, and E. S. died in 1881 without ever having had a child. At this time one child only of the testator was living, and he applied for leave to appeal against the order of 1836, on the ground that it was irregular in making a prospective declaration as to future rights:—Held, that leave to appeal ought not to be granted, the fact that a declaration was made as to future rights being no sufficient reason for giving such leave in a case where all parties who could in any event be interested were before the court and adult when the declaration was made. *Brandon v. Brandon* (7 D. M. & G. 365) and *Walmesley v. Foxhall* (1 D. J. & S. 451) considered and distinguished. *Curtis v. Sheffield* (No. 2), 21 Ch. D. 1; 51 L. J., Ch. 535; 46 L. T. 177; 30 W. R. 581—C. A.

— **Appellant Unaware of Order.**—An appeal against an order in excess of jurisdiction was allowed more than a year after it was made, the appellant having applied for leave to appeal as soon as he became aware of the existence of the order. *Padstow Tidal Loss and Collision Assurance Association, In re, Bryant, Ex parte*, 20 Ch. D. 137; 51 L. J., Ch. 344; 45 L. T. 774; 30 W. R. 326—C. A.

— **Where Interlocutory Order really final.**—A petition having been presented for payment out of court of a fund paid in under the Lands Clauses Act as the purchase-money of a devised estate, the court, on the 18th of June, made an order declaring the construction of the will and directing inquiries as to the persons interested. An application was made on behalf of some of the parties who were resident in America to extend the time for appealing to four weeks from the 8th of July, in order to allow time for the persons acting for them under a power of attorney to consult them as to appealing:—Held, that as the order was a final one, the case, though within the letter, was not within the spirit of rule 9 of the Rules of Court, 1875, Ord. LVIII., requiring an appeal to be brought within twenty-one days, and that the extension of time ought to be granted. *Jacques, In re, Carlisle Corporation, Ex parte*, 18 Ch. D. 392; 45 L. T. 297; 30 W. R. 394—C. A.

— **Some Parties only Served.**—Notice of an appeal from the refusal to annul an adjudication of bankruptcy must be served on the trustee in bankruptcy as well as on the petitioning creditor. And if notice of the appeal is served on the petitioning creditor in time, but is not served in time on the trustee, the appeal must be dismissed. The time for appealing will not be extended in such a case. *Ward, Ex parte*,

*Ward, In re*, 15 Ch. D. 292; 43 L. T. 183; 29 W. R. 206—C. A.

**— Mere Communication of Intention to Appeal.**—The mere communication by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal: nor, in the absence of other special circumstances, is it ground for an extension of time for appealing. *Blyth and Young, In re*, 13 Ch. D. 416; 41 L. T. 746; 28 W. R. 266—C. A.

A person against whom an order in a winding-up had been made for payment of money to the official liquidator served on the official liquidator a notice: "Take notice that it is the intention of J. L. to prosecute an appeal from the order made in this matter by the vice-warden of the stannaries on the 29th of May, 1878, whereby J. L. was ordered," &c.:—Held, that this notice was sufficient, and the appeal was ordered to be set down. *West Jewell Tin Mining Company, In re, Little's case*, 8 Ch. D. 806—C. A.

An arbitrator, to whom an action had been referred, stated a special case as to a question of damages for the opinion of the Queen's Bench Division: judgment was given upon the 1st of April, for the defendants. A few days after the plaintiff's solicitor wrote both to the arbitrator and to the defendants' solicitor, stating that an appeal would be brought: on the 18th he had an attack of illness which incapacitated him from attending to business until the 25th: he was informed by counsel on the 26th that it was then too late to set down the appeal as from an interlocutory order; and accordingly, on the 12th of May, he gave a fourteen days' notice of appeal as from a final order of judgment. At the hearing on the 23rd of February following, an objection was taken that the decision of the Queen's Bench Division was an interlocutory order or judgment, and that the appeal not having been brought within twenty-one days was too late: the objection having been allowed, the plaintiff then moved for an extension of time for appealing:—Held, that the application ought not to be granted. *West Jewell Tin Mining Company, In re, Little's case* (8 Ch. D. 806), distinguished. *Collins v. Paddington (Vestry)*. 5 Q. B. D. 368; 49 L. J., Q. B. 264—612; 42 L. T. 573; 28 W. R. 588—C. A.

#### d. Other Points.

**Sundays, &c., whether Included.**—By Ord. LVII., r. 2, Sundays, Christmas Days and Good Fridays are only excluded from the computation of limited time for doing any act where such time is less than six days or expires on one of the excluded days. *Gilbert, In re, Viney, Ex parte*, 4 Ch. D. 794; 46 L. J., Bk. 80; 36 L. T. 43; 25 W. R. 364—C. A.

**Objection as to Time—Costs of Affidavit filed by Respondent after Appeal set down.**—If a respondent to an appeal takes the objection that the notice of appeal was given too late, and the appeal is dismissed on that ground, the appellant will not be ordered to pay the costs of affidavits filed by the respondent after the appeal was set down. *Fardon's Vinegar Company, Ex parte, Jones, In re*, 14 Ch. D. 285; 49 L. J., Bk. 74; 43 L. T. 11; 28 W. R. 821—C. A.

**Costs incurred by Appellant with Knowledge**

**of Respondent.**—A respondent who, after the time for appealing has expired, knowingly allows his opponent to incur expense in preparing for the appeal, without warning him of his intention to object to the appeal being heard, may be deprived of his costs. *Blyth and Young, In re*, 13 Ch. D. 416; 41 L. T. 746; 28 W. R. 266—C. A.

#### 5. NOTICE OF APPEAL.

**Sufficiency of.**—A person against whom an order in a winding-up had been made for payment of money to the official liquidator served on the official liquidator a notice: "Take notice that it is the intention of J. L. to prosecute an appeal from the order made in this matter by the vice-warden of the stannaries on the 29th of May, 1878, whereby J. L. was ordered," &c.:—Held, that this notice was sufficient, and the appeal was ordered to be set down. *West Jewell Tin Mining Company, In re, Little's case*, 8 Ch. D. 806—C. A.

A petition for winding-up a company having been dismissed, the petitioner's solicitors wrote a letter to the company's solicitor urging him to get the order drawn up, adding, "as we are advised and intend to give notice of appeal." No formal notice of appeal was given till more than twenty-one days had elapsed from the dismissal of the petition, when the petitioner gave a supplemental notice of appeal:—Held, that the letter could not be treated as an informal notice of appeal, and therefore the appeal was too late. *Little's case* (8 Ch. D. 806) considered and distinguished. *New Callao, In re*, 22 Ch. D. 484; 52 L. J., Ch. 283; 48 L. T. 251; 31 W. R. 185—C. A.

The mere communication by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal. *Blyth and Young, In re*, 13 Ch. D. 416; 41 L. T. 746; 28 W. R. 266—C. A.

**Signature by London Agent—Name of principal Solicitor, Mistake in.**—A notice of appeal, given in due time, was signed by L. and J. as London agents for M. and D., who were, in fact, the solicitors of the appellant, though no order to change solicitors had then been made, S. and Son being the solicitors on the record. L. and J. were also agents for S. and Son. After the notice had been given, and the time for appealing had expired, the order to change solicitors was obtained:—Held, that the error only amounted to a false description, and that, as the respondents had not been misled, the notice was good. *Kettlewell v. Watson*, 52 L. J., Ch. 818; 48 L. T. 840; 31 W. R. 709—C. A.

Seemingly, a notice of appeal need not be signed by a solicitor unless in the case of a pauper. *Id.*

**Notice by Respondent.**—On the application of a trustee in bankruptcy, the registrar of a county court declared two bills of sale which the bankrupt had executed void against the trustee. On appeals by the two grantees, the chief judge affirmed the decision as to the first bill of sale, but held that the second bill of sale was valid as against the trustee. The first grantee gave notice of appeal, addressed to the trustee and to the second grantee. The trustee gave no original notice of appeal, but served notice on both the grantees that, on the hearing of the first gran-

tee's appeal, he should contend that the decision of the chief judge as to the second bill of sale ought to be varied in his favour:—Held, that this was a good notice under Rules of Court, 1875, Ord. LVIII. r. 6. *Payne, Ex parte, Cross, In re*, 11 Ch. D. 539; 40 L. T. 296; 27 W. R. 368.

By an order in an administration suit a fund which, according to the construction to be put upon a will and codicil, was payable to A. or B. or C. was directed to be paid to C. B. appealed, the notice of appeal having, by the direction of the court, been served on A. as well as C. On the dismissal of B.'s appeal:—Held, that under Ord. LVIII. r. 5, it was open to A. also to ask for a reversal of the order for payment to C., although he had given no notice of appeal, but on C.'s request the further hearing was adjourned. *Hunter v. Hunter*, 24 W. R. 527—C. A.

**Respondent varying order in which Appellant has no interest.**—A respondent who seeks to have an order varied on a point in which the appellant has no interest, cannot proceed by notice under Rules of Court, 1875, Ord. LVIII. r. 6, but must give a notice of appeal. *Cavan-der's Trusts, In re*, 16 Ch. D. 270; 50 L. J., Ch. 292; 29 W. R. 405—C. A.

**Who must be Served.**—By an order in an administration suit a fund, which, according to the construction to be put upon a will and codicil, was payable to A. or B. or C., was directed to be paid to C. A. appealed, serving notice of appeal upon C. only:—Held, that, whether or not the appellant was right under Ord. LVIII. r. 3, in serving C. only, the appeal could not be heard in the absence of B., and that the court would, in exercise of the discretion given to it by the same rule, order the appeal to stand over in order that B. might be served. *Hunter v. Hunter*, 24 W. R. 504—C. A.

An appellant ought to serve notice of appeal on all parties who will be affected by the order of the Court of Appeal, and if a party who would be so affected is not served, he may appear without service and obtain his costs. And this rule applies, although the appeal fails through irregularity, and never comes on to be heard. *New Callao, In re*, 22 Ch. D. 484; 52 L. J. Ch. 283; 48 L. T. 251; 31 W. R. 185—C. A.

**Substituted Service.**—In a proper case the Court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the rules of court. *Warburg, Ex parte, Whalley, In re*, 24 Ch. D. 364; 49 L. T. 243—C. A.

**Amendment of Notice of Appeal.**—The Court of Appeal has full discretion, under Rules of Court, 1875, Ord. LVIII., rule 3, to allow a notice of appeal to be amended as to dates or otherwise, and special circumstances are not required to justify such amendment. *Stockton Iron Furnace Company, In re*, 10 Ch. D. 335; 48 L. J., Ch. 417; 40 L. T. 19; 27 W. R. 433—C. A.

**Withdrawal of Appeal—Revocation of Withdrawal.**—The defendant in an action having given notice of appeal against an order, wrote to the plaintiff saying that he proposed to withdraw his appeal, and asking for his consent to his  
VOL. I.

doing so. The plaintiff at once consented to the withdrawal. Two days afterwards the defendant wrote to say that he was under misapprehension as to a material fact, and intended to go on with the appeal. No step was taken by either side to remove the appeal from the list of appeals, and both parties filed affidavits in support of their case:—Held, that the defendant had no power to revoke his withdrawal of the appeal, and that the appeal could not be heard. *Watson v. Care* (No. 2), 17 Ch. D. 23; 50 L. J., Ch. 561; 44 L. T. 117; 29 W. R. 768—C. A.

**Notice, Form of.**—Service of notice of an appeal motion not signed by the solicitors prosecuting the appeal is invalid, and unless the irregularity is waived by the other side, will not prevent the inrolment of the original order. *Limehouse Works Company, In re*, 9 L. R. Ch. 266; 43 L. J., Ch. 483; 30 L. T. 4; 22 W. R. 288.

## 6. SETTING DOWN APPEAL FOR HEARING.

**Within what Time.**—An appeal must be entered with the proper officer of the Court of Appeal before the day mentioned in the notice of appeal for the hearing, or if that day happens to be in a vacation when the office is closed, then before the next day of the sitting of the court, otherwise the respondent will be entitled to have the appeal motion dismissed as an abandoned motion, although the notice of appeal was given in time. *National Funds Assurance Company, In re*, 4 Ch. D. 305; 46 L. J., Ch. 183; 35 L. T. 689; 25 W. R. 151—C. A.

Notice of appeal from an interlocutory order made on the 24th of January was given on the 13th of February for the 18th of February, but owing to a mistake of the solicitor's clerk was not set down till the 19th. The appeal came on to be heard on the 20th:—Held, that, not having been set down till after the day for which notice was given, it must be dismissed. *Mansel, In re, Rhodes v. Jenkins*, 7 Ch. D. 711; 47 L. J., Ch. 870; 38 L. T. 403; 26 W. R. 361—C. A.

**Order not drawn up by Respondents.**—An interlocutory order having been made in an action on the 3rd of April, the defendants on the 23rd of April gave notice of appeal for the 30th of April. The order was not drawn up till the latter end of June, and the defendants then set down the appeal. Upon its coming on to be heard the plaintiffs objected that it could not be heard, as it had not been set down in time:—Held, that as it was the duty of the plaintiffs to draw up the order, and the appeal had been set down as soon as the plaintiffs had enabled the defendants to comply with the requisition of Rules of Court, 1875, Ord. LVIII., rule 8, that an office copy of the order shall be produced, the objection could not be sustained. *Harker, In re, Goodbarne v. Fothergill*, 10 Ch. D. 613; 40 L. T. 408; 27 W. R. 587—C. A. *Cp. Smith v. Grindley, infra.*

**Setting down on Second Notice after Abandonment of First.**—A final decree having been passed and entered on the 4th of December, the defendant on the following day served notice of appeal for the 19th, but by mistake his solicitor did not set it down till the 19th. A few days afterwards the plaintiff's solicitor informed the  
G

defendant's solicitor that the appeal had not been set down in time, and stated that he should insist on the objection. The appellant's solicitor then sent to the plaintiff's solicitor a fresh notice of appeal, offering to pay the costs occasioned by the first and asking him to consent to the first entry of the appeal being struck out. The plaintiff's solicitor refused to comply with this request, and returned the second notice of appeal. The defendant set down the second notice, and applied to have the first entry struck out, and to have the second notice and the entry of it treated as valid:—Held, that the appeal must proceed on the notice: and the applicant's costs were made costs in the appeal, no costs of the motion being given to the plaintiff. *Norton v. London and North Western Railway Company*, 11 Ch. D. 118; 40 L. T. 597; 27 W. R. 773—C. A.

**Practice—Production of Order.**—An appeal from the refusal of an interlocutory motion may be set down without production of the order appealed from, or a copy of it. *Smith v. Grindley*, *Smith v. Charrington*, 3 Ch. D. 80; 35 L. T. 112; 24 W. R. 956—C. A.

Ord. LVIII. r. 8, does not apply to such a case. *Ib. Cp. Harker, In re, Goodbarne v. Fothergill, supra.*

**If not set down a Respondent should not appear.**—When notice of motion of appeal is given, but the party giving it neglects to take the proceedings before the officer of the court directed by Ord. LVIII. r. 8, and the matter is not in the court paper of the day, the other party ought not to appear, but may make a substantive application for his costs of the motion. *Webb v. Mansel*, 2 Q. B. D. 117; 25 W. R. 389—C. A.

## 7. SECURITY FOR COSTS OF APPEAL.

**In what Cases—Poverty or Insolvency.**—The court refused to require an insolvent appellant to give security for the costs of the appeal, when the question at issue had not been previously considered in a court of error. *Rourke v. White Moss Colliery Company*, 1 C. P. D. 556; 35 L. T. 160.

An appellant will be ordered to give security for the costs of the appeal who is in insolvent circumstances, and also is vexatiously and unreasonably prosecuting the appeal. *Ueil v. Brearley*, 8 C. P. D. 206; 47 L. J., Ch. 380; 38 L. T. 249; 26 W. R. 371—C. A.

The facts that an appellant is a pauper and is seeking to restrain the respondent from administering on the footing upon which letters of administration were granted to him without taking proceedings to have the administration revoked are special circumstances, within Ord. LVIII. r. 15, sufficient to require the appellant to give security for costs. *Hankin v. Turner, Ivory, In re*, 10 Ch. D. 872; 39 L. T. 285; 27 W. R. 20—C. A.

The plaintiff, who was in receipt of parochial relief, was ordered by the Court of Appeal to give security for the costs of appeal, the court being of opinion that the appeal was a speculative one. *Ib.*

Per Cotton, L. J.: The insolvency of an appellant is *prima facie* a sufficient reason for ordering him to give security for costs. *Ib.*

A defendant in an action which had been tried by a judge without a jury gave notice of appeal

against the judgment, and also obtained *ex parte* a rule nisi for a new trial. The appellant being in insolvent circumstances, was ordered to give security for costs. *Waddell v. Blockey*, 10 Ch. D. 416; 40 L. T. 286; 27 W. R. 233—C. A.

The court has jurisdiction to make a defendant who is appealing give security for the costs of the appeal, and will, where the defendant is not a man of substance, and is merely a nominal defendant, stay the appeal until security is given. *Hastings (Corporation) v. Icail*, 9 L. R., Ch. 758; 43 L. J., Ch. 728; 31 L. T. 262; 22 W. R. 783.

The mere poverty of an appellant, without any other circumstance, is sufficient ground for requiring security for the costs of the appeal to be given, under Ord. LVIII. r. 15. *Harlock v. Ashberry*, 19 Ch. D. 84; 51 L. J., Ch. 96; 45 L. T. 602; 30 W. R. 112—C. A.

Insolvency of the appellant is of itself sufficient ground for ordering him to give security for the costs of an appeal. *Ueil v. Brearley* (3 C. P. D. 206) not followed. *Spencer, In re, Spencer v. Hart*, 45 L. T. 396—C. A.

**Action conducted by Solicitor for his own Benefit.**—When a plaintiff in error, defendant below, died after joinder in error in the Exchequer Chamber, that court stayed proceedings till security for costs should be given to the defendant in error, upon affidavits shewing ground for believing that the plaintiff in error had died insolvent, and that his attorney was prosecuting the writ in error at his own risk and for his own benefit. *Haygarth v. Wilkinson*, 12 Q. B. 851; 12 Jur. 727.

**Appeal by Company against Winding-up Order.**—*See COMPANY.*

**Foreigner Domiciled Abroad.**—The fact that an appellant is a foreigner domiciled abroad with no assets in this country, is a "special circumstance" within Ord. LVIII. r. 15, and entitles the respondent to security for costs of an appeal from an interlocutory order. *Grant v. Banque Franco-Egyptienne*, 2 C. P. D. 430; 47 L. J., C. P. 41; 26 W. R. 68—C. A.

A defendant living abroad, and appealing to a court of error, may be compelled to give security for the costs in error. *Dudley (Earl) v. Lumley*, 8 W. R. 543.

The court or a judge can order the defendant in an action to find security for costs, and where the defendant had brought error, was out of the country, and had not put in bail, the court refused to set aside an order that he should give security. *Hill v. Fox*, 3 H. & N. 547; 27 L. J., Ex. 416.

A plaintiff in error was a foreigner residing abroad, and had given security for costs in the court below. The court of error after joinder in error stayed proceedings until security was given for the costs of the proceedings in error. *Bougheux v. Swayne*, 3 El. & Bl. 829; 18 Jur. 894—Ex. Ch.

If a plaintiff in error resides out of the jurisdiction, the court may require him to give security for costs; and unless he does so, the defendant in error may proceed on his judgment. *Lewis v. Orens*, 5 B. & A. 265.

**Appellant a Lunatic.**—The court will not compel security for costs in error on the

ground of the plaintiff in error being a lunatic. *Steel v. Allan*, 2 B. & P. 437.

— **Order to wind up Company.**—Where an order has been made to wind up a limited company on the ground that it is unable to pay its debts, and an appeal is brought by the company alone, the appellants will be ordered to give security for the costs of the appeal. *Photographic Artists' Co-operative Supply Association, In re*, 48 L. T. 454; 31 W. R. 509—C. A.

— **Suit under Old Practice.**—The court will in a proper case direct substantial security for costs to be given under Ord. L.V. of February, 1876, in a suit proceeding under the old practice. *Republic of Costa Rica v. Erlanger*, 3 Ch. D. 62; 45 L. J., Ch. 743; 35 L. T. 19; 24 W. R. 955—C. A. Reversing the decision of Malins, V.-C., 24 W. R. 880.

— **Character of Order appealed from.**—On an application for security for the costs of an appeal, it is a material circumstance in favour of the application that the appeal is from the refusal of an order in the nature of a mandamus against a county court judge, who is made a respondent on the appeal. *Clarke v. Roche*, 46 L. J., Ch. 372; 25 W. R. 309—C. A.

**Time for Applying.**—After the costs incident to an appeal have been actually incurred by a respondent, and the time is fixed for the hearing of the appeal, it is too late to apply for an order that the appellant shall give security for costs. *Grant v. Banque Franco-Egyptienne*, 1 C. P. D. 143; 34 L. T. 470; 24 W. R. 338—C. A.

**Delay.**—An application for security for costs of an appeal ought to be made within a reasonable time; and, as a general rule, if made after the appeal is in the paper for hearing, would be too late. But where a motion for security for the costs of an interlocutory appeal and the appeal itself came into the paper on the same day, and it appeared that the motion for security had been delayed by reason of the court not having sat to hear such applications, the application was granted. *Indian, Kingston, and Sandhurst Gold Mining Co., In re*, 22 Ch. D. 83; 52 L. J., Ch. 31; 31 W. R. 34—C. A.

An application for the security for the costs of an appeal will be refused unless it is made promptly before costs of the appeal have been already incurred. Judgment was given in an action on the 22nd March. On the 6th April the defendant gave notice of appeal. The taxation of costs was not completed until the 4th November, the delay not being occasioned by either party. The plaintiffs then issued a *fi. fa.* for the amount of their taxed costs, to which the sheriff's return was *nulla bona*. On the 11th November the plaintiffs applied to the Court of Appeal that the appellant should give security for costs, the case being then ninth out of the list for hearing:—Held, that the application was too late, and on that ground must be refused. *Saltash (Mayor) v. Goodman*, 43 L. T. 464—C. A.

**Appellant out of Jurisdiction.**—An application for security for costs of an appeal must be made promptly. As a general rule it is too late if it is made where the appeal is in the paper for

hearing. But the court will take into account special circumstances. Where a motion for security for costs and the appeal came into the paper on the same day, and it appeared that notice of appeal had been given in the long vacation, and that the motion for security had been delayed by reason of the court not having sat to hear such applications on the usual day, the application was granted. *Indian, Kingston, and Sandhurst Mining Company, In re*, 22 Ch. D. 83; 52 L. J., Ch. 31; 48 L. T. 52; 31 W. R. 34—C. A.

Seemingly, the court will be more strict in enforcing promptness where the application is on the ground of poverty than where it is on the ground of the appellant being out of the jurisdiction. *Id.*

**Application, by whom made.**—When one plaintiff is dissatisfied with the judgment of a court, he may appeal, though his co-plaintiff does not wish to appeal; the latter should be made a respondent; and if he has any reason to doubt about security for costs if successful, he should apply that the appellants may give security. *Beckett v. Attwood*, 18 Ch. D. 54; 44 L. T. 660; 29 W. R. 796—C. A.

**Service of Notice without Leave.**—Notice of motion by a respondent that the appellant may be directed to give security for the costs of an appeal may be served without leave. *Grills v. Dillon*, 2 Ch. D. 325; 45 L. J., Ch. 432; 34 L. T. 781; 24 W. R. 431—C. A.

**Form of Order.**—A plaintiff appealed from a decree dismissing his bill. Upon proof of his having no means to answer the costs of an appeal, the appeal was stayed until he made a deposit of 50*l.*; but the court declined to order that in default of his doing so within a given time the appeal should be dismissed. *Wilson v. Smith*, 2 Ch. D. 67; 45 L. J., Ch. 421; 34 L. T. 471; 24 W. R. 421—C. A.

It is not the practice of the Court of Appeal, when ordering an appellant to give security for costs, to fix a time within which this is to be done. *Polini v. Gray, Sturla v. Freccia*, 11 Ch. D. 741; 49 L. J., Ch. 41; 40 L. T. 861—C. A.

Where an intending appellant having been ordered to give security for costs within a certain time has failed to do so, his right of appeal is gone for ever, although the usual period for appealing has not expired; and his appeal will be dismissed with costs. The form of order given in Seton, p. 1614, 4th edition, being correct. *Harris v. Fleming*, 30 W. R. 555—C. A.

**Offering Security for Costs of Appeal.**—An appellant who is clearly liable to give security for costs ought to offer security without an application to the court, and, if the offer is reasonable, it ought to be accepted; and in the case of an application to the court, the court in dealing with the costs will consider whose conduct has made it necessary. *The Ship Constantine*, 4 P. D. 156; 27 W. R. 747—C. A.

**What Security.**—When security for the costs of an appeal was ordered to be given, a bond with sureties was allowed. *Phosphate Sewage Company v. Hartmont*, 2 Ch. D. 811—C. A.

**Dismissal if Security not given.]**—An appellant who had been ordered to give security for the costs of an appeal from a decree failed to do so for nine months. At the end of that time, which was more than a year after the decree, the respondent moved to have the appeal dismissed with costs for want of prosecution, and the delay not being explained the court ordered accordingly. *Judd v. Green*, 4 Ch. D. 784; 46 L. J., Ch. 257; 35 L. T. 873; 25 W. R. 293—C. A.

When an appellant has been ordered to give security for costs and fails to do so, the respondent is entitled to have the appeal dismissed for want of prosecution after a reasonable time has elapsed, although no time was fixed by the order for completing the security for costs. *Vale v. Oppert*, 5 Ch. D. 633; 25 W. R. 610—C. A.

If the order is not complied with in a reasonable time the respondent may move to dismiss the appeal for want of prosecution; but what is a reasonable time must depend on the circumstances of each case. *Polini v. Gray, Sturla v. Freccia*, 11 Ch. D. 741; 49 L. J., Ch. 41; 40 L. T. 861—C. A.

**Costs of Application.]**—When security for costs of an appeal was ordered to be given, the costs of the application were ordered to follow the result of the appeal. *Phosphate Sewage Company v. Hartmont*, 2 Ch. D. 811—C. A.

#### 8. STAYING PROCEEDINGS PENDING APPEAL.

##### **To what Court made, where Action dismissed.]**

—Where an action has been dismissed with costs, an application to stay proceedings for costs pending an appeal must be made in the first instance to the court below and not to the Court of Appeal. *Wilson v. Church*, (11 Ch. D. 576) explained. *Otto v. Lindford*, 18 Ch. D. 394; 51 L. J., Ch. 102; 30 W. R. 418—C. A.

When an action has been altogether dismissed by a divisional court, no order can be made under Rules of Court, 1875, Ord. LVIII. r. 16, to stay proceedings pending an appeal; but the Court of Appeal will, in a proper case, grant an injunction to restrain any of the parties parting with property till the hearing of the appeal. *Wilson v. Church*, 11 Ch. D. 576; 48 L. J., Ch. 690; 41 L. T. 50; 27 W. R. 843—C. A.

**Refusal by Court below to stay—Time within which Application may be made to Court of Appeal.]**—In an action by patentees judgment was given referring it to the official referee to assess the damages occasioned to the plaintiffs by the defendants' infringement, and ordering payment within twenty-one days after service of the report. The defendants appealed, and set down their appeal on the 18th of April, and then moved to stay proceedings under the judgment pending the appeal. This was refused by Chitty, J. On the 25th of June, the official referee made his report, and on the 14th of July, more than twenty-one days after the above refusal, the defendants gave notice of motion before the Court of Appeal that the time for payment of the damages might be extended till after the hearing of the appeal. The plaintiffs took the objection that the application could not be made as an original motion, and as an appeal motion was out of time:—Held, that Ord. LVIII. r. 16, gives concurrent jurisdiction to the court

below and to the Court of Appeal as to staying proceedings pending an appeal; that rule 17 does not take away any of the jurisdiction thus given to the Court of Appeal, but only requires that it shall not be exercised till an application has first been made to the court below, and that the application to the Court of Appeal to stay proceedings when an order for that purpose has been refused by the court below, is not properly an appeal motion, and need not be brought within twenty-one days from the refusal. *Att.-Gen. v. Swansea Improvements and Tramways Company* (9 Ch. D. 46) considered. *Cropper v. Smith*, 24 Ch. D. 305; 49 L. T. 548; 32 W. R. 212—C. A.

**—Rule for New Trial.]**—A rule nisi for a new trial granted by the Court of Appeal should not be drawn up so as to include a stay of proceedings. The appellant's proper course in such a case is to apply to a master at chambers for a stay. *Goddard v. Thompson*, 47 L. J., Q. B. 382; 38 L. T. 166; 26 W. R. 362—C. A.

**—Appeal from Refusal.]**—The Court of Appeal has no jurisdiction to make an order to stay otherwise than on appeal from the refusal of such an order. *Ib.*

The renewal before the Court of Appeal of an application, under Ord. LVIII., to stay proceedings pending an appeal, after a similar application has been made to the court below and refused, is not an appeal, and does not therefore come within the ordinary rule as to an appeal from an exercise of discretion. *Cooper v. Cooper*, 2 Ch. D. 492; 45 L. J., Ch. 667; 24 W. R. 628—C. A.

An application to the Court of Appeal, under Ord. LVIII. rr. 16, 17, to stay the proceedings under a judgment pending an appeal to that court, inasmuch as it cannot be made until after an application has been made to the court of first instance, is not an original motion, but a motion by way of appeal, though it need not be formally entered as an appeal. *Att.-Gen. v. Swansea Improvements and Tramways Company*, 9 Ch. D. 46; 48 L. J., Ch. 72; 26 W. R. 840.

**Must be on Notice.]**—Notice must be given to the other side of any application to stay execution under a decision that is appealed from. *Republic of Peru v. Weguelin*, 24 W. R. 297.

**Appeal on point of Law—Staying Trial of Issues of Fact.]**—Where there is an appeal upon a question of law raised by way of demurrer or preliminary objection, the court will not stay the trial of issues of fact pending the appeal. *Palmer's Application, In re*, 22 Ch. D. 88; 31 W. R. 33—C. A.

**Staying Inquiries.]**—Inquiries having been directed as to the amount to be paid to a plaintiff who had succeeded in an action for specific performance and damages, the court, upon the ground that no irreparable injury would result, refused an application by the defendant to stay proceedings pending an appeal upon the main question. *Hyam v. Terry*, 29 W. R. 32.

**Proceedings under an Account.]**—In an action by a patentee to restrain alleged infringement of letters patent for the manufacture of pumps,

a judgment was made granting a perpetual injunction against the defendants, who were pump manufacturers, and directing an account of the profits made by them by the sale of pumps made in infringement of the letters patent. The defendants forthwith gave notice of appeal and set the appeal down for hearing, and then applied to stay proceedings under the account till the appeal was heard. This application was refused by Bacon, V.-C.:—Held, that as the discovery given by the account would enable the plaintiff to take proceedings against the customers of the defendants, and the defendants, supposing them to be ultimately successful, might thus sustain irreparable injury in their business, the appeal ought to be advanced, and proceedings under the account stayed till the hearing. *Adair v. Young*, 11 Ch. D. 136; 40 L. T. 598—C. A.

**Preventing Appeal, if Successful, from being Nugatory.]**—Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances. And when the court makes an order to stay proceedings pending an appeal it will put the appellants on terms to speed the appeal; and it will not interfere with the execution of the order of the court below respecting costs, except to put the solicitor who is to receive the costs upon an undertaking to refund them if required to do so. *Wilson v. Church*, 12 Ch. D. 454—C. A.

In a suit by a bondholder of a railway company on behalf of himself and other bondholders, against the company, claiming that the money advanced should be returned, instead of its being applied in the undertaking, judgment was given for the plaintiff with costs, and it was ordered that the money should be forthwith distributed among the bondholders. The bonds were payable to bearer, and the bondholders were very numerous and many were residing abroad. On the other hand the defendant company was insolvent, and it was very doubtful whether, if the undertaking was carried on, the shareholders would get any benefit from it. The defendants appealed, and moved to stay proceedings pending the appeal:—Held (dissentiente, James, L. J.), that there were sufficient grounds to induce the court to stay the distribution of the fund pending the appeal; and that the special circumstances of the company were not sufficient to prevent the court from interfering. *Id.*

Cp. cases *ante*, APPEAL TO HOUSE OF LORDS.

**On what Terms Granted.]**—An appeal was brought by a defendant from a decree which ordered him to pay costs. On motion to stay proceedings pending the appeal, the order was made on payment into court by the defendant of the costs below and on payment of the costs of the application to stay. *Cooper v. Cooper*, 2 Ch. D. 492; 45 L. J., Ch. 667; 24 W. R. 628—C. A.

**Costs of Application.]**—The costs of an application to stay proceedings pending an appeal must be paid by the applicant. *Cooper v. Cooper*, 2

Ch. D. 492; 45 L. J., Ch. 667; 24 W. R. 628—C. A.

When the parties appealing had applied to a vice-chancellor to stay proceedings pending the appeal and had been refused, they appealed to the Court of Appeal and were there successful in their application:—Held, that the costs of the application should be costs in the appeal. *Adair v. Young*, 11 Ch. D. 136; 40 L. T. 598—C. A.

## 9. EVIDENCE ON APPEAL.

### a. Fresh Evidence.

**Notice to Opponent—Leave of Court.]**—An appellant who wishes to produce further evidence on the hearing of an appeal should give to the other side notice of his intention to apply at the hearing of the appeal for leave to produce such evidence. *Hastie v. Hastie*, 1 Ch. D. 562; 45 L. J., Ch. 298; 34 L. T. 13; 24 W. R. 564—C. A.

When a party was desirous to adduce further evidence upon an appeal from a judgment after the cause had been heard upon the merits:—Held, that he might give notice to the other side that he would apply at the hearing for special leave to adduce such evidence. *Justice v. Mersey Steel and Iron Company*, 24 W. R. 199—C. A.

Where a party wishes to examine fresh witnesses at the hearing of an appeal, he must apply for leave by motion previously to the hearing of the appeal. *Hastie v. Hastie* (1 Ch. D. 562) only applies to affidavits and documentary evidence. *Dicks v. Brooks*, 13 Ch. D. 652; 28 W. R. 525—C. A.

**When Allowed.]**—Where at the trial of an action the witnesses have been examined vivâ voce, further evidence by affidavit of the same witnesses will not in general be admitted on an appeal. *Taylor v. Grange*, 15 Ch. D. 165—C. A.

The application for leave to adduce fresh evidence on appeal is an indulgence. That a party might have shaped his case better in the court below is no ground for giving leave. Nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in court. The exact point on which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury. For my part I think that in considering whether leave should be granted, the moral elements of the case ought to be taken into consideration. *Sanders v. Sanders*, 19 Ch. D. 380; 51 L. J., Ch. 279; 45 L. T. 637; 30 W. R. 281—per Jessel, M. R.

Where a judge is about to decide in favour of a litigant without hearing evidence with which he is prepared, his counsel may insist on the evidence being heard before the delivery of the decision; but if the counsel waives his right and accepts the decision, the court, on appeal, may hear the evidence before reversing the decision of the court below. *Jacobson, Ex parte, Pincoffs, In re*, 22 Ch. D. 312; 48 L. T. 197; 31 W. R. 554—C. A.

Where an applicant in the court below produces no evidence on a point which he is able to adduce, but does not do so because he did not know what objection the court raised:—Held, that evidence should be admitted on appeal.



**Leave to Subpoena without Prejudice.**—On an application to subpoena a witness who had been subpoenaed before the court to attend for examination on the hearing of an appeal, the court granted leave to subpoena him without prejudice to the question as to whether or not his evidence should be admitted. *Coal Examining Co. v. Governor's Case*, 24 W. R. 36.

**Power of Court to order Examination of Witnesses.**—The Court of Appeal may order certain witnesses on either side to attend for examination before the court below, in preference to ordering a new trial. *McCallum v. Giffin*, 6 Q. B. D. 515; 44 L. T. 914; 29 W. R. 408; 45 J. P. 628—C. A.

#### b. In Other Cases.

**Duty of Appellant.**—It is the duty of an appellant to bring before the Court of Appeal the whole of the evidence, oral as well as written, on which the order appealed from was founded, and if he does not do this, his appeal ought to be dismissed. *Firth, Ex parte, Curburn*, *In re*, 19 Ch. D. 419; 51 L. J., Ch. 473; 45 L. T. 120; 30 W. R. 529—C. A.

**Note of Oral Evidence lost—Power of Court.**—The Court of Appeal, however, has power, by way of indulgence, in a case where a note of oral evidence has been accidentally lost, to allow that evidence to be taken over again. *Id.*

**Evidence voluminous—Copies.**—On an ex parte application for directions in a pending appeal, where the evidence was very voluminous and consisted entirely of written affidavits, the court intimated that, notwithstanding Ord. LVIII, r. 11, it would not be necessary to have additional office copies of the affidavits taken for production to the members of the court, but that the office copies of their own affidavits usually taken by the solicitors on each side and the ordinary copies supplied by them to the solicitors on the other side would, with the assistance of the briefs of the junior counsel in the case, be sufficient. *Crouford v. Hornsea Steam Brick and Tile Works Company*, 24 W. R. 122—C. A.

When the affidavits read at the hearing in the court below, when an order was made from which the defendant appealed, were very voluminous, and had not been printed, the court, on the application of the plaintiff, in order that expense might be saved, dispensed with Ord. LVIII, rule 11, requiring printed copies to be produced on appeal, and ordered the officer in charge of the affidavits to attend in court on the hearing of the appeal with the affidavits for the use of the court. *Nickles v. Morris*, 24 W. R. 102—C. A.

**Filing Affidavits.**—Affidavits which are intended to be used on appeal should be filed with

the Clerk of the division of the High Court from which the appeal comes. *Watts v. Watts*, 45 L. J., Ch. 65—C. A.

**Judge's Notes, Request for, in case of Poverty of Appellant.**—Where an appellant had, by reason of his poverty, been unable to take shorthand notes of the evidence in the court below, the Court of Appeal sent a request in writing to the judge of the court below for a copy of his notes of the evidence, that the appellant might not be prejudiced in the prosecution of his appeal. *Drace v. Mason*, 41 L. T. 573—C. A.

**Costs of Printing Judge's Notes.**—The cost of printing the judge's notes of evidence were made costs of the appeal. *Orr-Ewing v. Johnston*, 13 Ch. D. 465—C. A.

**Shorthand Notes—Right to read Judge's Notes.**—At the hearing of an appeal a party is entitled to read a shorthand writer's notes of the evidence taken in the court below as his impression of what passed; and the judge's notes will be taken by the Court of Appeal to represent rightly the whole effect. *See In re. Laming v. Ger.*, 41 L. T. 744; 28 W. R. 217—C. A.

**Shorthand Notes of Evidence—Costs of.**—It is a settled rule that the costs of shorthand writers' notes of evidence will not be allowed on taxation unless there is in the order a direction to that effect. Such a direction will only be inserted in exceptional cases; the notes of the judge, supplemented by those of counsel, being amply sufficient, if not better, for all ordinary purposes. The general utility of shorthand writers' notes considered. *De la Warr (Earl) v. Miles*, 19 Ch. D. 80; 45 L. T. 421; 30 W. R. 35—C. A.

The costs of copies of the printed shorthand writer's notes of the evidence in the court below were made costs in the appeal. *Orr-Ewing v. Johnston*, 13 Ch. D. 465—C. A.

As a general rule the Court of Appeal refuses the costs of shorthand notes of the evidence in the court below. *Kelly v. Byles*, 13 Ch. D. 682; 49 L. J., Ch. 181; 28 W. R. 585—C. A. See also *Bewley v. Atkinson*, 13 Ch. D. 300—C. A.

The Court of Appeal has power to allow the costs of all shorthand notes properly used in the appeal, whether taken for the purposes of the appeal or not. *Hill's Executors v. Managers of the Metropolitan District Asylum*, 49 L. J., Q. B. 668; 43 L. T. 462; 28 W. R. 664—C. A.

**Time within which Application for Costs of Shorthand Notes used on Appeal should be made.**—Where shorthand notes of the evidence and proceedings in the court below are used on appeal, an application to be allowed, on taxation, the costs of the notes as costs of the appeal must be made before the judgment of the Court of Appeal is entered. *Id.*

**Alteration of Order after being drawn up.**—After the order of the Court of Appeal has been drawn up, the court has no power to alter the order by adding a direction that the costs of shorthand writers' notes of the evidence be allowed. *De la Warr (Earl) v. Miles, supra.*

— **On what Grounds allowed.**—The court will not allow the costs of shorthand notes of evidence except under very special circumstances. *Vernon v. St. James's Vestry*, 16 Ch. D. 473; 44 L. T. 229; 29 W. R. 222—C. A.

The court allowed the respondents the costs of copies of a shorthand writer's notes of evidence taken before the registrar, on the ground that they had been served by the appellant with notice that such notes would be read. *Harris, Ex parte, Ward, In re*, 30 W. R. 561—C. A.

Costs will not be allowed of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a question of law. *Webster, Ex parte, Morris, In re*, 22 Ch. D. 136; 52 L. J., Ch. 375—C. A.

Where the court has used the shorthand writers' notes of evidence taken in the court below, the costs will be allowed. *Smith v. Chadwick*, 20 Ch. D. 81; 51 L. J., Ch. 621—C. A.

It is the duty of the taxing master in a bankruptcy appeal to decide as to the costs of the transcript of a shorthand writer's notes of the depositions. *Cocks, Ex parte, Poole, In re*, 21 Ch. D. 407—C. A.

— **Of Judgment—Costs of.**—The court generally allows the costs of the shorthand writers' notes of the judgment of the court below, if the transcript of the judgment is made use of. *Collyer v. Isaacs*, 45 L. T. 567; 30 W. R. 71—C. A.

Costs of the transcript of the registrar's judgment in a bankruptcy appeal were ordered to be included in the costs of the trustee. *Cocks, Ex parte, Poole, In re*, 21 Ch. D. 407—C. A.

The costs of shorthand writers' notes of a judgment are not allowed when it has appeared in the reports, provided that the report appeared a sufficient length of time before the briefs were delivered; if the report appeared too late, the costs will be allowed. *London and South Western Railway Company v. Gomm*, 20 Ch. D. 589; 46 L. T. 455—C. A.

— **Printed Copies—Agreement to share Printer's Bill.**—Under the common order of the Court of Appeal giving the costs of the appeal, and of the shorthand writer's notes of the evidence and of the judgment in the court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to be allowed, in addition to the printer's bill, 3d. per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3d. per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each judge of the Court of Appeal. *Singer Manufacturing Company v. Loog*, 52 L. J., Ch. 288; 49 L. T. 484; 31 W. R. 392—C. A.

#### 10. HEARING OF THE APPEAL.

**Before what Judges.**—An appeal can be heard by the Court of Appeal, although one of the judges then in the court is a judge of the division in which the action is pending, if he has taken no part in making the order appealed from. *Fisher v. Val de Tracera Asphalt Company*, 1 C. P. D. 259; 45 L. J., C. P. 135; 24 W. R. 198—C. A.

**In case of Non-appearance of Appellant.**—When no one appears for an appellant, the appeal will, upon the application of the respondent, be dismissed with costs, and there is no necessity that the respondent should prove that he has been served with a notice of appeal. *Lox, Ex parte, Lox, In re*, 7 Ch. D. 160; 47 L. J., Bk. 24; 37 L. T. 583; 26 W. R. 229—C. A.

**Right to Begin.**—On an appeal by a defendant, the leading counsel for the defendant begins; the evidence of the plaintiff is then read; the evidence of the defendant is then read; the junior counsel for the defendant is then heard; the counsel for the plaintiff are then heard; counsel for the defendant replies. *Giffard v. Williams*, 5 L. R., Ch. 546.

— **Cross Appeals on Cross Demurrers.**—Where there are cross appeals on cross demurrers before the Court of Appeal, and the burden of proof is on the defendant, so that if he fails in his appeal, the cross appeal becomes immaterial, the defendant will be entitled to begin. *Clarke v. Bradlaugh*, 7 Q. B. D. 38; 50 L. J., Q. B. 342—C. A.

**Number of Counsel.**—In ordinary cases of appeal only two counsel will be heard on the same side. *Hoare v. Bremridge*, 42 L. J., Ch. 1; 27 L. T. 593; 21 W. R. 43—L. J. S. P., *Sneesby v. Lancashire and Yorkshire Railway Company*, 1 Q. B. D. 42; 45 L. J., Q. B. 1—C. A.; *Ties v. West Ham Union*, 46 L. T. 151—C. A.

**Signing by Counsel.**—A petition of appeal by a plaintiff, who sued in formâ pauperis, was allowed to be set down, although signed by one counsel only. *Jones v. Gregory*, 4 De G., J. & S. 58. Circumstances under which a petition of rehearing was received on the signature of one counsel only. *Midland Counties Benefit Building Society, In re*, 4 De G., J. & S. 468.

**Advancing Hearing.**—In a suit, the whole object of which was to restrain the alleged improper use of a trade name, a decree for a perpetual injunction was made at the hearing. The defendant, having appealed, applied to have the hearing of the appeal advanced:—Held, that as the right to an injunction was involved, and irreparable injury might result to the defendant, the hearing might be advanced. *Lazenby v. White*, 19 W. R. 291—L. J.

In an action where an account was ordered and notice of appeal was given:—Held, that as the discovery given by the account would enable the successful party to take proceedings against the other party's customers, and the other party, supposing the appeal to be successful, might thus sustain irreparable injury in the business, the appeal ought to be advanced.—*Adair v. Young*, 11 Ch. D. 136; 40 L. T. 598—C. A.

**Notice to discontinue Action, effect of.**—A plaintiff gave notice of appeal from the refusal of an injunction. Shortly afterwards the plaintiff's solicitors wrote to the defendants' solicitors to withdraw the notice of appeal. Two days after this the plaintiff's solicitors gave the defendants' solicitors notice of discontinuance of the action. The defendants' solicitors declined to consent to the withdrawal of the appeal except on terms to which the plaintiff's solicitors did not

agree, and the appeal came on in its turn:—Held, that the discontinuance of the action put an end to the appeal, and that no order could be made except to strike it out of the paper. *Combeare v. Lewis*, 13 Ch. D. 469; 28 W. R. 330—C. A.

**Point not raised in Court below—Leave to raise in Court of Appeal.**—An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the court below, even though there is some evidence in support of it, if the nature of that evidence is such that, by any possibility, the respondent might have been able to rebut it if the point had been raised originally. *Firth, Ex parte, Concuburn, In re*, 19 Ch. D. 419; 51 L. J., Ch. 473; 45 L. T. 120; 30 W. R. 529—C. A.

A plaintiff cannot on appeal make a case not made in his pleadings, or in the court below, unless he obtain the leave of the court. *New Zealand Land Company v. Watson* (per Bramwell, L. J.), 7 Q. B. D. 374; 50 L. J., Q. B. 433; 44 L. T. 675; 29 W. R. 694—C. A.

**Refusal of Application at Trial for Leave to amend Pleadings.**—When at the trial of an action an application for leave to amend the pleadings is refused, the refusal forms part of the judgment, and it is unnecessary to appeal separately from it; but on an appeal from the judgment the court of appeal has power, if it thinks fit, to give leave to amend. *Laird v. Briggs*, 16 Ch. D. 663; 44 L. T. 361—C. A.

**Power of Court of Appeal to amend Record of Trial.**—At the trial of an action the jury found certain issues in favour of the plaintiff, and the judge reserved judgment. The verdict was entered as a general verdict for the plaintiff, but the judge, notwithstanding the verdict, gave judgment for the defendant. On an appeal by the plaintiff from the judgment, the Court of Appeal amended the record by entering the verdict for the plaintiff on the issues only, and affirmed the judgment. *Clack v. Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

**Varying Order of Court below as to Costs.**—If we were to vary the order of the court below as to costs when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying the order as to costs. *Harpham v. Shacklock*, 19 Ch. D. 215; 45 L. T. 572; 30 W. R. 50—C. A., *per* Jessel, M. R. *S. P.*, *Llanocer v. Ilomfray*, 19 Ch. D. 232.

**Order of Appeal Court—Varying Minutes—Notice of Motion to vary.**—Where any party is dissatisfied with an order as settled by the registrar, and desires to bring the matter before the court, he must, whether the order be an order of the Court of Appeal or of a court of first instance, give notice of motion to vary the minutes. *General Share and Trust Company v. Welley Brick and Pottery Company*, 20 Ch. D. 130; 51 L. J., Ch. 464; 46 L. T. 70; 30 W. R. 695—C. A.

**Power of Court to rehear.**—Under the system of procedure established by the Procedure Acts

no judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other judge, the power to rehear being part of the appellate jurisdiction which is transferred by the acts to the Court of Appeal. *St. Nazaire Company, In re*, 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854—C. A.

After final judgment has been pronounced by the Court of Appeal it is not competent to the court to rehear the appeal on the ground of the discovery of fresh facts. The proper course is for the party complaining to commence an original action impeaching the decree. *Flower v. Lloyd*, 6 Ch. D. 297; 46 L. J. Ch. 838; 35 L. T. 454; 25 W. R. 793—C. A.

Seemingly, that where the decree is impeached on the ground of fraud, such an action may be commenced without leave of the court. *Id.*

To obtain leave to file a bill of review on the ground of new matter discovered, the matter must be not only material, but such that by employing reasonable diligence could not possibly have been used at the hearing. *Michael v. Fripp*, 18 W. R. 423.

## 11. COSTS OF THE APPEAL.

**General Rule.**—Under 38 & 39 Vict. c. 77, Ord. LV., costs are in the discretion of the court, and the opinion of the judges of the Court of Appeal is that as a general rule, the successful appellant will get his costs. The old rule that the successful appellant has to bear his own costs is no longer to be acted upon, unless the particular court in the particular case shall make an order to the contrary. *Mem.*, 1 Ch. D. 41—C. A.

On an appeal commenced under the practice of the Supreme Court a successful appellant will, in the absence of special circumstances, get his costs of the appeal. *Olivant v. Wright*, 45 L. J. Ch. 1—C. A. *See also S. P., Masters, Ex parte Winsor, In re*, 1 Ch. D. 113; 45 L. J. Bk. 18; 33 L. T. 613; 24 W. R. 113.

**Succeeding on point not raised below.**—When an appellant succeeds on a point not raised in the court below, he will be allowed the costs in the court below, but not the costs of the appeal. *Hussey v. Payne*, 8 Ch. D. 670; 47 L. J., Ch. 751; 38 L. T. 543; 25 W. R. 703—C. A.

Where an appellant is successful on an appeal upon a point not adjudicated upon in the court below, the general rule is that he will not be allowed his costs. *Goddard v. Jeffreys*, 46 L. T. 904—C. A.

**Judgment of Admiralty Division varied—Collisions—Both Vessels found to blame.**—Where the Court of Appeal vary a judgment of the Admiralty Division that one of two vessels only is to blame for a collision by finding both to blame, no order will be made as to costs either in the Court of Appeal or in the court below, but each party will pay his own costs of the whole litigation. *The Hector* (No. 1), 52 L. J. P. 47—C. A.

**Interlocutory Application—Costs below and in Court of Appeal.**—Where, upon an interlocutory application the judge below has based his decision upon the merits of the whole case, the Court of Appeal will decide the question of costs both below and on appeal. *Wilkinson v. Hull*,

*Barnsley, and West Riding Railway and Dock Company*, 30 W. R. 617—C. A.

**Further Trial—Costs of Former Trial.]**—A case being sent down by the Court of Appeal for further trial, the respondent was ordered to pay the costs of appeal but not the costs of the former trial. *Shardlow v. Cotterill*, 51 L. J., Ch. 353; 45 L. T. 572—C. A.

**Notice by Respondents to Vary Judgment.]**—Where on an appeal notice has been given by the respondents that they intend to apply to have the judgment below varied, and the appeal is dismissed, the appellant will be ordered to pay the costs of the appeal, except such as were occasioned by the notice. *The Lauretta*, 4 P. D. 25; 48 L. J., P. D. & A. 53; 40 L. T. 444; 27 W. R. 902—C. A.

**Costs of Appeal where Cross-Notice of Appeal—Apportionment.]**—A respondent who has given cross-notice of appeal under Ord. LVIII. r. 6, is in the same position as to costs as if he had presented a cross-appeal. Where there were two respondents to an appeal, one of whom gave cross-notice of appeal respecting his co-respondent, the court made an apportionment of the costs of the appeal. *Harrison v. Cornwall Minerals Railway Company*, 18 Ch. D. 334; 51 L. J., Ch. 68; 45 L. T. 498—C. A. *S. P., Johnstone v. Cox*, 19 Ch. D. 17; 45 L. T. 657; 30 W. R. 114—C. A.

In an action for redemption of a mortgage vested in the defendant, R. as a trustee for the defendant D., who was in possession, D. set up the case that he was not in possession by virtue of the mortgage, but under a lease. The court decided that he was in possession as mortgagee, and made a decree on that footing, but without rests. The defendants appealed. The plaintiff gave notice that at the hearing of the appeal he should ask to have the decree varied by directing the account to be taken with rests. The Court of Appeal held that the decree was right in treating D. as mortgagee in possession, but refused to direct rests:—Held, that as the case was one where the costs could not have been materially increased by the notice, the costs ought not to be apportioned as in *Harrison v. Cornwall Minerals Company* (18 Ch. D. 334), but that the defendants should have 5*l.* for their costs incidental to the notice. *Robinson v. Drakes*, 23 Ch. D. 98; 48 L. T. 740; 31 W. R. 871—C. A.

**Costs of Shorthand Writers' Notes.]**—*See supra*, EVIDENCE.

**Costs of Unnecessary Motions in Court of Appeal.]**—On the 26th of June an appellant in bankruptcy was ordered to give additional security for the costs of the appeal. On the 4th of November, the security not having been given, the respondent's solicitor, without having previously written to the appellant's solicitors, gave notice of motion to dismiss the appeal for want of prosecution. On the 13th of November the additional security was given, and on the 14th of November the motion to dismiss came on to be heard:—Held, that the appellant must pay the costs of the motion, and that the appeal could not be heard until he had done so. *Isaacs, Ex*

*parte, Baum, In re* (No. 2), 10 Ch. D. 1; 47 L. J. Bk. 111; 39 L. T. 520; 27 W. R. 297—C. A.

**Appeal Withdrawn—Notice of Motion for Costs of Appeal.]**—An appellant's solicitors wrote to the solicitors of the respondent withdrawing their notice of appeal as irregular. The respondent, who had delivered briefs to oppose the appeal, applied *ex parte* to discharge the notice of appeal with costs:—Held, that notice of motion must be given. *Oakwell Collieries, In re*, 7 Ch. D. 706; 26 W. R. 577—C. A.

**Appeal Abandoned after Notice of Appeal.]**—On the 20th of December, 1880, C. gave notice of appeal, but did not set it down. On the 11th of January he sent a letter withdrawing his notice of appeal. On the next day the solicitor for the respondents wrote to C. saying that he had delivered briefs, and that unless C. would undertake to pay the respondent's costs of the appeal the usual proceedings would be taken to enforce payment of them. C. did not answer this letter. The respondents then moved that the appeal might be dismissed, and that C. might be ordered to pay the costs of the appeal and of this application, and an order was made accordingly. *Charlton v. Charlton*, 16 Ch. D. 273; 29 W. R. 406—C. A.

Where parties who have set down their appeal obtain leave to withdraw it, they will only be ordered to pay such costs as they would have had to pay if the appeal had been heard that day and dismissed with costs. *Att.-Gen. v. Halifax (Corporation)*, 5 L. R., Ch. 116; 22 L. T. 82.

The relators in an information appealed against the decree of a vice-chancellor. After the appeal was set down costs were incurred by an application to the attorney-general to withdraw his fiat. The appellants then applied for leave to withdraw the appeal. The court, on giving leave, refused to make any special order as to the costs occasioned by the application to the attorney-general. *Id.*

**Of Application for Costs of Abandoned Notice of Appeal.]**—The costs of an application for the costs of an abandoned notice of appeal will not be allowed unless a previous demand for payment of them has been made and not complied with. *Griffin v. Allen*, 11 Ch. D. 913; 28 W. R. 10—C. A.

**Of Abandoned Notice of Motion.]**—A defendant in an action which had been tried by a judge without a jury gave notice of appeal against the judgment, and also obtained *ex parte* a rule nisi for a new trial. He did not set down the appeal for hearing, but, before the argument of the rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages:—Held, that the plaintiff was entitled to the costs of the first notice of appeal as an abandoned motion: Secondly, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under Rules of Court, 1875, Ord. XL. r. 10, upon the application to make the rule for a new trial absolute. *Waddell v. Blockley*, 10 Ch. D. 416; 40 L. T. 286; 27 W. R. 233—C. A.

**Taxation of Costs of Appeal before Termina-**

**tion of Action.]**—An application by a defendant in an action in the Queen's Bench Division, to strike out the statement of claim as embarrassing, having been refused by a divisional court, the defendant appealed, and the Court of Appeal made an order "that the judgment of the court below be reversed with costs of this appeal and of the proceedings in the court below." The defendant applied to the master to tax the costs, which he declined to do on the ground that they were costs of an interlocutory application, and that the taxation must stand over till the termination of the action:—Held, by the Court of Appeal, that the practice of the common law divisions to have only one taxation of costs in an action does not apply where costs are given by the Court of Appeal, and that under an order of the Court of Appeal, directing payment of costs, without any intimation that the taxation and payment are to be postponed, the party to whom they are ordered to be paid is entitled to have them taxed and paid forthwith. *Phillipps v. Phillipps*, 5 Q. B. D. 60; 28 W. R. 376—C. A.

#### **Enforcing Order for Payment pending Appeal.]**

—A party to whom costs have been ordered to be paid will not be restrained from enforcing the order pending an appeal to the House of Lords, if his solicitors undertake to refund if the order should be reversed. *Morgan v. Elford*, 4 Ch. D. 352; 25 W. R. 136.

The payment of costs, to be paid under a decision against which there is a *bonâ fide* intention to appeal to the House of Lords, will not be stayed where the solicitor receiving such costs personally undertakes to repay them in the event of the order of the court below being reversed. *Grant v. Banque Franco-Egyptienne*, 3 C. P. D. 202; 47 L. J., C. P. 455; 38 L. T. 622; 26 W. R. 669—C. A.

The mere chance of a litigant obtaining costs upon a decision at some subsequent stage of the proceeding is no ground for staying the payment of costs already ordered to be paid under a separate judgment. *Ib.*

#### **12. IN CHANCERY BEFORE JUDICATURE ACTS.**

[*Cases which may be usefully consulted under the present practice will be found under this subhead.*]

**Practice.]**—When a judge of a court of first instance declines to decide a question on a petition, and expresses his wish that it should be brought before the Appeal Court, the proper course is for the petitioner to present a short petition of appeal *pro forma*. *Berkeley (Earl)*, *In re*, 10 L. R., Ch. 56; 44 L. J., Ch. 3; 23 W. R. 195.

When a judge has decided on an adjourned summons a question which has arisen in proceedings in his chambers, but no order has been drawn up, no appeal can be brought from his decision. *Vyse v. Foster*, 10 L. R., Ch. 236; 44 L. J., Ch. 344; 23 W. R. 299.

Special leave had been given to make an original motion before the Court of Appeal in a cause which had been heard before the court, and in which an appeal was pending in the House of Lords:—Held, that the respondent had no right to have the motion first heard before the vice-chancellor. *Powell v. Elliot*, 20 W. R. 194.

A motion by defendants to expunge evidence for scandal and impertinence was ordered to stand over till the hearing of the cause. At the hearing a decree was made both on the hearing and on the motion, by which substantial relief was given, and the motion was refused, and the evidence sought to be expunged was entered as read. The plaintiff appealed from part of the decree, which was varied by the Lords Justices:—Held, that the whole decree was opened to the respondents on the appeal, and on their application the order on the motion was reversed, and the evidence directed to be expunged. *Middlemas v. Wilson*, 10 L. R. Ch. 230; 44 L. J., Ch. 476; 32 L. T. 105; 23 W. R. 301.

#### **As to Quantum of Damages Assessed by Jury.]**

—The Court of Appeal will not entertain an appeal from an order of the court below assessing damages, unless it is shown that the court below has acted on a wrong principle in assessing the quantum of damages. *Bull v. Ray*, 30 L. T. 1; 22 W. R. 283.

#### **Amount Involved.]**

—An appeal will not be allowed when the amount in dispute is only 1*l.* 15*s.* *National Assurance and Investment Society, In re, Cross, In re*, 7 L. R., Ch. 221; 41 L. J., Ch. 341; 26 L. T. 53; 20 W. R. 324.

A solicitor who had successfully prosecuted a claim on behalf of a creditor, under the winding-up of a company, applied to the court for a lien on the dividends payable to his client to the amount of his costs, which amounted to 1*l.* 15*s.* The application having been refused, the solicitor appealed. The court refused to entertain an appeal for so trifling an amount, although it was stated that it was a representative case, which would govern many others. *Ib.*

**Costs of Appeal.]**—The established rule, that the Court of Appeal will not give the costs of the appeal to a successful appellant, except under special circumstances, is still in force. If the court does not specially give the costs the appellant is not entitled to them. *Denny v. Hancock*, 6 L. R., Ch. 138; 40 L. J., Ch. 193; 23 L. T. 795; 19 W. R. 234.

The Court of Bankruptcy follows this rule, and will not, as a matter of course, give the costs of an appeal to a successful appellant. *Matthews, Ex parte, Cherry, In re*, 12 L. R., Eq. 596; 40 L. J., Bk. 90; 19 W. R. 1005.

The costs of a successful appeal will not be given in the absence of misconduct on the part of the respondent. *Stannard v. Lee*, 6 L. R., Ch. 346; 40 L. J., Ch. 489; 24 L. T. 459; 19 W. R. 615.

When the decision of the court below is reversed the Court of Appeal does not usually give to the successful appellant the costs of the appeal, although it has power to give such costs in special cases. *Alexander v. Mills*, 6 L. R., Ch. 124; 40 L. J., Ch. 73; 24 L. T. 206; 19 W. R. 310.

An appeal on the construction of a will, if unsuccessful, will in general be dismissed with costs. *Clark v. Henry*, 6 L. R., Ch. 588.

Where a decree of the court below, although in substance affirmed, was varied to the extent of protecting the interests of persons other than the respondent, no costs were given. *London and South Western Railway Company v. Black-*

more, 4 L. R., H. L. 610; 39 L. J., Ch. 713; 28 L. T. 504; 19 W. R. 305—II. L.

The Court of Appeal refuses to inquire into the various causes which may have influenced the decision of the court below in awarding costs, and therefore an appeal for costs will not generally be entertained; but where the judge of the court below placed on record on the face of the decree the reason why he ordered the party to pay the costs, and such reason was founded on the determination of a question of law, the Court of Appeal allowed the question of law to be argued on the appeal, that it might determine whether the reason embodied in the decree by the judge below was well founded. *Walker v. French*, 21 W. R. 493.

An appellant gave notice to a respondent whose costs the appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs:—Held, that the respondent was not entitled to his costs of appearing on the appeal. *Uymann v. Elkan*, 7 L. R., Ch. 130; 41 L. J., Ch. 246; 25 L. T. 813.

The costs of an unnecessary party to an appeal ordered to be paid by the appellant. *Scholefield v. Lockwood*, 4 De G., J. & S. 22.

When exceptions for scandal have been overruled in the court below, but allowed on appeal, the court gave the successful appellant his costs, both of the appeal and in the court below as between solicitor and client. *Christie v. Christie*, 8 L. R., Ch. 499; 42 L. J., Ch. 544; 28 L. T. 607; 21 W. R. 493.

**Repayment of Money on Reversal.**—When money has been paid under a decree which is afterwards reversed, it must be repaid with interest. *Imperial Mercantile Credit Association v. Coleman*, 40 L. J., Ch. 262.

### III. APPEAL FROM JUDGE IN CHAMBERS.

1. *Practice in Chancery Division.*
2. *Practice in Common Law Divisions.*

#### 1. PRACTICE IN CHANCERY DIVISION.

**From Judge in Chambers to Judge in Court—Practice when Appeal to Court of Appeal Desired.**—In the Rolls Court it is the practice, following the former practice of Jessel, M. R., to adjourn summonses into court for argument or judgment in cases in which an appeal is desired. If there is no such adjournment, the proper course, so far as any application to the court below is concerned, is for a party wishing to appeal to move in court to discharge the order made in chambers, not to apply to the court below for leave to appeal direct to the Court of Appeal. *Holloway v. Cheston*, 19 Ch. D. 516; 51 L. J., Ch. 208; 30 W. R. 120. But see next case.

Where, on a summons heard in chambers, an order has been made by the judge and not adjourned into court, and there is a desire to appeal against it, the proper course is not to move in court, on notice, to discharge the order, or for a certificate that the judge does not desire it to be reheard, but to make an application in chambers. *Holloway v. Cheston* (*supra*) not followed. *Butler's Wharf Company, In re*,

*Anderson v. Butler's Wharf Company*, 21 Ch. D. 131; 51 L. J., Ch. 694; 30 W. R. 723.

When a case has been heard by a judge in chambers in the Chancery Division, and parties desire to appeal to the Court of Appeal without another argument before the judge in court, it is a proper and convenient practice for the judge to refuse leave to go straight to the Court of Appeal, and to insist on an argument in court, as the Court of Appeal, after the hearing in court, has the benefit of a judgment of the court below, with the reasons, if any, for the decision. *Manchester Val de Travers Paving Company v. Slagg*, 47 L. T. 556—C. A.

An appeal on a mere point of practice, such as security for costs, may be made from an order made in chambers, without obtaining the judge's certificate. *Northampton Coal Company v. Midland Waggon Company*, 7 Ch. D. 500; 38 L. T. 82; 26 W. R. 485—C. A.

An order made by a judge of the Chancery Division, personally in chambers may be appealed from equally with an order made by him in court. *Blum, In re, Thomas v. Blum*, 6 Ch. D. 346; 25 W. R. 871—C. A.

As a general rule, however, a certificate should be obtained from the judge that he does not desire to hear any further argument in court. But the object of such a certificate is only to satisfy the Court of Appeal that the judge has judicially determined the matter, and, if otherwise satisfied of that fact, the Court of Appeal will hear the appeal without a certificate if the judge declines to give one. *Id.*

Application should in such a case be made to the Court of Appeal for leave to set down the appeal without the judge's certificate. *Id.*

A caveat against the enrolment of an order in chambers is not prosecuted with effect by service within twenty-eight days after it is warned of notice of motion before the judge in court to discharge the order. *Lewis, In re, Republic of Paraguay, Ex parte*, 45 L. J., Ch. 62—C. A.

Doubts thrown on the propriety of the practice of the Court of Appeal in Chancery in refusing to hear an appeal from an order in chambers, though made by the judge himself, without an application to the judge in court to discharge the order. *Id.*

An appeal can be made direct to the Court of Appeal, without leave, from an order made in chambers, where the matter has been fully argued before the judge himself; the fact that it has been so made should appear on the order itself, or be certified by the chief clerk. *Murr v. Cooke*, 34 L. T. 751; 24 W. R. 756.

The Court of Appeal will only hear an appeal from an order made in chambers, when the judge who makes the order certifies that the case has been so fully argued before him, that he does not desire to hear it re-argued in court. *Warrant Finance Company, Ex parte*, 5 L. R., Ch. 88; 39 L. J., Ch. 185.

**Notice of Appeal—Time for.**—In an action to set aside a contract for fraud, on the 23rd June, the judge made an order in chambers, upon a summons taken out by the defendants. The order was not drawn up, passed and entered until the 14th July. On the 18th July, the plaintiff gave notice of a motion in court to discharge the order. The judge refused the motion, on the ground that it was his invariable rule that notices of motion to discharge orders made in his

chambers must be given within twenty-one days from the date of pronouncing the order, and not from the date of its being perfected, whether the order was a simple refusal of an application or not. Sect. 50 of the Judicature Act, 1873, provides that orders made by a judge in chambers (except the discretionary orders mentioned in sect. 49) may be set aside or discharged upon notice by any divisional court, or by the judge sitting in court, "according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned." There did not appear to be any settled practice of the Chancery Division as to the time within which such appeals from the judge in chambers to the judge in court should be brought:—Held, that following the analogy of Ord. LVIII. r. 15, the limit of time for applying to a judge in court to discharge an order made by him in chambers is twenty-one days from the date of pronouncing the order in the case of a simple refusal, and, in other cases, twenty-one days from the date of the perfecting of the order. *Heatly v. Newton*, 19 Ch. D. 326; 51 L. J., Ch. 225; 45 L. T. 455; 30 W. R. 72—C. A.

Ord. LVIII. r. 15, limiting the time for bringing appeals, does not apply to the time for making motions before a divisional court or a judge in court to discharge an order in chambers; but in the Chancery Division the practice is, that no such motion shall be made without special leave after twenty-one days. *Dickson v. Harrison*, 9 Ch. D. 243; 47 L. J., Ch. 761; 38 L. T. 794; 26 W. R. 730—C. A.

## 2. PRACTICE IN COMMON LAW DIVISIONS.

**Order of Judge in Chambers—What is.]**—An order made by a registrar sitting as judge under Ord. LIV. is not, for the purposes of the Judicature Act, 1873, s. 50, an order made by a judge in chambers, and hence, where such an order has been reviewed by a judge in court, an appeal from the judge's decision will lie without special leave. *The Vivar*, 2 P. D. 29; 35 L. T. 782; 25 W. R. 453—C. A.

**Time for Appealing.]**—Ord. LIV. r. 6 (as amended R. March, 1879, r. 8), which directs that an appeal from a decision at chambers shall be made within eight days, applies to decisions at chambers during the long vacation; and if that period has elapsed without the sitting of a divisional court, the right to appeal is lost, unless the party decided against obtains an extension of time. An order empowering the plaintiff to sign judgment upon a specially indorsed writ, was made by a judge at chambers upon the 29th of August: the time for appealing to a divisional court was on the 2nd of September, extending conditionally upon payment into court of the sum sued for within fourteen days. This condition was never fulfilled, and no divisional court sat during the long vacation. Upon the first day of Michaelmas sittings, the defendant moved the Exchequer Division to set aside the order made upon the 29th of August:—Held, that as more than eight days had elapsed since the order was made, no appeal could lie. *Runtz v. Sheffield*, 4 Ex. D. 160; 48 L. J., Ex. 385; 40 L. T. 539—C. A.

An order having been made in chambers on the 20th of June, the defendant, on the 24th,

gave notice of appeal to a divisional court for Saturday, the 28th. The court sat on the 26th to hear motions, and was sitting on the 28th, but not for the purpose of hearing motions. The defendant brought forward his motion on the 30th, being the next day on which the court sat to hear motions:—Held, that the appeal motion was out of time, since a court to which an application to enlarge the time could be made had been sitting within the eight days. *Stirling v. Du Barry*, 5 Q. B. D. 65; 28 W. R. 405—C. A.

When notice of motion of appeal from a decision in chambers was given on the eighth day after the decision:—Held, that under Ord. LIV. r. 6, it was too late, as the notice must be given so that the motion can be heard within eight days after the decision appealed against. *Fox v. Wallis*, 2 C. P. D. 45; 35 L. T. 690; 25 W. R. 287—C. A.

By Ord. LIV. r. 6, appeals from chambers "shall be by motion, and shall be made within eight days after the decision appealed against." It is not a sufficient compliance with this rule to give notice of motion within eight days. *Deykin v. Coleman*, 36 L. T. 195; 25 W. R. 294—C. A.

A judge at chambers having made an order on the 29th of August, the party affected by such order moved the divisional court to rescind it during the Michaelmas sittings within eight days from the commencement of such sittings:—Held, that the application was too late, inasmuch as by Ord. LIV. r. 6, an appeal from a judge at chambers must be within eight days from the decision appealed against. *Crom v. Samuels*, 2 C. P. D. 21; 46 L. J., C. P. 1; 35 L. T. 423; 25 W. R. 45.

When an appellant from chambers has only the eighth and last day whereon to move, and it happens that no divisional court sits on that day, the right of appeal is not lost, but the appellant must move the next practicable court. *Forrest v. Davis*, 26 W. R. 534.

When the last of the eight days, limited by Ord. LIV. r. 6, for appealing from a decision at chambers expires on a Sunday, the appellant has the following Monday for appealing. *Taylor v. Jones*, 45 L. J., C. P. 110; 34 L. T. 131.

**Extension of Time.]**—By one of the general orders of the Judicature Act, 1875, eight days only are given for an appeal to the divisional court against an order made by a judge at chambers:—Held, that that limitation of time does not affect the right to appeal against an order made in vacation at chambers, when no divisional court would be sitting within the eight days. The time for appealing against such an order ought, almost as a matter of course, to be enlarged. *Wallingford v. Mutual Society*, 5 App. Cas. 685; 50 L. J., Q. B. 49; 43 L. T. 258; 29 W. R. 81—H. L. (E.)

Where an order had been made at chambers, and the eight days had, under such circumstances, expired without an appeal to the divisional court, the fact that an execution had in the meantime issued, makes no difference in the matter. *Id.*

Under Ord. VII. r. 6, the court or a judge has power to enlarge the time for appealing against an order in chambers, notwithstanding that the time for appealing has elapsed, and that the action stands dismissed under the order. *Carter v. Stubbs*, 6 Q. B. D. 116; 50 L. J., Q. B. 161; 43

L. T. 746; 29 W. R. 132—C. A. Affirming 50 L. J., Q. B. 4.

**What Orders are before Court of Appeal.]**—An order at chambers was made refusing leave to defend, except on terms, the time for performing which was allowed by the defendant to expire, and another order at chambers was afterwards made refusing leave to enlarge the time within which the first order might be contested. An appeal was then taken to the divisional court against the second order, when that court desired that the notice of motion should be considered as amended so as to include the first order:—Held, that the two orders were thus brought fully before the court, and the judgment then given must be taken as applicable to both of them. *Wallisford v. Mutual Society*, 5 App. Cas. 685; 50 L. J., Q. B. 49; 43 L. T. 258; 29 W. R. 81—H. L. (E).

For the same reason, in an appeal against that judgment, the Court of Appeal must be considered to have had both the orders brought under its revision, and on an appeal to the House of Lords both the orders and both the judgments were brought into discussion. *Id.*

**Fresh Affidavit.]**—The divisional court on an appeal from chambers will, as a matter of convenience, allow a new affidavit made since the date of the order at chambers to be read. *Robinson v. Bradshaw*, 32 W. R. 95.

**Costs.]**—Costs follow a reversal of a decision of a judge at chambers. *Friend v. London, Chatham, and Doker Railway Company*, 25 W. R. 735—C. A.

#### IV. APPEALS FROM MASTER TO JUDGE IN CHAMBERS.

**What the subject of Appeal—Appeal for Costs.]**—The enactment in s. 49 of the Judicature Act, 1873, that no order by the High Court, or any judge thereof, as to costs only which by law are left to the discretion of the court, shall be subject to any appeal, does not apply to the order of a master or district registrar, and therefore a judge of such court has power to vary as to costs an order of a district registrar dismissing the action without costs. *Foster v. Edwards*, 48 L. J., Q. B. 767.

**Time for Appealing.]**—In order that an appeal from a master to a judge at chambers may be in time, according to Ord. LIV. r. 4, it is not sufficient that the appeal summons should be taken out within four days from the master's decision, but it must be heard or adjourned within the four days. *Bell v. North Staffordshire Railway Company*, 4 Q. B. D. 205; 48 L. J., Q. B. 518; 27 W. R. 263.

**Extension of Time for Appeal.]**—Within four days from the decision of a master at chambers, an appeal summons was taken out and made returnable at a date after the expiration of the four days, but on the first day when any judge would sit at chambers:—The court held, that, under the circumstances, the time might be enlarged under Ord. LVII. r. 6, and that no summons for that purpose was necessary under Ord. LIV. r. 1. *Gibbons v. London Financial*

*Association*, 4 C. P. D. 263; 48 L. J., Ch. 514; 27 W. R. 619.

On the 2nd November an order was made dismissing an action unless a statement of claim was delivered within seven days, and on the 9th November this time was extended by three days. On the 14th November the plaintiff delivered his statement of claim, and on the following day the defendant drew up and served the order of the 2nd November. On the 17th November the master, and subsequently a judge, made an order that the statement of claim do stand:—Held, that the time of appealing from the order of the 2nd November should be extended. *Metcalfe v. British Tea Association*, 46 L. T. 31.

#### V. APPEAL FROM CHIEF CLERK TO JUDGE.

**Adjournment to Judge.]**—An adjournment from the chief clerk to the judge in person is not in the nature of an appeal. *Watts, In re, Smith v. Watts*, 22 Ch. D. 1; 52 L. J., Ch. 209; 48 L. T., 167; 31 W. R. 262—C. A.

#### VI. APPEALS FROM INFERIOR COURTS.

**Appeal from Court of Passage of Liverpool exercising Admiralty Jurisdiction—Security for Costs.]**—The appeal from the Court of Passage of Liverpool exercising admiralty jurisdiction is under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26, and security for costs must be given before the instrument of appeal is lodged. *The Ganges*, 5 P. D. 247; 43 L. T. 12—C. A.

**County Palatine of Lancaster.]**—Ord. LVIII. of the Rules of Court, 1875, applies to appeals from the court of the County Palatine of Lancaster as well as to appeals from the High Court of Justice, and the time for appealing is now regulated by rule 15 of that Order, and is no longer governed by the General Orders of 1855 regulating appeals from the court of the County Palatine. *Lee v. Nuttall*, 12 Ch. D. 61; 48 L. J., Ch. 616; 41 L. T. 4; 27 W. R. 805—C. A.

**Time for Entry—Setting down for Hearing—Notice of Appeal.]**—Where a rule nisi is obtained on a motion by way of appeal to reverse a judgment of an inferior court, unless the appeal be entered in the list at the crown office of the Queen's Bench Division, in compliance with Ord. LVIII. r. 19, before the day named for the hearing of the appeal in the notice to show cause, the appeal will be taken to have been abandoned, and the appellant will have lost his right to be heard. *Donnan v. Brown*, 42 L. T. 30.

**From Quarter Sessions to Divisional Court.]**—*See* sub tit. JUSTICE OF THE PEACE.

**From County Court to Divisional Court.]**—*See* COUNTY COURT.

**From Mayor's Court to Divisional Court.]**—*See* MAYOR'S COURT.



*Mason v. Mason*, 8 P. D. 21; 52 L. J., P. 27; 48 L. T. 290; 31 W. R. 361—C. A.

Leave was refused to a defendant to adduce fresh evidence on the hearing of an appeal for the purpose of proving admissions made by the plaintiff in conversation. *Glorer v. Daubney*, 4 De G., F. & J. 561.

**Leave to Subpoena without Prejudice.**—On an application to subpoena a witness who had made no affidavit in the suit, to attend for examination on the hearing of an appeal, the court granted leave to subpoena him without prejudice to the question as to whether or not his evidence should be admitted. *Coal Economising Gas Company, In re, Gover's Case*, 24 W. R. 36.

**Power of Court to order Examination of Witnesses.**—The Court of Appeal may order certain witnesses on either side to attend for examination before the court itself, in preference to ordering a new trial. *McCollin v. Gilpin*, 6 Q. B. D. 518; 44 L. T. 914; 29 W. R. 408; 45 J. P. 828—C. A.

#### b. In Other Cases.

**Duty of Appellant.**—It is the duty of an appellant to bring before the Court of Appeal the whole of the evidence, oral as well as written, on which the order appealed from was founded, and if he does not do this, his appeal ought to be dismissed. *Firth, Ex parte, Courburn, In re*, 19 Ch. D. 419; 51 L. J., Ch. 473; 45 L. T. 120; 30 W. R. 529—C. A.

**Note of Oral Evidence lost—Power of Court.**—The Court of Appeal, however, has power, by way of indulgence, in a case where a note of oral evidence has been accidentally lost, to allow that evidence to be taken over again. *Id.*

**Evidence voluminous—Copies.**—On an ex parte application for directions in a pending appeal, where the evidence was very voluminous and consisted entirely of written affidavits, the court intimated that, notwithstanding Ord. LVIII. r. 11, it would not be necessary to have additional office copies of the affidavits taken for production to the members of the court, but that the office copies of their own affidavits usually taken by the solicitors on each side and the ordinary copies supplied by them to the solicitors on the other side would, with the assistance of the briefs of the junior counsel in the case, be sufficient. *Croxford v. Hornsea Steam Brick and Tile Works Company*, 24 W. R. 422—C. A.

When the affidavits read at the hearing in the court below, when an order was made from which the defendant appealed, were very voluminous, and had not been printed, the court, on the application of the plaintiff, in order that expense might be saved, dispensed with Ord. LVIII. rule 11, requiring printed copies to be produced on appeal, and ordered the officer in charge of the affidavits to attend in court on the hearing of the appeal with the affidavits for the use of the court. *Sickles v. Morris*, 24 W. R. 102—C. A.

**Filing Affidavits.**—Affidavits which are intended to be used on appeal should be filed with

the officer of the division of the High Court from which the appeal comes. *Watts v. Watts*, 45 L. J., Ch. 658—C. A.

**Judge's Notes, Request for, in case of Poverty of Appellant.**—Where an appellant had, by reason of his poverty, been unable to take shorthand notes of the evidence in the court below, the Court of Appeal sent a request in writing to the judge of the court below for a copy of his notes of the evidence, that the appellant might not be prejudiced in the prosecution of his appeal. *Dence v. Mason*, 41 L. T. 573—C. A.

**Costs of Printing Judge's Notes.**—The cost of printing the judge's notes of evidence were made costs of the appeal. *Orr-Ewing v. Johnston*, 13 Ch. D. 465—C. A.

**Shorthand Notes—Right to read Judge's Notes.**—At the hearing of an appeal a party is entitled to read a shorthand writer's notes of the evidence taken in the court below as his impression of what passed; and the judge's notes will be taken by the Court of Appeal to represent rightly the whole effect. *Gee, In re, Laming v. Gee*, 41 L. T. 744; 28 W. R. 217—C. A.

**Shorthand Notes of Evidence—Costs of.**—It is a settled rule that the costs of shorthand writers' notes of evidence will not be allowed on taxation unless there is in the order a direction to that effect. Such a direction will only be inserted in exceptional cases; the notes of the judge, supplemented by those of counsel, being amply sufficient, if not better, for all ordinary purposes. The general utility of shorthand writers' notes considered. *De la Warr (Earl) v. Miles*, 19 Ch. D. 80; 45 L. T. 424; 30 W. R. 35—C. A.

The costs of copies of the printed shorthand writer's notes of the evidence in the court below were made costs in the appeal. *Orr-Ewing v. Johnston*, 13 Ch. D. 465—C. A.

As a general rule the Court of Appeal refuses the costs of shorthand notes of the evidence in the court below. *Kelly v. Byles*, 13 Ch. D. 682; 49 L. J., Ch. 181; 28 W. R. 585—C. A. See also *Beuley v. Atkinson*, 13 Ch. D. 300—C. A.

The Court of Appeal has power to allow the costs of all shorthand notes properly used in the appeal, whether taken for the purposes of the appeal or not. *Hill's Executors v. Managers of the Metropolitan District Asylum*, 49 L. J., Q. B. 668; 43 L. T. 462; 28 W. R. 664—C. A.

**Time within which Application for Costs of Shorthand Notes used on Appeal should be made.**—Where shorthand notes of the evidence and proceedings in the court below are used on appeal, an application to be allowed, on taxation, the costs of the notes as costs of the appeal must be made before the judgment of the Court of Appeal is entered. *Id.*

**Alteration of Order after being drawn up.**—After the order of the Court of Appeal has been drawn up, the court has no power to alter the order by adding a direction that the costs of shorthand writers' notes of the evidence be allowed. *De la Warr (Earl) v. Miles, supra.*

— **On what Grounds allowed.**—The court will not allow the costs of shorthand notes of evidence except under very special circumstances. *Vernon v. St. James's Vestry*, 16 Ch. D. 473; 44 L. T. 229; 29 W. R. 222—C. A.

The court allowed the respondents the costs of copies of a shorthand writer's notes of evidence taken before the registrar, on the ground that they had been served by the appellant with notice that such notes would be read. *Harris, Ex parte, Ward, In re*, 30 W. R. 561—C. A.

Costs will not be allowed of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a question of law. *Webster, Ex parte, Morris, In re*, 22 Ch. D. 136; 52 L. J., Ch. 375—C. A.

Where the court has used the shorthand writers' notes of evidence taken in the court below, the costs will be allowed. *Smith v. Chadwick*, 20 Ch. D. 81; 51 L. J., Ch. 621—C. A.

It is the duty of the taxing master in a bankruptcy appeal to decide as to the costs of the transcript of a shorthand writer's notes of the depositions. *Cocks, Ex parte, Poole, In re*, 21 Ch. D. 407—C. A.

— **Of Judgment—Costs of.**—The court generally allows the costs of the shorthand writers' notes of the judgment of the court below, if the transcript of the judgment is made use of. *Culler v. Isaacs*, 45 L. T. 567; 30 W. R. 71—C. A.

Costs of the transcript of the registrar's judgment in a bankruptcy appeal were ordered to be included in the costs of the trustee. *Cocks, Ex parte, Poole, In re*, 21 Ch. D. 407—C. A.

The costs of shorthand writers' notes of a judgment are not allowed when it has appeared in the reports, provided that the report appeared a sufficient length of time before the briefs were delivered; if the report appeared too late, the costs will be allowed. *London and South Western Railway Company v. Gomm*, 20 Ch. D. 589; 46 L. T. 455—C. A.

— **Printed Copies—Agreement to share Printer's Bill.**—Under the common order of the Court of Appeal giving the costs of the appeal, and of the shorthand writer's notes of the evidence and of the judgment in the court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to be allowed, in addition to the printer's bill, 3d. per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3d. per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each judge of the Court of Appeal. *Singer Manufacturing Company v. Loog*, 52 L. J., Ch. 288; 49 L. T. 484; 31 W. R. 392—C. A.

## 10. HEARING OF THE APPEAL.

**Before what Judges.**—An appeal can be heard by the Court of Appeal, although one of the judges then in the court is a judge of the division in which the action is pending, if he has taken no part in making the order appealed from. *Fisher v. Val de Travers Asphaltic Company*, 1 C. P. D. 259; 45 L. J., C. P. 135; 24 W. R. 198—C. A.

**In case of Non-appearance of Appellant.**—When no one appears for an appellant, the appeal will, upon the application of the respondent, be dismissed with costs, and there is no necessity that the respondent should prove that he has been served with a notice of appeal. *Louis, Ex parte, Louis, In re*, 7 Ch. D. 160; 47 L. J., Bk. 24; 37 L. T. 583; 26 W. R. 229—C. A.

**Right to Begin.**—On an appeal by a defendant, the leading counsel for the defendant begins; the evidence of the plaintiff is then read; the evidence of the defendant is then read; the junior counsel for the defendant is then heard; the counsel for the plaintiff are then heard; counsel for the defendant replies. *Giffard v. Williams*, 5 L. R., Ch. 546.

— **Cross Appeals on Cross Demurrers.**—Where there are cross appeals on cross demurrers before the Court of Appeal, and the burden of proof is on the defendant, so that if he fails in his appeal, the cross appeal becomes immaterial, the defendant will be entitled to begin. *Clarke v. Bradlaugh*, 7 Q. B. D. 38; 50 L. J., Q. B. 342—C. A.

**Number of Counsel.**—In ordinary cases of appeal only two counsel will be heard on the same side. *Hoare v. Bremridge*, 42 L. J., Ch. 1; 27 L. T. 593; 21 W. R. 43—L. J. S. P., *Snecoby v. Lancashire and Yorkshire Railway Company*, 1 Q. B. D. 42; 45 L. J., Q. B. 1—C. A.; *Iles v. West Ham Union*, 46 L. T. 151—C. A.

**Signing by Counsel.**—A petition of appeal by a plaintiff, who sued in formâ pauperis, was allowed to be set down, although signed by one counsel only. *Jones v. Gregory*, 4 De G., J. & S. 58. Circumstances under which a petition of rehearing was received on the signature of one counsel only. *Midland Counties Benefit Building Society, In re*, 4 De G., J. & S. 468.

**Advancing Hearing.**—In a suit, the whole object of which was to restrain the alleged improper use of a trade name, a decree for a perpetual injunction was made at the hearing. The defendant, having appealed, applied to have the hearing of the appeal advanced:—Held, that as the right to an injunction was involved, and irreparable injury might result to the defendant, the hearing might be advanced. *Lazenby v. White*, 19 W. R. 291—L. J.

In an action where an account was ordered and notice of appeal was given:—Held, that as the discovery given by the account would enable the successful party to take proceedings against the other party's customers, and the other party, supposing the appeal to be successful, might thus sustain irreparable injury in the business, the appeal ought to be advanced.—*Adair v. Young*, 11 Ch. D. 136; 40 L. T. 598—C. A.

**Notice to discontinue Action, effect of.**—A plaintiff gave notice of appeal from the refusal of an injunction. Shortly afterwards the plaintiff's solicitors wrote to the defendants' solicitors to withdraw the notice of appeal. Two days after this the plaintiff's solicitors gave the defendants' solicitors notice of discontinuance of the action. The defendants' solicitors declined to consent to the withdrawal of the appeal except on terms to which the plaintiff's solicitors did not

agree, and the appeal came on in its turn:—Held, that the discontinuance of the action put an end to the appeal, and that no order could be made except to strike it out of the paper. *Conybeare v. Lewis*, 13 Ch. D. 469; 28 W. R. 330—C. A.

**Point not raised in Court below—Leave to raise in Court of Appeal.**—An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the court below, even though there is some evidence in support of it, if the nature of that evidence is such that, by any possibility, the respondent might have been able to rebut it if the point had been raised originally. *Firth, Ex parte, Couchburn, In re*, 19 Ch. D. 419; 51 L. J., Ch. 473; 45 L. T. 120; 30 W. R. 529—C. A.

A plaintiff cannot on appeal make a case not made in his pleadings, or in the court below, unless he obtain the leave of the court. *New Zealand Land Company v. Watson* (per Bramwell, L. J.), 7 Q. B. D. 374; 50 L. J., Q. B. 433; 44 L. T. 675; 29 W. R. 694—C. A.

**Refusal of Application at Trial for Leave to amend Pleadings.**—When at the trial of an action an application for leave to amend the pleadings is refused, the refusal forms part of the judgment, and it is unnecessary to appeal separately from it; but on an appeal from the judgment the court of appeal has power, if it thinks fit, to give leave to amend. *Laird v. Briggs*, 16 Ch. D. 663; 44 L. T. 361—C. A.

**Power of Court of Appeal to amend Record of Trial.**—At the trial of an action the jury found certain issues in favour of the plaintiff, and the judge reserved judgment. The verdict was entered as a general verdict for the plaintiff, but the judge, notwithstanding the verdict, gave judgment for the defendant. On an appeal by the plaintiff from the judgment, the Court of Appeal amended the record by entering the verdict for the plaintiff on the issues only, and affirmed the judgment. *Clark v. Wood*, 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931—C. A.

**Varying Order of Court below as to Costs.**—If we were to vary the order of the court below as to costs when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits, but really only for the purpose of varying the order as to costs. *Harpham v. Shacklock*, 19 Ch. D. 215; 45 L. T. 572; 30 W. R. 50—C. A., per Jessel, M. R. *S. P., Llanover v. Homfray*, 19 Ch. D. 232.

**Order of Appeal Court—Varying Minutes—Notice of Motion to vary.**—Where any party is dissatisfied with an order as settled by the registrar, and desires to bring the matter before the court, he must, whether the order be an order of the Court of Appeal or of a court of first instance, give notice of motion to vary the minutes. *General Share and Trust Company v. Wetley Brick and Pottery Company*, 20 Ch. D. 130; 51 L. J., Ch. 464; 46 L. T. 70; 30 W. R. 695—C. A.

**Power of Court to rehear.**—Under the system of procedure established by the Procedure Acts

no judge of the High Court has any jurisdiction to rehear an order, whether made by himself or by any other judge, the power to rehear being part of the appellate jurisdiction which is transferred by the acts to the Court of Appeal. *St. Nazaire Company, In re*, 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854—C. A.

After final judgment has been pronounced by the Court of Appeal it is not competent to the court to rehear the appeal on the ground of the discovery of fresh facts. The proper course is for the party complaining to commence an original action impeaching the decree. *Flower v. Lloyd*, 6 Ch. D. 297; 46 L. J. Ch. 838; 35 L. T. 454; 25 W. R. 793—C. A.

Seemingly, that where the decree is impeached on the ground of fraud, such an action may be commenced without leave of the court. *Id.*

To obtain leave to file a bill of review on the ground of new matter discovered, the matter must be not only material, but such that by employing reasonable diligence could not possibly have been used at the hearing. *Michael v. Fripp*, 18 W. R. 423.

## 11. COSTS OF THE APPEAL.

**General Rule.**—Under 38 & 39 Vict. c. 77, Ord. LV., costs are in the discretion of the court, and the opinion of the judges of the Court of Appeal is that as a general rule, the successful appellant will get his costs. The old rule that the successful appellant has to bear his own costs is no longer to be acted upon, unless the particular court in the particular case shall make an order to the contrary. *Mcm.*, 1 Ch. D. 41—C. A.

On an appeal commenced under the practice of the Supreme Court a successful appellant will, in the absence of special circumstances, get his costs of the appeal. *Olivant v. Wright*, 45 L. J. Ch. 1—C. A. See also *S. P., Masters, Ex parte Winsor, In re*, 1 Ch. D. 113; 45 L. J. Bk. 18; 33 L. T. 613; 24 W. R. 113.

**Succeeding on point not raised below.**—When an appellant succeeds on a point not raised in the court below, he will be allowed the costs in the court below, but not the costs of the appeal. *Hussey v. Payne*, 8 Ch. D. 670; 47 L. J., Ch. 751; 38 L. T. 543; 26 W. R. 703—C. A.

Where an appellant is successful on an appeal upon a point not adjudicated upon in the court below, the general rule is that he will not be allowed his costs. *Goddard v. Jeffreys*, 46 L. T. 904—C. A.

**Judgment of Admiralty Division varied—Collision—Both Vessels found to blame.**—Where the Court of Appeal vary a judgment of the Admiralty Division that one of two vessels only is to blame for a collision by finding both to blame, no order will be made as to costs either in the Court of Appeal or in the court below, but each party will pay his own costs of the whole litigation. *The Hector* (No. 1), 52 L. J. P. 47—C. A.

**Interlocutory Application—Costs below and in Court of Appeal.**—Where, upon an interlocutory application the judge below has based his decision upon the merits of the whole case, the Court of Appeal will decide the question of costs both below and on appeal. *Wilkinson v. Hull*,

*Barnsley, and West Riding Railway and Dock Company*, 30 W. R. 617—C. A.

**Further Trial—Costs of Former Trial.]**—A case being sent down by the Court of Appeal for further trial, the respondent was ordered to pay the costs of appeal but not the costs of the former trial. *Shardlow v. Cotterill*, 51 L. J., Ch. 353; 45 L. T. 572—C. A.

**Notice by Respondents to Vary Judgment.]**—Where on an appeal notice has been given by the respondents that they intend to apply to have the judgment below varied, and the appeal is dismissed, the appellant will be ordered to pay the costs of the appeal, except such as were occasioned by the notice. *The Lauretta*, 4 P. D. 25; 48 L. J., P. D. & A. 55; 40 L. T. 444; 27 W. R. 902—C. A.

**Costs of Appeal where Cross-Notice of Appeal—Apportionment.]**—A respondent who has given cross-notice of appeal under Ord. LVIII. r. 6, is in the same position as to costs as if he had presented a cross-appeal. Where there were two respondents to an appeal, one of whom gave cross-notice of appeal respecting his co-respondent, the court made an apportionment of the costs of the appeal. *Harrison v. Cornwall Minerals Railway Company*, 18 Ch. D. 334; 51 L. J., Ch. 68; 45 L. T. 498—C. A. *S. P., Johnstone v. Cox*, 19 Ch. D. 17; 45 L. T. 657; 30 W. R. 114—C. A.

In an action for redemption of a mortgage vested in the defendant, B. as a trustee for the defendant D., who was in possession, D. set up the case that he was not in possession by virtue of the mortgage, but under a lease. The court decided that he was in possession as mortgagee, and made a decree on that footing, but without rests. The defendants appealed. The plaintiff gave notice that at the hearing of the appeal he should ask to have the decree varied by directing the account to be taken with rests. The Court of Appeal held that the decree was right in treating D. as mortgagee in possession, but refused to direct rests:—Held, that as the case was one where the costs could not have been materially increased by the notice, the costs ought not to be apportioned as in *Harrison v. Cornwall Minerals Company* (18 Ch. D. 334), but that the defendants should have 5l. for their costs incidental to the notice. *Robinson v. Drakes*, 23 Ch. D. 98; 48 L. T. 740; 31 W. R. 871—C. A.

**Costs of Shorthand Writers' Notes.]**—*See supra*, EVIDENCE.

**Costs of Unnecessary Motions in Court of Appeal.]**—On the 26th of June an appellant in bankruptcy was ordered to give additional security for the costs of the appeal. On the 4th of November, the security not having been given, the respondent's solicitor, without having previously written to the appellant's solicitors, gave notice of motion to dismiss the appeal for want of prosecution. On the 13th of November the additional security was given, and on the 14th of November the motion to dismiss came on to be heard:—Held, that the appellant must pay the costs of the motion, and that the appeal could not be heard until he had done so. *Isaacs, Ex*

*parte, Baum, In re* (No. 2), 10 Ch. D. 1; 47 L. J. Bk. 111; 39 L. T. 520; 27 W. R. 297—C. A.

**Appeal Withdrawn—Notice of Motion for Costs of Appeal.]**—An appellant's solicitors wrote to the solicitors of the respondent withdrawing their notice of appeal as irregular. The respondent, who had delivered briefs to oppose the appeal, applied *ex parte* to discharge the notice of appeal with costs:—Held, that notice of motion must be given. *Oakwell Collicries, In re*, 7 Ch. D. 706; 26 W. R. 577—C. A.

**Appeal Abandoned after Notice of Appeal.]**—On the 20th of December, 1880, C. gave notice of appeal, but did not set it down. On the 11th of January he sent a letter withdrawing his notice of appeal. On the next day the solicitor for the respondents wrote to C. saying that he had delivered briefs, and that unless C. would undertake to pay the respondent's costs of the appeal the usual proceedings would be taken to enforce payment of them. C. did not answer this letter. The respondents then moved that the appeal might be dismissed, and that C. might be ordered to pay the costs of the appeal and of this application, and an order was made accordingly. *Charlton v. Charlton*, 16 Ch. D. 273; 29 W. R. 406—C. A.

Where parties who have set down their appeal obtain leave to withdraw it, they will only be ordered to pay such costs as they would have had to pay if the appeal had been heard that day and dismissed with costs. *Att.-Gen. v. Halifax (Corporation)*, 5 L. R., Ch. 116; 22 L. T. 82.

The relators in an information appealed against the decree of a vice-chancellor. After the appeal was set down costs were incurred by an application to the attorney-general to withdraw his fiat. The appellants then applied for leave to withdraw the appeal. The court, on giving leave, refused to make any special order as to the costs occasioned by the application to the attorney-general. *Id.*

**Of Application for Costs of Abandoned Notice of Appeal.]**—The costs of an application for the costs of an abandoned notice of appeal will not be allowed unless a previous demand for payment of them has been made and not complied with. *Griffin v. Allen*, 11 Ch. D. 913; 28 W. R. 10—C. A.

**Of Abandoned Notice of Motion.]**—A defendant in an action which had been tried by a judge without a jury gave notice of appeal against the judgment, and also obtained *ex parte* a rule nisi for a new trial. He did not set down the appeal for hearing, but, before the argument of the rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages:—Held, that the plaintiff was entitled to the costs of the first notice of appeal as an abandoned motion: Secondly, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under Rules of Court, 1875, Ord. XL. r. 10, upon the application to make the rule for a new trial absolute. *Waddell v. Blockley*, 10 Ch. D. 416; 40 L. T. 286; 27 W. R. 233—C. A.

**Taxation of Costs of Appeal before Termina-**

**tion of Action.]**—An application by a defendant in an action in the Queen's Bench Division, to strike out the statement of claim as embarrassing, having been refused by a divisional court, the defendant appealed, and the Court of Appeal made an order "that the judgment of the court below be reversed with costs of this appeal and of the proceedings in the court below." The defendant applied to the master to tax the costs, which he declined to do on the ground that they were costs of an interlocutory application, and that the taxation must stand over till the termination of the action:—Held, by the Court of Appeal, that the practice of the common law divisions to have only one taxation of costs in an action does not apply where costs are given by the Court of Appeal, and that under an order of the Court of Appeal, directing payment of costs, without any intimation that the taxation and payment are to be postponed, the party to whom they are ordered to be paid is entitled to have them taxed and paid forthwith. *Phillipps v. Phillipps*, 5 Q. B. D. 60; 28 W. R. 376—C. A.

#### **Enforcing Order for Payment pending Appeal.]**

—A party to whom costs have been ordered to be paid will not be restrained from enforcing the order pending an appeal to the House of Lords, if his solicitors undertake to refund if the order should be reversed. *Morgan v. Elford*, 4 Ch. D. 352; 25 W. R. 136.

The payment of costs, to be paid under a decision against which there is a *bonâ fide* intention to appeal to the House of Lords, will not be stayed where the solicitor receiving such costs personally undertakes to repay them in the event of the order of the court below being reversed. *Grant v. Banque Franco-Egyptienne*, 3 C. P. D. 202; 47 L. J., C. P. 455; 38 L. T. 622; 26 W. R. 669—C. A.

The mere chance of a litigant obtaining costs upon a decision at some subsequent stage of the proceeding is no ground for staying the payment of costs already ordered to be paid under a separate judgment. *Id.*

#### **12. IN CHANCERY BEFORE JUDICATURE ACTS.**

[*Cases which may be usefully consulted under the present practice will be found under this subhead.*]

**Practice.]**—When a judge of a court of first instance declines to decide a question on a petition, and expresses his wish that it should be brought before the Appeal Court, the proper course is for the petitioner to present a short petition of appeal *pro formâ*. *Berkley (Earl), In re*, 10 L. R., Ch. 56; 44 L. J., Ch. 3; 23 W. R. 195.

When a judge has decided on an adjourned summons a question which has arisen in proceedings in his chambers, but no order has been drawn up, no appeal can be brought from his decision. *Vyse v. Foster*, 10 L. R., Ch. 236; 44 L. J., Ch. 344; 23 W. R. 299.

Special leave had been given to make an original motion before the Court of Appeal in a cause which had been heard before the court, and in which an appeal was pending in the House of Lords:—Held, that the respondent had no right to have the motion first heard before the vice-chancellor. *Powell v. Elliot*, 20 W. R. 194.

A motion by defendants to expunge evidence for scandal and impertinence was ordered to stand over till the hearing of the cause. At the hearing a decree was made both on the hearing and on the motion, by which substantial relief was given, and the motion was refused, and the evidence sought to be expunged was entered as read. The plaintiff appealed from part of the decree, which was varied by the Lords Justices:—Held, that the whole decree was opened to the respondents on the appeal, and on their application the order on the motion was reversed, and the evidence directed to be expunged. *Middlemas v. Wilson*, 10 L. R. Ch. 230; 44 L. J., Ch. 476; 32 L. T. 105; 23 W. R. 301.

#### **As to Quantum of Damages Assessed by Jury.]**

—The Court of Appeal will not entertain an appeal from an order of the court below assessing damages, unless it is shown that the court below has acted on a wrong principle in assessing the quantum of damages. *Ball v. Ray*, 30 L. T. 1; 22 W. R. 283.

#### **Amount Involved.]**—An appeal will not be

allowed when the amount in dispute is only 11. 15s. *National Assurance and Investment Society, In re, Cross, In re*, 7 L. R., Ch. 221; 41 L. J., Ch. 341; 26 L. T. 53; 20 W. R. 324.

A solicitor who had successfully prosecuted a claim on behalf of a creditor, under the winding-up of a company, applied to the court for a lien on the dividends payable to his client to the amount of his costs, which amounted to 11. 15s. The application having been refused, the solicitor appealed. The court refused to entertain an appeal for so trifling an amount, although it was stated that it was a representative case, which would govern many others. *Id.*

**Costs of Appeal.]**—The established rule, that the Court of Appeal will not give the costs of the appeal to a successful appellant, except under special circumstances, is still in force. If the court does not specially give the costs the appellant is not entitled to them. *Denny v. Hancock*, 6 L. R., Ch. 138; 40 L. J., Ch. 193; 23 L. T. 795; 19 W. R. 234.

The Court of Bankruptcy follows this rule, and will not, as a matter of course, give the costs of an appeal to a successful appellant. *Matthews, Ex parte, Cherry, In re*, 12 L. R., Eq. 596; 40 L. J., Bk. 90; 19 W. R. 1005.

The costs of a successful appeal will not be given in the absence of misconduct on the part of the respondent. *Stannard v. Lee*, 6 L. R., Ch. 346; 40 L. J., Ch. 489; 24 L. T. 459; 19 W. R. 615.

When the decision of the court below is reversed the Court of Appeal does not usually give to the successful appellant the costs of the appeal, although it has power to give such costs in special cases. *Alexander v. Mills*, 6 L. R., Ch. 124; 40 L. J., Ch. 73; 24 L. T. 206; 19 W. R. 310.

An appeal on the construction of a will, if unsuccessful, will in general be dismissed with costs. *Clark v. Henry*, 6 L. R., Ch. 588.

Where a decree of the court below, although in substance affirmed, was varied to the extent of protecting the interests of persons other than the respondent, no costs were given. *London and South Western Railway Company v. Black-*

more, 4 L. R., H. L. 610; 39 L. J., Ch. 713; 33 L. T. 504; 19 W. R. 305—H. L.

The Court of Appeal refuses to inquire into the various causes which may have influenced the decision of the court below in awarding costs, and therefore an appeal for costs will not generally be entertained; but where the judge of the court below placed on record on the face of the decree the reason why he ordered the party to pay the costs, and such reason was founded on the determination of a question of law, the Court of Appeal allowed the question of law to be argued on the appeal, that it might determine whether the reason embodied in the decree by the judge below was well founded. *Walker v. French*, 21 W. R. 493.

An appellant gave notice to a respondent whose costs the appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs:—Held, that the respondent was not entitled to his costs of appearing on the appeal. *Upmann v. Elkhan*, 7 L. R., Ch. 130; 41 L. J., Ch. 246; 25 L. T. 813.

The costs of an unnecessary party to an appeal ordered to be paid by the appellant. *Scholefield v. Lockwood*, 4 De G., J. & S. 22.

When exceptions for scandal have been overruled in the court below, but allowed on appeal, the court gave the successful appellant his costs, both of the appeal and in the court below as between solicitor and client. *Christie v. Christie*, 8 L. R., Ch. 499; 42 L. J., Ch. 544; 28 L. T. 607; 21 W. R. 493.

**Repayment of Money on Reversal.**—When money has been paid under a decree which is afterwards reversed, it must be repaid with interest. *Imperial Mercantile Credit Association v. Coleman*, 40 L. J., Ch. 262.

### III. APPEAL FROM JUDGE IN CHAMBERS.

1. *Practice in Chancery Division.*
2. *Practice in Common Law Divisions.*

#### 1. PRACTICE IN CHANCERY DIVISION.

**From Judge in Chambers to Judge in Court—Practice when Appeal to Court of Appeal Desired.**—In the Rolls Court it is the practice, following the former practice of Jessel, M. R., to adjourn summonses into court for argument or judgment in cases in which an appeal is desired. If there is no such adjournment, the proper course, so far as any application to the court below is concerned, is for a party wishing to appeal to move in court to discharge the order made in chambers, not to apply to the court below for leave to appeal direct to the Court of Appeal. *Holloway v. Cheston*, 19 Ch. D. 516; 51 L. J., Ch. 208; 30 W. R. 120. But see next case.

Where, on a summons heard in chambers, an order has been made by the judge and not adjourned into court, and there is a desire to appeal against it, the proper course is not to move in court, on notice, to discharge the order, or for a certificate that the judge does not desire it to be reheard, but to make an application in chambers. *Holloway v. Cheston* (*supra*) not followed. *Butler's Wharf Company, In re*,

*Anderson v. Butler's Wharf Company*, 21 Ch. D. 131; 61 L. J., Ch. 694; 30 W. R. 723.

When a case has been heard by a judge in chambers in the Chancery Division, and parties desire to appeal to the Court of Appeal without another argument before the judge in court, it is a proper and convenient practice for the judge to refuse leave to go straight to the Court of Appeal, and to insist on an argument in court, as the Court of Appeal, after the hearing in court, has the benefit of a judgment of the court below, with the reasons, if any, for the decision. *Manchester Val de Travers Paving Company v. Slagg*, 47 L. T. 556—C. A.

An appeal on a mere point of practice, such as security for costs, may be made from an order made in chambers, without obtaining the judge's certificate. *Northampton Coal Company v. Midland Waggon Company*, 7 Ch. D. 500; 38 L. T. 82; 26 W. R. 485—C. A.

An order made by a judge of the Chancery Division, personally in chambers may be appealed from equally with an order made by him in court. *Elson, In re, Thomas v. Elson*, 6 Ch. D. 346; 25 W. R. 871—C. A.

As a general rule, however, a certificate should be obtained from the judge that he does not desire to hear any further argument in court. But the object of such a certificate is only to satisfy the Court of Appeal that the judge has judicially determined the matter, and, if otherwise satisfied of that fact, the Court of Appeal will hear the appeal without a certificate if the judge declines to give one. *Id.*

Application should in such a case be made to the Court of Appeal for leave to set down the appeal without the judge's certificate. *Id.*

A caveat against the inrolment of an order in chambers is not prosecuted with effect by service within twenty-eight days after it is warned of notice of motion before the judge in court to discharge the order. *Lewis, In re, Republic of Paraguay, Ex parte*, 45 L. J., Ch. 62—C. A.

Doubts thrown on the propriety of the practice of the Court of Appeal in Chancery in refusing to hear an appeal from an order in chambers, though made by the judge himself, without an application to the judge in court to discharge the order. *Id.*

An appeal can be made direct to the Court of Appeal, without leave, from an order made in chambers, where the matter has been fully argued before the judge himself; the fact that it has been so made should appear on the order itself, or be certified by the chief clerk. *Murr v. Cooke*, 34 L. T. 751; 24 W. R. 756.

The Court of Appeal will only hear an appeal from an order made in chambers, when the judge who makes the order certifies that the case has been so fully argued before him, that he does not desire to hear it re-argued in court. *Warrant Finance Company, Ex parte*, 5 L. R., Ch. 88; 39 L. J., Ch. 185.

**Notice of Appeal—Time for.**—In an action to set aside a contract for fraud, on the 23rd June, the judge made an order in chambers, upon a summons taken out by the defendants. The order was not drawn up, passed and entered until the 14th July. On the 18th July, the plaintiff gave notice of a motion in court to discharge the order. The judge refused the motion, on the ground that it was his invariable rule that notices of motion to discharge orders made in his

chambers must be given within twenty-one days from the date of pronouncing the order, and not from the date of its being perfected, whether the order was a simple refusal of an application or not. Sect. 50 of the Judicature Act, 1873, provides that orders made by a judge in chambers (except the discretionary orders mentioned in sect. 49) may be set aside or discharged upon notice by any divisional court, or by the judge sitting in court, "according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned." There did not appear to be any settled practice of the Chancery Division as to the time within which such appeals from the judge in chambers to the judge in court should be brought:—Held, that following the analogy of Ord. LVIII. r. 15, the limit of time for applying to a judge in court to discharge an order made by him in chambers is twenty-one days from the date of pronouncing the order in the case of a simple refusal, and, in other cases, twenty-one days from the date of the perfecting of the order. *Heatly v. Newton*, 19 Ch. D. 326; 51 L. J., Ch. 225; 45 L. T. 455; 30 W. R. 72—C. A.

Ord. LVIII. r. 15, limiting the time for bringing appeals, does not apply to the time for making motions before a divisional court or a judge in court to discharge an order in chambers; but in the Chancery Division the practice is, that no such motion shall be made without special leave after twenty-one days. *Dickson v. Harrison*, 9 Ch. D. 243; 47 L. J., Ch. 761; 38 L. T. 794; 26 W. R. 730—C. A.

## 2. PRACTICE IN COMMON LAW DIVISIONS.

**Order of Judge in Chambers—What is.]**—An order made by a registrar sitting as judge under Ord. LIV. is not, for the purposes of the Judicature Act, 1873, s. 50, an order made by a judge in chambers, and hence, where such an order has been reviewed by a judge in court, an appeal from the judge's decision will lie without special leave. *The Vivar*, 2 P. D. 29; 35 L. T. 782; 25 W. R. 453—C. A.

**Time for Appealing.]**—Ord. LIV. r. 6 (as amended R. March, 1879, r. 8), which directs that an appeal from a decision at chambers shall be made within eight days, applies to decisions at chambers during the long vacation; and if that period has elapsed without the sitting of a divisional court, the right to appeal is lost, unless the party decided against obtains an extension of time. An order empowering the plaintiff to sign judgment upon a specially indorsed writ, was made by a judge at chambers upon the 29th of August: the time for appealing to a divisional court was on the 2nd of September, extending conditionally upon payment into court of the sum sued for within fourteen days. This condition was never fulfilled, and no divisional court sat during the long vacation. Upon the first day of Michaelmas sittings, the defendant moved the Exchequer Division to set aside the order made upon the 29th of August:—Held, that as more than eight days had elapsed since the order was made, no appeal could lie. *Rwntz v. Sheffield*, 4 Ex. D. 150; 48 L. J., Ex. 385; 40 L. T. 539—C. A.

An order having been made in chambers on the 20th of June, the defendant, on the 24th,

gave notice of appeal to a divisional court for Saturday, the 28th. The court sat on the 26th to hear motions, and was sitting on the 28th, but not for the purpose of hearing motions. The defendant brought forward his motion on the 30th, being the next day on which the court sat to hear motions:—Held, that the appeal motion was out of time, since a court to which an application to enlarge the time could be made had been sitting within the eight days. *Stirling v. Du Barry*, 5 Q. B. D. 65; 28 W. R. 405—C. A.

When notice of motion of appeal from a decision in chambers was given on the eighth day after the decision:—Held, that under Ord. LIV. r. 6, it was too late, as the notice must be given so that the motion can be heard within eight days after the decision appealed against. *For v. Wallis*, 2 C. P. D. 45; 35 L. T. 690; 25 W. R. 287—C. A.

By Ord. LIV. r. 6, appeals from chambers "shall be by motion, and shall be made within eight days after the decision appealed against." It is not a sufficient compliance with this rule to give notice of motion within eight days. *Deykin v. Coleman*, 36 L. T. 195; 25 W. R. 294—C. A.

A judge at chambers having made an order on the 29th of August, the party affected by such order moved the divisional court to rescind it during the Michaelmas sittings within eight days from the commencement of such sittings:—Held, that the application was too late, inasmuch as by Ord. LIV. r. 6, an appeal from a judge at chambers must be within eight days from the decision appealed against. *Crom v. Samuels*, 2 C. P. D. 21; 46 L. J., C. P. 1; 35 L. T. 423; 25 W. R. 45.

When an appellant from chambers has only the eighth and last day whereon to move, and it happens that no divisional court sits on that day, the right of appeal is not lost, but the appellant must move the next practicable court. *Forrest v. Davis*, 26 W. R. 534.

When the last of the eight days, limited by Ord. LIV. r. 6, for appealing from a decision at chambers expires on a Sunday, the appellant has the following Monday for appealing. *Taylor v. Jones*, 45 L. J., C. P. 110; 34 L. T. 131.

**Extension of Time.]**—By one of the general orders of the Judicature Act, 1875, eight days only are given for an appeal to the divisional court against an order made by a judge at chambers:—Held, that that limitation of time does not affect the right to appeal against an order made in vacation at chambers, when no divisional court would be sitting within the eight days. The time for appealing against such an order ought, almost as a matter of course, to be enlarged. *Wallington v. Mutual Society*, 5 App. Cas. 685; 50 L. J., Q. B. 49; 43 L. T. 258; 29 W. R. 81—H. L. (E.)

Where an order had been made at chambers, and the eight days had, under such circumstances, expired without an appeal to the divisional court, the fact that an execution had in the meantime issued, makes no difference in the matter. *Id.*

Under Ord. VII. r. 6, the court or a judge has power to enlarge the time for appealing against an order in chambers, notwithstanding that the time for appealing has elapsed, and that the action stands dismissed under the order. *Carter v. Stubbs*, 6 Q. B. D. 116; 50 L. J., Q. B. 161; 43

L. T. 746; 29 W. R. 132—C. A. Affirming 50 L. J., Q. B. 4.

**What Orders are before Court of Appeal.]**—An order at chambers was made refusing leave to defend, except on terms, the time for performing which was allowed by the defendant to expire, and another order at chambers was afterwards made refusing leave to enlarge the time within which the first order might be contested. An appeal was then taken to the divisional court against the second order, when that court desired that the notice of motion should be considered as amended so as to include the first order:—Held, that the two orders were thus brought fully before the court, and the judgment then given must be taken as applicable to both of them. *Wallisford v. Mutual Society*, 5 App. Cas. 685; 50 L. J., Q. B. 49; 43 L. T. 258; 29 W. R. 81—H. L. (E).

For the same reason, in an appeal against that judgment, the Court of Appeal must be considered to have had both the orders brought under its revision, and on an appeal to the House of Lords both the orders and both the judgments were brought into discussion. *Id.*

**Fresh Affidavit.]**—The divisional court on an appeal from chambers will, as a matter of convenience, allow a new affidavit made since the date of the order at chambers to be read. *Robinson v. Bradshaw*, 32 W. R. 95.

**Costs.]**—Costs follow a reversal of a decision of a judge at chambers. *Friend v. London, Chatham, and Dover Railway Company*, 25 W. R. 735—C. A.

#### IV. APPEALS FROM MASTER TO JUDGE IN CHAMBERS.

**What the subject of Appeal—Appeal for Costs.]**—The enactment in s. 49 of the Judicature Act, 1873, that no order by the High Court, or any judge thereof, as to costs only which by law are left to the discretion of the court, shall be subject to any appeal, does not apply to the order of a master or district registrar, and therefore a judge of such court has power to vary as to costs an order of a district registrar dismissing the action without costs. *Foster v. Edwards*, 48 L. J., Q. B. 767.

**Time for Appealing.]**—In order that an appeal from a master to a judge at chambers may be in time, according to Ord. LIV. r. 4, it is not sufficient that the appeal summons should be taken out within four days from the master's decision, but it must be heard or adjourned within the four days. *Bell v. North Staffordshire Railway Company*, 4 Q. B. D. 205; 48 L. J., Q. B. 518; 27 W. R. 263.

**Extension of Time for Appeal.]**—Within four days from the decision of a master at chambers, an appeal summons was taken out and made returnable at a date after the expiration of the four days, but on the first day when any judge would sit at chambers:—The court held, that, under the circumstances, the time might be enlarged under Ord. LVII. r. 6, and that no summons for that purpose was necessary under Ord. LIV. r. 1. *Gibbons v. London Financial*

*Association*, 4 C. P. D. 263; 48 L. J., Ch. 514; 27 W. R. 619.

On the 2nd November an order was made dismissing an action unless a statement of claim was delivered within seven days, and on the 9th November this time was extended by three days. On the 14th November the plaintiff delivered his statement of claim, and on the following day the defendant drew up and served the order of the 2nd November. On the 17th November the master, and subsequently a judge, made an order that the statement of claim do stand:—Held, that the time of appealing from the order of the 2nd November should be extended. *Metcalfe v. British Tea Association*, 46 L. T. 31.

#### V. APPEAL FROM CHIEF CLERK TO JUDGE.

**Adjournment to Judge.]**—An adjournment from the chief clerk to the judge in person is not in the nature of an appeal. *Watts, In re, Smith v. Watts*, 22 Ch. D. 1; 52 L. J., Ch. 209; 48 L. T., 167; 31 W. R. 262—C. A.

#### VI. APPEALS FROM INFERIOR COURTS.

**Appeal from Court of Passage of Liverpool exercising Admiralty Jurisdiction—Security for Costs.]**—The appeal from the Court of Passage of Liverpool exercising admiralty jurisdiction is under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26, and security for costs must be given before the instrument of appeal is lodged. *The Ganges*, 5 P. D. 247; 43 L. T. 12—C. A.

**County Palatine of Lancaster.]**—Ord. LVIII. of the Rules of Court, 1875, applies to appeals from the court of the County Palatine of Lancaster as well as to appeals from the High Court of Justice, and the time for appealing is now regulated by rule 15 of that Order, and is no longer governed by the General Orders of 1855 regulating appeals from the court of the County Palatine. *Lee v. Nuttall*, 12 Ch. D. 61; 48 L. J., Ch. 616; 41 L. T. 4; 27 W. R. 805—C. A.

**Time for Entry—Setting down for Hearing—Notice of Appeal.]**—Where a rule nisi is obtained on a motion by way of appeal to reverse a judgment of an inferior court, unless the appeal be entered in the list at the crown office of the Queen's Bench Division, in compliance with Ord. LVIII. r. 19, before the day named for the hearing of the appeal in the notice to show cause, the appeal will be taken to have been abandoned, and the appellant will have lost his right to be heard. *Donovan v. Brown*, 42 L. T. 30.

**From Quarter Sessions to Divisional Court.]**—*See sub tit. JUSTICE OF THE PEACE.*

**From County Court to Divisional Court.]**—*See COUNTY COURT.*

**From Mayor's Court to Divisional Court.]**—*See MAYOR'S COURT.*



## APPORTIONMENT.

### I. WHAT RIGHTS APPORTIONABLE.

#### II. PERIODICAL PAYMENTS.

1. *General Principles.*
2. *Annuities and Rent Charges.*
3. *Rents.*
4. *Dividends and Interest.*
5. *Salaries.*

### I. WHAT RIGHTS APPORTIONABLE.

**Right of Turbary under a Demise of Lands.]**—A., by deed in 1735, demised lands to B. and C. for a term of 889 years, and covenanted that B. and C., "their executors, administrators and assigns, and every of them, should and might from time to time, and at all times during the grant, raise, cut and carry away from off certain bog lands" (the absolute property of the lessor, and not included in the lease), "turf sufficient to be expended on the premises." B. and C. covenanted to repair all houses and outhouses that were or thereafter might be built upon the premises. In 1735, B. and C. partitioned the lands, and in 1856 the Irish Incumbered Estates Court granted B.'s moiety to D., with the appurtenances:—Held, that the right of turbary was apportionable, and that D. was entitled to a proportional share. *Hargrove v. Congleton (Lord)*, 12 Ir. C. L. R. 368.

### II. PERIODICAL PAYMENTS.

#### 1. GENERAL PRINCIPLES.

**Under 4 & 5 Will. 4, c. 22.]**—This statute applies to cases in which the interest of the person interested in such rents and payments is terminated by his death, or by the death of another person; but does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representative of such person, whose interest is not terminated at his death. *Broune v. Amyot*, 3 Hare, 173; 13 L. J., Ch. 232; *S. P., Beer v. Beer*, 12 C. B. 60; 21 L. J., C. P. 124; 16 Jur. 223.

Where A. was by deed appointed to the offices of auditor and superintending manager of B.'s estates at a salary payable half-yearly, and B. had revoked the appointment in the middle of a current year:—Held, that 4 & 5 Will. 4, c. 22, s. 2, did not enable A. to recover a proportionate part of the salary, in respect of that portion of the year during which he held the offices. *Lovendes v. Stamford and Warrington (Earl)*, 18 Q. B. 425; 21 L. J., Q. B. 371; 16 Jur. 903.

The statute applies to cases where payment for the whole period must be made to some person, and does not include a payment under a contract between employer and employed, for services performed, where the payment entirely ceases upon the determination of the claimant's right to receive it. *Ib.*

Where it can be predicated that the interest mentioned in sect. 2 of 4 & 5 Will. 4, c. 22, has been determined, the rents and other payments there mentioned shall be apportioned; but where this cannot be predicated, the interest being between the heir and the executor, the

heir shall take the whole, and there shall be no apportionment. *Clulow, In re*, 3 Kay & J. 689; 26 L. J., Ch. 513.

### 2. ANNUITIES AND RENT CHARGES.

**Annuities, who Entitled.]**—Where an annuity was granted by deed to A. during the joint lives of B. and C., charged upon lands and payable by two equal portions on the 1st of May and 1st of November in each year, to pay the same to B. during the joint lives of B. and C., and then to C. if she survived:—Held, that C. having survived B., and died on the morning of the 1st of May, A. was entitled to the entire sum due upon that day. *Robinson v. Robinson*, 2 Ir. C. L. R. 370.

A. covenanted on his marriage to pay an annuity to his wife during her life. By will he confirmed the annuity, and devised his residuary real and personal estate to his wife for life, with remainders over:—Held, that the payments of the annuity were apportionable between the value of the life estate and the value of the reversion. *Yates v. Yates*, 6 Jur., N. S. 1203.

An estate was devised to A. for life, with remainder to his first and other sons in tail, with remainder to the right heirs of the testator. C. was the heir of the testator, and died without issue:—Held, that his executors were not entitled, as against his heir, to an apportionment of the rent growing due at his death. *Clulow, In re*, 26 L. J., Ch. 513; 3 Kay & J. 689.

A tenant for life granted a rent-charge, chargeable on lands, for the life of the grantor, provided the grantee should so long live, with a power of distress and a covenant for further assurance, to a relative, as a suitable provision for her, with an apportionment clause in the event of the death of the grantee between two days of payment. The grantor died between the days of payment, leaving the grantee surviving:—Held, first, that independently of 4 & 5 Will. 4, c. 22, there could be no apportionment. *Leathley v. French*, 8 Ir. Ch. R. 401.

Held, secondly, that the court could not imply an intention that there should be an apportionment on the death of the grantor, having regard to the express apportionment clause on the death of the grantee in the lifetime of the grantor. *Ib.*

Annuities, independently of the 4 & 5 Will. 4, c. 22, are not apportionable, unless granted for the maintenance of infants or married women living separate from their husbands. *Ib.*

By 1 & 2 Will. 4, c. 11, William the Fourth was empowered by indenture under the great seal, to grant to the queen an annuity of 100,000*l.*, to commence after his decease and continue during her life, and to be paid out of the Consolidated Fund on the 31st March, the 30th June, the 30th September and the 31st December, by even and equal portions, the first payment to be made at such of the days as should first happen after the decease of his majesty. The king was empowered to settle Marlborough House and Bushy Park upon her majesty for her life, and upon her executors for one year after her demise. He exercised these powers, by an indenture, expressing that he was desirous to settle an ample revenue for supporting the honour and dignity of her majesty, and that the grant was made for her jointure, and in satisfaction of her dower, and of his especial grace, certain knowledge and mere motion. He died on the 20th June 1837, and on the 30th of the

same month a full quarter of the annuity was paid to the Queen Dowager. She died on the 2nd December, 1849. Upon application for a mandamus to the Lords of the Treasury for the payment of the arrears of the annuity subsequently to the 30th September, 1849:—Held, that the annuity was not apportionable. *Reg. v. Lords Commissioners of the Treasury*, 16 Q. B. 357; 20 L. J., Q. B. 305; 15 Jur. 767.

A terminable annuity is apportionable under 7 & 8 Will. 4, c. 22. *Sutton v. Ennis*, 18 W. R. 882; 4 Ir. R., Eq. 325.

**Under Apportionment Act, 1870.]**—The 33 & 34 Vict. c. 35, is retrospective and makes every species of income, from whatever source derived, apportionable as between tenant for life and remainderman, where the tenant for life dies after the passing of that act. *Thacker, In re*, 28 L. T. 56; 21 W. R. 285.

By an order of the Court of Chancery made in 1855, an annuity of 100*l.* was directed to be paid to W. during her life. W. died in 1872:—Held, that the annuity was apportionable to the day of her death. *Id.*

A testator after the Apportionment Act, 1870, bequeathed —1. to trustees, such sum to carry interest at 4½ per cent. until the same should be paid or appropriated, upon trust, with the consent of his wife, to invest the same in certain specified securities, and to pay the annual income of the legacy and the investments thereof, including in such income the interest payable in respect of such legacy, to his wife, for life, with remainders over. Interest was paid to the widow up to the day when, pursuant to an order of the court, the bequeathed sum was invested in stocks on some of which five months' dividend had then accrued:—Held, that the Apportionment Acts did not apply, and that the widow was entitled to the whole of the dividends when received upon the purchased stocks. *Clarke, In re, Barker v. Perowne*, 18 Ch. D. 160; 50 L. J., Ch. 733; 44 L. T. 736; 29 W. R. 730.

A grandfather bequeathed his residuary personal estate to trustees for his two granddaughters in equal shares at twenty-one or marriage, and directed that in case they or either of them should marry under twenty-one, their shares should be settled upon them and their children in the usual form. The granddaughters married under twenty-one, one in 1867, and the other in 1870, after the passing of the Apportionment Act, 33 & 34 Vict. c. 35:—Held, that in both cases the income of the trust funds was apportionable down to the date of the respective marriages. *Clive v. Clive*, 7 L. R., Ch. 433; 41 L. J., Ch. 386; 26 L. T. 409; 20 W. R. 477.

A testator bequeathed a legacy of 10,000*l.* with interest from his death at 4 per cent. per annum to trustees upon trust to pay the income to certain persons during the life of one of them, and after her death upon trust for other persons. The estate was insufficient for payment in full of his legacies, and the realization of his assets occupied several years:—Held, that moneys from time received by the trustees and applicable to the legacy were divisible rateably between capital and income, so as to attribute to income 4½ per cent. from the testator's death on the amount attributed to capital. *Tinkler, In re*, 20 L. R., Eq. 456.

The Apportionment Act, 1870, 33 & 34 Vict.

c. 35, applies to a specific devise of real estate, and generally as between the real and personal representatives, and that in a case where a will has been made before and the testator has died after the passing of the Act. *Hastick v. Pedley*, 19 L. R., Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155.

The Apportionment Act, 1870, applies to every will executed before, and confirmed by a codicil executed after, its passing; and, semble, also to every will coming into operation after its passing. *Constable v. Constable*, 11 Ch. D. 681; 48 L. J., Ch. 621; 40 L. T. 516.

The income arising from personalty specifically bequeathed is not apportionable under the Apportionment Act, 1870, as between the specific legatee and the estate of the testator. *Whitehead v. Whitehead*, 16 L. R., Eq. 628; 29 L. T. 289.

**Rent Charge.]**—Upon the death of a tenant for life, under a will executed before the Apportionment Act, 4 & 5 Will. 4, c. 22, of tithes which after the act were commuted for a rent-charge, payable at fixed periods:—Held, that the award of the tithe commissioners was "an instrument under which the rent-charge was payable" within s. 2, and therefore the rent-charge was apportionable. *Heasman v. Pearne*, 8 L. R., Eq. 599. See also *Leathby v. French*, 8 Ir. Ch. R. 401.

### 3. RENTS.

**When apportionable under 4 & 5 Will. 4, c. 22.]**—A. died in 1838, having, by will, given real estates to trustees, in trust, after keeping up his mansion, to pay five-eighths of the net rent to his widow for life. The widow died in 1847, and rents were receivable on the next rent day, under leases created by A. anterior to 4 & 5 Will. 4, c. 22:—Held, that the rents were apportionable. *Knight v. Boughton*, 12 Beav. 312; 19 L. J., Ch. 66.

The act extends to Scotland. *Fordyce v. Bridges*, 1 H. L. Cas. 1.

And to a tenant in tail. *Baillie v. Lockhart*, 2 Macq. H. L. Cas. 258.

Where a tenancy from year to year has been originally created by the owner of the fee, it is not determined by the death of a tenant for life, claiming under the original lessor, and 11 Geo. 2, c. 19, s. 15, does not therefore apply to such a case. *Cattley v. Arnold*, 1 Johns. & H. 651; 28 L. J., Ch. 352; 5 Jur. N. S. 361.

The 4 & 5 Will. 4, c. 22, does not apply to rents reserved by parol. *Id.*; *S. P., Alexander, In re*, 4 Ir. Ch. R. 257.

Therefore, where an owner of the fee demised by parol to tenants from year to year, and died, having devised the estates to a tenant for life, with remainder over, upon the death of the tenant for life:—Held, that the remainderman was entitled to the whole of the rents accruing for the half-year in which he died, without apportionment. *Id.*

So also, where the parol demise originated with the tenant for life. *Id.*

The 4 & 5 Will. 4, c. 22, applies where either the instrument creating the life interest or the lease under which the rent is payable, is dated after the statute. *Llewellyn v. Rous*, 12 Jur. N. S. 580; 35 Beav. 591.

An equitable tenant for life under a settlement of freehold leases for lives, obtained a renewed

grant for lives to himself. At his death the property was in the occupation of yearly tenants, under parol demises by him:—Held, that the rents were not apportionable either under 11 Geo. 2, c. 19, or 4 & 5 Will. 4, c. 22. *Mills v. Trumper*, 4 L. R., Ch. 320; 20 L. T., 384; 17 W. R. 428.

A testator, whose will came into operation before 4 & 5 Will. 4, c. 22, gave the rents of his real estates to his son after he should attain twenty-one, and directed personal estate to be invested in funds or securities, with power to invest in land. The son attained his majority in July, 1854:—Held, that he was entitled to receive the whole of the rents which became due in September on the devised estates and on the purchased estates, without regard to the date of the leases under which the rents became payable. *Fletcher v. Moore*, 26 L. J., Ch. 530; 3 Jur. N.S. 458.

A devise in trust for one for life, the remainder for his first and other sons in tail, remainder for testator's own right heirs. The devisee for life proved to be heir-at-law of the testator, and died intestate and without leaving issue:—Held, that notwithstanding the interposition of an estate tail which might have arisen and prevented the remainder in fee from vesting absolutely, the death of the devisee was not a determination of his interest, within the meaning of 4 & 5 Will. 4, c. 22, and therefore the rents were not apportionable between his heir and his personal representative. *Clulow, In re*, 3 Kay & J. 689; 26 L. J., Ch. 513.

Where leases were granted after 4 & 5 Will. 4, c. 22, came into operation, under a power contained in a settlement made before:—Held, that the rents were apportionable. *Lock v. De Burgh, De Burghersh (Lord) v. Burgh*, 4 De G. & S. 470; 20 L. J., Ch. 384; 15 Jur. 961.

The 4 & 5 Will. 4, c. 22, applies to all cases where either the lease reserving the rent, or the instrument creating the life interest in it, has been executed since the passing of the statute. *Plummer v. Whiteley*, Johns. 585; 29 L. J., Ch. 247; 5 Jur., N. S. 1416.

Rent reserved by a lease granted after the act under a power in a settlement executed before the act:—Held, to be apportionable between the executors of the tenant for life under the settlement and the remainderman. *Id.*

The act also applies to a case of an expiration of a term in trustees to accumulate rents, for payment of debts, legacies and other charges, with remainder to a tenant for life; as well as to the case of an estate for life to A., remainder to B. *St. Aubyn v. St. Aubyn*, 1 Drew. & Sm. 613; 30 L. J., Ch. 917; 5 L. T., 519; 9 W. R. 922.

But the act only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents, payable at uncertain periods; such as royalties payable upon the selling of ore from a mine. *Id.*

The Apportionment Act, 4 & 5 Will. 4, c. 22, s. 2, is not intended to apply as between a mortgagee (of a tenant for life) who has not entered and a remainderman, so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived. *Paget v. Anglesca (Marquis)*, 17 L. R., Eq. 283; 43 L. J., Ch. 437; 29 L. T., 721; 22 W. R. 507.

C. occupied two parcels of land upon an under-

standing that he should let off a portion of it when he could. He paid the rent agreed upon for more than a year, and he then let off a portion of each parcel to A. and B. separately, who paid rent to D., and C. continued to hold the residue himself. The rent becoming in arrear, the landlord distrained:—Held, that there was evidence that the rent was apportionable, and that the landlord was entitled to distrain. *Flesher v. Trotman*, 6 L. T. 218—Ex. Ch.

Commissioners under the powers of a private act purchased land lying partly in two parishes for the purpose of forming a metropolitan road, and charged it with the payment of an annual rent. By the Metropolis Roads Act, 1863 (26 & 27 Vict. c. 78), s. 4, it was provided that so much of the road as lay within any parish mentioned in a schedule, which included the two parishes, should be dealt with as part of the common highways of the parish, and all quit rents and other outgoings payable in respect thereof should be paid as part of the expenses of maintenance:—Held, that the effect of the Metropolis Roads Act was to apportion the rent between the two parishes; and that the representatives of the person from whom the land was bought were entitled to recover from each of the parishes a proportional part of the rent; and that the proper form of declaration was one framed on the statute, and not for use and occupation. *Sansom v. St. Leonard (Vestry), Shoreditch*, 4 L. R., C. P. 654; 38 L. J., C. P. 286; 15 W. R. 40.

**Under Apportionment Act, 1870.]**—The Apportionment Act, 1870, applies to every will executed before, and confirmed by a codicil executed after, its passing; and, semble, also to every will coming into operation after its passing. *Constable v. Constable*, 11 Ch. D. 681; 48 L. J., Ch. 621; 40 L. T. 516.

A testator, by a will executed before the passing of the Apportionment Act, 1870, bequeathed his residuary personality to trustees upon certain trusts; and he devised his real estate to trustees on certain trusts, and, subject thereto, to his son for life, with remainders over in strict settlement. But he provided that his son should not take any estate under the will unless, within a year after the testator's death, he executed a settlement of certain other real estate, upon limitations corresponding to those created by the will of the devised real estate. And the testator gave the clear and undisposed of rents of his real estate to trustees, upon trust for the son, if he should make the settlement required of him within the year, and, if not, then upon trust for the persons who would thereupon become entitled to the devised real estate. By a codicil, executed after the passing of the act, the testator made some alterations in his will, and in all other respects confirmed it. The son executed the settlement required of him within a year after the testator's death:—Held, that the rents of the devised real estate accruing due at the time of the testator's death must be apportioned between the son and the persons interested in the residuary personality. *Id.*

A testator seized in fee devised real estate by a will dated before the Apportionment Act, 1870 (33 & 34 Vict. c. 35); and confirmed by a codicil dated after the act:—Held, that the rents were apportionable between the executor and the devisee. *Capron v. Capron*, 17 L. R., Eq. 288; 43 L. J., Ch. 677; 29 L. T. 826; 22 W. R. 347.

Semble, that the result would have been the same without the codicil. *Ib.*

The residue of a term under a lease having become vested in the trustee of the lessee, who was a liquidating debtor, the trustee assigned over during a current quarter. In an action, brought after the expiration of the quarter against the trustee by the lessor, to recover a proportionate part of the quarter's rent up to the time of the assignment over by him:—Held, that the Apportionment Act, 1870, applied, and that the lessor was entitled to recover. *Secaucus Bank v. Thomas*, 4 Ex. D. 94; 48 L. J., Ex. 344; 40 L. T. 558; 27 W. R. 491.

The 33 & 34 Vict. c. 35, has not the effect of altering the usual contract of purchase, so as to entitle a purchaser to obtain out of the purchase-money lodged by him, the portion of the head-rent from the last gale day to the time of his purchase. *Krillor, In re*, 6 Ir. R., Eq. 329.

Since the Apportionment Act, 1870, a devise of the testator's estate in fee does not, per se, pass that portion of the current gale of rent which had accrued at the time of his death. *Rosengrave v. Burke*, 7 Ir. R., Eq. 186.

When a gift of part of a farm, subject to an entire rent, described it as "containing about ninety-eight acres, subject to the proportion of rent the same bears to the whole," and the gift of the other part of the farm had described it as "containing about twenty acres, subject to the proportion of rent to which the entirety of the lands is subject," the proportion of the rent to be borne by the twenty acres and ninety-eight acres respectively was to be determined by their relative value, and not by acreage. *O'Connor v. O'Connor*, 19 W. R. 90.

#### 4. DIVIDENDS AND INTEREST.

##### Profits of a Company—4 & 5 Will. 4, c. 22.]

—Dividends out of profits, from time to time declared by a commercial company, are apportionable under 4 & 5 Will. 4, c. 22. *Hartley v. Allen*, 27 L. J., Ch. 621; 4 Jur., N. S. 500.

But a simple sum of money of me to be divided among the shareholders is not so apportionable. *Ib.*

For the purpose of apportionment a dividend is to be taken as payable on the day on which it was actually payable, and not on the last day of the period during which it was earned. *Ib.*

If a company is so constituted that its dividends are to be declared, and therefore become due at fixed periods, such dividends are apportionable. *Marwell, In re*, 1 H. & M. 610; 32 L. J., Ch. 333; 9 Jur., N. S. 350; 7 L. T. 224; 11 W. R. 480.

Secus, as to the dividends of companies; as railway companies governed by the Companies Clauses Act, which have no fixed period for declaring a dividend, and are under no obligation to declare a dividend at all. *Ib.*

When a dividend is apportionable, it is with reference to the last payment, not to the period during which the profits were earned, that the proportions are to be calculated. *Ib.*

The 4 & 5 Will. 4, c. 22, s. 2, applies to a determinable interest in dividends, created by a will made after the passing of the act, in exercise of a power contained in a deed dated before the act. *Wardroper v. Cusfield*, 33 L. J., Ch. 605; 10 Jur., N. S. 194; 9 L. T. 753; 12 W. R. 458.

VOL. I.

**Railway Debentures.**—Interest payable upon railway debentures is not within the 4 & 5 Will. 4, c. 22, not being part of one entire thing, which the dividends on stock are. If a testator, possessed of railway debentures, dies after the time at which the interest is due, but before it is declared, that portion which accrued due in his lifetime is capital and not income, as between tenants for life and remaindermen. *Roger, In re*, 1 Drew. & Sm. 338; 30 L. J., Ch. 153; 6 Jur., N. S. 1363; 3 L. T. 397; 9 W. R. 64.

Railway debentures are in the nature of mortgages, and the interest accrues due de die in diem. *Ib.*

**Money in Court.**—The land of an intestate having been sold compulsorily, one-third of the purchase-money was paid into court to the widow's dower account, and invested:—Held, that the dividends on such investment were apportionable, under 11 Geo. 2, c. 19, s. 15, between the heir-at-law and the legal personal representatives of the widow. *Harrop v. Wilson*, 34 Beav. 166; 11 Jur., N. S. 102; 11 L. T. 699; 13 W. R. 334.

The Apportionment Act, 1870, applies to all instruments, whether coming into operation before or not till after the passing of the act. *Cline, In re*, 18 L. R., Eq. 213; 30 L. T. 249; 22 W. R. 512.

Dividends on a fund in court representing real estate of a testator who died in 1827, are apportionable as between successive tenants for life. *Ib.*

**Current Dividends.**—A settlor assigned securities to trustees upon trust after his death, during the minority of A., to pay such portion of the income as they should think proper, for his maintenance and education; and when he should have attained twenty-one, and thenceforth until he should attain thirty, by and out of the income to pay to him such annual sum as they should in their discretion think proper, not exceeding 5,000*l.*, and accumulate the unapplied portion, and stand possessed of the accumulations upon the trusts thereafter declared concerning the fund; and upon further trust, when and so soon as he should have attained thirty, to stand possessed of the funds, and the annual produce, upon trust that they and he shall pay unto and permit him and his assigns to receive and take the whole of the dividends, interest, and annual produce, during his life, for his and their own use and benefit, with limitations over. Upon his attaining thirty:—Held, that there must be an apportionment of the current dividends. *Donaldson v. Donaldson*, 10 L. R., Eq. 635; 40 L. J., Ch. 64; 23 L. T. 550; 18 W. R. 1104.

**Stock in a Canal Company.**—Bequest of stock in a canal company to trustees to pay the dividends to the testator's wife for life, and afterwards to fall into the residue:—Held, that the dividends were apportionable. *Pollock v. Pollock*, 18 L. R., Eq. 329; 44 L. J., Ch. 168; 30 L. T. 779; 22 W. R. 724.

**Payments by way of Bonus.**—The word "dividends" in the Apportionment Act, 1870, includes payments by way of bonus or surplus profits to the shareholders of a public company,

H

even though such payments may be only occasional and not strictly periodical: as for instance, where the payments are made under the deed of settlement of a life assurance society, providing for distribution of a bonus or surplus profits among its shareholders once in every five years, "unless a special meeting of shareholders shall otherwise direct." *Griffith, In re, Carr v. Griffith*, 12 Ch. D. 655; 41 L. T. 540.

A bonus or surplus profits accruing on shares in the company specifically bequeathed by a will dated in 1875, held to be apportionable under the Apportionment Act, 1870. *Ib.*

**Public Companies.**—The words "trading or other public companies" in s. 5 of the Apportionment Act, 1870, include any public company, but not a private partnership. *Ib.*

A life assurance society, unincorporated, but established in 1843 by a deed of settlement, with a board of directors, 100,000*l.* capital, and list of shareholders, and possessing certain powers and concessions under a special act of parliament, passed in 1868, held to be a "public company" within the meaning of s. 5 of the Apportionment Act, 1870. *Ib.*

**Private Partnership.**—A testator bequeathed the dividends and income of his share and interest in an iron company to A. for life, and after his death he gave the share and interest to his daughter absolutely. The testator died in October, 1870. The iron company was a private trading partnership regulated by a deed of partnership, under which the accounts were made up in the January of each year, and the profits of the previous year ascertained, which account was settled and signed by all the partners. The managing partner then decided what dividend should be paid to the partners, and the dividend was paid by instalments in the next few months:—Held, that the dividend in respect of the profits realized during 1870, which was declared in January, 1871, was not a dividend or a periodical payment within the Apportionment Act, 1870 (33 & 34 Vict. c. 35), and was not apportionable, and that the whole belonged to the tenant for life. *James v. Ogle*, 8 L. R., Ch. 192; 42 L. J., Ch. 334; 28 L. T. 245; 21 W. R. 239. Affirming 14 L. R., Eq. 419; 41 L. J., Ch. 633; 27 L. T. 367; 20 W. R. 794.

A testatrix, who died in 1858, directed her trustees to carry on a business and to apply the net profits as to one-fourth upon trust for C. for life, and after his death upon trust for his widow for life; and the testatrix left the mode and time of ascertaining or dividing the profits wholly in the discretion of the trustees, except that they should, every January, draw up a balance-sheet, shewing the net profits during the year ending on the preceding 31st of December. C. died on the 23rd December, 1877, and his widow, as next tenant for life, claimed to be entitled to the whole of the one-fourth share of the net profits for the half-year ending on the 31st of that month:—Held, first, that, independently of the Apportionment Act, 1870 (33 & 34 Vict. c. 35), the person entitled to take a share of net profits must be living at the time when the profits were ascertained. *Cox, In re*, 9 Ch. D. 159; 47 L. J., Ch. 735; 27 W. R. 63.

Held, secondly, that the share of net profits in question was neither a dividend nor a periodical payment within the meaning of that act. *Ib.*

#### Share in a Colliery—Accumulation of Profits.]

—A testator directed his executors to manage and carry on the share he might have in any colliery at the time of his death, and to permit his wife to receive the profits during her life. At the time of his death he was entitled to a share in a colliery partnership, carried on by him in partnership with four other persons under a deed which contained a provision for yearly settlements of accounts, and that upon such settlements the clear profits, or a portion, if the majority in value of the partners should so direct, should be added to the joint-stock of the company or be divided between the partners in proportion to their respective shares, or passed to their respective separate accounts. For a considerable period after the death of the testator no dividend was paid to the partners, but the undivided profits, when there were any, were accumulated. Afterwards dividends were paid which did not exhaust the profits; no resolutions were passed declaring that any portion of the profits should be added to the joint-stock of the company, but the undivided credit balances were at the end of each year carried forward to the profit and loss account and employed for the general purposes of the concern. On the death of the widow:—Held that the accumulations of profits made during her life and not divided, belonged to the testator's estate and not to her representatives, and that they were entitled, under 4 & 5 Will. 4, c. 22, to an apportioned share of the profits made in the year which was current at the time of her decease. *Straker v. Wilson*, 6 L. R., Ch. 503; 40 L. J., Ch. 630; 24 L. T., 763; 19 W. R. 761.

**Rate of Interest on value of Shares.**—H., by his will, gave his property to trustees upon trust, to convert, or in their discretion to retain, present investments. The estate was administered by the court, and, acting on the chief clerk's certificate, some of the investments were retained, and, in particular, several shares in the West Middlesex Waterworks, which were shewn to have paid a high dividend, and also to have increased in value since the death of the testator. On a question as to the apportionment of the dividends on these shares between a tenant for life and remaindermen:—Held, that the tenant for life was only entitled to interest at 4 per cent. per annum on the value of the shares at the death of the testator. *Furley v. Hyder*, 42 L. J., Ch. 626.

#### 5. SALARIES.

The clerk of the crown resigned his office in the middle of the half-year:—Held, entitled to recover from his successor, as money had and received, an apportioned part of that half-year's salary which had been paid to him. *Treacy v. Corcoran*, 8 Ir. R., C. L. 40.

#### APPRAISER.

See VALUER AND APPRAISER.

## APPRENTICE.

### I. CONTRACT OF APPRENTICESHIP, 197.

1. *General Requisites*, 197.
2. *Parties who may take Apprentices*, 199.
3. *Agreements in Contemplation of Apprenticeship*, 200.
4. *Consideration and Stamping*, 201.
5. *Compulsory Binding*, 205.
6. *Dissolution*, 206.
7. *Proceedings on*, 208.
8. *Proof of*, 209.

### II. RIGHTS AND LIABILITIES OF PARTIES, 210.

1. *Master*, 210.
2. *Apprentice*, 213.
3. *Father*, 214.

### III. JURISDICTION OF JUSTICES, 215.

### IV. PARISH, 216.

### V. SEA.—See SHIPPING LAW.

### VI. ATTORNEY'S.—See SOLICITOR.

### VII. ILLTREATING.—See CRIMINAL LAW.

## I. CONTRACT OF APPRENTICESHIP.

### 1. GENERAL REQUISITES.

**Indentures must be Executed.]**—No agreement whatever will constitute an apprenticeship unless there are indentures executed. *Rees v. Whitechurch*, 1 Bott's P. L. 532; *Burr. S. C.* 540; *Rees v. Margran*, 5 T. R. 153; *Rees v. Maicman*, *Burr. S. C.* 290; *Rees v. Stratton*, *Burr. S. C.* 272; *Rees v. Kingncare*, *Burr. S. C.* 839.

**What Constitutes.]**—A contract to serve for three years, at so much per week, the master agreeing to teach the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship, if the instrument is sealed and stamped. *Rees v. Rainham*, 1 East, 531.

**Contract of Hiring.]**—L. agreed, on behalf of his son, that he should serve M. from the date of the agreement until a certain specified time, M. paying, at the expiration of the term, five pounds to the son; L. to find his son clothes, washing, and all other necessities, and M. meat, drink, and lodging:—Held, that this was a contract of hiring, and not of apprenticeship. *Rees v. Billinghay*, 1 N. & P. 149; 5 A. & E. 676; 2 H. & W. 419.

**Counterpart.]**—If an apprentice is bound, it is not necessary to the validity of his indenture, that the master should sign a counterpart. *Rees v. Fleet*, Cald. 31; *Rees v. St. Peter's on the Hill*, 2 Bott's P. L. 367. See *Millership v. Brookes*, 5 H. & N. 797; 29 L. J., Ex. 369.

**Father and Apprentice Illiterate.]**—An inden-

ture having been prepared for binding a boy apprentice, he and his father, being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master and left it with him; and afterwards stated that when he did so he considered himself bound; and he went into the service under the indenture:—Held, that the indenture was sufficiently executed and delivered. *Rees v. Longnor*, 1 N. & M. 576; 4 B. & Ad. 647.

**Date.]**—A printed indenture of apprenticeship executed on one day, but bearing date on another, is not void by 8 Ann. c. 9, and 5 Geo. 3. c. 46, s. 19. *Rees v. Harrington*, 4 A. & E. 618; 6 N. & M. 163; 1 H. & W. 747.

**Two Persons, two Trades.]**—An indenture by which an apprentice was bound for seven years, to serve one person for the first four years, and his own father for the last three, to learn two different trades, is valid. *Rees v. Louth*, 8 B. & C. 247; 2 M. & R. 273.

**Death of one of two Partners.]**—Where an apprentice is bound to two partners, on the death of one he becomes in law the apprentice of the survivor. *Rees v. St. Martin's, Exeter*, 1 H. & W. 69; 4 N. & M. 385; 2 A. & E. 655.

**Surety.]**—In an action against a surety on an indenture of apprenticeship of A. to serve B. and C., the surety pleaded that there never were or was any services or service for A. to perform to or for B. and C. jointly. To this plea they, after setting out the indenture whereby the surety covenanted for the service of A. as apprentice to B., surgeon, and C., surgeon and apothecary, replied that at the time of executing the indenture B. and C. were not in partnership, nor did they carry on business jointly or on the same premises, but that they carried on business wholly separate and apart from and independent of each other, which the surety at the time of executing the indenture well knew, and that B. and C. never represented to him that they should carry on business in partnership:—Held, that the replication was bad in substance. *Popham v. Jones*, 13 C. B. 225.

**Second Master.]**—If a service by an apprentice with a second master, can in other respects be construed to be a good service under the indenture with the first master, it is immaterial whether the second master knew the fact of the apprenticeship or not. *Rees v. Sandhurst*, 1 N. & P. 296; W. W. & D. 34; 6 A. & E. 130.

**Escrow, Delivery subject to Condition.]**—An indenture of apprenticeship sealed and delivered to an attorney who is acting for all the parties to it, with directions that it is not to take effect till something else is done, operates merely as an escrow. *Millership v. Brookes*, 5 H. & N. 797; 29 L. J., Ex. 369.

**Objectionable Conduct of Apprentice—Bill in Equity.]**—A bill in equity by an apprentice praying that his master might be ordered to execute the indenture of apprenticeship, and to take

into his employ and teach him his trade, was dismissed without costs, it appearing that the conduct of the apprentice was objectionable, on account of his idleness, and other unsatisfactory particulars. *Brown v. Banks*, 3 Giff. 190; 7 Jur., N. S. 1273; 4 L. T. 698.

**Locality of Business—Change of—Division of Business.**—The plaintiff was bound apprentice to the defendants and their partners and successors in business in the trade of an engineer; and his father covenanted to provide him with board, lodging, and other necessaries. At the date of the indenture the business was carried on by the four defendants in London, where also the father of the apprentice resided, but there was no stipulation in the indenture as to the place where the business should be carried on. Before the term of the apprenticeship expired the defendants' partnership was dissolved and two firms established, one in London, consisting of two of the defendants, and the other at Derby, consisting of the other two; the manufacturing part of the old business being carried on at Derby and the selling part in London. The defendants called on the plaintiff to attend at the place of business at Derby:—Held, that there was an implied stipulation that the contract was to be performed at the place where the business was carried on and the parties resided at the date of the indenture; and that the direction to the apprentice to go to Derby was an unreasonable command which he was not bound to obey. *Eaton v. Western*, 9 Q. B. D. 636; 52 L. J., Q. B. 41—C. A.

Held, also, that as the business was not carried on in its entirety by either of the two new firms, neither of them was the successor of the original firm or entitled to the services of the apprentice. *Royce v. Charlton* (*infra*) overruled. *Ib.*

**—Implied Stipulation.**—A deed of apprenticeship contained the usual provision that the master should teach the apprentice, but no express provision as to the place where the contract was to be performed by the master:—Held, that no stipulation could be implied that it was to be performed at the place where at the time of its execution the master carried on business and the parties to the deed resided. *Royce v. Charlton*, 8 Q. B. D. 1; 45 L. T. 712; 30 W. R. 274; 46 J. P. 197. Overruled by preceding case.

## 2. PARTIES WHO MAY TAKE APPRENTICES.

Semble, that an infant may take an apprentice. *Rex v. St. Petroz, Dartmouth*, 4 T. R. 196.

But the binding an apprentice to feme covert is void. *Rex v. Guilford*, 2 Chit. 284.

The 10 Geo. 2. c. 31, s. 5, after reciting the inconvenience which happens by watermen, wherry-men and lightermen taking apprentices before they are housekeepers, or have any settled habitation for themselves or their apprentices, enacts, that it shall not be lawful for any waterman, though a freeman of the (waterman's) company, or his widow, to take and keep any person as his or her apprentice, unless he or she shall be the occupier of some house or tenement wherein to lodge him or herself and such apprentice; and that he or she shall keep such apprentice in the same house

or tenement wherein he or she shall lodge or lie, on pain of forfeiting ten pounds for every offence. By s. 4. no such freeman, or freeman's widow, shall take or retain more than two apprentices at the same time, under a penalty:—Held, that any contract to take an apprentice, entered into by a freeman or widow, not being an occupier of some house, &c., or having already two apprentices, was prohibited; and, therefore, where a pauper bound himself by indenture of apprenticeship to serve the widow of a waterman, she not having such house, &c., but it being understood that he was to live at the house of a freeman of the company (which he did), and to serve him conformably to the indenture, he having two other apprentices at the time, such indenture was absolutely void. *Rex v. Gracesend*, 3 B. & Ad. 240.

## 3. AGREEMENTS IN CONTEMPLATION OF APPRENTICESHIP.

**On Trial.**—If a lad goes on liking, with a view to his being bound an apprentice, his intended master cannot charge for his board and lodging for the first month, nor, perhaps, for so long a time as he conducts himself with propriety; but if he stays for many months, behaving ill, after complaints to his father of his misconduct, it will be for the jury to say whether there was any contract, either express or implied, that his father should pay for his board and lodging. *Earratt v. Burghart*, 3 C. & P. 381.

**—Board and Lodging.**—So, in another case, under similar circumstances, it was held, that, if no fresh agreement was entered into, the master was not entitled to charge for the board and lodging of the lad whom he employed in his trade; and by consequence, could not set it off in an action by the lad's father for money lent. *Wilkins v. Wells*, 2 C. & P. 231.

The defendant being desirous of apprenticing his son to the plaintiff, it was verbally agreed between them that the son should go on trial for a month, and if the parties were satisfied, he should be bound apprentice for four years, the defendant to pay a premium by instalments. The son went on trial, and remained above sixteen months, when the defendant removed him. No deed of apprenticeship was executed, or any part of the premium paid:—Held, that the plaintiff could not recover for the son's board and lodging during any part of the time he remained with him. *Harrison v. James*, 7 H. & N. 804; 31 L. J., Ex. 248.

## —Two Years' Compensation for Services.]

The defendant agreed with the plaintiff's father to receive the plaintiff (who was a minor) into his service on trial, and to take him as an apprentice, if he approved of it. The plaintiff went to and worked for the defendant nearly two years. Several applications were made during that time by the father, to take him on paying 10*l.*: this was agreed to; but the defendant shortly after quarrelled with the plaintiff, and told him to go home about his business. He went home; and on the father applying to the defendant for an explanation, the latter told him to go and do his worst. The father then caused a letter to be written to the defendant

by his attorney, requiring him either to take the plaintiff as his apprentice, or recompense him for his work, but no satisfactory answer was given; and the plaintiff, by his next friend, brought an action to recover compensation for his service. The judge put it to the jury on these facts,—whether or not the defendant's conduct was such as warranted the father in considering the contract for an apprenticeship as rescinded; and he further stated, that if they thought it was, they were to give the plaintiff such compensation for his work as they thought proper. The jury found a verdict for the plaintiff, with damages, by way of compensation for his services:—Held, that the direction was right, and the verdict not to be disturbed. *Phillips v. Jones*, 1 A. & E. 333.

**Breach—Board and Lodging Prior to.]**—Where a surgeon agreed with the defendant to take his son an apprentice in consideration of a premium; and after the son had served a short time, the agreement was broken off on account of the refusal to pay the expense of the stamp for the indenture:—Held, that the surgeon could not recover damages for a breach of the agreement, nor for the board and lodging of the son during the time he remained with him. *Keene v. Parsons*, 2 Stark. 506.

**Board and Lodging—Agreement.]**—A. placed his son with B., a chemist and druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill health. It was intended that A.'s son should be apprenticed to B., but he stayed for five years with B., having his board and lodging, and being taught the business of a chemist and druggist, and he then left B., and was never apprenticed to him:—Held, that, to entitle B. to recover for the board, lodging and teaching of A.'s son, the jury must be satisfied that A.'s son was placed with B. upon an agreement or understanding that B. was to be paid for his board and lodging and for teaching him;—but that if the jury was not so satisfied, or if they thought that A.'s son was not to be paid for till B. had passed his examination at Apothecaries' Hall, and that A.'s son was then to be apprenticed to B. as an apothecary:—Held, that B. was not entitled to recover anything for the board and lodging and teaching during the five years. *Atticaters v. Courtney*, Car. & M. 51.

#### 4. CONSIDERATION AND STAMPING.

**Operation of 8 Anne, c. 9—Sum truly Inserted.]** 8 Anne, c. 9, s. 39, makes void indentures of apprenticeship in which the full sum or sums of money received, given, paid, secured or contracted for are not truly inserted. It does not apply where the sum actually paid is inserted in the indenture, though it is a less sum than that which was originally agreed for, and the reduction was made to diminish the amount of the stamp duty. *King v. Lowe*, 3 C. & P. 620; *S. P.*, *Shepherd v. Hall*, 3 Camp. 180.

**Undertaking to pay Further Sum by Mother.]**—An undertaking by the mother of an apprentice, without the knowledge of her husband, to pay the master a sum of money beyond the premium inserted in the indenture and paid by the husband at the time of its execution (the

stamp on the indenture being sufficient for both sums), does not make the indenture void, the undertaking being void, and no fraud being practised on the revenue. *Rex v. Burton-on-Dunsmore*, 3 M. & R. 631; 9 B. & C. 872.

The consideration expressed in an indenture of apprenticeship was 4*l.*, to be paid to the master by a public charity; but the apprentice's mother privately agreed to pay, and did pay, the master, after execution of the indenture, 1*l.* in addition:—Held, that the indenture (though stamped) was void by s. 39, the full sum contracted for, with, or in relation to, the apprentice, not being inserted. *Rex v. Baildon*, 3 B. & Ad. 427.

**—By Grandfather.]**—Trustees of a charity bound out an apprentice to R.: the consideration expressed in the indenture was 10*l.*, paid by the trustees. Previously to the execution of the indenture, the apprentice's grandfather, who was no party to the indenture, had agreed with the mistress that the premium should be 25*l.*; and subsequently to the execution the grandfather paid to the mistress 15*l.*: the trustees were entirely ignorant of the contract, or of the payment of any sum beyond the 10*l.*:—Held, that the agreement by the grandfather to pay the additional sum of 15*l.* was a binding agreement, and that therefore the indenture was void by 8 Anne, c. 9, s. 39, for not stating the full consideration. *Rex v. Amersham*, 6 N. & M. 12; 4 A. & E. 508; 1 H. & W. 694.

**Apprentice Covenanting to Maintain Himself.]**—In indentures the apprentice covenanted to provide for himself meat, drink, lodging, and physic in sickness, during the term, for which benefit to the master no additional duty was paid: the indentures were held to be admissible evidence, it not appearing that weekly payments, which the master covenanted to make to the apprentice during the term, were not an equivalent. *Rex v. Walton-in-le-Dale*, 3 T. R. 515.

**Friends.]**—If the friends of an apprentice covenant to maintain him, and to provide him with clothes, it is not such a benefit as is liable to the duty imposed by 8 Anne, c. 9, s. 45. *Rex v. Leighton*, 4 T. R. 732; Nolan, 100.

**Earnings of Apprentice.]**—A master stipulating for 4*d.* out of every 1*s.* of the earnings of his apprentice, is no benefit to him within the statute, for which an additional duty is to be paid, being by law entitled to the whole. *Rex v. Wantage*, 1 East, 601.

**Agreement prior to Indentures.]**—Nor is an agreement before the binding to pay the master 30*s.*, to clothe the apprentice, within the statute, and the indenture is not void for want of inserting it therein. *Rex v. North Onam*, Burr. S. C. 145; 2 Stra. 1132.

**Necessaries.]**—Nor is an agreement by the father of an apprentice to provide necessaries for his son, in consideration of a weekly sum to be paid him by the master, within the statute. *Rex v. Portsea*, Burr. S. C. 834.

**Agreement Contemporaneous with Indenture.]**



—A sum of 99l. 19s. was paid as an apprentice fee, and was stated as the consideration in the indenture. Contemporaneously with the indenture, a written agreement was made between the master and the apprentice's uncle, that the latter should pay 150l. more for the board of the apprentice during the term, 50l. of which was paid, and notes given for the residue. This was not stated in the indenture:—Held, that the consideration was truly stated, and that the indenture was not void under 8 Anne, c. 9. *Hawkins v. Clutterbuck*, 2 C. & K. 811.

**Premium paid by Society—Fraud upon.**—A father, upon apprenticing his son to B. by a charitable society, agreed to give him, in addition to a premium of 20l. to be paid by the society, four l O U's for 5l. each, payable at intervals of a year. The boy was apprenticed, and served the full term; the indenture stating the consideration to be 20l., paid by the society; after the expiration of the term, B. sued the father upon his l O U's:—Held, that the transaction was not a fraud upon the society. *Wentlake v. Adams*, 5 C. B., N. S. 248; 27 L. J. C. P. 271; 4 Jur., N. S. 1021.

Held, also, that the indenture being void by 8 Anne, c. 9, s. 39, for not truly setting forth the consideration, did not prevent B. from suing the father upon the l O U's, the execution of the indenture (though void) being a sufficient consideration for his promise to pay the additional 20l. *Ib.*

**Exempt.**—A binding with the consent of trustees of funds bequeathed for that purpose, though they do not execute, is exempt from duty. *Rees v. Quainton*, 2 M. & S. 338.

**Public Charity—Stamp—Fraud.**—A pauper was bound apprentice by trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term; and he did so. It did not appear that the trustees were privy to this engagement:—Held, that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given to or for the benefit of the master, within 55 Geo. 3, c. 184; or, assuming that it was, then it was void as being a fraud on the trustees, who had bound out the apprentice on the faith that the master was to provide clothes. *Rees v. Aylesbury*, 3 B. & Ad. 569.

**Parish Officers—Premium.**—The premium given by parish officers upon the binding out of a poor apprentice, need not be set out in the indenture in words at length; such an indenture being exempted from any duty by s. 40, and the insertion of the premium being required for no other purpose but to ascertain the amount of the duty. *Rees v. Oadby*, 1 B. & A. 477.

**Master or Mistress.**—Neither is any duty payable for any consideration-money, unless it is given to the master or mistress of the apprentice. *Rees v. Saint Petroz, Dartmouth*, 4 T. R. 169.

**Assignment—Stamping.**—An assignment of

a parish apprentice is not subject to the regulations imposed by 8 Ann. c. 9, and need not, therefore, be stamped within two months, nor must the consideration paid for such assignment be set forth in it. *Rees v. Ide*, 2 B. & Ad. 866.

— **Unstamped—Admissible Evidence.** —

An unstamped assignment of a parish apprentice stated that the new master, in consideration of 3l. 10s. paid him by the old master, agreed to accept the apprentice:—Held, that parol evidence was admissible to show that the money paid on the assignment was parish money; and, therefore, that the instrument did not require a stamp. *Rees v. Llangunnor*, 2 B. & Ad. 616.

A boy was apprenticed by the trustees of a charitable fund, and a premium of 15l. paid out of the fund; before the expiration of the term, the master, at the request of the apprentice, verbally, and without the knowledge of the trustees, consented to his serving the remainder of his term with another person; and agreed to give that person 6l., as part of the 15l. paid as a premium on the binding:—Held, that the 6l. was a valuable consideration paid to the second master, "other than what was given by any public charity," and, therefore, that the transfer was void for want of a stamped assignment. *Rees v. Fakenham*, 4 N. & M. 553; 2 A. & E. 528; 1 H. & W. 222.

— **Additional Year's Service.**—An assignment of an apprenticeship indenture contained a stipulation for an additional year's service with a new master:—Held, that the common assignment stamp was sufficient. *Morris v. Cox*, 3 Scott, N. R. 116; 2 M. & G. 659; 9 D. P. C. 661; 5 Jur. 367. See 16 & 17 Vict. c. 59.

**Single Stamp.**—An indenture to two masters, to serve them consecutively in distinct trades, requires only a single stamp. *Rees v. Louth*, 2 M. & R. 273; 8 B. & C. 247.

**Time for Stamping.**—The 55 Geo. 3, c. 184, does not repeal 8 Ann. c. 9, as to the time for stamping indentures of apprenticeship; and, therefore, an indenture of apprenticeship (a premium having been paid with the apprentice), must be stamped with the ad valorem duty, within the time prescribed by 8 Ann. c. 9, ss. 36, 37, 38, and if not stamped, is wholly void. *Rees v. Church Hulme*, 5 B. & Ad. 1029.

An indenture of apprenticeship, in which no consideration is expressed, is not within 8 Ann. c. 9, which limits the time of stamping to particular periods, in no case exceeding six months; and is therefore receivable in evidence, though stamped more than a year after execution. *Smith v. Agett*, 8 D. P. C. 411.

— **Ex.**

**Want of Stamp—Effect.**—No action can be maintained by the plaintiff on a note given to him by the defendant, as an apprentice fee with his son, who was to be bound to the plaintiff, if it appears that the indenture executed was void by the statute, for want of the insertion of such premium therein, and a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and

until he absconded. *Jackson v. Warwick*, 7 T. R. 121.

**Indenture Void—Premium not Inserted—Recovery.**—Money paid as a premium for an apprentice, by a parent to a master under an indenture, cannot be recovered back if such indenture is void for not having the amount of the premium inserted therein; although the statutes relative to the duties payable on such indentures impose a penalty on the master alone for such omission; as the parent, by executing the instrument, must be considered to be aware of its illegality, and therefore in paridelioto with the master. *Stokes v. Twitoken*, 2 Moore, 538; 8 Taunt. 492.

**Insufficient Stamp.**—Where a boy was bound apprentice in 1827, by indenture, upon a premium of 30*l.*, which was agreed to be paid, and for which a bill was given; and the indenture had a 1*l.* stamp only impressed upon it; and the apprentice having served his master for five months, and a difference having arisen between the master and the father, and it having been discovered that the stamp was insufficient, the apprentice left his master's service:—Held, that the apprentice might have compelled him to continue that instruction and maintenance, by causing the indenture to be properly stamped. *Mann v. Lent*, 10 B. & C. 877; M. & M. 240.

#### 5. COMPULSORY BINDING.

[5 Eliz. c. 4, avoided all indentures of apprenticeship other than for seven years: but 54 Geo. 3, c. 96, repealed that statute, and enacted that it might be lawful for persons to take apprentices though not according to the provisions of the 5 Eliz. c. 4.]

The statute related only to infants, and not to adults. *Smedley v. Gooden*, 3 M. & S. 189.

The 5 Eliz. c. 4, was construed as rendering indentures made for a less time voidable only, and not void. *Gray v. Cookson*, 16 East, 13; S. P. *Rez v. St. Nicholas*, Burr. S. C. 91; 2 Stra. 1066.

**Antedating Indenture.**—A minor, by an indenture of apprenticeship, put himself apprentice to his father to learn the trade of a tailor. The indenture first bore date the 12th of December, 1813, but the parties, for the fraudulent purpose of enabling the minor to exercise the trade of a tailor, and have the full benefit of the 5 Eliz. c. 4, then in force, after five years' apprenticeship, caused the indenture, before execution, to be antedated two years; on an appeal touching the validity of this indenture:—Held, that as it was fraudulently intended to contravene 5 Eliz. c. 4, s. 31, it was altogether void. *Rez v. Barnston*, 3 N. & P. 167; 7 A. & E. 858; 2 Jur. 537.

**Guardians of Poor—Years.**—Where a statute, incorporating guardians of the poor of a district, enacted that it should be lawful for the corporation to bind out apprentices for any number of years, "provided such child be not bound for a longer term than until he or she shall have attained twenty-two, if a boy, and twenty, if a girl:—Held, that an indenture, by which a boy fifteen-and-a-half was bound for seven years, was voidable only and not void. *Rez v. St. Gregory, Canterbury*, 4, N. & M. 137; 2 A. & E. 99.

**Assent of Boy.**—By a local act, property was vested in guardians of the poor of a city for the benefit of the poor, and they were required to give a bond to provide for and maintain sixteen poor boys of the city, and to cause them to be instructed, and to "put them out apprentices, after they and every of them should have attained thirteen, and before fifteen:—Held, that the act did not authorize the guardians to apprentice a boy without his assent, especially if the boy was beyond fifteen; and that, consequently, where a boy never executed an indenture of apprenticeship, and was seventeen when the guardians apprenticed him, the indenture was invalid, and the boy did not acquire a settlement under it. *St. Nicholas, Rochester v. St. Botolph, Bishopsgate*, 12 C. B., N. S. 645; 31 L. J., M. C. 258; 9 Jur., N. S. 101; 6 L. T., 495.

#### 6. DISSOLUTION.

**By Bankruptcy of Master.**—[By 12 & 13 Vict. c. 106, s. 170, similar to 6 Geo. 4, c. 16, s. 49, the bankruptcy of the master will operate as a discharge of the apprentice, and premium may be returned.]

—Where a fiat of bankruptcy had been issued against the master of an apprentice, but was afterwards annulled by means of a composition between the bankrupt and his creditors:—Held, that the indentures of apprenticeship were discharged. *Allen v. Chata*, 1 Beav. 274.

**By Death.**—Apprenticeship is determined by the death of the master. *Rez v. Clark*, Burr. S. C. 782; *Baxter v. Burfield*, 2 Strange, 1266; 1 Bott's P. L. 696.

—By indenture an infant, with the consent of his father, bound himself apprentice to a tradesman, "his executors and administrators, such executors or administrators carrying on the same trade or business, and in the town of W.," and with him and them to serve for the term of seven years; and the master, in consideration of the service of the apprentice, covenanted to teach and instruct him, or cause him to be taught and instructed, during the term:—Held, first, that upon the death of the master the apprentice was bound to serve his widow, who was his executrix, whilst she carried on the same business in the same town, and that she was bound to teach the apprentice. *Cooper v. Simmonds*, 7 H. & N. 707; 31 L. J., M. C. 138; 8 Jur., N. S. 81; 5 L. T., 712; 10 W. R. 270.

Held, secondly, that it was no answer to an information against the apprentice for absenting himself from the service of the executrix that he had consulted an attorney, who advised him that the apprenticeship was determined by the death of the master, and that he had acted on the bona fide belief that the advice was correct. *Ib.*

**On attaining Majority.**—When an infant apprentices himself under an indenture of apprenticeship, such indenture is only voidable upon his attaining his majority, and if he intends to disaffirm it, he must do so within a reasonable time after he arrives at full age. What is a reasonable time is a question of fact for the court before which it is brought for decision. *Wray v. West*, 15 L. T., 180.

An apprentice, bound by indenture for seven years, while under twenty-one, is entitled to put an end to the apprenticeship when he attains that age, but must give to his master reasonable notice of his intention so to do. *Coghlan v. Culaghan*, 7 Ir. C. L. R. 291.

**By Absenting of Apprentice.]**—The absenting of himself from his master's service by an apprentice is not an avoidance of the apprenticeship. *1b*.

**On Relinquishment of Trade or Business.]**—By an indenture of apprenticeship an infant, with the consent of his father, put himself apprentice to a person described as "an auctioneer, appraiser and corn-factor, to learn his art, and with him after the manner of an apprentice to serve" for a certain period. The father was party to the indenture, and entered into covenants for the performance of its terms on the behalf of the apprentice:—Held, that the fact of the master's having during the continuance of the apprenticeship relinquished the trade of corn-factor was an answer to an action brought by him against the father for a desertion of his service by the apprentice; and this, though the father had by parol consented to the discontinuance of that trade, and allowed the son to continue to serve after it. *Ellen v. Topp*, 6 Ex. 424; 20 L. J., Ex. 241; 15 Jur. 451.

By indenture between A. and B., B. covenanted to teach A. the art and mystery of an apothecary. At the time of the indenture being executed B. kept a shop, making up his own prescriptions and those of other medical men. B. subsequently closed his shop and confined his business to that of a general practitioner, making up his own prescriptions, but not those of other medical men:—Held, that this did not disqualify B. from teaching A. the art and mystery of an apothecary, so as to entitle the latter to a direction in an action brought by him for breach of the covenant in the indenture. *Butty v. Monks*, 12 L. T. 832; 15 Ir. C. L. R. 388.

**Before Breach.]**—To an action on an indenture of apprenticeship, the defendant pleaded, that when the indenture was entered into the plaintiffs were partners, and that, before any breach of duty by the apprentice, the partnership was dissolved. The court refused to set aside the plea on the ground that it was not issuable. *Lloyd v. Blackburn*, 9 M. & W. 363; 1 D., N. S. 647.

**Indenture being given Up.]**—Apprenticeship is determined by the indenture being given up, though not cancelled. *Rea v. Titchfield*, Burr. S. C. 511.

And by the master telling his apprentice he might go where he pleased, and giving up his indenture. *Rea v. Notton*, Burr. S. C. 629.

Where there has been such an agreement between the master and the apprentice to give up the indenture, that, to an action of covenant brought by the former, the latter could plead the matter in bar, the indentures are considered as cancelled, though the indentures still subsist in fact. *Rea v. Harburton*, 1 T. R. 139.

**Verbal Agreement.]**—A verbal agreement by a master, "upon being paid three pounds, to set his apprentice at liberty, and to give him up his indenture," does not discharge the indenture. *Rea v. Warden*, 2 M. & R. 24.

The mother of an apprentice, before the expiration of his apprenticeship, applied to his master to give him up to her, to which he consented, and the apprentice left him; but the indenture remained in the hands of the overseers, and was never applied for, or given up:—Held, that the apprenticeship was not put an end to by the agreement between the parties. *Rea v. Skeffington*, 3 B. & A. 382. See also *Rea v. Warminster*, 3 B. & A. 121.

**Master Receiving Money.]**—Where a master receives money of his apprentice, who is of full age, to vacate his indenture, the relation is dissolved, although the indenture remains uncanceled. *Rea v. Devonshire (Justices)*, Cald. 32.

**By Consent.]**—The apprenticeship of an infant may be dissolved with the consent of all parties concerned. *Rea v. Waddington*, Burr. S. C. 766; *S. P. Rea v. Spaurston*, S. C. 801.

**Continuance of Service.]**—Where an apprentice was bound for seven years to A., and served him in his house between five and six, and resided at his mother's for the remainder of the term, having previously agreed with A. that he might work for whom he pleased on his paying a weekly sum to A., who also during the term occasionally gave him work for which he was not paid:—Held, that this was not a continuance of the service to A. for seven years under the indenture. *Rea v. Inman*, 4 B. & A. 55.

**Breach of Conditions.]**—Where a master had agreed by indorsement (unstamped) on the indenture to cancel it, "provided the apprentice made no engagement or entered into any person's service in a particular town:—Held, that the apprentice setting up a trade for himself in the town was a breach of the condition, which entitled the master to recall him into his service. *Gray v. Cookson*, 16 East, 13.

## 7. PROCEEDINGS ON.

**Covenants.]**—The covenants in an indenture of apprenticeship are distinct from and independent of each other. *Winstone v. Linn*, 2 D. & R. 465; 1 B. & C. 460.

**Misconduct.]**—And consequently misconduct in an apprentice affords no justification to the master for putting an end to the contract. *Phillips or Philips v. Clift*, 4 H. & N. 168; 28 L. J., Ex. 153; 5 Jur., N. S. 74; 32 L. T., O. S. 282.

**Plea "not his deed."]—To an action on a deed of apprenticeship, the defendant pleaded that the indenture was not his deed:—Held, that a special demurrer to such plea was not frivolous. *Bird v. Holman*, 2 D., N. S. 234; 9 M. & W. 761.**

**Pledings.]**—Action by father of an apprentice, against the master, for not teaching the apprentice: plea, that he did teach, until the apprentice ran away, and never returned: replication, that, on a certain day, the master refused to take back the apprentice, and thereby discharged him: rejoinder, that the apprentice had previously enlisted as a soldier, and that the father never requested the master to take the apprentice when he was able to return: surrejoinder, that soon after the apprentice had enlisted, the master

refused to take him back, and wholly discharged him:—Held, that the surrejoinder was bad, and no answer to the rejoinder; and that the plea was a good answer, and that the father should have alleged an offer to return the apprentice. *Hughes v. Humphreys*, 9 D. & R. 715; 6 B. & C. 680. And see *Cuming v. Hill*, 3 B. & A. 59.

**Jurisdiction of Court of Equity.**—A Court of Equity has no jurisdiction to order the cancellation of articles of apprenticeship, and the return of a portion of the premium, on the ground of the wrongful refusal of the master to continue to instruct his apprentice in his trade, according to his agreement. *Webb v. England*, 29 Beav. 44; 30 L. J., Ch. 222; 7 Jur., N. S. 153; 3 L. T., 574; 9 W. R. 183.

**Surety's Obligation for good Conduct.**—To a statement of claim alleging that the defendant had become surety on an indenture of apprenticeship for the faithful service of the apprentice, and that the apprentice had not faithfully served, but had absented himself, the defendant pleaded that while the apprentice was in the plaintiff's service the plaintiff assaulted him and inflicted personal injury upon him, and threatened to do him grievous bodily harm, and that the apprentice, fearing that grievous bodily harm would be inflicted upon him, left the service:—Held, that the statement of defence should be amended by adding an allegation that the apprentice had reasonable ground for such fear. *Halliwell v. Council*, 38 L. T. 176.

## 8. PROOF OF.

**Averment in Declaration.**—An averment in a declaration on the 8 Ann. c. 9, against a master of an apprentice, for not inserting the true consideration in the indenture, that A., the apprentice, by an indenture executed, put himself apprentice to the defendant, may be proved by the production of that part of the indenture executed by the defendant, in which it is recited that A. had put himself apprentice. *Burleigh v. Sibbs*, 5 T. R. 465.

**Admissions—Parol Evidence.**—It was proved by a pauper that he had been bound apprentice twenty-three years before by the overseers of a parish, to A. for seven years, that the indenture was signed and sealed, and that he served the seven years, and that A. had the indenture; that, when the apprenticeship expired, the pauper asked A. for the indenture, who said the overseers had it:—Held, that the declarations of A., who might have been called as a witness, were not admissible, and that parol evidence of the contents was not admissible, the indenture not having been sufficiently accounted for. *Rez v. Denio*, 7 B. & C. 620; 1 M. & R. 294; S. P., *Rez v. Castleton*, 6 T. R. 236.

**Settlement by Apprenticeship.**—To prove a settlement by apprenticeship, evidence was given that proper search had been made for an indenture, but in vain; and a person deposed that more than sixty years back he worked with the same master as the pauper, and always believed him to be apprenticed to that master; that the pauper was instructed there by a journeyman, and lodged and boarded in the house with two others, who were apprentices:—Held, evidence

from which a settlement by apprenticeship under an indenture might be presumed. *Reg. v. Fordinbridge*, El. Bl. & El. 678; 27 L. J., M. C. 290; 4 Jur., N. S. 951.

Appellants against an order of removal set up a settlement of a pauper by apprenticeship under an indenture which had been lost. To prove proper search, they proposed to ask certain witnesses what enquiries they had made of, and what answers they had received from, parties who were likely to have the document in their possession; but the parties themselves were not called. The sessions refused to allow the questions to be put:—Held, that the evidence was admissible, upon the preliminary inquiry whether proper search had been made, though it might not be admissible in the main issue before the court. *Reg. v. Braintree*, 1 El. & Bl. 51; 4 Jur., N. S. 1238; 28 L., M. C. 1.

**Expired Indenture—Custody.**—An expired indenture of apprenticeship sometimes remains with the master and sometimes with the apprentice, but the most proper custody is with the apprentice; and although shortly after the expiration of the apprenticeship search might be required amongst the papers of both, yet, after the lapse of some years, proof of search among the papers of the apprentice is sufficient to warrant justices in admitting secondary evidence of its contents. *Reg. v. Hinckley*, 3 B. & S. 885; 32 L. J., M. C. 158; 9 Jur., N. S. 1054; 8 L. T. 270; 11 W. R. 663.

## II. RIGHTS AND LIABILITIES OF PARTIES.

### 1. MASTER.

**Condition Precedent.**—It is a condition precedent to the liability of a master, on a covenant to teach an apprentice his trade, that the apprentice should be ready and willing to be taught by the master. *Raymont or Raymond v. Minton*, 1 L. R., Ex. 244; 35 L. J., Ex. 153; 12 Jur., N. S. 435; 14 L. T. 367; 14 W. R. 675; 4 H. & C. 371.

**Personal Trust—Assignment.**—The interest of a master in his apprentice is a mere personal trust; and an indenture not being assignable in his lifetime, except by custom, and with the consent of the apprentice, the master's executors cannot maintain an action on a bond for performance of the covenants in the indenture, unless his executors are named. *Baxter v. Burfield*, 1 Bott's P. L. 581; 2 Str. 1266.

**Harbouring Apprentices.**—The master may have an action against those who detain an apprentice after knowing him to be such. *Rez v. Edwards*, 7 T. R. 745.

**Enticing away.**—No action will lie for enticing away an apprentice unless there is a valid contract of apprenticeship. *Cox v. Muncy*, 6 C. B., N. S. 375.

**Injuring or Disabling.**—In an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for the prospective damage, and is not limited to the loss up to the time of the com-

mencement of the action; for the damage alone is not the cause of action, but the illegal act and the damage together; and the master could not bring a fresh action as often as fresh damage resulted. *Hodson v. Stalbrass*, 3 P. & D. 200; 11 A. & E. 301; 9 C. & P. 63; 8 D. P. C. 482.

#### Discharging Apprentice—Absence—Damages.]

—When an apprentice has absented himself, the fact that the master declined to have any trouble taken to find him, and described him as worthless, though it will not sustain a plea of leave and licence, may be material in mitigation of damages, and the jury can only give the real value of his services up to the time of action. *Russell v. Shinn*, 2 F. & F. 695.

—**Misconduct.**—A person has no right to turn away an apprentice because he misbehaves; but the case of a young man seventeen years old, who, under a written agreement not under seal, is placed with a surgeon as pupil and assistant, and with whom a premium is paid, is a case between that of apprenticeship and service; and if such a person, on some occasions, comes home intoxicated, this alone will not justify the surgeon in dismissing him. But if the pupil and assistant, by employing the shop-boy to compound the medicines, occasions real danger to the surgeon's practice, this would justify the surgeon in dismissing him. *Wise v. Wilson*, 1 C. & K. 622. See *Mercer v. Wall*, 5 Q. B. 447; 14 L. J., Q. B. 267; 9 Jur. 576.

A declaration alleged that the defendant agreed with the plaintiff to take his son as an apprentice for three years, to learn the business of a tea broker; and in consideration of 200*l.* to teach him such business and pay him a salary, provided that he should obey all commands and give his services entirely to the business during office hours. Breach, that the defendant dismissed the son from his service. Plea, that the son misconducted himself in the service, by wilfully disobeying the orders of the defendant, and by habitually neglecting his duties and refusing to give his services during office hours without just cause, wherefor the defendant discharged him:—Held, that the proviso empowered the defendant to discharge the apprentice, and that the plea was good. *Westwick v. Theodor*, 10 L. R., Q. B. 224; 44 L. J., Q. B. 110; 32 L. T. 696; 23 W. R. 620.

#### Unlawfully Quitting Service—Damages.]

Where there is a contract of apprenticeship by deed, and the apprentice unlawfully quits the service, the master can only recover damages up to the time of action, when the term of apprenticeship would end. *Lewis v. Peachey*, 1 H. & C. 518; 31 L. J., Ex. 496; 10 W. R. 797.

**Habitual Thief.**—If an apprentice, whose master's business lies in precious articles, constantly lying about, is an habitual thief, the master may discharge him. *Cox v. Matthew*, 2 F. & F. 397.

**Absenting—Taking back.**—If an apprentice absents himself from his master, and his master takes him back, and an action is afterwards brought for such absenting, the taking back, to constitute a defence, must be specially pleaded. *Wright v. Gihon*, 3 C. & P. 583.

—**Sunday.**—The staying out by an apprentice on a Sunday evening, beyond the time allowed him, is not such an unlawful absenting of himself as will enable his master to maintain an action against a person who became bound for the due performance of the indenture. *Ib.*

—**In Scotland.**—An apprentice to a barber in Scotland, bound by his indenture "not to absent himself from his master's business on holidays or week-days, late hours or early, without leave, went away on Sundays without leave, and without shaving his master's customers:—Held, that he could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that that work, and all other sorts of handicraft, were illegal in England as well as in Scotland, not being work of necessity, or mercy, or charity. *Phillips v. Innes*, 4 C. & F. 234.

**Harbouring—Earnings.**—A master is entitled to maintain an action for the work and labour of his apprentice, against another who harbours him after desertion. *Foster v. Stewart*, 3 M. & S. 191.

So a master of an apprentice who has been seduced from his service to work for another person, may waive the tort, and bring an action for work and labour done by his apprentice, against the person who tortiously employed him. *Lightly v. Clouston*, 1 Taunt. 112.

So the captain of a ship of war, detaining an impressed apprentice after notice, is liable to the master for wages for the service of the apprentice. *Eades v. Vandeput*, 5 East, 39, n.; 4 Dougl. 1.

Even if the captain has knowledge of the fact from the apprentice's assertion merely. *Ib.*

Prize money gained by an apprentice serving on board a letter of marque ship, does not belong to the master of the apprentice, the usage being proved to be, that such money is the property of the apprentice. *Carsan v. Watts*, 3 Dougl. 350.

**Deductions from Wages.**—When in a deed of apprenticeship the master covenanted to find meat, drink, lodging, and all other necessities, and certain wages:—Held, that he was not entitled to set off the cost of clothes and washing supplied to the apprentice against the wages due to him, and a custom among masters to deduct the cost of clothes and washing from the wages paid to the apprentice could not be supported on the ground that clothes and washing being necessities in the ordinary sense of the word, such a custom would contravene the terms of the deed. *Abbott v. Bates*, 45 L. J., C. P. 117; 33 L. T. 491; 24 W. R. 101—C. A.

**Impressment.**—If an apprentice is impressed, the master cannot sue out a habeas corpus to bring him up to be discharged, though the apprentice may. *Rez v. Edwards*, 7 T. R. 745; *Rez v. Reynolds*, 6 T. R. 497.

Nor where an apprentice is impressed, if he is willing to enter into the service. *Landown, Ex parte*, 5 East, 38. *Grocot, Ex parte*, 5 D. & R. 610.

The master, however, may have a warrant to the commander of the vessel to have the apprentice discharged. *Ib.*

Such warrant is granted by the Chief Justice

of Q. B. *Apprentices' Case*, 1 Leach, C. C. 208; *S. P.*, *Rex v. Parkins*, 2 Ld. Ken. 295.

## 2. APPRENTICE.

**Infant.**—An infant may bind himself apprentice by indenture, because it is for his benefit. *Rex v. Arundel*, 5 M. & S. 257. And see *Keane v. Boycott*, 2 H. Bl. 511; *Drury v. Drury*, 5 Bro. C. C. 570.

An infant can do no act to bind himself, except such as is clearly for his own benefit; therefore, though he may bind himself an apprentice, he cannot dissolve the indenture. *Rex v. Wigston*, 5 D. & R. 339; 3 B. & C. 484.

— **Bona fide advance by Trustee of.**—A trustee bona fide advanced a sum to apprentice an infant, in the life of his father, who was in great pecuniary distress, and while the infant's interest in the trust fund was contingent, and before a power of advancement had come into operation:—Held, that in taking the accounts as against the trustee, the amount ought to be allowed him. *Worthington v. McCrae or McCraw*, 23 Beav. 81; 26 L. J., Ch. 286.

**Avoiding Indenture.**—The indenture cannot be avoided when the apprentice is before a magistrate, charged with misbehaviour under the indenture. *Rex v. Eccerred*, Cald. 26.

Nor by the apprentice's absenting himself from the service. *Smedley v. Gooden*, 3 M. & S. 189; *S. P.*, *Cogan v. Calaghan*, 7 Ir. C. L. R. 291.

**Return to Habeas Corpus.**—A return to a habeas corpus for the discharge of an apprentice above twenty-one, stating the custom of London, that every citizen and freeman of the city may take as an apprentice any person above fourteen, and under twenty-one, to serve for seven years and more, must shew that the apprentice was within those ages when he bound himself apprentice; for the court will not intend that from matter dehors the return. *Eden, Ex parte*, 2 M. & S. 226.

The court has no power to discharge an apprentice from his indentures who has bound himself when an infant to serve till twenty-five, and who, when he came of age, elected to avoid indentures, after which he had been committed to the house of correction for a misdemeanor, in absenting himself from his master's service, when it appeared by the return to a habeas corpus that he was committed upon a regular conviction by two magistrates. *Gill, Ex parte*, 7 East, 376; 3 Smith, 369.

**Seventeen years of Age.**—An apprentice of seventeen years of age, and upwards, bound by indenture (which stated her to be fourteen) for seven years, is entitled to be discharged at twenty-one. *Davis, Ex parte*, 5 T. R. 715.

**Deserting—Wages.**—An indentured apprentice deserting his service, on entering on board ship cannot maintain an action for wages. *Bright v. Lucas*, Peake's Add. Cas. 121.

**Dismissal—Damages.**—In an action for an unlawful dismissal of an apprentice, the measure of damages is the loss or injury that has been incurred by the apprentice from the time of his

dismissal to the time of action. *Addams v. Carter*, 6 L. T. 130.

The measure of damages in an action upon an apprenticeship deed, for wrongful dismissal, is the loss actually sustained by the specific breach of covenant complained of up to the time of action brought, and the jury cannot therefore take into consideration the possible injury the plaintiff may have sustained by reason of his wrongful dismissal, as such damages are not damages in the ordinary course of things flowing from the breach. *Parker v. Catheart*, 17 Ir. C. L. R. 787.

**Breach of Agreement by retirement of one of two Partners.**—An agreement by two partners to teach an apprentice his trade is broken if one of them retires from the business and so fails to teach him. *Couchman v. Sillar*, 22 L. T. 480; 18 W. R. 757.

**Effect of Covenant to serve.**—A covenant in an apprenticeship deed that the apprentice will honestly remain with and serve his master for a certain term, is, though in terms absolute, subject to an implied condition that the apprentice shall continue in a state of ability to perform his contract. To an action, therefore, by the master for breach of the covenant, a plea that the apprentice was prevented by the act of God, to wit, permanent illness, which arose after the making of the deed and before breach, is good. *Boast v. Firth*, 4 L. R., C. P. 1; 38 L. J., C. P. 1; 19 L. T. 264; 17 W. R. 29.

## 3. FATHER.

**Son's Assent necessary.**—A father cannot bind his infant son an apprentice without his assent; therefore, an indenture of apprenticeship executed by the master and father, but not by the apprentice himself, is invalid. *Rex v. Arcsby*, 3 B. & A. 584.

Where the master and father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and the son should receive half his earnings, and the master the other half; under which the boy served out the time as an apprentice:—Held, that this agreement between the father and master (to which the son was no party), not binding the son, or the father for him, to any service to the master, but the son's service in fact, being merely voluntary, was no apprenticeship in point of law. *Rex v. Cromford*, 8 East, 25.

**Adult must Execute.**—An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice. *Rex v. Hipon*, 9 East, 295.

**Absenting—Plea Covenant.**—In an action on an indenture of apprenticeship, by the master against the father, the declaration assigned for breach, that the apprentice absented himself from the service, and he pleaded that his son faithfully served till he came of age, and that he then avoided the indenture:—Held, that this was no answer to the action, as it did not discharge the father's liability on the covenant, which was that his son should serve for seven years. *Cum-*

*ing v. Hill*, 3 B. & A. 59. And see *Hughes v. Humphreys*, 6 B. & C. 680; 9 D. & R. 715.

**Covenant—Plea and Performance.**—The father of an apprentice covenanted to provide his son with washing; afterwards the master suggested that the father should allow the son a certain sum of money a year, and the master supply the son with washing, and the son pay him for it. This was acceded to, and the master accordingly supplied the washing:—Held, that the master could not recover in an action on the indenture against the father for his not providing the son with washing, if the master provided the washing, by agreement, on the credit of either the father or the son; and that, in an action on the covenant, a plea of performance by the father was supported by proof of those facts. *Blackburne v. Davis*, 1 C. & K. 167.

**Recovery of Premium on Death of Master.**—A father apprenticed his son to a watchmaker and jeweller for the term of six years, paying to the master a premium. The master duly instructed the apprentice for a year, and then died. The father sought, in an action against the master's executrix for money had and received, to recover the whole or some part of the premium, on the ground of failure of consideration:—Held, that such failure being only partial, the action was not maintainable. *Whincup v. Hughes*, 6 L. R., C. P. 78; 40 L. J., C. P. 104; 24 L. T. 74; 19 W. R. 439.

**Return of Premium.**—A deed of apprenticeship contained a provision that, in the event of the failure of the health of the apprentice, so as to incapacitate him from following the profession of a civil engineer, before the 1st of April, 1866, the master should refund to the father 50*l.* of the premium; it being agreed that the production at any time before that day of a certificate signed by two duly qualified medical men, testifying as to the fact, should be conclusive evidence that the health of the apprentice had failed, so as to incapacitate him from following his profession. The health of the apprentice failed, and he died on the 4th of August, 1865. On the 28th of March, 1866, the master was served with a certificate in the terms of the condition, dated the 24th of March, but referring to the state of health of the apprentice in June, 1865:—Held, that the certificate was a sufficient compliance with the condition to entitle the father to recover the 50*l.* *Derby v. Ilmber*, 2 L. R., C. P. 247; 15 L. T. 538.

### III. JURISDICTION OF JUSTICES.

**20 Geo. 2, c. 19.**—The 20 Geo. 2, c. 19, s. 4, enabling two magistrates, "upon application or complaint made upon oath, by any master against such apprentice," as is described in the act, touching any misdemeanour in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing, preferred by the master, and verified by the oath of another person. *Finley v. Jovle*, 12 East, 248.

—**6 Geo. 3, c. 25.**—This statute is not repealed by 6 Geo. 3, c. 25, s. 1, empowering the justices to oblige an apprentice absenting himself from his master's service to serve out, after

the expiration of the apprenticeship, such time of absence, as to make satisfaction for it; and in default of such satisfaction, to commit the apprentice; for, the remedy given to the master by the latter statute is cumulative to the punishment inflicted on the apprentice by the former statute for his offence. *Gray v. Cookson*, 16 East, 13.

**Conviction for Misbehaviour.**—A conviction on 4 Geo. 4, c. 34, of an apprentice for misbehaviour must shew on the face of it that he is an apprentice within 4 Geo. 4, c. 29, which extends previous acts to apprentices upon whose binding out no larger sum than 25*l.* has been paid. *Rea v. Taylor*, 7 D. & R. 622.

**Under 5 Eliz., c. 4, s. 35—Premium.**—The justices at sessions have no power under 5 Eliz., c. 4, s. 35, on making an order for the discharge of an apprenticeship, to direct the return of any part of the premium already paid to the master, or the non-payment of any part of it remaining unpaid. *East v. Pell*, 4 M. & W. 665; 1 H. & H. 421.

**Expiration of Indenture before Complaint.**—Under 4 Geo. 4, c. 34, s. 2, a justice of the peace has jurisdiction to inquire into and hear a complaint made by an apprentice claiming wages due from his master notwithstanding the term of apprenticeship has expired and the indenture of apprenticeship determined before the complaint is made; and an apprentice sworn to give evidence touching such complaint, who has given false testimony upon the hearing of the complaint, may be convicted of perjury. *Reg. v. Proud*, 1 L. R., C. C. 71; 36 L. J., M. C. 62; 10 Cox, C. C. 455; 16 L. T. 364; 15 W. R. 796.

### IV. PARISH APPRENTICES.

**Chimney Sweepers—under Eight.**—The 28 Geo. 3, c. 48, s. 4, made void the indentures if children under eight were bound to chimney-sweepers. *Rea v. Hipwell*, 8 B. & C. 466; 2 M. & R. 474.

**Assent of Justices—Requisites.**—The assent of justices to the binding of a parish apprentice, under 43 Eliz. c. 2, s. 5, must shew on the face of it that the justices were at the time acting within the local limits of their jurisdiction. *Starerton (Overacker) v. Ashburton (Overacker)*, 4 El. & Bl. 526; 24 L. J., M. C. 53; 1 Jur., N. S. 233.

So also an order of justices for binding an apprentice, under 56 Geo. 3, c. 139. *Reg. v. St. George, Bloombury*, 4 El. & Bl. 520; 24 L. J., M. C. 49; 1 Jur., N. S. 231.

The approval of the justices must be sealed as well as signed, by 56 Geo. 3, c. 139, s. 11. *Rea v. Stoke Damarel*, 7 B. & C. 563; 1 M. & R. 458.

**56 Geo. 3, c. 139.**—Where an indenture stated in the body of it that the binding was with the approbation of two justices, whose names were thereunto subscribed, and the allowance at the foot of the indenture purported to be signed by the justices before the indenture was executed by any of the parties and referred by date and the names of the justices, to the order for binding, such a reference is a com-

pliance with 56 Geo. 3, c. 139, as the allowance is in such case part of the indenture. *Reg. v. Aldborough*, 13 Q. B. 190; 3 New Sess. Cas. 486; 18 L. J., M. C. 81; 13 Jur. 322.

— **28 Geo. 3, c. 48—Chimney Sweep—Not under Eight.**—An indenture of apprenticeship under 28 Geo. 3, c. 48, by which a boy, not under eight years, bound himself apprentice to a chimney-sweeper with the consent of his parent, was valid, without the consent of two justices, and therefore a settlement was gained by service under it. *Reg. v. Epsum*, 4 El. & Bl. 1003; 24 L. J., M. C. 119; 1 Jur., N. S. 474.

— **Jurisdiction — Metropolis.**—By 3 & 4 Will. 4, c. 63, s. 3, indentures for binding parish apprentices within any city, borough, or town corporate, shall be allowed by two justices, one acting for and on behalf of the county, and the other acting for and on behalf of the city, borough, or town corporate within the limits of which such child shall be bound. By 2 & 3 Vict. c. 71, s. 14, a magistrate of the metropolitan police courts may do at a police court any act which may be done by more than one justice. A pauper was bound apprentice by a parish, which was within the city and liberty of Westminster, into a parish in the county of Middlesex. Justices for the county of Middlesex have concurrent jurisdiction, and usually act in the liberty of Westminster:—Held, that 2 & 3 Vict. c. 71, s. 14, gave one police magistrate jurisdiction to allow the indenture. *Reg. v. St. George's, Bloomsbury*, 16 Q. B. 1005; 20 L. J., M. C. 200; 15 Jur. 799.

**By Guardians.**—By a local act directors and acting guardians of the poor, or any five of them, were to bind out pauper apprentices. An indenture of apprenticeship was executed, which purported to be between the guardians of the poor of the one part, and the apprentice's mistress of the other part; and in the operative part it witnessed "that the directors and acting guardians, by virtue of the act, did put, place, and bind the pauper as apprentice." The covenants by the mistress were made with the guardians, and by one of them she bound herself not to assign over the apprentice without the consent of the directors and acting guardians. In witness thereof the guardians caused the seal of the union to be put to the indenture; and the indenture was subscribed by two justices:—Held, that by 3 & 4 Will. 4, c. 63, s. 2, the indenture was rendered valid. *Reg. v. Isle of Wight (Guardians)*, 10 L. T. 370; 12 W. R. 744.

**By the Parish Officers before 1st October, 1844.**—The 43 Eliz. c. 2, does not require absolutely two churchwardens in every parish for the management of the poor; and, therefore, an indenture binding out a poor apprentice, by one churchwarden (where by custom there was but one) and one overseer, was good within s. 5, which requires it to be executed by the greater part of the churchwardens and overseers. *Reg. v. Skilton (Earl)*, 1 B. & A. 275.

— **13 & 14 Car. 2, c. 12—where Township has no Churchwardens.**—Since 13 & 14 Car. 2, c. 12, an indenture executed by the overseers of a township which has no churchwardens or chapel-

wardens, and maintains its own poor separately, is valid, although neither of the churchwardens of the parish at large within which the township is situate join in the execution. *Reg. v. Nantwich*, 16 East, 228.

— **Evidence of Execution.**—An indenture, executed by a churchwarden and an overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, will be deemed good, by intending that there were two overseers for the hamlet, as required by 13 & 14 Car. 2, c. 12, s. 21, and only one churchwarden by custom, in the same place. *Reg. v. Hinckley*, 12 East, 361.

— **Under 22 Geo. 3, c. 83—Requisites.**—Where a parish is incorporated with others for the maintenance of its poor, and a guardian is appointed under 22 Geo. 3, c. 83, the churchwardens and overseers may bind out poor children apprentices, and the indentures need not be signed by the guardian. *Reg. v. Lutterworth*, 5 D. & R. 343; 3 B. & C. 487.

— **Under 51 Geo. 3, c. 80.**—The 51 Geo. 3, c. 80, extends to parishes where there are three officers only, one of whom acts as churchwarden as well as overseer; and, therefore, an indenture in such a case, signed by two parish officers, one of whom acted in a double capacity, was valid. *Reg. v. St. Margaret's, Leicester*, 2 B. & A. 200.

And notwithstanding that statute, an indenture signed by two parish officers, one of whom acted in the double capacity of churchwarden and overseer, was good. *Reg. v. Stoke Golding*, 1 B. & A. 173.

— **Under 54 Geo. 3, c. 107.**—The binding of an apprentice by the churchwarden of a township and one of two overseers is made valid by 54 Geo. 3, c. 107, s. 2. *Reg. v. Stainforth*, 11 Q. B. 66; 3 New Sess. Cas. 53; 17 L. J., M. C. 25; 12 Jur. 95.

**Notice to Overseers—56 Geo. 3, c. 139.**—No settlement was acquired by service under an indenture of apprenticeship ordered, made and allowed under 56 Geo. 3, c. 139, unless the notice required by s. 2 was duly given, and was proved to the justices before allowance. *Reg. v. Whiston*, 6 N. & M. 65; 4 A. & E. 607.

But where an indenture of apprenticeship appeared on the face of it to be ordered and allowed by justices under 56 Geo. 3, c. 139, s. 2, it was *prima facie* to be presumed that the notice was duly given, and was proved before the magistrates by whom the indenture was allowed. *Ib.*

Under 56 Geo. 3, c. 139, s. 2, when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace. *Reg. v. Threlkeld*, 4 B. & Ad. 229; 1 N. & M. 14.

Where a parish apprentice is bound into another parish by assignment of the indenture of apprenticeship, notice from the churchwardens and overseers of the first parish to those of the second was not requisite under 56 Geo. 3,



c. 139, s. 2. *Re v. Exminster*, 1 N. & P. 603; 6 A. & E. 598; W., W. & D. 244.

— **Sufficiency of.**—Where a pauper was bound apprentice under 56 Geo. 3, c. 139, it was sufficient, if a notice of the intended binding, directed generally to the overseers of the parish into which the apprentice was to be bound, was served on one of such overseers. *Reg. v. Holme*, 9 Q. B. 71; 2 New Sess. Cas. 364; 15 L. J., M. C. 125; 10 Jur. 737.

**Indentures—Effect of Fraud.**—An indenture of apprenticeship of an infant pauper, sanctioned by the overseers and magistrates acting bona fide, is not avoided by its having been fraudulently contrived between the parent and nominal master, for the purpose of obtaining a premium from the parish, and keeping such infant at home. *Re v. Great Sherpy*, 2 M. & R. 286; 8 B. & C. 74.

— **Rules of Poor Law Commissioners.**—The rules of the poor law commissioners for binding poor children apprentices, excepting as to the signature by the apprentices, are directory only, and non-compliance with them will not make indentures void. *Reg. v. St. Mary Magdalen, Bermondsey*, 2 El. & Bl. 809; 23 L. J., M. C. 1; 17 Jur. 1075.

— **Stamp.**—The stamp is no part of the indenture, and a statement that it is duly stamped is sufficient. *Reg. v. Keighley*, 8 Q. B. 877; 2 New Sess. Cas. 321; 15 L. J., M. C. 102; 10 Jur. 492.

— **Misnomer of Apprentice.**—A misnomer of the apprentice in the body of the indenture will not affect its validity. *Reg. v. Wooldale*, 6 Q. B. 549; 1 New Sess. Cas. 377; 14 L. J., M. C. 13; 9 Jur. 83.

— **Order for Binding, presumption of.**—On appeal against an order of removal, the respondents alleging a parish apprenticeship, and ground having been laid for the reception of secondary evidence, the pauper and his father stated that in 1824 they, with the overseers and P., were before the magistrates for the purpose of the pauper being bound to P.; that the magistrates asked the father whether he had any objection to his son being bound to P.; that papers were drawn up, and that the pauper went to P. the next morning, and remained with him between two and three years, until the death of P. The respondents also produced the register-book of the parish, which contained an entry that the pauper had in 1824 been bound apprentice to P.:—Held, that the sessions were justified in presuming that an order for binding was made, and that it was referred to in the indenture of apprenticeship, as directed by 56 Geo. 3, c. 139, s. 1. *Reg. v. Broadhempston*, 1 El. & Bl. 155; 28 L. J., M. C. 18; 5 Jur., N. S. 267.

— **Date of Order Omitted in.**—Where a parish apprentice was bound by the order of two justices, which was referred to in the indenture, in which the date of the order was omitted:—Held, that such indenture was void by 56 Geo. 3, c. 139. *Re v. Baurburgh*, 3 D. & R. 338; 2 B. & C. 222.

**Dissolution of Contract.**—An infant parish apprentice and his master cannot by themselves vacate the indenture. *Re v. Gwinear*, 3 N. & M. 297; 1 A. & E. 152.

— **To Cancel at Twenty-one.**—But a parish apprentice may agree with his master to cancel his indentures, at twenty-one, though bound till twenty-four. *Bierlow v. Warslow*, 1 W. Bl. 592.

— **Death of Mistress, Effect of.**—A parish apprentice, who was not living at the time of his mistress's death with her appointee under 32 Geo. 3, c. 57, though living with her son by her individual consent, could not gain a settlement in another parish by serving another mistress with the consent of the son and assignee of the original mistress, given after the death of the original mistress; the contract of service being declared by the recital of the act to be at an end upon the death of the original mistress, unless continued in the manner described in the act. *Re v. Sheephead*, 15 East, 59.

## APPROPRIATION OF PAYMENTS.

See PAYMENT.

## ARBITRATION, REFERENCE, AND AWARD.

### I. IN ORDINARY CASES.

1. *Parties to References*, 222.
2. *What Matters may be Referred*, 226.
3. *The Submission*, 228.
  - a. *Jurisdiction to Stay Proceedings*, 228.
    - i. *In what Cases*, 228.
    - ii. *Practice thereon*, 234.
  - b. *Amendment of Orders of Reference*, 236.
  - c. *Revocation*, 237.
    - i. *By Death*, 237.
    - ii. *By Bankruptcy and Insolvency*, 239.
    - iii. *By Marriage*, 239.
    - iv. *By Act of Party*, 239.
    - v. *Action for Revoking Submission or not Appointing Arbitrator*, 243.
  - d. *Making Submission a Rule of Court*, 243.
    - i. *In what Cases*, 243.
    - ii. *Rule of what Court*, 247.
    - iii. *Practice thereon*, 247.
  - e. *Validity—Condition Precedent to Action*, 249.
  - f. *Compulsory References*, 256.
  - g. *Stamping Agreements of Reference*, 259.
4. *The Arbitrator*, 260.
  - a. *Appointment*, 260.
  - b. *Disqualification and Death*, 262.

- c. Commencement and Duration of Authority, 263.
  - i. Generally, 263.
  - ii. Enlargement of time, 264.
    - a. By Consent of Parties, 264.
    - b. By Arbitrator, 265.
    - γ. By Court or Judge, 267.
- d. Privilege as to Disclosing Evidence, 270.
- e. Actions Against, 271.
- f. Delegating Authority, 273.
- g. Jurisdiction of Court over Arbitrators, 276.
- h. Fees and Remuneration, 277.
- i. Stating Case for Opinion of Court, 278.
- j. Proceedings before, 281.
  - i. Hearing Counsel, 281.
  - ii. Amending Pleadings, &c., 281.
  - iii. Viewing Premises, 281.
  - iv. Accepting Hospitality from Parties, 282.
  - v. Employing Party's Solicitor to Prepare Award, 282.
  - vi. Parties Making False Representations before Arbitrator, 282.
  - vii. Where Two or more Arbitrators, 282.
  - viii. Attendance of Witnesses, &c., 283.
  - ix. Conduct of Enquiry, 285.
- k. Action for not Appointing Arbitrator. *See ante*, SUBMISSION (INVOCATION OF).
- 5. *Empire and Umpirage*, 294.
  - a. Appointment of Umpire, 294.
    - i. By Arbitrators, 294.
    - ii. By a Court or Judge, 296.
  - b. Proceedings before, &c., 297.
- 6. *The Award*, 300.
  - a. Form and Contents, 300.
    - i. Form and Construction Generally, 300.
    - ii. Including Matters Arising after Submission or Award, 306.
    - iii. Giving Directions and Ordering Execution of Deeds, 307.
    - iv. Must Extend to all Matters Referred, 311.
    - v. Several Claims and Issues, 316.
      - a. Reference of all Matters in Difference, 316.
      - b. When Event of Cause or Issues must be Determined, 319.
    - vi. Where Award Illegal, Inconsistent, or Repugnant, 327.
    - vii. Entry of Verdict, Judgment, &c., 329.
    - viii. Where Damages or Amount should be Awarded, 331.
    - ix. Limit to Amount Awarded, 331.
    - x. The Order to Pay, 332.
    - xi. Other Points relating to, 334.
  - b. Altering an Award, 342.
  - c. Referring Back an Award, 343.
    - i. Jurisdiction of Court, 343.
    - ii. The Application, 344.
    - iii. In what Cases Allowed, 345.
    - iv. Duty of Arbitrator when Award sent Back, 349.
  - d. Setting aside Award, 351.
    - i. On what Grounds, 351.
    - ii. Practice thereon, 356.
    - iii. Time within which Application made, 362.

## c. Enforcing Award, 367.

- i. By Attachment, 367.
  - a. When Granted, 367.
  - b. By and against whom Granted, 370.
  - γ. Previous Demand, 372.
  - δ. Practice relating to, 374.
- ii. By Execution under 1 & 2 Vict. c. 110, 378.
- iii. By Judgment and Execution in Pursuance of Verdict, 381.
- iv. Specific Performance, 384.
- v. By Action, 384.
- 7. *Effect of Submission and Award*, 389.
- 8. *Costs*, 394.
  - a. Costs of Reference, 394.
  - b. Costs of Cause, 396.
  - c. Effect of County Courts Act, 398.
  - d. To abide Event, 402.
  - e. Power of Arbitrator over Costs, 406.
  - f. Taxation, 409.

## II. REFERENCES TO REFEREE UNDER JUDICATURE ACT, 1873, ss. 56, 57.

- 1. *In what Cases*, 413.
- 2. *The Application and Proceedings thereon*, 415.
- 3. *Powers and Duties of Referee*, 416.
- 4. *The Report and Proceedings thereon*, 417.

## I. IN ORDINARY CASES.

### 1. PARTIES TO REFERENCES.

**By Agents and Assignees.**—H. and M., being partners, had covered wires with gutta percha for R., in pursuance of a contract. They afterwards assigned the partnership business to H., with power to him to take proceedings in their name for the recovery of debts due to them, to enforce existing contracts, and to deal in respect thereof as they themselves might have done. H., after the assignment, also covered wires for R. on his own account, and brought two actions against him, one in his own name, the other in the names of H. and M. It was agreed between H. and R. to refer both actions, and all matters in difference, as well between H. and M. and R. as between H. and R.; whereupon an order of reference was drawn up, and an award had been made:—Held, that the award was not bad for want of finality in awarding a discontinuance of H. and M.'s action without determining the cause of action, as it appeared that the discontinuance had been entered before or at the time of making the order of reference, and that it was left to the arbitrator to decide whether the discontinuance should remain, and it was intended that he should not proceed further in that action. *Hancock v. Reid*, 2 L., M. & P. 584; 21 L. J., Q. B. 78; 15 Jur. 1036.

An assignee of debts under a power to compound and receive them may refer. *Banfield v. Leigh*, 8 T. R. 571.

**By Solicitors.**—An attorney, authorized to appear for a party in an action, has, incidentally, authority to refer it without any fresh authority to that effect; and an attorney, having appeared for a corporation, to the knowledge of the directors, the corporation is bound by his acts as attorney, though not authorized to appear by any authority under seal. *Fariell v. Eastern Coun-*

*ties Railway Company*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 223, 297.

If his client withdraws that authority from him, and the attorney nevertheless refers the cause, the validity of the reference cannot be disputed, upon shewing cause against a rule for enforcing the award; and semble, that the client's only remedy is against his attorney. *Smith v. Troup*, 6 D. & L. 679; 7 C. B. 757; 18 L. J., C. P. 209.

After an order of reference has been made with the consent of counsel and attorney, the court will not set it aside on an affidavit by a party expressly denying his attorney's authority to refer, though the application is made before any step taken by the arbitrator, excepting the appointment of a meeting. *Filmer v. Delber*, 3 Taunt. 486; 1 Chit. 193.

Where matters in a suit in Chancery were ordered by the vice-chancellor, with the consent of the attorneys of the parties in the suit, to be referred to A. B.:—Held, that no sufficient authority to refer on behalf of infant plaintiffs was shewn, the attorneys in the suit having no such authority, and that therefore the submission was not mutual, and consequently the award was bad. *Biddell v. Dowse*, 6 B. & C. 255; 9 D. & R. 404. See *Jones v. Powell*, 7 D. P. C. 483; 1 W. W. & H. 60; *Wrightson v. Bywater*, 6 D. P. C. 659; 3 M. & W. 199; 1 H. & H. 50.

In an action of trespass A. was plaintiff, and B., C.'s land agent, was the nominal defendant, C. being the party really interested. H., who acted as the defendant's attorney upon the employment of C., and who also acted as C.'s attorney in certain actions and suits depending between C. & A., consented to an order of nisi prius, on the terms that A. should give up to C. the possession of the farm on which the trespass had been committed, and that all proceedings should be stayed in the actions and suits between A. and B. and C., and that C. should pay the taxed costs in the present action, and the further sum of 10*l.* to A. On motion to set aside the order of nisi prius, and a rule of court made thereon, upon the ground that H. had no authority to bind C. by any such arrangement, the court refused to interfere in a summary way. *Thomas v. Hewes*, 2 C. & M. 519; 4 Tyr. 355.

**By Attorneys.**—H. & M., who had contracted to cover wires with gutta percha for R., who supplied the wires, afterwards assigned their business to C., and gave him a power of attorney, authorizing him in their names to bring any action or suit, or other proceeding, to enforce any existing contracts, and otherwise to deal in respect thereof as he might think proper. C., after the assignment, covered wires with gutta percha for R. Afterwards C. brought two actions against R., one in his own name, the other in the names of H. & M., to recover a balance for covering the wires. R. pleaded in each action the general issue, payment and set-off. Issue was not joined in the second action. On the trial of the first action, a reference, by consent, was made in the cause of C. v. R., and professed to refer "this cause and all matters in difference in this cause and in the cause of H. & M. v. R., and all matters in difference between the parties, and all matters in difference in the cause of H. & M. v. R. between those parties." After the reference, a rule for a discontinuance having been obtained in the action of H. & M. v. R., the

order of reference was amended by consent, and it was ordered that the rule for a discontinuance should be suspended and left to the decision of the arbitrator. R., before the arbitrator, made a claim for damages, in respect of some wires spoilt by M. & R. in covering them. The award decided that the claim was not valid, and awarded a discontinuance in the action of H. & M. v. R.:—Held, that the order of reference was good, although it did not appear on the face of the document that H. & M. consented to the reference, and although they did not, in fact, consent to it, as the power of attorney from them gave C. power to refer all matters arising out of the contract; and the order of reference referred nothing in the names of H. & M., except the matters in the action of H. & M. v. R. *Hancock v. Reid*, 2 L. M. & P. 584; 21 L. J., Q. B. 78; 15 Jur. 1036.

#### **By Bankrupts, their Assignees and Trustees.]**

—A submission by a bankrupt, though of matters which have passed to his assignees, is not void: and payment of costs pursuant to the award may be enforced against him. *Milnes, In re*, 15 C. B. 451; 24 L. J., C. P. 29; 18 Jur. 1108; or *Milnes v. Robertson*, 3 C. L. R. 232.

An assignee of an insolvent debtor, under 1 & 2 Vict. c. 110, had power to refer an action brought to recover a debt due to the insolvent, without the consent of the creditors or of the Insolvent Debtors' Court. *Sutcliffe v. Brooke*, 3 D. & L. 302; 14 M. & W. 855; 15 L. J., Ex. 118; 9 Jur. 1112.

Assignees of a bankrupt, having received money from a debtor to the bankrupt, as a debt due to his estate, and having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agree with him to refer their differences, and the submission is, that all matters in difference between the parties in the cause be referred; the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appears to have been paid by mistake. *Malcolm v. Fullerton*, 2 T. R. 645.

Trustees of an insolvent debtor by entering into an arbitration bond, admit that they have assets, and may be directed to pay costs. *Wanborough v. Dyer*, 2 Chit. 40.

#### **By Executors and Trustees.]**

—An award upon a submission by executors, trustees for infants and a married woman, referring matters relating to the estate of the person whom they represent, and touching the administration of the trusts of whose will there had been disputes, will not be set aside, at their instance, for want of mutuality. *Warner, In re*, 2 D. & L. 148; 13 L. J., Q. B. 370; 8 Jur. 1597.

An award upon a submission of all matters in difference by executors respecting the estate of the deceased and the principal legatees, taking an account of the estate, generally directing its administration, and that one of the parties shall pay the legacy duty, is not void. *Id.*

An executor does not preclude himself, by referring a cause, from availing himself of a plea of judgment recovered puis darrein continuance, whilst the reference was pending, although it appears from affidavits that he has a certain amount of assets in his hands. *Alder v. Parke*, 5 D. P. C. 16.

In another case it was held, that proof must

be given of assets to make a trustee who has submitted to arbitration personally liable. *Davies v. Ridge*, 3 Esp. 101.

**By Married Women.]** Award upon a submission respecting freehold estates and interest in land in Jamaica, some of the parties to be bound by the reference being married women interested in the property:—Held, invalid, by reason of the coverture of the parties whose interests could not be bound by such a reference. *Strachan v. Dougall*, 7 Moore, P. C. C. 365.—**See MARRIED WOMEN'S PROPERTY ACT, 1882.**

**By Partners or Joint Contractors.]**—One partner cannot bind his co-partner by a reference without his consent. *Adams v. Bankart*, 1 C. M. & R. 681.

A. and B., partners, dissolved the partnership upon the terms that all debts due to and owing by the firm should be received and paid by A. A. employed C., an attorney, in winding up the affairs. A. having brought an action against D., in the names of himself and B., for a debt alleged to be due to the firm, and pleas having been pleaded, all matters in difference between A. and B. and D. were, by an order, and by the consent of the attorneys in the cause, referred. C. acted solely under A.'s instructions, without any express authority from B. In an action on the award:—Held, that the submission was not binding on B. *Hatton v. Royle*, 3 H. & N. 500; 27 L. J., Ex. 486.

Upon a submission between two individuals (not being partners in trade), and a third person, where the agreement of reference is signed by one of them thus:—"A. for self and B.," on making the submission a rule of court, it must be shewn by affidavit that A. had the authority of B. to sign for him. *Aldington and Hancock, In re*, 15 C. B., N. S. 375.

A submission by three of five joint-contractors does not bind their co-contractors. *Stead v. Salt*, 3 Bing. 101; 10 Moore, 389.

**Infants.]**—Three causes were referred, in one of which an infant sued by his next friend; the other two being actions in which he was the substantial though not the nominal plaintiff. The costs of the causes were to abide the event, and costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator decided all the causes in favour of the defendant, and ordered that the infant should pay all the costs of reference and award:—Held, that this was no excess of authority. *Proudfont v. Boyle or Poile*, 15 M. & W. 198; 3 D. & L. 524.

A cause was referred to an arbitrator who was to settle all matters in difference between the parties. At the time of the submission, two equity suits were pending in which the parties to the action and also certain infants were concerned:—Held, that the circumstance of infants being parties to those suits did not invalidate the award. *Wrightson v. Bywater*, 6 D. P. C. 359; 3 M. & W. 199; 1 H. & H. 50.

**By acquiescence.]**—The plaintiff, a merchant at Dublin, contracted with L., a ship-builder at Quebec (for whom the defendant was London agent), for a ship particularly described in the

contract to be paid for by accepting a bill at six months; "and should the vessel, on her arrival at Dublin, exhibit any defect which shall be so declared by two competent persons, L. agrees to put it to rights, at his own expense, on her second voyage." A bill was sent to the plaintiff to accept, which he declined to do, having heard from Quebec that the ship was defective; and he wrote to the defendant, "I only want your guarantee that L. shall perform his contract to the full extent; if you agree to appoint one merchant, I will another. Let them agree to an umpire, and give me a letter of guarantee that L. will abide by the award, and perform his part without delay." The defendant answered, "If you will accept L.'s bill for the price, and return it to us forthwith, I agree to become personally responsible to you for the fulfilment of L.'s contract; and as C. and F. have the confidence of both parties, we suggest that they should be appointed to decide what should be done in case you have cause to complain." The plaintiff replied, "Relying on the guarantee you give me, I send enclosed the bill accepted for the full amount of the new ship." The bill was paid at maturity. The ship arrived in Dublin and was defective. A surveyor was appointed by the plaintiff, and another by C. and F. to survey the ship, who reported it would take 376*l.* to make her equal to the contract, and C. and F. therefore made an award, whereby they ordered the defendant to pay that sum, which he refused to do:—Held, that the plaintiff never acquiesced in the defendant's proposal to refer the matter to C. and F.; that C. and F. never professed to act under any authority derived from the plaintiff, and consequently that the plaintiff was not entitled to recover in respect of the award. *Fagan v. Harrison*, 8 C. B. 388; 19 L. J., C. P. 105.

If a third person, interested in a pending action, verbally consents to become a party to an order of nisi prius for a reference, he is bound by it, and the court will enforce the order, unless satisfied that the party has been deceived or mistaken in giving his assent. *Williams v. Lewis*, 7 El. & Bl. 929; 3 Jur., N. S. 1324.

By a memorandum between A. and B. it was agreed that a question of boundary should be referred to a surveyor. The lessees of A. and B. were not parties to the agreement:—Held, that the agreement was evidence for the lessee of A. against the lessee of B., after proof that the lessee of B. had applied to A. for a lease of the spot in dispute, in case the decision should be against B., and that he was present when the boundary was staked out by the referee. *Taylor v. Parry*, 1 M. & G. 604; 1 Scott, N. R. 576.

## 2. WHAT MATTERS MAY BE REFERRED.

**Criminal Matters.]**—A party who has preferred an indictment for an assault may submit the adjustment of the reparation to arbitration, as well as the costs. *Baker v. Townshend*, 1 Moore, 120; 7 Taunt., 422.

Indictment for non-repair of a highway ratione tenuræ, the record being removed into the Queen's Bench was made up for trial, but before a jury was empanelled the prosecutor and defendant agreed upon leaving the question of liability to reference, and they accordingly, by agreement, submitted all matters in difference relative to the indictment to a barrister, who was

to have the same powers in all respects as a judge of assize would have had upon the trial; and a verdict was to be entered according to the result of such award, on the application of either party. It was agreed that the submission might be made a rule of court, if the court should so please:—Held, that the agreement was illegal, as referring an indictment to arbitration, and an award having been made, the court refused to order payment of costs, in pursuance of the award, though the submission had been made a rule of court according to the agreement. *Reg. v. Blakemore*, 14 Q. B. 544.

The matter in difference was not legally a subject of reference, the question as to liability being of public concern:—Per Lord Campbell, C. J. *Id.*

Two indictments, one for perjury, another for conspiracy, were removed by certiorari. The indictment for perjury came on for trial, when, by the advice of counsel, it was agreed that no evidence should be tendered, a verdict of not guilty taken on both indictments, and that all matters in difference between the prosecutor and defendant should be referred to a barrister; the cost of the indictment, reference and award to be in his discretion. An order of reference was drawn up, and made a rule of court. After several meetings the defendant revoked his submission, and took steps in a Chancery suit, which was one of the matters of difference so referred. On motion to attach him for contempt, or to set aside the verdict on the indictments:—Held, that it would have been illegal to refer an indictment for perjury, or semble for conspiracy, but that the indictments were not referred, and the verdicts of acquittal given on the ground that no evidence was produced, must, at all events, stand; and there was nothing illegal in referring all matters in difference, and at the same time consenting to a verdict of acquittal, unless there was a corrupt agreement to stifle a prosecution, which did not appear to be the fact. *Reg. v. Hardy*, 14 Q. B. 529; 19 L. J., Q. B. 196; 14 Jur. 649.

**Writ of Trial.**—On the trial before the sheriff under a writ of trial, a verdict cannot be taken subject to a reference; for the sheriff is bound to try the matter, and cannot delegate his authority. *Wilson v. Thorpe*, 6 M. & W. 721.

**In Case of Friendly Societies.**—See FRIENDLY SOCIETY.

**In Case of Building Societies.**—See BUILDING SOCIETY.

**Under Lands Clauses Consolidation Act.**—See LANDS CLAUSES ACT.

**Between Railway Companies.**—See RAILWAY.

**As to Damages.**—See SHIPPING.

**Under Artisans' Dwellings Act.**—See ARTISANS.

**Under Public Health Act.**—See HEALTH.

**Matrimonial Matters.**—See HUSBAND AND WIFE.

### 3. THE SUBMISSION.

#### a. Jurisdiction to stay Proceedings.

- i. In what Cases.
- ii. Practice thereon.

##### i. In what Cases.

**Statute.**—By 17 & 18 Vict. c. 125, s. 11, *whenever the parties to any deed or instrument in writing to be after the 24th October, 1854, made or executed, shall agree that any then existing or future differences between them shall be referred to arbitration, and they or any one claiming through or under them shall nevertheless commence an action in respect of the matters so agreed to be referred, the court or a judge on application by the defendant after appearance and before plea, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred according to the agreement of the parties, and that the defendant was, at the time of bringing the action, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, may stay the proceedings on such terms as to costs and otherwise as may seem fit.*

**Cases of Fraud.**—The Common Law Procedure Act, 1854, s. 11, providing for a stay of proceedings, and a reference to arbitration by the court where the parties have agreed to refer, is to be construed liberally, so as generally to give effect to such agreements, except in cases of fraud, or where some relief is required to keep matters in statu quo pending the litigation. *Willesford v. Watson*, 14 L. R., Eq. 572; 42 L. J., Ch. 90; 38 L. T. 428; 20 W. R. 32. Affirmed, 8 L. R., Ch. 473; 42 L. J. Ch. 447; 28 L. T. 428; 21 W. R. 350.

**Charge of Fraud—General Principles on which Court acts.**—In a case where fraud is charged, the court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the court will not necessarily accede to it, and will never do so unless a *prima facie* case of fraud is proved. *Russell v. Russell*, 14 Ch. D. 471; 49 L. J., Ch. 268; 42 L. T. 112.

**Power to expel Partner—Charges of Fraud—Discretion.**—Partnership articles between A. and B. provided that, if the business should not be conducted to the satisfaction of B., he should have power to give notice to A. to determine the partnership; the articles also contained an arbitration clause providing that any differences in relation to the partnership should be referred to arbitration. B. having given notice to A. for the partnership to be determined, A. brought an action against B., alleging various charges of fraud, and claiming that the notice should be declared void, and that B. should be restrained from announcing the dissolution of the partnership, whereupon B. moved that the matters in question should be referred to arbitration:—Held, that the power to give the notice under the articles was exercisable by B. at his own will and pleasure:—Held, also (A. having, in the judgment of the court, failed to establish a

prima facie case of fraud), that the matters in question should be referred to arbitration according to the articles. *Ib.*

— **Question similar to Fraud.**—M. effected a policy of insurance on his life with the defendant company, which contained a condition to the effect that all disputes should, if the company or the assured or his legal representatives required it, be referred to arbitration in the manner specified in the company's private act (27 & 28 Vict. c. cxxv). By s. 33 of that act the court or a judge is empowered to order a stay of any proceedings contrary to the act. In an action on the policy, in which it appeared that the only issue to be tried was whether the death of M. was caused by accident or by natural causes:—Held, that the defendant company, in the absence of any suggestion of fraud, were entitled to a stay of proceedings under sect. 33, notwithstanding the fact that the issue and the evidence in support of it might bear upon the conduct of M. and of those who attended him, and so might involve a question similar to that of fraud or no fraud. *Minife v. Railway Passengers Assurance Company*, 44 L. T. 532.

**Fraud—Alteration of Circumstances.**—By a contract for the sale of seed (paid for on receipt of the shipping documents), warranted, when shipped, of fair merchantable quality, and equal to the fair average, any dispute arising out of the contract should be settled by arbitration, but the contract should not be void on that account. An action having been brought by the buyers to recover damages for the breach of warranty, the declaration alleged that they had sustained damage by having resold and converted a great part of the seed into oil before they discovered or could reasonably discover the breach of warranty; the court stayed the proceedings, there being nothing on the record to shew that any question of fraud could arise, and nothing to shew such an alteration of circumstances as to induce the court to withdraw the matter from the mode of investigation which the parties themselves had selected. *Hirach v. Im Thurn*. 4 C. B., N. S. 559; 27 L. J., C. P. 254; 4 Jur., N. S. 587.

**Case where Receiver would be appointed.**—An action may be referred to arbitration and all proceedings therein stayed under the Common Law Procedure Act, notwithstanding a sufficient case be shewn for the appointment of a receiver in the action. *Compagnie du Ségol v. Smith*, 49 L. T. 527; 32 W. R. 111.

**Discretion—Advantage to which party not entitled by law.**—A. and B., having brought an action against C. to recover the price of timber delivered under a contract, and C. having brought a cross action, in which he sought to recover damages against A. and B. for breaches by them of the same contract, the actions, and all matters in difference between the parties, were referred. Before anything was done under the reference A. and B. became bankrupt, and their assignees brought a fresh action against C. for the timber. Upon motion to stay the proceedings in the last-mentioned action:—Held, that assuming the 11th section of the 17 & 18 Vict. c. 125, to apply to

such a case (which the court inclined to think it did not), it was not one in which the court would, in the exercise of its discretion, interfere, inasmuch as by so doing, the court would be giving C. an advantage to which the law did not entitle him. *Pennell v. Walker*, 18 C. B. 651; 26 L. J., C. P. 9.

— **Limited Time for Referring.**—Where the time for referring differences to arbitration had expired, except as to an isolated dispute arising in the course of the other differences, the court refused to direct a difference. *Young v. Buckett*, 51 L. J., Ch. 504; 46 L. T. 266; 30 W. R. 511.

— **How Exercised.**—Where a mining lease contained a clause for referring to arbitration all questions to arise between lessor and lessee relative to or concerning the indenture, or any covenant, clause, matter or thing therein contained, upon the request in writing of either party; and after a bill filed by the lessor in equity to compel the lessee to work the mine in a particular manner, notices to refer had been served by the lessee; upon motion to stay proceedings, held, that the case was one which came within 17 & 18 Vict. c. 125, s. 11, but that the section gave the court a discretion; and the court in its discretion refused to stay proceedings on the ground that the notices to refer related to other matters besides those the subject of the suit, and that questions arose in the suit which did not come within the clause in the lease. *Wheatley v. Westminster Brymbo Coal and Coke Company*, 2 Drew. & Sm. 347; 11 Jur. N. S. 232; 11 L. T. 728; 13 W. R. 400.

**Where Legal Question arises.**—To an application for a stay of proceedings, on the ground that the instrument upon which the action is brought contains a stipulation that "if any difference should arise between the parties, either in principle or detail," the same shall be referred, it is no answer that the difference is one of law, as to the construction of the instrument. *Randegger v. Holmes*, 1 L. R., C. P. 679.

In 1868, C. was admitted by purchase into partnership with A. and B., a firm of solicitors, for a term of fifteen years. It was provided by the articles that if at any time any dispute or difference of opinion should arise between the partners relative to any clause, matter or thing therein contained, or to the conduct of any of the partners, or upon any other point whatever, the same should be referred to arbitration. On the 17th of June, 1873, A. and B. served C. with notice, alleging that he had committed several breaches of the articles, and in particular had neglected to keep proper accounts and to make proper entries of business, and declaring the partnership dissolved and determined from the date of serving the notice, under a power contained in the articles. C. refused to admit the validity of this notice of dissolution, and told his partners that he should submit the question of the validity of the notice to arbitration. On the 1st of July A. and B. filed a bill for a partnership account on the footing of a dissolution from the time of serving the notice, and on the same day C. served them with notice requiring them to refer to arbitration all questions that had arisen relatively to the notice of dissolution:—Held, that he was entitled to an order staying proceedings in the suit, pursuant to the Common

Law Procedure Act, 1854, s. 11, in order that the questions as to the validity of the notice of dissolution might be determined by arbitration. *Pleus v. Baker*, 16 L. R., Eq. 564; 43 L. J., Ch. 212.

**Reference of Matters to Foreign Court.**—L. and three other persons, G., N., and F., all British subjects, entered into an agreement, in the Russian language and registered in Russia, to trade in co-partnership in Russia, providing that the head office of the firm should be in St. Petersburg; and reserving to G. and N. the right to recall their capital within a year, and, if not paid within a month, the firm was to be wound up; and also providing that "all disputes, no matter how or where they shall arise, shall be referred to the St. Petersburg commercial court," whose decision shall be final. L. alleged that there was a contemporaneous English agreement, not registered in Russia, by which G. and N. agreed to compensate him in the event of a dissolution within a year, under the powers reserved to them. The two partners exercised their right within the year to recall their capital, and immediately took steps to wind up the partnership in Russia. L. having thereupon commenced an action in England, alleging that the proceedings of his co-partners, the defendants, were taken without his knowledge and sanction, and were invalid and not binding on him, and claiming a dissolution of the partnership, relief in respect of the English agreement, the appointment of a receiver and other relief, they moved for a stay of proceedings in the action and a reference to the St. Petersburg commercial court:—Held, that an agreement to refer all disputes to a foreign court is within s. 11 of the Common Law Procedure Act, 1854, and that the defendants were entitled to an order on their motion; and that, although the court had jurisdiction to appoint a receiver pending a reference to arbitration, it was not proper to do so except under special circumstances, as the course of litigation before the tribunal chosen by the parties themselves would thereby be interfered with. *Law v. Garrett*, 8 Ch. D. 26; 38 L. T. 3; 26 W. R. 426. Affirming 37 L. T. 602.

**Whether whole Agreement must be in One Document.**—The statute does not give the court power to stay proceedings in an action upon a deed or an instrument, unless the deed or instrument contains an agreement to refer differences, though the parties have made such an agreement in writing subsequently to the differences arising. *Blythe v. Lafone*, 1 El. & Bl. 435; 28 L. J., Q. B. 164; 5 Jur., N. S. 364. See *Mason v. Hadden*, 6 C. B., N. S. 526.

An agreement to refer is within sect. 11 of the Common Law Procedure Act, 1854, although contained in a separate instrument from that under which the dispute arose. *Randall v. Thompson*, 1 Q. B. D. 748; 45 L. J., Q. B. 713; 35 L. T. 193; 24 W. R. 837—C. A.

A farming lease contained an agreement to refer to arbitration all matters in dispute, "touching these presents, or any clause, matter, or thing herein contained, or the construction hereof, or anything to be done under the covenants or agreements herein contained, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, or

liabilities of either party in connection with the premises." By a supplemental deed of even date, which contained no arbitration clause, the lessor released the lessee from the observance of certain of the restrictive covenants in the lease. The assignees of the lessor having brought ejectment for alleged breaches of covenant, the defendant moved for a stay of proceedings and that the matter might be referred:—Held, that the lease and supplemental deed must be read and construed as one instrument, and that, therefore, although the alleged breaches arose under the supplemental deed, the matters in dispute came within the arbitration clause, and would be left to the decision of the arbitrator. *Wade-Gery v. Morrison*, 37 L. T. 270.

Held, that it was no objection to the application that an arbitrator could not award ejectment; for that the court could give effect, if necessary, to the finding of the arbitrator in that respect. *Id.*

**Arbitration Clause applicable though determined.**—An order was made under sect. 11 of the 17 & 18 Vict. c. 125, where it appeared that the parties had gone on dealing under the terms of a former agreement, which contained a clause for reference to arbitration. *Hattersley v. Hatton*, 3 F. & F. 116.

Articles for a partnership for one year contained an arbitration clause. The partnership was continued beyond the year and ultimately dissolved:—Held, that the arbitration clause was in force, and proceedings in a suit for accounts by one of the partners against the other were stayed under the Common Law Procedure Act, 1854, s. 11. *Gillett v. Thornton*, 19 L. R., Eq. 599; 44 L. J., Ch. 398; 23 W. R. 437.

**Agreement to Refer must subsist.**—To support an application for a stay of proceedings under sect. 11, or for an enlargement of time under sect. 15 of the Common Law Procedure Act, 1854, the agreement to refer must at the time of the application be still capable of being carried into effect. *Randall v. Thompson*, 1 Q. B. D. 748; 45 L. J., Q. B. 713; 35 L. T. 193; 24 W. R. 837—C. A.

The plaintiff bought a cargo of maize from the defendant. The contract contained a clause that if any dispute should arise "the contract not to be void, it being agreed to leave the same to be settled by two London cornfactors, whose decision should be final." The plaintiff having paid 650*l.* on account, afterwards rejected the maize, as not being of the crop and quality contracted for, and sued the defendant to recover the 650*l.* The defendant obtained an order for stay of proceedings under the Common Law Procedure Act, 1854, s. 11:—Held, that the order to stay was properly made. *Moffat v. Cornelius*, 39 L. T. 102—C. A. Affirming 26 W. R. 914.

**Conduct of Applicant.**—When a partner proceeded to wind up a partnership concern with the assistance of the Court of Chancery, the defendant moved, pursuant to the Common Law Procedure Act, 1856 (Ireland), s. 14, to stay all proceedings in the case, the parties having agreed to refer the matter to arbitration. It appearing that after the dissolution of the partnership the defendant persisted in carrying on the business, the motion was refused, such conduct of the defendant not coming within the section of the

partnership deed which provided that all disputes relating to the partnership business arising between the partners should be referred. *Dennehy v. Jolly*, 22 W. R. 449.

**What Matters in Dispute are within the Agreement.**—Articles of partnership between the plaintiff and other persons for performing a contract contained an agreement that any dispute between the partners should be settled by arbitration, but there was no agreement that the submission to arbitration might be made a rule of court. One of the partners became a liquidating debtor, and the defendant was appointed his trustee, and he elected to carry on the contract. The defendant claimed to have purchased the shares of the plaintiff and other partners in the undertaking. The plaintiff brought an action against the defendant asking for an account of the partnership dealings. The main questions at issue were whether the shares of the other partners were purchased on behalf of the plaintiff and defendant or of the defendant alone, and whether the defendant had purchased the share of the plaintiff as well as of the other partners. The defendant moved for an order under the Common Law Procedure Act, 1854, s. 11, staying all proceedings in the action, and referring the matters in question to arbitration, but before the motion was heard the plaintiff revoked the agreement for arbitration:—Held, that the matters in dispute were not within the agreement for arbitration, and the motion was accordingly refused. *Piercy v. Young*, 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 845—C. A.

The question whether the matters in dispute are within the agreement for arbitration is one which the court will decide, and will not leave to the arbitrator. *Id.*

In a bill in equity for the dissolution of a partnership at will, carried on upon the terms of an indenture, after the expiration of the period fixed by the indenture, the plaintiff alleged that disputes had arisen between himself and the defendant, his partner, and prayed for a dissolution of the partnership, the realization of the assets, and the appointment of a receiver. The defendant put in a plea, stating that one of the clauses of the indenture provided, that in case any difference should at any time during the partnership, or after the expiration thereof, arise between the partners, the same should be referred to arbitration, and neither of the partners should proceed against the other at law or in equity until the reference had been determined, and that the award should be made a rule of court. The plea was overruled, on the grounds that the clause did not contemplate the entire dissolution of the partnership, which could not be considered as a matter in dispute; that all the bill prayed could be done without any disputes having arisen at all; and that consequently the plea met an immaterial averment in the bill, and that much of what was prayed by the bill was dehors the arbitration clause. *Wood v. Robson*, 15 W. R. 756.

By a charterparty it was agreed, that "should any dispute arise between the owner and charterer, the matters in dispute shall be referred." The owner having brought an action for freight, and the charterer having preferred a cross claim for damages for the captain's refusal to ship a reasonable amount of cargo, and for general disobedience of orders, and being willing to refer all matters:—

Held, a case for the interference of the court to stay the action. *Seligmann v. Le Bouillier*, 1 L. R., C. P. 681.

In an action for a wrongful dismissal, on a contract to pay salary, and also to give a share of the profits during a certain time, the contract contained a clause for reference to arbitration of disputes relating to the construction of the deed, or as to the accounts, the contest being as to the right to dismiss for neglect of duty:—Held, that the action was not referable. *Smith v. Allen*, 3 F. & F. 156.

In an action on a charterparty against a surety for freight, he was not allowed a reference of a claim for compensation for a breach of a warranty of the capacity of the vessel; that being a claim of which the charterer only could take advantage, and not the surety. *Dauvt v. Lazard*, 27 L. J., Ex. 399.

By an agreement in writing, a ship was chartered at a fixed sum per month. It was provided, that should any difference of opinion arise between the parties to this contract, either in principle or detail, the same should be referred. The charterer claimed from the shipowner damages for a breach of an implied warranty of seaworthiness, and desired to have this claim referred. The shipowner did not comply, and the charterer commenced an action. The hire became due, the shipowner demanded it from the charterer, and, on his refusal, commenced an action against him. The ground of refusal was that the charterer desired to have all matters referred together, whereby he would have the benefit of a set-off. On a rule by the charterer to stay proceedings in the shipowner's action:—Held, that though there was no dispute as to the subject matter of the action itself, viz., the hire, which was admittedly due, the circumstances gave the court jurisdiction; and the court being satisfied, notwithstanding the pendency of the cross action, that the charterer had always been desirous to refer all matters, and that the application was bona fide, and that justice would be done by staying the action, made the rule absolute. *Russell v. Pellegrini*, 6 El. & Bl. 1020; 26 L. J., Q. B. 75; 3 Jur., N. S. 184.

By a charterparty it was agreed that the charterers should insure the vessel, and that the policies should be delivered to and be the property of the owners; and there was a stipulation that any question or difficulty which might thereafter arise out of the charterparty should be decided by arbitration. An action having been brought by the owners against the charterers for refusing to deliver them the policies, against which action it was admitted that there was no defence:—Held, not a case for a compulsory reference. *Lury v. Pearson*, 1 C. B., N. S. 639.

By a written agreement the plaintiff undertook to manage a brewery of the defendant for a certain number of years. Before the time expired the defendant dismissed him for some misconduct, and sent circulars to her customers in different counties, announcing his dismissal, and desiring that no further moneys should be paid to him on her account. The plaintiff having brought an action for this as a violation of the agreement:—Held a proper case for staying proceedings. *Wickham v. Hardy*, 28 L. J., Ex. 215; 5 Jur., N. S. 871.

## ii. Practice thereon.

**Party to apply—Trustee in Liquidation.]—**



Whether the trustee in the liquidation was a party entitled to make the application within the 11th section of the Common Law Procedure Act, *quære*. *Piercy v. Young*, 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 843—C. A.

**Whether all Parties must Join.**—A mining lease contained a clause providing that if any dispute, question or difference should arise between the parties, "touching these presents, or any clause, matter or thing herein contained, or the construction, or the working of the mines, or any compensation or satisfaction to be paid or made, or any other thing to be done under the covenants by the lessees herein contained, or touching the rights, duties and liabilities of either party in connection with the premises," the matter in difference should be referred to two arbitrators or their umpire, pursuant to, and so as in all respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854. The lessors having filed a bill to restrain the lessees from working adjoining mines by means of a shaft sunk on the lessor's land, some of them applied to stay proceedings in the suit, and to refer the matter in difference to arbitration under the above-mentioned clause:—Held, that the subject-matter of the suit was within the arbitration clause, and that it was not necessary for all to join in the application to stay proceedings in the suit. *Willesford v. Watson*, 14 L. R., Eq. 572; 42 L. J., Ch. 90; 20 W. R. 32. Affirmed on appeal, 8 L. R., Ch. 473; 42 L. J., Ch. 447; 28 L. T. 428; 21 W. R. 350.

**Application for, after Appearance and "before Plea or Answer."**—The 11th section of the Common Law Procedure Act, 1854, is imperative in requiring an application to the court to send to arbitration matters which the parties have originally agreed shall be decided by arbitration, to be "after appearance and before plea or answer," in the action in which it is sought to stay proceedings. Where, therefore, after statement of defence delivered, a defendant applied to the court under the section:—Held, that the application was made too late, and that the action must proceed to the hearing. Inquiries as to matters at issue in the action directed to be made before the hearing. *West London Dairy Society v. Abbott*, 44 L. T. 376; 29 W. R. 584.

**Onus of Proof.**—By the act regulating an insurance company it was provided that any question arising under any policy should, if either the company or the assured or the representatives of the assured required it, be referred to arbitration under the act, and it was provided that if a policy-holder or his representatives commenced any action a judge might, on the application of the company, "upon being satisfied that no sufficient reason exists why the matter cannot be or ought not to be referred to arbitration," stay proceedings in the action. An action having been commenced by the representatives of a policy-holder to recover the sum assured, the company disputing their liability, the company obtained an order to stay proceedings in the action in order that the dispute might be referred to arbitration:—Held, that the burden lay on the plaintiffs to shew that some sufficient reason existed why the dispute should not be referred to arbitration, and not on the company to shew that no such reason existed, and that as no such reason

had been shewn the order to stay proceedings was right. *Hodgson v. Railway Passengers Assurance Company*, 9 Q. B. D. 188—C. A.

**Proceedings stayed with Liberty to apply.**—A. and B., on dissolving partnership in 1866, agreed to refer matters in dispute to arbitration. Arbitrators were appointed in 1869, who held their first meeting in May, 1870. A's arbitrator shortly afterwards died, and A. refused to appoint another, but filed a bill to have the partnership wound up in chancery. The time for making the award had been enlarged to 25th March, 1872. On motion by B. to stay proceedings, it was ordered that proceedings should be stayed till further order, with liberty to both parties to apply if no award should be made before the 25th March, 1872. *Kitchen v. Turnbull*, 20 W. R. 253.

#### b. Amendment of Orders of Reference.

**In what Cases.**—The court will amend an order of reference *ad nisi prius*, made a rule of court, by inserting such omitted matters as are incident to the substance of the agreement between the parties. *Erans v. Senior*, 5 Taunt. 662.

An order of reference will not be varied upon a suggestion by one party of subsequently discovered matter. *Drake v. Brown*, 2 C. M. & R. 270.

But the terms of a submission were amended by the erasure of a condition to file no bill in equity, where the bill was essential to the justice of the case. *Grimstone v. Bell*, 4 Taunt. 254.

Where the christian and surname are transposed by mistake in an order of reference, the court will allow that mistake to be amended. *Price v. James*, 2 D. P. C. 435.

**After Award.**—Where an arbitrator awarded a larger sum than that mentioned in the order of reference, and there appeared to be a mistake in the order as to the sum, semble, that the court would amend the order. *Annan v. Job*, 10 Jur. 926.

Where a rule under the 17 & 18 Vict. c. 125, s. 3, referring a cause, was silent as to costs, and it appeared that the understanding of the officer of the court and the parties on the drawing up of the rule was, that the costs would abide the event, and the arbitrator awarded in favour of the plaintiff, with costs, the court amended the rule *nunc pro tunc*, so as to give effect to the intention of the parties when the rule was drawn up. *Bell v. Postlethwaite*, 5 El. & Bl. 695; 25 L. J., Q. B. 63; 1 Jur., N. S. 1167.

So, where the words "and all matters in difference" were improvidently inserted in an order of reference, under the same sentence, and the arbitrator made his award in favour of the plaintiff, stating that there were no matters in difference but those in the cause, the court, on motion to set aside a *fi. fa.* issued to enforce the award, amended the order by striking out the words "and all matters in difference." *Kendil v. Merrett*, 18 C. B. 173; 25 L. J., C. P. 251; 2 Jur., N. S. 523.

**Reference by Consent.**—The court will not amend an order of reference drawn up by one of the parties thereto, upon affidavits by such

party that an error was made by him in copying a document attached by consent to the order of reference. *Wynn v. Nicholson*, 7 C. B. 819; 6 D. & L. 717; 18 L. J., C. P. 231.

It is not competent to the court to amend an order of reference which has been drawn up "by consent," unless it is made manifest that there has been some omission on the part of its officer, or that by some accident or mistake the order is not in accordance with the intention of the parties, or that some fraud has been practised. *Vanderbyl v. McKenna*, 3 L. R., C. P. 252.

A consent order was drawn up in a printed form, which contained no power to the arbitrator to amend:—Held, that the order could not be amended by inserting therein a power to amend. *Ib.*

**Practice.**—Upon moving for a rule to amend the *postea* in a cause referred at nisi prius in order to make it conformable to the award for taxing costs, it is not necessary to bring before the court the order of reference, but it is enough to shew the award which recites it; for if there is anything in the order of nisi prius itself inconsistent with what is recited in the award, it is for the other side to shew it. *Cooper v. Pegg*, 16 C. B. 264.

### c. Revocation.

#### i. By Death.

**At Common Law.**—At common law the death of a party does not operate as a revocation of a submission where the arbitrator is in the situation of a person appointed by vendor and purchaser to fix the value and price of an estate sold. *Calcedonian Railway Company v. Lockhart*, 3 Macq. H. L. Cas. 808.

**Death before Award.**—An arbitrator's power is determined by the death of the parties to the submission, or any one of them. *Edmunds v. Cuz*, 3 Doug. 406.

At any time before the award. *Cooper v. Johnson*, 2 B. & A. 394.

But the court will not set aside an award made after the death of one of the parties, where a cause is referred by order of nisi prius. *Ib.*

So where a verdict was found for the plaintiff, subject to an award, and before award made the defendant died:—Held, that a subsequent award of a verdict for the defendant, and judgment thereon, could not be supported. *Toussaint v. Hartop*, 7 Taunt. 571; 1 Moore, 287; Holt, 335.

So, also, if a juror is withdrawn, and the cause referred, an award made after the defendant's death is bad. *Ib.*

Where all the matters referred under an order of nisi prius will be embraced in the verdict and judgment, the death of either of the parties before the award is made will not revoke the submission. *Bower v. Taylor*, cited in *Rhodes v. Haigh*, 3 D. & R. 610; 2 B. & C. 345.

But it is otherwise if the verdict and judgment will not embrace all the matters referred. *Rhodes v. Haigh*, 3 D. & R. 608; 2 B. & C. 345.

Where the plaintiff had died before award made, and the arbitrator had enlarged the time after his death:—Held, that an award made afterwards was valid, and binding upon the defendant. *Tyler v. Jones*, 4 D. & R. 740; 3 B. & C. 144.

One of the parties to an order of reference had died before the award was actually made:—Held, that this did not prevent the arbitrator from proceeding to make his award. *Harding v. Wickham*, 4 L. T. 738; 9 W. R. 652.

An award against trustees and guardians of an infant tenant for life of the realty, who died before the award was made, is not binding. *Bristow v. Binne*, 3 D. & R. 184.

**Death after Award, but before Judgment.**—The death of the defendant after the making of an award, in pursuance of a rule of court, where no verdict or judgment has been entered up, abates the suit, and the court will not enforce the performance of the award by attachment. *Maffey v. Godwyn*, 1 N. & M. 101; S. C., 1 D. P. C. 538, sub nom. *Reg. v. Maffey*.

**Clause in Agreement, Effect of.**—It is best, in entering into a reference, to stipulate that the reference shall not be defeated by the death of one of the parties before award made. *Toussaint v. Hartop*, 7 Taunt. 571; Moore, 287; Holt, 335.

By order of nisi prius, a cause was referred with liberty for the arbitrator to examine the parties, but the death of either was not to operate as a revocation of the reference. The plaintiff died before he was examined, and before the arbitrator had made his award; whereupon the defendant having revoked his submission, on the ground, as he alleged, of his having lost the opportunity of examining the plaintiff, the court ordered him to pay the costs of a trial occasioned by the termination of the reference. *Smith v. Fielder*, 10 Bing. 306; 3 M. & Scott, 853; 2 D. P. C. 764.

The death of either of the submitting parties will not determine the authority of the arbitrator, or vacate the subsequent proceedings upon the reference, where the deed or instrument of submission contains a proviso that the submission shall not vacate or expire through the death of either of the parties. *Maodougall v. Robertson* (in error), 2 Y. & J. 11; 1 M. & P. 147; 4 Bing. 435.

So, where matters in a suit in equity, and all disputes were ordered by the vice-chancellor, with the consent of the attorneys of the parties in the suit, to be referred, and there was a clause that in case any of the parties should happen to die before the award, the reference was not to abate, but the executors and administrators of the parties so dying were to be considered and taken as parties to the order, in like manner as their testator or intestate:—Held, that the death of one of the parties before the award was made did not revoke the authority of the arbitrator, but that the executors were bound by his award made after the death of the testator. *Dowse v. Core*, 10 Moore, 272; 3 Bing. 20; S. C. (in error) sub nom. *Biddle v. Dowse*, 9 D. & R. 404; 6 B. & C. 255.

So the authority of an arbitrator under a rule of court, which empowers him to deliver his award to the parties or their executors, does not determine by the death of one of the parties before the award is executed. *Clarke v. Crofts*, 4 Bing. 143; 12 Moore, 349.

So, where A. and B., partners, referred all matters in difference between them and C.; and if either of the parties should die before the award was made, it was to be delivered to his personal representatives, or such of them as

should desire the same. Pending the arbitration B. died. Several meetings were held after his death, and C. protested against the arbitrator's proceeding unless the executor of B. was made a party. An award having been made in favour of A., without B.'s executor having been made a party, the court refused on that ground to set aside the award. *Hare, In re*, 6 Bing. N. C. 158; 8 D. P. C. 71; 8 Scott, 367.

## ii. By Bankruptcy and Insolvency.

Bankruptcy is no revocation of a submission to arbitration. *Hemsworth v. Brian*, 1 C. B. 131; 2 D. & L. 844; 14 L. J., C. P. 134.

In a submission by an order of *nisi prius*, in an action between A. and B., it is stipulated that a certain sum of money shall be placed by B. in the hands of C., the arbitrator, to abide the event of the award. B., after placing the sum in the hands of C., becomes bankrupt. The submission is not revoked, nor are the assignees of B. entitled to demand back the money. *Taylor v. Marling or Shuttleworth*, 2 M. & G. 55; 2 Scott, N. R. 374.

If one of two parties who have submitted disputes to arbitration become bankrupt, if all his interest in the matter in dispute pass to the assignees, the other may revoke the submission without being liable to an action: for the submission was no longer mutual, and therefore not binding. *Marsh v. Wood*, 9 B. & C. 659; 4 M. & R. 504.

Where a cause was referred by order of *nisi prius*, and the plaintiff became bankrupt after the reference, but before the award:—Held, to be no revocation of the submission. *Andrews v. Palmer*, 4 B. & A. 250; *S. P., Snook v. Hellyer*, 2 Chit. 43.

After traverse of an extent in aid, the prosecutor and defendant agreed to refer the amount of the debt due to the former; and an award was made for payment of money by the defendant to the prosecutor; before which, however, the defendant was discharged under an insolvent act, having inserted this debt in his schedule. The crown being no party to the reference, the award was set aside, and the insolvency held to exonerate the defendant from liability to an attachment for not performing it. *Rea v. Bingham*, 2 Tyr. 46.

## iii. By Marriage.

A submission by a woman is revoked by marriage. *McCave v. O'Ferrall*, 8 C. & F. 30; *S. P. Charnley v. Winstanley*, 5 East. 266.

## iv. By Act of the Party.

**Before 3 & 4 Will. 4.**—Where a cause was referred by order of *nisi prius*, either party had power to revoke the submission, and the court could not vacate the revocation, or compel the party revoking to pay costs to the other party, unless a power to do so was given by the order of reference. *Shee v. Cowen*, 10 B. & C. 483.

A judge's order directed that a cause should be referred, and that either party wilfully preventing the arbitrator from making an award by affected delay or otherwise, should pay such costs as the court thought reasonable and just:—Held, that such order might be made a rule of

court after one of the parties had revoked the authority of the arbitrator. *Aston v. George*, 2 B. & A. 395; 1 Chit. 204.

Where parties by bond have agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it was competent to either, even since the 9 & 10 Will. 3, c. 15, to revoke by deed his submission, and notify the same to the arbitrators before the authority was executed. *Milne v. Gratrix*, 7 East, 608.

Where a cause was referred under a judge's order, and one of the parties, before the award was published, and before the order was made a rule of court, revoked his submission, and the arbitrator made an award notwithstanding such revocation, the court set it aside, although the order had been made a rule of court before any application to set aside the award was made. *Clapham v. Higham*, 7 Moore, 703; 1 Bing. 87.

So, where a cause was referred to arbitration by an order of *nisi prius*, and the arbitrator, after a notice of revocation in writing, made an award directing a verdict to be entered for the defendant, the court set aside the award, assuming it to be a nullity. *Doe d. Turnbull v. Brown*, 8 D. & R. 100; 5 B. & C. 384.

**Statute.**—By 3 & 4 Will. 4, c. 42, s. 39, the power and authority of arbitrators or umpires appointed by or in pursuance of any rule of court, or judge's order, or order of *nisi prius* in any action, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of court, shall not be revocable by any party to such reference without leave of the court or a judge; and the arbitrators or umpires are to proceed with the reference notwithstanding any such revocation, and to make an award, although the person making such revocation shall not afterwards attend; and the court or judge may from time to time enlarge the time for making the award.

**In what Cases Statute Applies.**—The statute does not apply to arbitrators appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed, but which umpire has not been appointed. *Bright v. Durnell*, 4 D. P. C. 756.

**Application for Leave to Revoke.**—A judge's order for the revocation of the authority of an arbitrator under 3 & 4 Will. 4, c. 42, s. 39, cannot issue upon an ex parte application. *Clarke v. Stoken*, 5 D. P. C. 32; 2 Hodges, 1; 2 Bing. N. C. 651; 3 Scott, 90.

**In what Cases Leave Given.**—To induce the court to permit a party to rescind his submission under the statute, strong grounds must be laid before them. *James v. Attwood*, 7 Scott, 841.

Where there did not appear to have been any misconduct on the part of the parties or arbitrators, the court refused to direct a submission to be revoked. *Woodcroft, In re*, 9 D. P. C. 538; 5 Jur. 771.

All matters in difference in a cause were referred by order of *nisi prius*, the arbitrator to have power to reserve points of law for the court; the evidence tendered at the arbitration

was objected to by the defendant on several grounds. The arbitrator considered the objections valid, but received the evidence, undertaking to raise the question of its admissibility on his award, but declining to pledge himself to state all the objections. The defendant applied for leave to revoke his submission on the ground that the evidence had been improperly admitted, and that by its admission the arbitration would be much protracted and the expense increased:—Held, no ground for leave to revoke the submission under 3 & 4 Will. 4, c. 42, s. 39, although the admissibility of the evidence appeared to the court very doubtful. *Scott v. Vansandau*, 1 Q. B. 102; 4 P. & D. 725.

A writ was issued, and by consent an order was made referring "the claims of the plaintiff in the action." The plaintiff made other claims, and the arbitrator decided on them, although the defendants objected:—Held, that if the matter in dispute were not within the jurisdiction of the arbitrator, the defendant should have applied to the court to revoke the submission. *Purcell v. Eastern Counties Ry. Co.*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 297.

An arbitrator having erroneously refused to require the plaintiff to produce his books, the court, upon application before award, ordered that the arbitrator's authority should be revoked, unless the plaintiff allowed the defendant to open and look at the books. *Hart v. Duke*, 32 L. J., Q. B. 55; 9 Jur., N. S. 119; 11 W. R. 75.

An action and a chancery suit were, with the consent of the parties to the action, referred at nisi prius. One of the parties to the chancery suit was not a party to the action, but nothing was said when the suit was referred as to obtaining his consent to the reference. His refusal afterwards to concur therein, held to be no reason for rescinding the reference, as the award might dispose of the action and the suit also, so far as concerned the parties to the reference, who were bound by their submission. *Wilson v. Morrell*, 15 C. B. 720; 3 C. L. R. 333; 1 Jur., N. S. 310.

**When Submission may be Revoked without Leave.**—The 9 & 10 Will. 3, c. 15, and the 3 & 4 Will. 4, c. 42, apply to references of civil proceedings only. When criminal matters, therefore, are referred, the submission is revocable at common law. *Rees v. Bardell*, 5 A. & E. 619; 2 H. & W. 401; 1 N. & P. 74.

And without the leave of the court or a judge. *Rees v. Skillicee*, 2 D. P. C. 238.

By a deed between P., the plaintiff, and the defendant, P. covenanted with the plaintiff that he would commence and forthwith build and finish a gas-holder tank, and that the work should be completed on or before the 30th June, 1853, or in default P. should forfeit to the plaintiff 50*l.*, and 20*s.* for every day the completion should be delayed beyond the time; and the defendant, as P.'s surety, covenanted with the plaintiff that P. should perform the covenants on his part, which should be subsisting, and in default, that the defendant would pay to the plaintiff such sums as E., or other the engineer for the time being of the plaintiff, should adjudge to be proper to be paid for such default. In an action for not finishing the work on the 30th June, 1853, and for not paying the amount which E. had adjudged proper to be paid to the

plaintiff for the default of P. in performing the covenant:—Held, that the adjudication of E. was not in the nature of an award by an arbitrator, and that therefore his power to adjudicate could not be revoked by any of the parties to the deed. *Northampton Gaslight Company v. Parnell*, 15 C. B. 630; 3 C. L. R. 409; 24 L. J., C. P. 60; 1 Jur., N. S. 211.

A plaintiff agreed with the defendant to empty a millpool for 5*d.* a cubic yard of mud, the admeasurement of the mud removed to be settled by N., and if any dispute arose, the dispute to be referred to N., to be by him decided:—Held, that although the former part of the agreement was not revocable, the latter part was revocable. *Mills v. Bayley*, 2 H. & C. 86; 32 L. J., Ex. 179; 9 Jur., N. S. 499; 8 L. T. 392; 11 W. R. 598.

An agreement not under seal, for submission of the matters therein mentioned to arbitration, did not provide that it should be made a rule of any court of record; nor did it contain words purporting that the parties to it intended that it should not be made such. It was, however, unusual in its terms, and created certain trusts of the property directed to be sold by order of the arbitrators. Pending the reference under the submission, one of the parties to it, by a deed poll under his hand and seal, revoked the agreement for the submission. A motion by the other party to the agreement to make it, notwithstanding such revocation, an order of court, was refused with costs. *Drury, In re*, 38 L. J. Ch. 278; 19 L. T. 763.

The power to revoke without the leave of a court a submission to arbitration, which does not contain a consent clause for making the submission a rule of court, is not affected by the C. L. P. Act, 1854. *Thomson v. Anderson*, 9 L. R., Eq. 523; 39 L. J., Ch. 468; 22 L. T. 570; 18 W. R. 445.

A. and B., having dissolved partnership, signed an agreement by which, after stating that B. had offered A. 18,000*l.* for the purchase of his interest in the partnership business and assets, and that A. had declined the offer, but was willing to accept 20,000*l.*, they agreed to leave it to a referee to say what sum should be paid by B. to A.:—Held, that the agreement was revocable by either party at any time before the award was made. *Id.*

A submission, which is not made in any action, and does not contain an agreement that it shall be made a rule of court, is revocable by either party at pleasure before an award is made, although such submission has been made a rule of court pursuant to the Common Law Procedure Act, 1854, s. 17. *Rouse, In re*, 6 L. R., C. P. 312; 40 L. J., C. P. 145; 23 L. T. 865; 19 W. R. 438.

An existing dispute was referred to arbitration. One of the parties, no award having been made, revoked his submission and brought an action:—Held, that by the revocation the agreement to refer was at an end, and that sect. 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), did not apply. *Randall v. Thompson*, 1 Q. B. D. 748; 45 L. J., Q. B. 713; 35 L. T. 193; 24 W. R. 837.—C. A. Compare *Moffat v. Cornelius*, 39 L. T. 102.—C. A.

Although a particular submission to arbitration may be revoked, a general agreement to refer to arbitration cannot be revoked by one of the parties. *Piercy v. Young*, 14 Ch. D. 200;

42 L. T. 710; 28 W. R. 845—C. A.; S. P., *Christie v. Noble*, 14 Ch. D. 203 (\*), W. N. 1880, 71.

*v. Action for Revoking Submission or not Appointing Arbitrator.*

**When maintainable.**—A submission by deed may be revoked by deed and notice of revocation before award made; but the arbitrators are right in afterwards proceeding to award, because the party continuing in submission is entitled to his action for damages on non-performance of the covenant to abide by the award. *King v. Joseph*, 5 Taunt. 452.

So, if bound in a penalty, the penalty is not avoided by the revocation. *Ib.*

A revocation of a submission not under seal, before award made, is in effect a breach of an agreement to stand to, obey, abide, and perform an award, for which an action will lie. *Brown v. Turner*, M'Clel. & Y. 464; 1 C. & P. 651.

A declaration for such breach may state that the defendant undertook to perform the agreement, and not to revoke the submission, and lay the revocation as a breach. *Ib.*

An action will lie on an agreement, when the parties bound themselves in a penalty "for the true and faithful observance and performance of the award which should be made," where one party revoked his submission before an award was made. *Warburton v. Storer*, 6 D. & R. 213; 4 B. & C. 103.

**Refusing to Nominate Arbitrator.**—Semble, that no action can be maintained, for refusing to nominate an arbitrator, in pursuance of a covenant to refer matters. *Tattersall v. Groot*, 2 B. & P. 131.

By a lease of quarries for a term, it was agreed that, in case any difference should arise during the term as to the amount of rent, it should be fixed by arbitration; and the lessee covenanted that he would appoint an arbitrator; differences as to the amount of the rent having arisen between the lessor and lessee, which had not terminated at the death of the latter, and the defendant having become his personal representative and entered into possession, and having failed, though requested, to appoint an arbitrator:—Held, that an action for breach of the covenant was sustainable against him sued as assignee. *Donegal (Marquis) v. Verner*, 6 Ir. R. C. L. 504.

**d. Making Submission a Rule of Court.**

*i. In what Cases.*

**Under 9 & 10 Will. 3].**—By 9 & 10 Will. 3, c. 15, s. 1, *merchants, traders, and others, desiring to end any controversy, suit, or quarrel, for which there is no other remedy but by personal action or suit in equity, may, by arbitration, agree that their submission of their suit to the award or umpirage of any person shall be made a rule of any of his majesty's courts of record, and insert the agreement in the submission, which may, on affidavit of the witnesses thereto, or any one of them, be made a rule of court, and enforced by the usual means.*

The act was made to put submissions, where no cause was depending, upon the same footing as where there was, and is only declaratory of

what the law was before in the latter cases. *Lucas v. Wilson*, 2 Burr. 701.

Where the plaintiff's attorney, having received a sum of money from the defendant for the plaintiff in the progress of a cause, entered into an agreement to secure it to the latter, in which was contained a proviso that the agreement should be made a rule of court:—Held, that the court had not authority to direct it to be done, as the 9 & 10 Will. 3, c. 15, was confined to cases of submission to arbitration, and the plaintiff's attorney was no party to the original suit; and that therefore the plaintiff's only remedy was by action for the breach of the agreement. *Steers v. Harrop*, 7 Moore, 466; 1 Bing. 133.

But a judge's order for referring a cause may be made a rule of court, though the defendant gave no authority to his attorney to consent to its being made a rule of court. *Paull v. Paull*, 2 D. P. C. 340; 2 C. & M. 235; 4 Tyr. 72.

The courts have jurisdiction, though the submission is to make the award, instead of the submission, a rule of court. *Pedley v. Westmacott*, 3 East, 603.

So, where a submission contained an agreement that the award, instead of the submission, might be made a rule of court, which was done; the court refused to set aside the rule, holding that they had jurisdiction under 9 & 10 Will. 3, c. 15. *Storey, Ex parte*, 7 A. & E. 602; 2 N. & P. 667; 2 Jur. 46.

So also a submission may be made a rule of court, where the bond, made between the trustee of a wife and her husband, recited that a suit for a separation had been instituted between the husband and wife, and that, in order to put an end to any contest about the terms of separation, it had been agreed that all matters should be referred to S., and either of the parties should be "at liberty to apply to the court" to make the award a rule of court. *Soilleux v. Herbet*, 2 B. & P. 444.

The court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment. *Watson v. McCullum*, 8 T. R. 520.

A deed contained a covenant, that if any question should arise between the parties touching certain payments by instalments, which it was agreed that one should make to the other, it should be referred to P. to arbitrate, determine and award between them; and the parties covenanted that they would stand to and obey the award, so as it should be made before a day certain, but that it should be lawful for the arbitrator to enlarge the time, so as the period to which the time should be so enlarged should not exceed another day specified; and that special submission should be made a rule of court. The arbitrator enlarged the time so far as he had power, and then an order was procured from a judge enlarging the time beyond the last day named in the deed; and the arbitrator, within the time specified in the order, but after the last day named in the indenture, made his award. Upon objection that the judge had no power, under 3 & 4 Will. 4, c. 42, to make the order, because that statute applies only to submissions capable of being made rules of court under 9 & 10 Will. 3, c. 15, and that the covenants were not a submission within the latter statute, because they were a submission of prospective disputes:—Held, that the covenants amounted to a sub-

mission, and that there was nothing in that statute to prevent a submission in writing from being made a rule of court, merely because it is a submission of prospective disputes. *Parkes v. Smith*, 15 Q. B. 297; 19 L. J., Q. B. 405; 14 Jur. 761.

It is no objection to making a submission a rule of court, that all the proceedings taken under it are null and void. *Anon.*, 10 Jur. 525.

**Under 17 & 18 Vict. c. 125, s. 17.**—*By this section, every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity, on the application of any party thereto, unless the agreement or submission contain words purporting that the parties intend that it should not be made a rule of court, and if in the agreement or submission it is provided that the same may be made a rule of one in particular of such courts, it may be made a rule of that court only, and if when there is no such provision, a case is stated for the opinion of the court, and the court is specified in the award, and the document authorizing the reference has not, before the award is published, been made a rule of court, such document may be made a rule only of the court specified in the award; and where the document authorizing the reference is or has been made a rule or order of any one of such courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.*

**Submission must be in writing.**—A parol reference, although in pursuance of a general written agreement to refer, cannot be made a rule of court under this provision. *Glaysker, In re*, 3 H. & C. 442; 34 L. J., Ex. 41; 10 Jur. N. S., 1208; 11 L. T. 638; 13 W. R. 165.

By an agreement for the transfer of a business, it was stipulated that, "in case any dispute should arise between the parties concerning any matter relating to the business, or the agreement or its construction, such disputes should be referred to such member of the firm of B. & Co. as should be appointed by that firm to undertake the reference, in accordance with and subject to the provisions of the Common Law Procedure Act, 1854." Disputes having arisen, B. & Co. appointed a member of their firm to be arbitrator, and he duly made his award:—Held, that there was a sufficient submission in writing to be made a rule of court. *Willcox, In re*, 1 L. R., C. P. 671.

The court has no authority under the statute to make a parol submission to an award a rule of court. *Ansell v. Beans*, 7 T. R. 1.

**In what Cases.**—An order of reference of a cause at nisi prius may be made a rule of court, although it does not contain a clause empowering the parties to that effect. *Harrison v. Smith*, 1 D. & L. 876; 8 Jur. 560; *S. P. Millington v. Claridge*, 3 C. B. 609.

Nor can an agreement for a reference not arising out of an action or a suit be made a rule of court. *Bradford v. Maningham*, 3 F. & F. 88.

Where there was an agreement in a lease that future disputes, if they should arise between the

parties, should be referred to the arbitration of two persons, one to be named by each party, and that if either party, after receiving notice in writing from the other of his appointment of an arbitrator, should for seven days neglect to appoint another arbitrator, the arbitrator appointed should act as arbitrator for both parties, and there was a further agreement in the lease that the submission might be made a rule of court:—Held, that, upon an affidavit that disputes had arisen, and that one party had in writing given notice of his appointment of an arbitrator, and that the other had for more than seven days afterwards neglected to appoint another arbitrator, the lease and the written appointment by the one party might be made a rule of court. *Newton v. Hetherington*, 19 C. B., N. S. 342; 12 L. T. 633; 13 W. R. 863.

By a rule of a corn trade association all disputes arising out of transactions connected with the trade are to be referred to two arbitrators, to be appointed by the parties, or, if they refuse, by the chairman of the association. A broker having entered into a contract for the sale of corn per account of F. pursuant to the rules, F. denied that the broker was his agent, and refused to deliver the corn or appoint an arbitrator. The chairman having appointed arbitrators, and an award having been made:—Held, that the court would not make the award a rule of court unless it was made clearly to appear that the broker was the agent of F. *Henshaw & Falk, In re*, 12 L. T. 638; 13 W. R. 870.

The lease of a farm contained a clause that if the premises should during the term be sold, the tenant should, if required by the landlord or the owners for the time being, quit at six months' notice, and the tenant and landlord should each appoint a valuer to estimate the compensation to be given to the tenant, and the valuers should, before proceeding to value, name an umpire. The premises having been sold during the term, and notice given to the tenant by deed between the parties, the amount of compensation to be paid to the tenant was referred to A. and B., or such third person as they should by indorsement thereon before proceeding to value appoint. There were clauses empowering the arbitrators to examine the parties, and their witnesses, and requiring the parties to produce books, &c., relating to the matters in difference:—Held, an arbitration within 17 & 18 Vict. c. 125, s. 17. *Hopper, In re*, 8 B. & S. 109; 2 L. R., Q. B. 367; 36 L. J., Q. B. 97; 15 L. T. 566; 15 W. R. 443.

**After Revocation.**—Where an agreement to refer matters, not under seal, was afterwards duly revoked by deed, the court refused an application to make such agreement a rule of court. *Drury, In re*, 38 L. J., Ch. 278; 19 L. T. 763.

**Words purporting that Rule of Court not Intended.**—By a written instrument the plaintiff agreed to build four houses on land of the defendant, the defendant to grant the plaintiff a lease when the houses were completed; the architects for the time being of the defendant were to certify as to the progress of the work, and if there should be any unnecessary delay or unsatisfactory conduct on the part of the builder with regard to the erection of the buildings, or any matter or thing connected therewith ("the

fact of such delay or unsatisfactory conduct to be ascertained and decided in writing by the architects, against whose decision there shall be no appeal"), then it should be lawful for the defendant to employ other persons to execute the works and to sell the buildings and lease the land to other persons. On an application to make the agreement a rule of court, under the Common Law Procedure Act, 1854, s. 17:—Held, that, assuming the agreement to be "an agreement or submission to arbitration" within the section, the clause that there was to be no appeal against the decision of the architects amounted to "words purporting that the parties intended that it should not be made a rule of court." *Wadsworth v. Smith*, 6 L. R., Q. B. 332; 40 L. J., Q. B. 118; 19 W. R. 797.

**Against Will of one Party.**—A submission under the Lands Clauses Act, 1845, s. 35, may be made a rule of court against the will of the other party. *Harper, Ex parte*, 18 L. R. Eq. 539; 22 W. R. 942.

## ii. Rule of what Court.

Where an order of reference of an inferior court of record, by consent, contained a clause that the order might, at the option of either party, be made a rule of the Court of Queen's Bench, under 8 & 9 Will. 3, c. 15:—Held, that as an agreement of reference between the parties, it might be made a rule of court. *Harlow v. Winstanley*, 1 L. M. & P. 425; 19 L. J., Q. B. 430; 15 Jur. 426.

Where an agreement of reference is to be made a rule in the alternative of one of two courts, and it is made a rule of one, it cannot be made a rule of the other. *Wispenny v. Bates*, 1 D. P. C. 559; 2 C. & J. 379; 2 Tyr. 466.

A. and B. entered into an agreement in writing to refer a pending suit and all other matters in difference between them. The agreement contained a stipulation for making the submission and the award a rule of court. An award was made accordingly, but no proceeding was taken under the last-mentioned stipulation. B. filed a bill in equity against A. to set aside the award, and to this bill A. demurred. The Lord Chancellor of England, allowing the demurrer, on the ground that the jurisdiction of the court to interfere by bill was excluded by the statute:—Held, that the Court of Chancery is within 9 & 10 Will. 3, c. 15, and that its jurisdiction must therefore be exercised in the mode pointed out by the statute. *Heming v. Swinerton*, 2 Ph. 19; 16 L. J., Ch. 90; 10 Jur. 907.

Where a cause in the Exchequer has been referred by a judge's order, and it is part of the order that it shall be made a rule of the Queen's Bench, there is no objection to its being so made. *Milstead v. Craufield*, 9 D. P. C. 124; 1 W. P. C. 10.

## iii. Practice thereon.

**Application ex parte.**—An application for an order to make a submission to arbitration a rule of court should be made ex parte by summons in chambers. *Davey and Railway Passengers Assurance Company, In re Arbitration between*, 49 L. J., Ch. 568; 43 L. T. 234—C. A.

An order of reference is made a rule of court by a side-bar rule, which is always ex parte. *Roberts v. Evans*, 6 B. & S. 4.

**Whether Stamping Necessary.**—An agreement of reference of a cause, in which the costs, reference and award were to abide the event, contained a clause authorizing either party to make it a rule of court. The arbitrator found that the plaintiff was entitled to recover a less sum than 20*l.*:—Held, that it might be made a rule of court without being stamped. *Lloyd v. Mansell*, 1 L. M. & P. 130; 19 L. J., Q. B. 192.

**Enlargements, whether included.**—When the object is to set aside an award, the court will make the order of reference a rule of court omitting the enlargements. *Gripe v. Wilkie*, 20 W. R. 112.

An order of reference, with the enlargements of time for making the award endorsed on the order, may be made a rule of court on an affidavit verifying the handwriting of the arbitrator to the indorsements, and there need not be an affidavit either by the arbitrator or by the attesting witness, if there be one, verifying the times when the enlargements were made. *Roberts v. Evans*, 6 B. & S. 1; 34 L. J., Q. B. 73.

**Signed as Agent for Another.**—A submission was signed by A. "for self and H.," A. and H. being co-plaintiffs; the defendant signed below A.'s signature. The arbitrator made his award in favour of the plaintiffs:—Held, that on production of the affidavit shewing that H. had given A. authority to sign for him, or had subsequently ratified his signature, the submission and award might be made a rule of court. *Aldington v. Cheshire*, 15 C. B., N. S. 375; 9 L. T. 582; 11 W. R. 202.

**Signed by one Party.**—Under special circumstances, the court will make a submission a rule of court, though such submission has been signed by one party only. *Simpson, In re*, 17 L. T. 617.

**Rule during Vacation.**—The submission to arbitration may be made a rule of court in vacation. *Taylor, In re*, 5 B. & A. 217.

**Motion made on Original Submission.**—A motion to make a submission a rule of court must be made upon the original submission; therefore, if it is in the possession of the other party, the court will grant a rule calling on him to produce it. *Boston (Lord) v. Mesham*, 8 D. P. C. 867; 1 W. P. C. 56.

Where an award is made on a submission by order of reference at nisi prius, the order of reference does not belong exclusively to either party, but the party holding it holds it for the benefit of both parties, and is bound to produce it, in order to its being made a rule of court. *Bottomley v. Buckley*, 4 D. & L. 157.

Where two parts of a submission were executed, on one of which only the arbitrator indorsed the enlargement of the time for making the award, the court compelled the party in whose possession it was to make it a rule of court. *Smith, In re*, 1 W. W. & H. 314; 8 D. P. C. 130.

**Copy of Submission, when Allowed.**—Or the

court will grant a rule, allowing a verified copy of the submission to be made a rule of court. *Midland Railway Company, In re*, 11 Jur. 904.

But if one of two parties to an arbitration wishes to make the submission a rule of court, but the submission is in the possession of the other party, who refuses to produce it, he must apply at chambers for an order to produce the submission before moving the court for a rule on a verified copy. *Gething v. Fotheringham*, 13 W. R. 96; *S. P., Bligh v. Cotton or Cottall*, 3 N. R. 117; 12 W. R. 102.

An agreement of reference contained a clause for making such agreement a rule of court. The award being published, and a motion about to be made for setting it aside, the party interested in opposing such motion refused to produce the agreement for the purpose of its being made a rule. The court, in the term next after making the award, permitted a copy of the agreement to be made a rule of court. *Plews, In re*, 6 Q. B. 845.

An order of reference, with the appointment of an umpire, and two enlargements indorsed thereon, having been accidentally destroyed, the court allowed a duplicate of the order, together with copies of the indorsements on the original, verified by affidavit, to be made a rule of court. *Parker v. Bach*, 17 C. B. 512.

So, where from some misconduct of the arbitrator, the original order of reference cannot be obtained, a duplicate may be made a rule of court. *Thomas v. Philby*, 2 D. P. C. 145.

**Effect of Judicature Acts.**—Where a reference to arbitration has been made under an agreement, the submission ought to be made a rule of court, according to the practice of the Common Law Courts before the Judicature Acts. *Jones v. Jones*, 14 Ch. D. 593; 43 L. T. 76; 29 W. R. 65—C. A. *S. C.*, 41 L. T. 651.

**Costs of Application.**—A cause was referred by a judge's order by consent, the costs of the action, reference and award to be in the discretion of the arbitrator. The arbitrator ordered the defendant to pay the plaintiff two sums of money on a certain day, and that each party should bear his own costs of the action, reference and award. The defendant did not pay the money on the day appointed, and the plaintiff made the order of reference a rule of court, but before any demand the defendant paid the plaintiff the sum awarded:—Held, that it was in the discretion of the court to order the defendant to pay the costs of making the order of reference a rule of court; and as that step had been taken by the plaintiff, without any demand of payment, he was not entitled to the costs. *Carter v. Tong Burial Board*, 5 H. & N. 523; 29 L. J., Ex. 293.

Motion to make a submission to arbitration an order of court, the order not being required for any present purpose, was refused with costs. *Railway Passengers Assurance Company's Act, 1864, In re, Liscombe, In re*, 49 L. J., Ch. 236.

#### e. Validity—Condition precedent to Action.

**Jurisdiction of Courts not Ousted.**—Agreements or covenants, that, in case of disputes between the parties, all matters in difference

shall be referred to arbitration, do not oust the courts of law or equity of their jurisdiction. *Thompson v. Charnock*, 8 T. R. 139; *S. P., Mitchell v. Harris*, 2 Ves. Jun. 133; *Street v. Rigby*, 6 Ves. 822.

A deed by which A., as auditor and manager of an estate, engaged himself that he, who was a barrister, should relinquish so much of his practice as was incompatible with the office, and the whole if required by S., the employer. That if S. should revoke the appointment without adequate cause, the adequacy to be determined in like manner, S. should allow A. a retiring pension a year during their joint lives; and that the adequacy of the cause for any revocation or resignation should be determined by a referee; with a proviso for other reference in case of necessity:—Held, first, that the stipulation for reference was not void as ousting the courts of jurisdiction. *Louder v. Stamford and Warrington (Earl)*, 18 Q. B. 425; 21 L. J., Q. B. 371.

Held, secondly, that A., being dismissed wrongfully, might sue for the retiring pension without having first procured the adequacy of the cause to be decided upon by the referee; the sense of the agreement being that the onus of proving the adequacy of the cause to be adjudicated upon should lie upon that party who did an act (whether revocation or resignation) determining the employment. *Id.*

A. granted a lease of a coal mine to B. for a term of years, at a royalty, and B. covenanted to raise at least 4,000 tons; and it was agreed between the parties that if any difference or question should arise between them touching any covenant or matter expressed in the deed, or its meaning, it should be settled by two arbitrators, to be nominated within two months after the difference arose; with mutual covenants to obey and perform the award, and not to bring any action or suit without first submitting all matters to arbitration:—Held, that, as the agreements and covenants to refer were absolute to oust the jurisdiction of the courts, they were void for that purpose, and could not be pleaded to an action for not raising the tons of coal. *Horton v. Sayer*, 4 H. & N. 643; 26 L. J., Ex. 28; 5 Jur., N. S. 989; 33 L. T., O. S. 287; 7 W. R. 735; *S. P., Lee v. Page*, 30 L. J., Ch. 857; 7 Jur., N. S. 768; 9 W. R. 754.

Action on a contract containing a prospective agreement, that if any difference arose, it should be referred; that a difference arose, and a refusal to refer:—Held, that the action lay. *Livingston v. Ralli*, 5 El. & Bl. 132; 24 L. J., Q. B. 269; 1 Jur., N. S. 594.

The plaintiff, Mrs. H., who was the wife of the defendant, claimed specific performance of an agreement for a separation deed entered into upon the compromise of a suit in the Divorce Court which was instituted by the husband against the wife for a divorce on the ground of adultery. The agreement was signed by both husband and wife after the husband's evidence in support of his case had been heard, and before the wife's defence had been commenced, and was in these terms:—"Petition and answer dismissed. Deed of separation with usual covenants; costs of preparing deed to be borne by Mr. H. Mr. H. to pay Mrs. H. for herself and child or children 150l. a year quarterly, Mrs. H. to maintain the child or children. Mr. H. to pay wife's costs. In case of difference in work-



ing out these terms matter to be referred to Mr. W. and Dr. D." (the leading counsel on each side).—Held, that the agreement on the face of it being complete, the arbitration clause could only come into force in case of difference between the parties, and did not oust the jurisdiction of the court to settle the deed itself. *Hart v. Hart*, 18 Ch. D. 670; 50 L. J., Ch. 697; 45 L. T. 13; 30 W. R. 8.

**Condition Precedent—Amount or Dispute first Determined by Arbitrator.**—It is a principle of law that parties cannot by contract oust the courts of their jurisdiction; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant. *Scott v. Avery*, 5 H. L. Cas. 811; 25 L. J., Ex. 303; 2 Jur., N. S. 815. (Judgment of Exchequer Chamber, 8 Ex. 487; 22 L. J., Ex. 287; 17 Jur. 810, affirmed.)

A. effected in a mutual insurance company a policy of insurance on ship, one of the conditions of which was that the sum to be paid to any insurer for loss should, in the first instance, be ascertained by a committee; but if a difference should arise between the insurer and the committee relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance, the difference was to be referred, in a way pointed out in the conditions; provided always, that no insurer who refused to accept the amount settled by the committee should be entitled to maintain any action or suit in equity on his policy, until the matter had been decided by the arbitrators, and then only for such sum as they should award, and the obtaining of their decision was declared a condition precedent to the maintaining of an action.—Held, that these conditions were lawful, and that (even should the difference relate to other matters than those of mere amount) till an award made, no action was maintainable. *Id.*

A condition in a contract to refer any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but unless the condition expressly stipulates that until arbitration had no action shall be brought, its performance is not precedent to the right to sue on the contract. *Ruper v. Lendon*, 1 El. & El. 825; 28 L. J., Q. B. 260; 5 Jur., N. S. 491; 7 W. R. 441.

Under a covenant that if the covenantor do or omit a certain act, he will pay to the covenantee such damages as a third person shall award, there is (in the absence of fraud) no demand at law or in equity unless the award is made. *Scott v. Liverpool Corporation*, 3 De G. & J. 334; 28 L. J., Ch. 236; 5 Jur., N. S. 105; 32 L. T., O. S. 265; 7 W. R. 153.

A policy was entered into with a company against bodily injury from any railway accident directly affecting the assured while travelling by a passengers' train. There was a condition, that, in case of difference of opinion as to the amount of compensation payable in any case, the question should be referred to a person to be named by the secretary for the time being of the Master of the Rolls, and all expenses should be subject to the decision of such arbitrator, and the award made on such arbitration was to be taken as a final settlement of the question, and might be made a rule of court.—Held, that a reference, in the manner prescribed, was a condition prece-

dent to bringing an action for an injury within the policy. *Braunstein v. Accidental Death Insurance Company*, 1 B. & S. 782; 31 L. J., Q. B. 17.

A policy was subject to the following rule:—"All average claims and claims of abandonment shall be adjusted and settled, conformably to the custom of Lloyd's or the Royal Exchange, by a professional average-stater. But should the committee or the assured be dissatisfied by the adjustment, they may refer the same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, and the award of such two persons shall be final; and all other cases of dispute, of whatever nature, shall be referred in like manner; but the committee or assured, by mutual consent, may refer all such adjustments or disputes to one person only, whose award shall also be final, and no action shall be brought until the arbitrators have given their decision:—Held, that no action could be maintained on the policy for a total loss until the claim had been adjusted and settled by arbitration, in pursuance of the rule. *Tredwen v. Holman*, 1 H. & C. 72; 31 L. J., Ex. 389; 8 Jur., N. S. 1080; 10 W. R. 652.

In an action for the price of goods, a plea, that there being a dispute as to their quality and the price, it was agreed, that the buyer should pay to the seller the amount of the price claimed, less the sum in dispute, and should deposit that sum in the hands of a third party as stakeholder, until such dispute should be adjusted, and that he had done so, and was ready to concur in an adjustment, is a good plea. *Page v. Meek*, 3 B. & S. 259; 32 L. J., Q. B. 4; 7 L. T. 270; 11 W. R. 23.

A contract contained a clause that the engineer for the time being should have power to make such additions to or deductions from the work as he might think proper, and to make such alterations and deviations as he might judge expedient during the progress of the work; and if by reason thereof he should consider it necessary to extend the time for the completion of the work, or otherwise, the time of completion should be deemed to be not extended; and that the value of all such additions, deductions, alterations and deviations, should be ascertained and added to or deducted from the amount of the contract price. That in the event of the contractors failing to complete their work within the specified time, they should pay 5*l.* as liquidated damages for each day between the day specified for completion and the day when the work should be completed and ready for delivery. And if any doubt, dispute or difference should arise concerning the work, or relating to the quantity or quality of the materials employed, or as to any additions, alterations, deductions or deviations made to, in, or from the work, the same should from time to time be referred to and decided by the engineer, whose decision should be final and binding on both parties. The defendant, by directing extra work, rendered the performance of the contract by the contractors within the stipulated time impossible. In an action to recover the amount of extra works:—Held, that the ascertainment of the value of the extra works was a condition precedent to the right of the contractors to maintain their action. *Westwood v. Secretary of State for India*, 1 N. R. 262; 7 L. T. 736; 11 W. R. 261.

Held, also, that the defendant having by his own act rendered the performance of the contract

impossible within the stipulated time, was not entitled to set off the penalties, although there had been no extension of the time for completion by the engineer. *Id.*

By a policy of insurance a company covenanted to indemnify the assured against loss by fire, "according to the exact tenor of the articles subjoined." One of the articles subjoined was in the following terms:—All persons assured by this corporation are, upon any loss or damage by fire, forthwith to give notice to the office in London, or to the known agents of the corporation, and within fifteen days after such fire deliver in as particular an account of their loss or damage as the nature of the case may admit, and make proof of the same by their oath or affirmation, and that of their domestics or servants, and by their books of accounts and such other proper vouchers as may be required; which loss or damage, after the same shall be adjusted, shall immediately be paid in money by the corporation without any deduction, or they shall at their option forthwith provide or supply the assured with the like quantity and quality of goods with those burnt or damaged by fire, or at the expiration of sixty days after notice of the fire they shall expend in rebuilding or repairing any building damaged or destroyed by fire, the sum assured thereon, under the direction of able and experienced workmen, if the loss and damage shall in their opinion amount thereto. In case any difference shall arise touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of claim:—Held, that the covenant was not an absolute covenant to indemnify with a collateral agreement to refer disputes to arbitration, but was a covenant to pay an amount adjusted between the parties by agreement or arbitration, and, therefore, that the adjustment of the amount was a condition precedent to a right to sue on the covenant in the policy. *Elliott v. Royal Exchange Assurance Corporation*, 2 L. R., Ex. 237; 36 L. J., Ex. 129; 16 L. T. 399; 15 W. R. 907.

A. entered into a written contract with M. for the purchase of a cargo of wheat. The contract contained a clause, "should any dispute arise, the contract not to be void, it being agreed by buyers and sellers to leave the same to be settled by two London corn factors, respectively chosen, with power to call in an umpire, whose decision is to be final." A. brought an action to recover his deposit on the ground of misdescription of the subject-matter of the contract, and applied to set aside the nomination of an arbitrator by M. Some imputations of fraud in A.'s conduct were made by M., but were denied by A.:—Held, that the words of the contract were large enough to make these matters of difference, the settlement of which should be enforced by arbitration. *Alexander v. Mendl*, 22 L. T. 609.

A building contract contained a clause that, in case of difference between the contractor and his employer, the award in writing of the architect in all matters connected with the works, or their execution, or the value of extra work, or reductions, or the meaning of the plans or specifications, should be final and conclusive, so far as the law permitted, and such award should be a condition precedent to any proceeding whatever

at law or in equity in respect of any matter or thing which could or might be the subject of such award:—Held, that the architect's award was not a condition precedent to an action by the employer against the contractor for not completing the buildings, and for leaving them unfinished. *Mansfield v. Doolin*, 4 Ir. R., C. L. 17.

The rules of a marine insurance association provided that disputes should be referred to arbitration:—Held, that the assurer was not bound to submit a legal point to the decision of arbitration before suing in equity. *Alexander v. Campbell*, 41 L. J., Ch. 478; 27 L. T. 25.

A policy in a mutual insurance society was subject to the following rules:—(1) That the directors should have full power to adjust, settle and decide all claims and determine all disputes between the society and its members, and that their decision should be final, and that no member should be allowed to bring any action for any claim on the society "except as is provided by these presents;" and (2) that in all cases of loss of any vessel the directors should examine into the circumstances and make such decision and regulations thereon as in their judgment the case might require, and that the owner should not prosecute any action without their consent; and (3) that if any member should be dissatisfied with the decision of the directors he should take certain specified steps to obtain a revision thereof, in the first instance by a board of directors or ultimately by a special general meeting, the decision of which last was to be final:—Held, that an action could be maintained on a policy for a total loss though no final decision by a special general meeting had been obtained in accordance with these rules. *Edwards v. Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563; 34 L. T. 457—C. A.; reversing 44 L. J., Q. B. 67; 23 W. R. 304.

A lessee covenanted with the lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that in case he kept such a number as should injure the crops he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators, or an umpire. The lessor having brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares and rabbits as would do no injury, but had kept such a number as did injure, and had neglected to pay any compensation:—Held, that upon the true construction of the lease the covenant to refer the amount of compensation was a collateral and distinct covenant, and that the action was maintainable, although there had been no arbitration. *Dawson v. Fitzgerald (Lord)*, 1 Ex. D. 257; 45 L. J., Ex. 893; 35 L. T. 220; 24 W. R. 773—C. A. Reversing judgment of the Exchequer, 9 L. R., Ex. 7; 43 L. J., Ex. 19; 29 L. T. 776; 23 W. R. 162.

When a contract has provided that the certificate of the engineer or of an arbitrator shall be a condition precedent to payment, the court does not obtain jurisdiction because of the power to refer to arbitration. *Sharpe v. San Paulo Railway Company*, 8 L. R., Ch. 597; 29 L. T. 9.

When under an agreement, legislatively confirmed, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the mode of carrying it out:—Held, that the jurisdiction of the courts was, by

this agreement, excluded, and that all disputes arising under it must be settled by arbitration. *Caledonian Railway Company v. Greenock and Wemyss Railway Company*, 2 L. R., 8c. App. Cas. 347.

The plaintiff bought of the defendant jute of a particular mark, to arrive from Calcutta, the defendant guaranteeing the jute to be of the average quality of that mark as hitherto imported, and promising that if found to be inferior a fair allowance should be made to the plaintiff. The quality, as alleged by the plaintiff, was found to be inferior, and damages were claimed accordingly. The defendant stated in defence that the purchase was subject to a term that in the event of any dispute arising out of the contract, it was to be referred to jute brokers for arbitration, and that any reference to arbitration was to be demanded within fourteen days of final landing of the jute. The defendant alleged that this was a dispute arising out of the contract, and no reference was demanded within the stipulated time:—Held, that this was a good defence to the action. *Pompe v. Fuchs*, 34 L. T. 800.

A clause which stipulates that all matters in difference which should arise touching the agreement should be submitted to arbitration, and prohibits any action being brought in respect of the matters actually submitted to arbitration, is a collateral and independent agreement, and an award thereunder is not a condition precedent to such action, except as regards such sums as under the agreement are not payable until the amount thereof has been ascertained by such award. *Collins v. Locke*, 4 App. Cas. 674; 48 L. J., P. C. 68; 41 L. T. 292; 28 W. R. 189.—P.C.

Where by a written agreement a tenant of a furnished house agrees at the expiration of the tenancy to deliver up possession of the house and the furniture in good order, and in the event of loss, damage, or breakage, to make good or pay for the same, the amount of such payment if disputed to be settled by two valuers, the settlement of the amount of the payment by the valuers is a condition precedent to the right of the landlord to bring an action in respect of the dilapidations. *Babbage v. Coulburn*, 9 Q. B. D. 235; 51 L. J., Q. B. 638; 46 L. T. 283; 30 W. R. 950. Affirmed, 9 Q. B. D. 237, n.; 52 L. J., Q. B. 50; 46 L. T. 794; 30 W. R. 950, n.—C. A.

**Dispute between Building Society and Member.**—By the rules of a building society incorporated under the Building Societies Act, 1874, it was provided, pursuant to s. 16, sub-s. 9 of the act, that a reference of every matter in dispute between the society and any member of the society should be referred to the arbitration of the registrar of friendly societies. The plaintiff, who was an advanced member of the society and had executed a mortgage for securing his subscriptions and fines in respect of the advance, commenced an action against the society for an account in respect of the mortgage transaction:—Held, that the jurisdiction of the court was ousted, and that the society was entitled to have the dispute referred to arbitration. *Wright v. Monarch Investment Building Society* (5 Ch. D. 726) approved. *Haak v. London Provident Building Society*, 23 Ch. D. 103; 52 L. J., Ch. 541; 48 L. T. 247; 31 W. R. 392.—C. A. Affirmed 52 L. J. Ch. 225; 31 W. R. 378.

See further, BUILDING SOCIETY.

## f. Compulsory References.

**Statute.**—By 17 & 18 Vict. c. 125, s. 3, if it be made appear at any time after issuing the writ, to the satisfaction of the court or a judge, upon application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot be conveniently tried in the ordinary way, the court or a judge may decide the matter in a summary manner or order the matter, either wholly or in part, to be referred to an arbitrator appointed by the parties, or to an officer of the court [or in country causes to the judge of a county court]—(But by 21 & 22 Vict. c. 74, s. 5, this provision, as to references to a county court judge, is repealed), upon such terms as to costs and otherwise as the court or judge thinks reasonable, and the decision or order of the court or judge, or the award or certificate of the referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

By sect. 6, if upon the trial of an issue of fact, which the parties have consented to try before a judge, it shall appear to him that questions arising thereon involve matter of account, he may order such account to be referred.

**At what period Order made.**—A judge at nisi prius has no power to order a compulsory reference of matters of account, since sect. 3 only applies to a reference before trial, and the 6th section to a reference by a judge on a trial without a jury. *Robson v. Lees*, 6 H. & N. 258; 30 L. J., Ex. 235; 7 Jur., N. S. 244; 4 L. T. 516.

A judge at nisi prius cannot, under the Common Law Procedure Act, 1854, s. 6, refer a cause after the jury is sworn, for that section only applies where the judge is trying without a jury. *Jeffries v. Lovell*, 23 L. T. 782; 19 W. R. 408.

A judge compulsorily referred a cause after the jury was sworn, stating that he did so as if sitting in camera:—Held, that he had no power to do so, but he must first discharge the jury, and adjourn the court, before he can be in a position to sit in camera, and refer the cause. *Morgan v. Ainslie*, 28 L. T. 120.

**Jurisdiction of Judge.**—Assuming that a judge at nisi prius cannot, merely upon an application by one party, refer a case to arbitration, yet if a judge at chambers has dismissed an order for that object, on the terms of the cause being thus referred, if the judge at nisi prius is of opinion that the cause cannot be disposed of at nisi prius, he may act upon such order, and refer the cause to arbitration without consent. *Purdie v. Furness*, 4 F. & F. 942.

A judge of the Mayor's Court, and at nisi prius, has no power to order a cause to be compulsorily referred against the will of one of the parties. *Morgan v. Ainslie*, 28 L. T. 120.

**Dispute consisting wholly or in part of Matters of Account.**—When it appears that the matter in dispute in an action consists in part only of matters of account, the court or judge may not refer the whole matter compulsorily under 17 & 18 Vict. c. 125 (the Common Law Procedure Act, 1854), s. 3. *Clew v. Harper*, 3 Ex. D. 198; 47 L. J., Ex. 393; 38 L. T. 269; 26 W. R. 364.—C. A.

Therefore, where in an action for breach of

covenants in a lease to repair and to leave the premises in substantial repair, the defendant denies the whole of the breaches, thus raising a question as to his liability, the court has no jurisdiction to refer the action compulsorily under the above section. *Ib.* But see *Ward v. Pilley*, 5 Q. B. D. 427; 49 L. J., Q. B. 706; 43 L. T. 301; 28 W. R. 937—C. A.

An action may be referred under s. 3 of the Common Law Procedure Act, 1854, although the question in dispute does not consist entirely of matters of mere account. *Martin v. Fyfe*, 49 L. T. 107; 31 W. R. 840. But in C. A., though not reversed, the matter was referred to an official referee.

The plaintiffs sued the defendant for 7,129,300 cubic feet of gas sold and delivered, during a period of nearly five years, at a price of 2s. 5d. per 1000 cubic feet. The defendant, as to part of the claim, paid money into court, and pleaded, as to the residue, never indebted and payment. He then obtained an order, compulsorily referring the action, on the ground that the matter in dispute was wholly or in part one of mere account, which could not conveniently be tried by a jury. The plaintiffs applied to rescind this order, alleging that they proposed at the trial to attempt to prove that the defendant had been guilty of fraudulent conduct by the secret abstraction of their gas, and that upon this question, which would regulate the damages awarded, they were entitled to the verdict of a jury:—Held, that the nature of the dispute was not altered because the plaintiffs imputed fraud to the defendant in relation to it; that, substantially, the matter was one wholly or in part of mere account, which could not be conveniently tried by a jury, and that, therefore, the order was rightly made. *Birmingham and Staffordshire Gas Company v. Ratcliff*, 6 L. R., Ex. 224; 40 L. J., Ex. 136; 19 W. R. 776.

When a matter in dispute consists wholly or in part of matters of mere account, the court or a judge has power to order a reference either of the whole or a part only. *Browne v. Emerson*, 17 C. B. 361; 25 L. J., C. P. 104; 2 Jur., N. S. 190.

In an action on an attorney's bill, there being a dispute as to items, and also a defence on the ground of negligence, and a judge having made an order to refer compulsorily the matter to the master, the court refused to disturb the order, it not having been made to appear on the part of the defendant at chambers that the defence of negligence was so distinct as that it ought to be tried by a jury. *Reece v. Chaffers*, 1 L. T. 781; 11 W. R. 307.

**Charge of Fraud.**—The mere fact that some one item in the account may involve a charge of fraud does not oust the jurisdiction of the judge to order that the cause be referred to the master. *Imhof v. Sutton*, 2 L. R., C. P. 406; 36 L. J., C. P. 130; 15 L. T. 578.

A plaintiff's claim consisted partly of matters of mere account, which could not be conveniently tried by a jury, and partly in respect of commission, which the plaintiff had paid to the defendant for orders for goods, and which the plaintiff sought to recover back, on the ground that such orders were fictitious:—Held, that a judge had jurisdiction to refer the case compulsorily to a master; and the court refused to interfere with the judge's exercise of such jurisdiction. *Ib.*

VOL. I.

In an action for work done and materials provided, a judge, at the instance of the plaintiff, made a compulsory order of reference. When before the master, the plaintiff, on cross-examination, charged the defendant with having misled and deceived him in respect of a clause of the contract entered into between them. On motion by the defendant for a rule to shew cause why the issue between the parties should not be tried, and on affidavits stating that the defendant would be seriously prejudiced if the question of fact was not tried by a jury, and that a question of law would arise which ought to be reserved, the court refused the rule, on the ground that the question was one within the province of the master to decide. *Trickett v. Green*, 1 H. & R. 63; 35 L. J., C. P. 69; 11 Jur., N. S. 1037; 13 L. T. 405; 14 W. R. 141.

**Defence of Non-Liability.**—A plaintiff sued for work and labour as an auctioneer, and before plea the defendant applied for an order to refer the matter to a master upon an affidavit which stated "that the matter in dispute in this action consists of mere matter of account, which cannot be conveniently tried in the ordinary way," which order, though opposed by the plaintiff, was accordingly made. Upon a subsequent application by the plaintiff to set aside such order, upon the ground that an action for work and labour was not within the operation of the C. L. P. Act, 1852, s. 3, and that it would be competent to the defendant to set up a defence of non-liability:—Held, that such action is within the operation of the clause, and that if when before the master the defendant sets up any other matter of defence, then will be the proper time for the plaintiff to apply to rescind the order. *Clark v. Ware*, 17 L. T. 144.

**Matters of Account, what are.**—A judge has power to refer an action for dilapidations. *Angell v. Felgate*, 7 H. & N. 396; 31 L. J., Ex. 41; 5 L. T. 322; 10 W. R. 83; *S. P.*, *Pell v. Addison*, 2 F. & F. 291.

And when money is paid into court, and the question is only as to the amount of the dilapidations. *Cummings or Cummin v. Birkett*, 3 H. & N. 156; 27 L. J., Ex. 216; 4 Jur., N. S. 242.

The court refused to refer compulsorily an action upon bills of exchange. *Pellatt v. Markwick*, 3 C. B., N. S. 760.

After the writ in an action upon a bond to secure 1000*l.* had been served, the defendant wrote a letter, stating that he had paid 430*l.* over and above all interest which he was liable to pay; and that he was ready to pay the balance, 570*l.* After receipt of this, the attorney for the plaintiff delivered a declaration, to which the defendant pleaded payment. When the cause was in the paper for trial a judge's order was given, by consent, for a reference to the master, who afterwards made his allocatur in the plaintiff's favour for 741*l.* 2s. 6d. and costs. The defendant became bankrupt between the receipt of the letter and the allocatur:—Held, that there was no negligence on the part of the attorney in his not applying, after the receipt of the letter, for an order compulsorily to refer the cause. *Chapman v. Van Tull*, 8 El. & Bl. 396; 27 L. J., Q. B. 1; 3 Jur., N. S. 1126.

Where, in an ejectment against a builder, on

a clause of forfeiture in a building contract, an order of nisi prius had been made, under which the buildings were to be sold, and the builder paid the balance due to him out of the proceeds, and he afterwards sued the employers for money had and received, and also for improperly selling, the court declined either to stay this action, or to refer to the master. *Orphan Working School (Trustees) v. Henley*, 27 L. J., Ex. 426.

Where there was a set-off to an attorney's bill, and the question of retainer might arise on many of the items:—Held, that the cause involved matter of account, which could not be conveniently tried, and therefore that it must be referred. *Goodred v Seale*, 2 F. & F. 382.

**Amendment of Order.**—An order, which was opposed by the plaintiff, referred "the cause and all matters in difference;" an award was made in his favour, stating that there were no matters in difference but those in the cause. On a motion to set aside, for irregularity, a fieri facias issued on this award as on a compulsory reference, the court directed the words "and all matters in difference" to be struck out of the order, as having been improvidently inserted. *Kendil v. Merrett*, 18 C. B. 173; 25 L. J., C. P. 251; 2 Jur., N. S. 523.

**Amending Particulars.**—When on the application of a plaintiff a compulsory order of reference of an action has been made, the court has power at any time before the award to amend the particulars of demand. *Gibbs v. Knightly*, 2 H. & N. 34; 26 L. J., Ex. 294; 3 Jur., N. S. 472.

**Rescinding Order.**—Where, upon a summons, to refer an action to the master as involving mere matters of account, an order to refer it has been assented to on the part of the plaintiff, and it has been arranged that he shall have the carriage of the order so to refer it, he cannot, after some delay, apply to rescind the order on the ground that it is not a matter of account. *Rogers v. Kearns*, 29 L. J., Ex. 328.

In an action to recover the amount due to the plaintiff for the insertion by him, on the order of the defendant, of certain advertisements, from time to time, in various newspapers, the court made absolute a rule to set aside a compulsory order of reference, it appearing to the court, on an affidavit of the defendant made subsequently to the order, that the amount sued for was admitted, and that the only question was as to the liability of the defendant, as the agent of a third person, in giving the orders for insertion to the plaintiff. *Brown v. Girard*, 19 L. T., 324.

#### g. Stamping Agreements of Reference.

By a memorandum between A. and B., it was agreed, that a question of boundary should be referred to some indifferent surveyor residing at a distance. By a further memorandum, written on the same paper, at a subsequent day, it was agreed that the question should be settled by C.:—Held, that the two memorandums constituted one agreement, requiring only one stamp. *Taylor v. Parry*, 1 M. & G. 604; 1 Scott, N. R. 576.

An agreement of reference of all matters in

difference in a cause does not require a stamp when it does not appear that the matter of the agreement is of the value of 20*l.* *Lloyd v. Mansell*, 19 L. J., Q. B. 192; 1 L. M. & P. 130.

#### 4. THE ARBITRATOR.

##### a. Appointment.

An agreement between A. and B. contained the following clauses:—"In every case of any difference between the parties or their representatives, whether touching the true intent or construction of this agreement, or of anything therein expressed, or touching anything to be done or omitted in pursuance of this agreement, or as to any of the incidents or consequences thereof, or otherwise relating to the premises, the matter in question shall be referred to arbitration. Every such reference shall be made to two persons, one to be named by each party. If either party, for fourteen days after being requested by the other party to name an arbitrator, fail so to do, then both arbitrators may be named by the party making such request." Differences having arisen, A. appointed an arbitrator, but B. declined to do so on request; whereupon A. appointed a second arbitrator, and they proceeded to hear and dispose of the matter. The appointment of the arbitrators purported to be made by A. and one C. (who was said to be an incumbrancer on A.'s presumed interest under the agreement) severally, and the notice was also given by A. and C.:—Held, that the appointments were not vitiated by the introduction of the name of C. *Haddan, In re*, 9 C. B., N. S. 683.

Held, also, that it was not necessary in the appointment of the arbitrators to particularise the matters to be arbitrated upon. *Id.*

Held, also, that the request to B. to appoint an arbitrator was not rendered invalid by its requiring him to notify the appointment to the solicitors who had been acting for A. throughout the matter instead of to A. himself. *Id.*

A railway company entered into a contract, one of which was that T., "if and so long as he shall continue to be the company's principal engineer," should be the arbitrator as to matters in difference. Afterwards the company was amalgamated by act of parliament with another railway company. Disputes having arisen between the parties to the contract, T. made two awards as to the subject-matter of it:—Held, that he was still the proper person to make the awards. *Wansbeck Railway Company v. Trowsdale*, 1 L. R., C. P. 269; 12 Jur., N. S. 740.

**Official Referee, by Consent.**—When a reference had been ordered to an official referee, and the order of reference was drawn up in the form known as the "Long Order," under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and the parties with knowledge of the terms of the order appeared before the referee, who gave his award:—Held, that the referee must be taken to have sat as arbitrator by consent, and that his award was binding on the parties, neither of whom could obtain a new trial. *Longman v. East*, 3 C. P. D. 142; 47 L. J., C. P. 211; 38 L. T. 1; 26 W. R. 183—C. A.

**Where Reference Abortive.**—Where a verdict

was found for a plaintiff for the damages laid in the declaration, subject to the award of an arbitrator, who declined proceeding in the reference, he having been previously consulted by one of the parties in the cause:—Held, that the plaintiff was entitled to sign judgment and issue execution against the defendant forthwith for the damages found by the jury, unless he consented to refer the damages to another arbitrator. *Woolley v. Clarke*, 2 D. & R. 158; *S. C. nom. Woolley v. Kelly*, 1 B. & C. 68.

Where a plaintiff obtained a verdict, subject to a reference, and the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, and one of them afterwards objected to such substitution, the court refused to interfere, as the death of the arbitrator had the effect of opening the cause, and as execution could not be issued on the verdict on account of such death. *Harper v. Abrahams*, 4 Moore, 3.

**Substitution.**—After a submission by deed, an arbitrator may, with the assent of both parties, be substituted in the place of one of the original arbitrators. *Tunno, In re*, 2 N. & M. 328; 5 B. & Ad. 488.

**Statute.**—By 17 & 18 Vict. c. 125, s. 12, if in case of arbitration the document authorising the reference provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in appointing one, or if the one appointed refuse to act, or become incapable of acting, or die, and the terms of the document do not shew that it was intended that the vacancy should not be supplied, and the parties do not concur in appointing a new one, or if where the parties or two arbitrators are at liberty to appoint an umpire and do not, or if the appointed umpire refuse to act or become incapable of acting or die, and the terms of the document authorising the reference do not shew that it was intended that a vacancy should not be supplied, and they do not appoint one, then any party may serve the remaining parties or arbitrators with a written notice to appoint an arbitrator or umpire as the case may be, and if within seven clear days after service of the notice no arbitrator or umpire is appointed, a judge may, upon the application of the party who serves the notice, appoint an arbitrator or umpire who has the like power to act as if appointed by consent of all parties.

The section applies to references not only made by any document, but also otherwise, as by act of parliament or by parol. *Lord, In re*, 1 Kay & Johnson, 90; 24 L. J., Ch. 145.

By an agreement between two telegraph companies whose submarine lines were not then constructed, for the exclusive working of their undertakings in conjunction for twenty years, and for payments each to the other of a proportion of their gross receipts in manner therein-after mentioned, it was arranged amongst other things that either party might, after five years, claim to have the agreement, or any of the provisions thereof, modified in matters of detail by arbitration. In case the parties should not agree upon the sole arbitrator, the matter was to be referred to a sole arbitrator to be appointed in accordance with the Railway Companies Arbitration Act, 1859, and the provisions of that act were to apply to every reference to arbitra-

tion under the agreement, and as if the parties to the reference were railway companies. Amongst other things, one of the two companies claimed, after five years, to vary the proportion of gross receipts to be paid by each to the other, and the other company refused to agree to an arbitration. The Board of Trade, upon application, refused to appoint an arbitrator under the Act of 1859:—Held, upon appeal from a master's order appointing an arbitrator, under s. 12 of the Common Law Procedure Act, 1854, that this order was within the jurisdiction of the court given by that section; but that the claim to vary the proportion of gross receipts was not a matter of detail, and that in respect of this modification the order would not be confirmed. *Brazilian Submarine Telegraph Company and Western, &c. Telegraph Company, In re Arbitration between*, 42 L. T. 234.

**Appointment of One, to act alone.**—S. 13 of 17 & 18 Vict. c. 125, provides that when the reference is to two arbitrators, one to be appointed by each party, and either party fails to appoint, the other party may, after giving seven clear days' written notice, appoint an arbitrator to act alone.

The provisions of the C. L. P. Act, 1854, s. 13, that where the reference is to two arbitrators, and one party fails to appoint, the other party may appoint his arbitrator to act alone, and an award made by such arbitrator shall be binding on both parties, do not apply where the reference is to three arbitrators, one to be appointed by each of the parties thereto, and the third to be chosen by the two so appointed. *Gumm v. Hallett*, 14 L. R., Eq. 555; 26 L. T. 468.

Upon a sale of lands, one of the conditions of sale was, that "if any mistake was made in the description of the property, or any error appeared in the particulars of sale, such mistake or error should not annul the sale; but in such a case a reasonable compensation or equivalent should be given or taken, such compensation or equivalent to be settled by two referees, one to be appointed by either party, or an umpire."—Held, that the assessment of the compensation by referees was not an arbitration within the meaning of the C. L. P. Act of 1854, s. 13, so as to entitle one party to appoint a sole arbitrator. *Bos v. Helsham*, 2 L. R., Ex. 72; 36 L. J., Ex. 20; 15 L. T. 481; 15 W. R. 259.

#### b. Disqualification and Death.

**By reason of Interest.**—A dispute having arisen as to the result of a horse race, the stewards (who, by the rules of course, were to be the arbitrators of all disputes) decided against a horse against which one of them had made a bet:—Held, that the decision of the stewards was not invalid on the ground of one of them being an interested arbitrator. *Ellis v. Hopper*, 3 H. & N. 766; 28 L. J., Ex. 1.

**Being indebted to party.**—The mere fact of an arbitrator being indebted to one of the parties, is not of itself sufficient to set aside an award, though the other party was ignorant of the circumstance, and, as soon as he knew of it, objected to the arbitrator's proceeding. *Morgan v. Morgan*, 1 D. P. C. 611.

**Death.**—A contract for sale of land to a rail-

way company provided that certain specified roads should be provided by the company. This original contract was varied by an agreement, which provided that an estimate of the cost of making one of the roads should be made by A., agent of one party, and submitted to B., agent of the other, for approval, and in case of difference the amount settled by C., and that the company should pay the price to the landowner. B. died before A. submitted any estimate. Specific performance of the original contract was decreed at the suit of the landlord. *Firth v. Midland Railway Company*, 20 L. R., Eq. 100; 44 L. J., Ch. 313; 32 L. T., 219; 23 W. R. 509.

Where a plaintiff obtained a verdict, subject to a reference, and the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, and one of them afterwards objected to the substitution, the court refused to interfere, as the death of the arbitrator had the effect of opening the case, and as execution could not be issued on the verdict on account of such death. *Harper v. Abrahams*, 4 Moore, 3.

See now 17 & 18 Vict. c. 125, s. 12, *supra*.

### c. Commencement and Duration of Authority.

#### i. Generally.

**Commencement.**—S. and K., watermen on the Thames, agreed to row a right away sculler's race according to the recognized rules of boat racing, the decision of the referee to be final. The stakes were deposited with the defendant. In sculling races between professional watermen it is the custom for the competitors to start themselves, but if either should make default in starting, and any question should in consequence arise, it would be in the power of the referee to determine that question. S. and K. attempted unsuccessfully to start, and K. rowed to the referee, who ordered him to tell S. that if he would not start K. must start without him. K. rowed over the course without S., and the referee awarded the race and the stakes to him, without hearing any evidence or taking any steps to ascertain if his order had been communicated to S., and without having any means of acquiring the knowledge of the fact. In an action by S. to recover his deposit, the jury found that the order of the referee was not communicated to him, and that he had not a fair opportunity of starting:—Held, that the jurisdiction of the referee never attached, and therefore his decision was not final, and S. was entitled to recover. *Sadler v. Smith*, 10 B. & S. 17; 5 L. R., Q. B. 40; 39 L. J. Q. B. 17; 21 L. T. 502; 18 W. R. 148—Ex. Ch.

If the referee had decided that his order was communicated to S., his decision of that fact would have been final. *Id.*

An arbitrator enters on a reference, not when he accepts the office, or takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he enters into the matter of the reference, either with both parties before him, or under a peremptory appointment enabling him to proceed *ex parte*. *Baker v. Stephens*, 8 B. & S. 438; 2 L. R., Q. B. 523; 36 L. J., Q. B. 236; 15 W. R. 902.

**When Authority expires.**—An action having

been referred, under the Common Law Procedure Act, 1854 s. 3, to a master, "with all the powers of certifying of a judge at nisi prius, the costs of the cause and of the reference to be in the discretion of the master," the master made his award in favour of the plaintiff for a sum not exceeding 20*l.* and directed that the costs of the cause and of the reference should be paid by the defendant. After the award had been taken up, the master indorsed on the award a certificate that there was sufficient reason for bringing the action in the superior court:—Held, that the certificate was bad, the master being *functus officio* when it was given. *Bedwell v. Wood*, 2 Q. B. D. 626; 46 L. J., Q. B. 725; 36 L. T. 213; *S. P. Mordue v. Palmer*, 6 L. R., Ch. 22; 40 L. J., Ch. 8; 23 L. T. 752; 19 W. R. 86; and see cases *post*, AWARD, ALTERATION OF.

Sect. 15 of 17 & 18 Vict. c. 125, directs that the award shall be made within three months after the arbitrator has been appointed and entered upon the reference, unless the time has been enlarged by consent of parties or the court or a judge.

Under 17 & 18 Vict. c. 125, s. 15, an award, whether original or amended, is made in time if made within three months from the holding of the first meeting, for the purpose of considering the matters referred, and in the case of an amended award, the date of the order referring it back, and not the date of the original appointment, is intended. *Baker v. Stephens*, 8 B. & S. 438; 2 L. R., Q. B. 523; 36 L. J., Q. B. 236; 15 W. R. 902.

#### ii. Enlargement of Time.

##### a. By Consent of Parties.

**After Expiration.**—An enlargement of the time of reference, made subsequently to the time within which the award ought to have been made had expired, but with the consent of all parties, is good. *Jones v. Powell*, 1 W. W. & H. 60.

**Contents and Form of Consent.**—An agreement to enlarge the time for making an award must contain a consent that it shall be made a rule of court, otherwise no attachment will be granted for not performing an award made under it. *Jenkins v. Law*, 8 T. R. 87.

But where parties, by an indorsement in general terms on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference; amongst others, that the submission for such enlarged time shall be made a rule of court; and, consequently, the party is liable to an attachment for non-performance of an award made within such enlarged time, under 9 & 10 Will. 3, c. 15. *Evans v. Thompson*, 5 East, 189; 1 Smith, 380.

A declaration on an arbitration bond, averred that, before the time limited had expired, the parties to the bond, by a deed-poll, indorsed on the back of the bond, agreed to give the arbitrators further time to make their award, and that it was accordingly made within the enlarged time, but not performed by the parties against whom it was so made:—Held, that the plaintiff was entitled to maintain an action on such declaration, for the recovery of the amount of the

penalty contained in the bond. *Greig v. Talbot*, 3 D. & R. 446; 2 B. & C. 179.

A judge's order enlarging the time for an arbitrator to make his award should shew on the face of it that the time was enlarged with the defendant's consent, before the latter can be attached for not performing the award; but it seems that the defendant's consent may be collected from other circumstances, so as to cure the objection. *Halden v. Glasscock*, 8 D. & R. 151; 5 B. & C. 390.

Where, in an action on an arbitration bond, in which the time was limited for the arbitrator to make his award, the declaration stated that the time was afterwards, by mutual consent, enlarged:—Held, that no action would lie on the bond to recover the penalty for not performing the award made after the time first limited. *Brown v. Goodman*, 3 T. R. 592, n.

### B. By Arbitrator.

**How often.]**—When an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once. *Payne v. Deakle*, 1 Taunt. 509; *S. P.*, *Anon*, 2 Chit. 45.

**Effect of.]**—If an arbitrator has power to enlarge the time for making his award to any other day, the court will expound it to mean to any other days. *Barrett v. Parry*, 4 Taunt. 658.

Where an arbitrator enlarges the time for making his award until a particular day, the time is to be construed as inclusive of that day. *Kerr v. Jeston*, 1 D., N. S. 538; 6 Jur. 1110; *S. P.*, *In re Higham*, 9 D. P. C. 203.

A submission empowered the arbitrator to say, "by his award in writing, ready to be delivered to the parties, or any of them, on or before the 30th day of December next," or on such further and ulterior day as the arbitrator should signify "by a memorandum in writing under his hand, to be indorsed hereon," what was due by the defendant to the plaintiff:—Held, that it sufficiently appeared that the arbitrator had power to enlarge the time for making his award. *Kirk v. Unwin*, 2 L. M. & P. 519; 6 Ex. 908; 20 L. J., Ex. 345.

**Two out of three Arbitrators.]**—Where a cause was referred to two arbitrators, with power to them to appoint a third, the award to be made by a day named, or such other day as they or any two of them should appoint, and the two originally named enlarged the time for making the award before they appointed the third:—Held, that this was an invalid enlargement, and that the award made by the three could not be enforced by attachment. *Reade v. Dutton*, 2 M. & W. 62; 2 Gale, 228.

**Form of.]**—After the expiration of the time within which, by an order of reference, an award was to be made, an order was obtained to enable the arbitrator to enlarge the time to the 2nd of November, "or such other or ulterior day as the arbitrator should ultimately appoint, and signify in writing under his hand, to be indorsed on the order of reference." The arbitrator, accordingly, enlarged the time till the 2nd of November, and made his award on the 11th of October:—Held, that it was necessary to indorse such enlargement on the order of reference. *Davison v.*

*Gawtlett*, 3 M. & G. 550; 4 Scott, N. R. 220; 1 D., N. S. 198.

**Mistake in Award.]**—Where the time for making an award had been duly enlarged, but, by mistake, appeared in the recital of the award to have been enlarged after the time for doing so had expired:—Held, no ground for refusing to enforce the award. *Lloyd, In re*, 6 D. & L. 531.

**Enlargement lost.]**—So, where the enlargement of the time for making an award was lost, the court, upon an affidavit of the loss, the due making of the enlargement, and the making of the award before the expiration of the enlarged time, allowed the order of reference to be made a rule of court. *Phillips v. Higgins*, 2 L. M. & P. 96.

**Rule, Form of.]**—A rule nisi for an enlargement, or for remitting the matters back, or for entering judgment after an award, need not, in terms, be drawn up "upon reading the rule of court making the submission in the cause a rule of court," if it sufficiently appears by the affidavits that the submission has been made a rule of court. *Brown v. Collyer*, 2 L. M. & P. 470; 20 L. J., Q. B. 426; 15 Jur. 881.

**Verification of Enlargement.]**—An arbitrator, who has enlarged the time for making his award, may be required to verify the enlargement. *Roberts v. Evans*, 6 B. & S. 1; 34 L. J., Q. B. 7; 11 Jur., N. S. 15; 11 L. T. 336; 13 W. R. 74.

On his refusal to do so, the court will make an order for his examination. *Id.*

An enlargement of time by an arbitrator for making his award, indorsed thereupon, and purporting to have been made within the time prescribed by the reference, needs not be proved by an affidavit either of the arbitrator or of an attesting witness, but it is sufficient that there is an affidavit verifying the handwriting and signature of the arbitrator. *Roberts v. Evans*, 34 L. J., Q. B. 73; 11 Jur., N. S. 321; 11 L. T. 625; 13 W. R. 290.

### Waiver of irregular or invalid Enlargement.]

—By the terms of a reference, two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, and to make their award before a certain day, or such time as they, or any two of them, should appoint; the arbitrators, before appointing an umpire, enlarged the time, and afterwards held a meeting, at which the parties attended:—Held, that the latter being aware of these facts, and having attended, could not afterwards make any objection on the ground of the enlargement of the time having been made before the appointment of the umpire. *Hick, In re*, 8 Taunt. 694.

An objection that the time for making an award has not duly been enlarged, is waived by proceeding in the reference with a knowledge of that fact. *Lawrence v. Hodgson*, 1 Y. & J. 16; *S. P.*, *Hallett v. Hallett*, 5 M. & W. 25; 7 D. P. C. 389; 2 H. & H. 3; 3 Jur. 727.

By an order of nisi prius a verdict was entered for the plaintiff, subject to the award of an arbitrator. The plaintiff's attorney neglected to deliver the order of reference to the arbitrator until after the time for making the award had expired:—Held, that it was irregular to try the



cause a second time without getting rid of the previous verdict, and that such irregularity was not waived by the defendant attending an order for the examination of the plaintiff's witnesses. *Hall v. Rouse*, 6 D. P. C. 656; 4 M. & W. 24.

If an arbitrator, who has suffered his time to expire, determines to proceed in the reference, notwithstanding an objection taken on that ground by a party to the reference, and the party protests that any award which the arbitrator may make will be therefore void, his continuing to attend and contest the case before the arbitrator, under such protest, does not give the arbitrator authority to make an award. *Ringland v. Lowndes*, 17 C. B., N. S. 514; 33 L. J., C. P. 337; 10 Jur., N. S., 860; 12 W. R. 1210—Ex. Ch.; *S. P., Davies v. Price*, 34 L. J., Q. B. 8; 11 L. T. 203; 12 W. R. 1009—Ex. Ch.

A waiver must be an intentional act with knowledge. Where, therefore, there is an agreement to refer to arbitration, and it is agreed that the award shall be made within a specified time, and the award is not made until after the expiration of such time, and one of the parties, in ignorance of that fact, takes it up and pays the charges for it, his doing so will not amount to a waiver of the condition as to time specified in the agreement. *Darnley (Earl) v. London, Chatham and Dover Railway Company*, 2 L. R., H. L. 43; 36 L. J., Ch. 404; 16 L. T. 217; 15 W. R. 817—H. L.

An award bad, as being made out of time, is not cured by the party impeaching it having attended the first of several meetings after the expiration of the period limited in the order of reference. Such attendances are only good pro tanto, and do not justify the arbitrator in going on when the parties are absent. Nor do they constitute a parol submission to a fresh arbitration. The later meetings take place on the terms of the original submission. *Dunstan v. Norton*, 13 L. T. 722.

On a compulsory reference it is no objection to entering up judgment on the award, that the award was made more than three months after the arbitrator entered on the reference, though the order of reference names no time, and no written consent for enlarging the time has been given by the parties, if it appears that the parties have, within a month before the making of the award, acted upon the reference as subsisting, such acting estopping them from contending that the circumstances necessary to give jurisdiction to the arbitrator did not exist. *Tyerman v. Smith*, 6 El. & Bl. 719; 25 L. J., Q. B. 359; 2 Jur., N. S. 860.

#### *γ. By Court or Judge.*

**Statute.**—By 3 & 4 Will. 4, c. 42, s. 39, *where the submission is by or in pursuance of a rule of court, or judge's order, or order of Nisi Prius, in any action, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of court, the court or a judge may from time to time enlarge the time for making the award.*

**Effect of Statute.**—The power given to the court or a judge by 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, is general, and is not confined to cases where there has been a revocation of or attempt

to revoke the submission. *Burley v. Stephens*, 1 M. & W. 156; 4 D. P. C. 255, 770; 1 Gale, 374; *S. P., Salkeld, In re*, 12 A. & E. 767; 4 P. & D. 732; 4 Jur. 1132.

**After Time elapsed.**—The power of the court to enlarge the time for making an award under 3 & 4 Will. 4, c. 42, s. 39, extends to cases where the order or rule of court gives the arbitrator himself power to enlarge, but he has refused or neglected to exercise it. *Edwards v. Davies*, 2 C. L. R. 681; 23 L. J., Q. B. 278; 18 Jur. 448.

The court has power, under 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator, having power to do so, has allowed the time limited by the submission for making the award to elapse without doing so. *Parberry v. Newnham*, or *Newman v. Parberry*, 7 M. & W. 378; 9 D. P. C. 288; 5 Jur. 175; *S. P., Leslie v. Richardson*, 6 C. B. 378; 6 D. & L. 91; 17 L. J., C. P. 324; 12 Jur. 730.

**Effect of Delay.**—But where a cause was referred in 1846, after which both parties had delayed proceeding with the reference, and the arbitrator having omitted to enlarge the time for making his award beyond Easter Term, 1850, the court refused to enlarge the time to Michaelmas Term, 1852, the defendant refusing his consent to such enlargement. *Andrews v. Eaton*, 7 Ex. 221; 21 L. J., Ex. 110; *S. P., Lambert v. Hutchinson*, 3 Scott, N. R. 221; 2 M. & G. 858.

The court will not enlarge the time for making an award where there has been a long delay (e.g. three years) since the last step was taken upon the award, and such delay is not satisfactorily explained, because the position of the parties may be altered, and they may be unable to produce their witnesses. *Doe d. Maynes or Mays v. Cannew or Cannell*, 22 L. J., Q. B. 321; 17 Jur. 347.

**Though Contrary to Submission.**—A covenant that any differences which may thereafter arise between the parties touching the matters of the deed shall be referred; and although the covenant to abide by the award is expressly subjected to the proviso, "so as" the award be made within a given time, with power to the arbitrator to enlarge the time, but "so as" the enlargement shall not extend beyond a day named, yet if the submission can, by the agreement, be made a rule of court, a judge may, before the expiration of the limited period, or of such enlargement, extend the time for making the award to a day later than the last day named in the submission. *Parke v. Smith*, 15 Q. B. 297; 19 L. J., Q. B. 405; 14 Jur. 761.

By reference of the 8th of April, 1854, arbitrators were to award by the 25th of June, with liberty to enlarge the time, but not to exceed the 31st of August; if they did not award within the time limited for them, the matters were to be determined by an umpire, who was to make his award within two months from his appointment, with liberty to him to enlarge his time, but not exceeding another two months. On the 20th of April the arbitrators appointed an umpire, and in the appointment stated that his duties should commence officially on the 1st of September, and should terminate before the 1st of January. The arbitrators could not agree. The umpire did not enlarge his time,

and the 31st of October passed. The court, without deciding as to the validity or effect of the umpire's appointment, granted a rule, enlarging the time of the umpire for making the award until the end of December. *Johnson, In re*, 24 L. J., Q. B. 63.

**After Award.]**—The court or a judge has power to enlarge the time after the arbitrator has made his award. *Brown v. Cullyer*, 2 L. M. & P. 470; 20 L. J., Q. B. 426; 15 Jur. 881.

By a submission which might be made a rule of court, the time for making the award was limited to a day named, or such further day, not exceeding two calendar months from the date of the submission, as the arbitrator might appoint. The arbitration was closed before the day named, and the arbitrator also before the day named enlarged the time for making the award, but to a day later than the two months. The arbitrator made his award within the enlarged time, but after the two months.—Held, that the court or a judge had power afterwards to enlarge the time for making the award under 3 & 4 Will. 4, c. 42, s. 39. *Ward, In re*, 32 L. J., Q. B. 53; 11 W. R. 88.

**Death of Party.]**—By an order of a judge a cause was referred to two arbitrators, and in the event of their disagreeing to an umpire, with power to examine the parties to the suit. The day fixed for making the award was the 20th of April; that period was subsequently enlarged, by consent, to the 10th of October; on the 24th of July the defendant died; on the 17th of October, by an order of a judge, the time limited for the arbitrators to make their award was extended to the 7th of November. The umpire, on the 6th of November, made an award in favour of the plaintiff. On motion made on the last day but two of Michaelmas Term, to set aside the judge's order for enlarging the time:—Held, too late. *Bowen v. Williams*, 6 D. & L. 235; 3 Ex. 93.

Upon a reference by order of nisi prius, the arbitrator was to make his award on or before the 24th of August, 1852, or such his ulterior day as he might from time to time appoint. The award was to be delivered to the personal representatives of either party who might die. Meetings were held, and there was an adjournment, with a view to an amicable settlement between the parties. The arbitrator inadvertently allowed the 24th of August to pass without enlarging the time, and in June, 1853, the plaintiff died:—Held, that, under the circumstances of the case, the court would not exercise its discretion by ordering the time to be enlarged. *Edwards v. Davies*, 2 C. L. R. 681; 23 L. J., Q. B. 278; 18 Jur. 448.

**On Bankruptcy of Party.]**—A. and B., parties in three actions, submitted all matters in dispute between them to arbitration; B. became bankrupt after the arbitration had been entered upon, and before any award had been made by the arbitrator, who had inadvertently allowed the enlarged period, within which the award was to be made, to expire without further enlargement. The assignees of B., without having become parties to the proceedings, moved the court to enlarge the time for making the award:—Held, that the court even if it had the jurisdiction, would not enlarge the time, there being no

mutuality between A. and the assignees of B. *Gaffney v. Killen*, 12 Ir. C. L. R. App. xxv.

**Orders for Enlargement.]**—An order for enlarging the time for making an award as to matters in difference was intitled in a cause in the Queen's Bench which was at an end:—Held, that the title was mere surplusage, and did not invalidate the order. *Oldfield v. Price*, 6 C. B., N. S. 539.

Orders of different judges to the number of eleven, enlarging the time for making an award, were made a rule of court by a single rule. *Upperton and Tribe, In re*, 3 A. & E. 295; 1 H. & W. 280.

**17 & 18 Vict. c. 125, s. 15.]**—By 17 & 18 Vict. c. 125, s. 15, a judge is authorized "for good cause, to be stated in the order for enlargement," to enlarge the time for making an award:—Held, that an order is not invalid for omitting to state any cause for making it; and, therefore, if there is no application to set aside such order, and the order is made within the enlarged time, an objection to the award, on the ground of such omission in the order, cannot be sustained. *Burdon, In re*, 27 L. J., C. P. 250.

The 17 & 18 Vict. c. 125, s. 15, applies to references by consent, as well as those under a compulsory order. *Lord v. Lee*, 9 B. & S. 269; 3 L. R., Q. B. 404; 37 L. J., Q. B. 121; 16 W. R. 856.

The plaintiff and defendant agreed in writing, on the 8th August, 1866, to refer all matters in dispute between them to an arbitrator. The agreement did not limit any time for making the award. The arbitrator entered on the reference at once, but did not make his award within three months after. Afterwards a judge made an order, enlarging the time for making the award; and the plaintiff took up the award within the time so enlarged. In an action upon the award:—Held, that the judge had power to make the order, and that its effect was to ratify the act of the arbitrator, and therefore the action was maintainable. *Id.*

**— After Three Months.]**—In a reference under 17 & 18 Vict. c. 125, s. 11, the court or a judge has power to enlarge the time for making the award, although the three months limited for it by s. 15 have expired. *Watson v. Bennett* or *Bennett v. Watson*, 5 H. & N. 831; 29 L. J., Ex. 357; 6 Jur., N. S. 637; 8 W. R. 612.

By a submission in writing the award was to be made within a month, or within such further time (not exceeding three months from the date of the submission) as the arbitrator should enlarge the time to. The award not having been made within the three months:—Held, that a judge, in his discretion, had power to enlarge the time under the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 15. *Denton, In re, Denton v. Strong*, 9 L. R., Q. B. 117; 43 L. J., Q. B. 41; 30 L. T. 52; 22 W. R. 316.

#### d. Privilege as to Disclosing Evidence.

**Before Award taken up.]**—Arbitrators whose award has not been taken up are privileged from producing as witnesses, on the subpoena of a party to the submission, the submission, the award, or papers obtained by them from experts for their guidance, and from disclosing the con-

tents of the award, or giving evidence as to the discussions which took place during the investigation, whether public or private; but they are bound to produce documents handed to them during the investigation by the party who calls them as witnesses; and any objections to the production of like documents belonging to other parties can be taken only by such parties, and not by the arbitrators. *Ponford v. Swaine*, Johns. & H. 433.

Arbitrators are also bound to answer whether a particular subject of inquiry was pressed upon them by either party, but not as to the course of discussion and investigation which followed. *Ib.*

**As to Enlargements of Time.]**—On motion to discharge a rule for making an order of reference with the enlargements of time indorsed thereon a rule of court, the court, under 17 & 18 Vict. c. 125, s. 46, ordered the arbitrator to appear before the master to be examined as to the time when the enlargements were made. *Roberts v. Evans*, 6 B. & S. 1; 34 L. J., Q. B. 7; 11 Jur., N. S. 321; 11 L. T. 625; 13 W. R. 290.

#### **Competency of Arbitrator to Explain Award.]**

—An arbitrator may be called as a witness in an action to enforce his award. *Buccleuch (Duke) v. Metropolitan Board of Works*, 5 L. R., H. L. Cas. 418; 41 L. J., Ex. 137; 27 L. T. 1—H. L.

He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration. *Ib.*

But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to him. *Ib.*

The court will admit evidence of an arbitrator in explanation of his award. *Dare Valley Railway Company, In re*, 6 L. R., Eq. 429; 37 L. J., Ch. 719.

An arbitrator may be properly asked by the court whether he was or was not required to find specifically on the various issues submitted to him; on being asked, the arbitrator may, but is not compelled, to answer. *Wilson v. Hinchley*, 18 L. T. 695.

**— Since Judicature Acts.]**—The former law and practice with regard to references to arbitration are not abolished by the Judicature Act, and consequently, where a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be called on to report to the court with regard to the matter referred to him, but his decision is final. *Cruikshank v. Floating Swimming Baths Company*, 1 C. P. D. 260; 45 L. J., C. P. 684; 34 L. T. 733; 21 W. R. 644.

An order was made that a cause should be referred to the master, and that the subsequent proceedings should be continued and concluded according to the new practice:—Held, that the reference was not merely for report by the master under the new powers given by the Judicature Act, but for decision, and that the master could not be made to report to the court, but his decision was final. *Ib.*

#### **e. Actions Against.**

**Liability to be Sued—Valuer or Arbitrator.]**—

The plaintiff purchased the goodwill, stock, and effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, and in case of difference by an umpire to be chosen by the valuers. The plaintiff employed the defendant as his valuer, and he and the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, the plaintiff applied to administer interrogatories to the defendant to ascertain the basis on which he had agreed with the valuer of the defendant to calculate the valuation:—Held, that the defendant had not acted in the matter as an arbitrator, but as a valuer only, and was therefore liable to his employer for negligence, and the plaintiff accordingly was allowed to administer the interrogatories. *Turner v. Goulden*, 9 L. R., C. P. 57; 53 L. J., C. P. 60.

A broker made a contract for the seller as follows:—"Oct. 26, 1869. Sold by order and for account of Mr. P., to my principals, Messrs. S. H. & Son, to arrive, 500 tons black Smyrna raisins, 1869 growth, fair average quality in opinion of selling broker, to be delivered here in London at 22s. per cwt. Shipment November or December, 1869."—Held, that the broker was employed as an arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for failing to exercise reasonable care and skill in coming to a decision, he having acted *bonâ fide*, and to the best of his judgment. *Pappa v. Rose*, 7 L. R., C. P. 32; 41 L. J., C. P. 11; 20 W. R. 62; affirmed on appeal, 7 L. R., C. P. 525; 41 L. J., C. P. 187; 27 L. T. 348; 20 W. R. 784—Ex. Ch.

L., exercising the avocation known among the mercantile community as an average adjuster, was employed by A. and B., under the terms of an agreement, to examine into and decide upon a disputed claim between them as to the salvage and loss of cargo upon a wreck. Having pronounced his decision, with which A. was dissatisfied, he brought an action for damages, imputing that L. had not used due diligence in ascertaining the facts as to the matters submitted to him, and for negligence in the performance of the duty which he had undertaken for reward. To this L. pleaded that he had decided *bonâ fide*:—Held, that he was, in reference to the question into which he was commissioned by A. and B. to inquire, in the position of an arbitrator, and that as they must be held to have bound themselves to abide by his award, he in the character that had been imposed upon him by the parties was not liable to an action at the suit of either of them. *Tharsis Sulphur and Copper Company v. Loftus*, 8 L. R., C. P. 1; 42 L. J., C. P. 6; 27 L. T. 549; 21 W. R. 109.

**For Recovery of Stakes.]**—A. deposited a stake with B., with a view to a race between A. and K., upon the terms "that the race was to be a right-away sculler's race, and the decision of the referee to be final." In such races the start is made by the men themselves; but if they fail to start through default of either, or both, the referee has power to interfere. There was a default in the start, and the referee, who was

stationed at some distance from the starting-post, ordered that K. should inform A. that if he did not start, K. was to row over the course without him. K. rowed over the course without having communicated this order to A., or given him any opportunity of starting, and the referee, without inquiry or communication with A., ordered the stakes to be paid to K. An action having been brought by A. to recover his deposit:—Held, that, as the order of the referee was conditional on its being communicated to A., the order not having been communicated, there never was such a start or a race as was contemplated; the referee's jurisdiction to award the stakes, therefore, did not attach, and his decision was not final, and that A. was entitled to recover. *Sadler v. Smith*, 10 B. & S. 17; 5 L. R., Q. B. 40; 39 L. J., Q. B. 17; 21 L. T. 502; 18 W. R. 148—Ex. Ch.

### f. Delegating Authority.

**By Arbitrators to one of themselves.]**—A cause, and all matters in dispute, were referred to two merchants and a legal arbitrator; the arbitrators met, and two of them agreed, upon the merits, to find in favour of the plaintiff; but the lay arbitrators agreed to leave a point of law, which had arisen, to the decision of the barrister. The legal arbitrator decided that point in favour of the plaintiff, and executed the award at Birmingham, in accordance with his own views. On the next day, the award was executed in London by one of the lay arbitrators, also in favour of the plaintiff:—Held, that the award was bad, as being a decision by one arbitrator pursuant to a power delegated to him by the other arbitrators, they having no authority so to delegate. *Little v. Newton*, 2 Scott, N. R. 159; 2 M. & G. 351; 9 D. P. C. 437; 5 Jur. 246.

Where there are three arbitrators, one legal and two lay, no principle of law will authorize the laymen in giving up their opinion on any question of law, which may await upon their decision, to the separate and distinct ruling of the legal arbitrator. *Ib.*

**By Consent of Parties.]**—Pending a reference, the parties, by a memorandum to which the arbitrator was an assenting party, agreed that a portion of an account in dispute between them should be settled and adjusted by a third person, whose report was to be adopted by the arbitrator as conclusive evidence:—Held, that this was not an improper delegation of authority by the arbitrator. *Sharp v. Nowell*, 6 C. B. 253.

**Part of Matter in Dispute left to be determined by Another.]**—An action by one weir proprietor against another for disturbance of a weir, was referred to an arbitrator, who was to have full power to define and for ever set at rest all disputes, quarrels and controversies touching all manner of rights of depths of weirs, and other water privileges. The arbitrator directed that "for the purposes of defining, denoting and perpetuating the limit of the depth," that within one month such durable erections and marks be placed on the land adjoining to the weir, as B. may direct as being the best adapted for so defining, denoting and perpetuating the limit of the depth of fourteen inches:—Held bad, as being a delegation of the discretion vested in

him. *Johnson v. Latham*, 1 L. M. & P. 348; 19 L. J., Q. B. 329.

On a reference of all matters in dispute between G. & M., the umpire directed that the parties should execute mutual releases of all claims and demands whatsoever, and that in case of dispute the form of the releases should be settled by P.:—Held, that the delegation to P. of authority to settle the releases was void. *Goddard, In re*, 1 L. M. & P. 25; 19 L. J., Q. B. 305.

An arbitrator, on a reference with respect to the right to a house and premises, directed conveyances to be executed by one party to the other, and awarded that, in case of any dispute arising with respect to the form of those conveyances, those disputes should be settled by such counsel or solicitor as he should appoint:—The court set aside the award, on the ground that the arbitrator, by reserving a future power to himself to delegate the authority to determine disputes between the parties, had exceeded his authority, and as this direction could not be separated from the rest of the award. *Tandy, In re*, 9 D. P. C. 1044; 5 Jur. 726.

Arbitrators were empowered to decide on what terms a building lease held by an individual under a corporation should be renewed. They awarded that the corporation should put the premises in "good tenantable repair, to the satisfaction of M., builder":—Held, that this reference of the repairs to the judgment of a third person was not within the authority of the arbitrators, and made the award bad. *Tynlin v. Fordwich (Mayor, &c.)*, 6 N. & M. 594; 5 A. & E. 147.

Where an arbitrator made his award "subject to the opinion" of another:—Held, that this was a substituted judgment, and the award therefore bad. *Ellison v. Bray*, 9 L. T. 730.

**Expert may be asked his Opinion.]**—Under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock of a partnership, it is no objection to their award that they have availed themselves of the assistance of such person in deciding on the partnership accounts. The arbitrators, by adopting in terms the opinion of such person, do not constitute him an umpire, but make his opinions their own; and their award cannot be impeached on that account. *Anderson v. Wallace*, 3 C. & F. 26.

Where, by the terms of a submission, an arbitrator is allowed the assistance of an accountant, or any other person for a particular purpose, the arbitrator must not delegate his authority to such assistant, or permit him to interfere in any way with the award. *Haigh v. Haigh*, 31 L. J. Ch. 420; 8 Jur., N. S. 983—L. J.

Various matters in difference being referred to two arbitrators, the parties consented that they might, in case of difficulty, consult a third person, who was named, and the arbitrators did so on one out of the whole number of questions arising in the investigations, and they adopted the opinion which he gave them upon it, without, as far as appeared, exercising any independent opinion on it, and made their award on the whole of the matters referred:—Held, that the award was not thereby invalidated. *Whitmore v. Smith*, 7 H. & N. 509; 31 L. J., Ex. 107; 8 Jur., N. S. 514; 6 L. T. 618—Ex. Ch.

It is not ultra vires of an arbitrator to remit

to an expert. He may consult men of science, or call in a valuer to assist him, unless prohibited by the terms of the submission. *Caledonian Railway Company v. Lockhart*, 3 Macq. H. L. Cas. 808.

**Report of Expert—Further Evidence.]**—An arbitrator who, in making his award as to certain disputed questions of account, was to have regard to the principles of taking the accounts shewn in certain accounts prepared by public accountants, submitted the written statements of claims made by either disputant to such accountants for their report thereon, upon receiving which he forthwith made his own award in accordance therewith and in absence of the parties:—Held, that the award must be set aside without prejudice to any question; first, because the report of the accountants must be considered as evidence on which either party had a right to be heard, and that the issue of the award was made with undue haste; and, secondly, because the arbitrator had too far delegated his own authority to the accountants. *Eastern Counties Railway Company v. Eastern Union Railway Company*, 3 De G., J. & S. 610.

Upon a reference of an action on a builder's bill to the master, he may appoint a surveyor to report as to value, but he must receive the report in the same way as other evidence, and cannot refuse to hear additional evidence tendered by the parties. *Gray v. Wilson*, 1 L. R., C. P. 50; 35 L. J., C. P. 123; 14 W. R. 584.

**Opinion of Counsel.]**—The court refused to set aside an award made by two of three arbitrators, upon a suggestion by the third, that the award had been influenced by the opinion of counsel taken by the others upon a case inaccurately stated; the two arbitrators swearing that the case was not inaccurately stated, and that their minds had been made up as to the award before the opinion was taken. *In re Hare*, 8 Scott, 267.

**Legal Adviser.]**—A recital in an award, that it had been drawn by a person who, under the terms of the submission, attended the arbitrator as an attorney, does not constitute any improper delegation of authority. *Baker v. Cuttlerill*, 7 D. & L. 20; 18 L. J., Q. B. 345; 14 Jur. 1120.

It is highly improper, though not per se a ground for setting aside his award, for an arbitrator to employ the attorney of one of the parties to the reference (though his own attorney also) to assist him in framing the award. *Underwood, In re, Bedford and Cambridge Railway Company, In re*, 11 C. B., N. S. 442; 31 L. J., C. P. 10; 5 L. T. 581; 10 W. R. 106.

Semble, that a lay arbitrator may avail himself of and charge for professional assistance in preparing his award. *Galloway v. Keyworth*, 15 C. B. 228; 2 C. L. R. 860; 23 L. J., C. P. 218.

The court will not sanction an award which has been made ex parte, one of the parties having withdrawn from the reference in consequence of the arbitrator (a layman) insisting, in spite of his protest, to retain the services of an attorney to assist him at the hearing. *Proctor v. Williams, or Williamson*, 8 C. B., N. S. 386; 29 L. J., C. P. 157; 6 Jur., N. S. 758; 1 L. T. 372; 8 W. R. 190.

## **g. Jurisdiction of Court over Arbitrators.**

**Entering Nonsuit against direction.]**—Where a cause has been referred the court cannot interfere to enter a nonsuit against the arbitrator's direction; but the party objecting to the award must move to set it aside. *Peters v. Anderson*, 1 Marsh. 238; 5 Taunt. 596.

**Restrain from acting.]**—Semble, that the court has jurisdiction to restrain by injunction an arbitrator from proceeding with a reference, on the ground of corruption. *Malmesbury Railway Company v. Budd*, 2 Ch. D. 118; 45 L. J., Ch. 271.

An injunction was granted, at the instance of one of the parties to an arbitration, restraining an arbitrator from continuing to act, the court being of opinion that under the circumstances it was not probable that he would faithfully and honestly discharge his duty. *Beddow v. Beddow*, 9 Ch. D. 89; 47 L. J., Ch. 588; 26 W. R. 570.

The Judicature Act, 1873, s. 25, sub-s. 8, has given no power to the High Court to issue an injunction in a case in which no court before that act had power to give any remedy whatever. Therefore the High Court has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious:—Semble, per Brett, L. J., that the Judicature Act, 1873, has dealt only with procedure, and not with jurisdiction at all, and that if no court had power to issue an injunction before that act, the High Court has no such power now. *North London Railway Company v. Great Northern Railway Company*, 11 Q. B. D. 30; 52 L. J., Q. B. 380; 48 L. T. 695; 31 W. R. 490.—C. A. Reversing, 47 L. T. 383.

The court will not grant a rule to restrain the arbitrator from proceeding when criminal matters are referred to him. *Rea v. Bardell*, 5 A. & E. 619.

**Compelling to Proceed.]**—A cause and all matters in difference were referred: the arbitrator to make and publish his award, ready to be delivered to the parties or either of them, "or if they or either of them should be dead before making the award, to their personal representatives" on or before a certain day. Several meetings were held, but one party died before the reference was concluded. The arbitrator refused to proceed as the executrix of the deceased protested:—Held, that the court could not direct the arbitrator to proceed. *Lewin v. Ilcbrook*, 11 M. & W. 110; 2 D. N. S. 991; 12 L. J., Ex. 267. *S. P., Edwards v. Davies*, 23 L. J., Q. B. 278; 18 Jur. 448.

**Not Private Arbitrators.]**—Where a railway act provided that the expenses of altering the gauge of a railway should be borne by several companies in equitable proportions, to be determined in case of difference by the Board of Trade:—Held, that the Board of Trade and commissioners of railways (who succeeded to the functions of the Board) were not in the position of private arbitrators, but had a discretion which the court could not control, and that a bill to set aside their award, on the ground of undue delegation of authority, and the admission of

ex parte statements, could not be sustained. *Newry and Banishillen Railway Company v. Ulster Railway Company*, 8 De G., Mac. & G. 487.

#### h. Fees and Remuneration.

**Jurisdiction of Court.**—The court has no general jurisdiction over arbitrators as to the amount of fees charged by them, whether the reference is under a rule of court or not. *Dossett v. Gingell*, 2 M. & G. 870; 3 Scott, N. R. 179.

Nor over those of an attorney who prepares the award. *Id.*

**Amount.**—When a lay arbitrator charged fifty guineas for four meetings, the master declined as between party and party to allow anything in addition (except the stamp duty) for the charges of an attorney for preparing the award, and a rule to review was refused. *Galloway v. Keyworth*, 15 C. B. 228; 2 C. L. R. 860; 23 L. J., C. P. 218.

Where arbitrators awarded in favour of the plaintiff, who, in order to take up the award, paid their charges, which were exorbitant. The master, on taxation of the plaintiff's costs, refused to allow the full charge paid by him:—Held, that the excessive charge was properly disallowed. *Barnes v. Hayward*, 1 H. & N. 742; *S. P.*, *Webb v. Wyatt*, 3 Jur., N. S. 496.

The amount of the fee which an arbitrator awards to be paid to himself for his award, is examinable by the master. *Fitzgerald v. Graces*, 5 Taunt. 342.

If arbitrators award an excessive sum to be paid to themselves, the court will refer it to the master to reduce it. *Miller v. Robe*, 3 Taunt. 461. And see *Musselbrook v. Dunkin*, 2 M. & Scott, 740; 9 Bing. 605; 1 D. P. C. 722.

If a lay arbitrator avails himself of professional assistance, his charges must be reasonable. *Galloway v. Keyworth*, 15 C. B. 228; 2 C. L. R. 860; 23 L. J., C. P. 218.

**Application for Arbitrator to Refund.**—A cause being referred, the arbitrator, in 1825, received from the plaintiff's attorney 87l. for his fees and expenses. In 1827, the parties went before the master, when he allowed only 35l. The defendant, after a lapse of eight years from the time the payment was made (the attorney who paid the money having died in the interim) applied to the court to order the arbitrator to refund the difference:—Held, that the application was too late. *Brazier v. Bryant*, 3 M. & Scott, 844; 2 D. P. C. 757.

Where a party is compelled to pay to a lay arbitrator an exorbitant sum, in order to take up the award, he may maintain an action to recover the excess beyond what is a proper remuneration for the arbitrator's service. *Barnes v. Braithwaite*, 2 H. & N. 569.

**Recovery of Fees.**—Where an award is taken up by one party, and all the costs paid to two out of three arbitrators, the third arbitrator has no remedy against either party in the cause. *Burroughes v. Clarke*, 1 D. P. C. 48.

An action on an implied promise to remunerate an arbitrator cannot be maintained. *Virany v. Warne*, 4 Esp. 416. See *Swinford v. Burn*, Gow, 7.

But an arbitrator may maintain an action on

an express promise to pay him the costs of a reference. *Hoggins v. Gordon*, 2 G. & D. 656; 3 Q. B. 467; 11 L. J., Q. B. 286; 6 Jur. 895.

A declaration stated that a cause was referred to A. and B. and such third person as they should appoint, or of any two of them; that A. and B. appointed C., of which the defendant had notice; and that, in consideration that A., B. and C. would take upon themselves the burthen of the reference, the defendant promised to pay them their reasonable costs of the award; that they proceeded and made their award, ordering the defendant to pay them their costs:—Held, that the three arbitrators could sue on this as a joint contract. *Id.*

**Recovery of Moiety from another party.**—Where two parties employ an arbitrator, and one pays the arbitrator's fees to enable him to take up the award (there being no event of the award to entitle either party to costs), the party so paying is entitled to recover from the other a moiety of the sum paid, as money paid to his use. *Marnack v. Webber*, 6 H. & N. 1; 4 L. T. 553.

By articles of agreement between the plaintiff and the defendant, certain differences between them were referred, the costs of the reference and the award to be in the discretion of the arbitrators. The award found a sum due from the defendant to the plaintiff, and directed that the costs of the reference and award, including compensation to the arbitrators, should be borne, one moiety thereof by the plaintiff, and the other moiety by the defendant. The plaintiff took up the award, and paid the whole costs:—Held, that he could not recover a moiety thereof as money paid to the defendant's use. *Bates v. Townley*, 2 Ex. 152; 19 L. J., Ex. 399.

**Naming amount in award.**—Upon shewing cause against a rule to pay over to one party to a reference the sum awarded, it appearing that the umpire awarded that a specific amount should be paid for his own and the arbitrator's costs, the court, upon the ground that the specific amount of such costs was mentioned in the award, refused to exercise its summary jurisdiction, and discharged the rule. *Parkinson, In re*, 30 L. J., Q. B. 178; 9 W. R. 340.

It is no ground for setting aside, or sending back, an award, that the arbitrator has fixed the cost of his own award (the amount not being shewn to be excessive), nor that he has said nothing as to the plaintiff's costs, the plain inference being that he meant the plaintiff to pay his own costs. *Rose v. Redfern*, 10 W. R. 91.

An arbitrator cannot, unless such power is expressly reserved to him by the submission, award to himself a sum (named or otherwise), for his own costs and expenses. *Roberts v. Eberhardt*, 3 C. B., N. S. 482; 4 Jur. N. S. 898. *S. P.*, *Coombs, In re*, 4 Ex. 839; *Fernley v. Branson*, 15 Jur. 354; 20 L. J., Q. B. 178.

#### 1. Stating Case for Opinion of Court.

**Statute.**—By 17 & 18 Vict. c. 125, s. 5, it shall be lawful for the arbitrator, upon a compulsory reference, or upon a reference by consent of parties where the submission is or may be made a rule or an order of the superior courts of law or equity, if he shall think fit, and it is

*not provided to the contrary, state his award as to the whole or any part thereof in the form of a special case for the opinion of the court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court.*

**Power to state Case.]**—The West Kent Sewerage Board is incorporated by a local act of 38 & 39 Vict. c. clxiii., and by sect. 93 it is enacted that, if any difference arises between the board on the one hand and any constituted authority or person on the other hand, or between any two or more constituted authorities, or between any constituted authority and any parish or person, respecting any assessment of a main sewer rate, or any determination of the board, or any controversy or other matter under the act, the same shall by virtue of the act stand referred for decision to the Local Government Board, whose decision thereon and respecting the costs of the reference shall be final and binding. A dispute having arisen between the West Kent Sewerage Board and the Bexley Local Board respecting a claim made by the local board against the sewerage board for compensation for damage done to the highways, &c. of the district, the disputants, with the consent of the Local Government Board, stated a case for the opinion of this court:—Held, that it was not competent to them to do so, the Local Government Board being by sect. 93 constituted the tribunal whose decision on the matter was to be final and binding, and this not being a submission to arbitration within sect. 5 of the Common Law Procedure Act, 1854. *Bexley Local Board v. West Kent Main Sewerage Board*, 9 Q. B. D. 518; 51 L. J., Q. B. 456; 47 L. T. 192; 31 W. R. 119; 46 J. P. 519.

The umpire in an arbitration under the Lands Clauses Consolidation Act, 1845, in which each party had appointed an arbitrator, made his award in the form of a special case for the opinion of a superior court:—Held, that he had the power to state a case, the appointment of an arbitrator being, by the terms of s. 25, a submission to arbitration on the part of the party by whom the same is made, and the arbitration being, therefore, an arbitration by consent within the Common Law Procedure Act, 1854, s. 5. *Rhodes v. Airedale Drainage Commissioners*, 1 C. P. D. 402; 45 L. J., C. P. 861; 35 L. T. 46; 24 W. R. 1053—C. A. Reversing 9 L. R., C. P. 508; 43 L. J., C. P. 323; 31 L. T. 59.

**Optional not compulsory Power.]**—Where a cause is referred, the arbitrator to be at liberty to state any point of law for the opinion of the court, and he declines to do so, the court will not interfere with his discretion. *Miller v. Shuttleworth*, 7 C. B. 105; *S. P., Wood v. Hotham*, 5 M. & W. 674.

An action was referred to the master, who was to be at liberty to state any point of law desired by either party, for the opinion of the court. The master gave his certificate in favour of the plaintiff, and declined to submit to the court for its opinion a point of law which was taken by the defendant on the hearing. The defendant having moved to set aside the certificate:—Held, that the clause giving liberty to the master to state a case was not compulsory; and the matter having been fully discussed before

the arbitrator, the court would not set aside the certificate or remit the case to the arbitrator. *Gibson v. Parker*, 5 L. T. 584.

**Form of Case.]**—When an arbitrator states a special case, involving a question of law, for the adjudication of the court, he ought to set forth such facts as are necessary to enable the court to determine the question of law. *Sheridan v. Nagle*, 6 Ir. R., C. L. 110.

If it clearly appears, from reading an award, that an arbitrator intended to leave a particular question of law open, the court will consider it, although in terms the arbitrator may in one part of his award have determined it. *Sherry v. Oke*, 3 D. P. C. 349; 1 H. & W. 119.

An arbitrator, with liberty, if he should think fit, to report specially to the court, set out a long and rambling statement of the evidence, leaving the court to draw inferences of fact; the court expressed a strong opinion, that this was not a due exercise by the arbitrator of the power entrusted to him. *Jephson v. Hawkins*, 2 Scott, N. R. 605; 2 M. & G. 366.

An arbitrator decided in favour of the plaintiff, and stated facts, ordering that, if the court should differ from him in opinion on considering those facts, a nonsuit should be entered. The court refused to set aside the award, on the ground that he had come to a wrong conclusion, for though they did not concur in it, it did not appear that there was no evidence in support of it. *Barrett v. Wilson*, 1 C., M. & R. 586; 3 D. P. C. 220; 5 Tyr. 218.

**Appeal on Special Case.]**—An action was referred, by order of a judge of the Queen's Bench and consent of parties, to the decision of an arbitrator. The order of reference was made before the passing of the Judicature Acts, and contained a clause that "neither the plaintiff nor the defendant shall bring or prosecute any action or suit against the arbitrator, or bring any writ of error, or prefer any bill in equity against each other, of and concerning the matters so as aforesaid referred." The arbitrator made his award after the passing of the Judicature Acts, and, after disposing of other matters in difference between the parties, as to 1,500*l.* claimed by the plaintiff as damages from the defendant, stated a special case for the opinion of the court under s. 5 of the C. L. P. Act, 1854. The Queen's Bench Division ordered that "judgment be entered for the plaintiff on the special case for 1,500*l.* and costs incurred after the date of the award." On the defendant's appeal from that decision, a preliminary objection was taken to the appeal for the plaintiff:—Held, that no appeal would lie, as the terms of the order of reference amounted to an express agreement by the parties that no appeal should be brought. *Jones v. Victoria Graving Dock Company*, 2 Q. B. D. 314; 46 L. J., Q. B. 219; 36 L. T. 347; 25 W. R. 501—C. A.

A cause and other matters in difference were referred by consent by order of *nisi prius*. The order contained no clause relating to the statement of a special case by the arbitrator, but it provided that the parties should not bring error against him or each other respecting the matters referred. The arbitrator, at the request of the parties, stated his award, as to the cause only, in form of a special case for the opinion of the court, and the court gave judgment thereon for

the defendant:—Held, first, that the plaintiff could not bring error upon this judgment, the opinion of the court on a special case stated under 17 & 18 Vict. c. 125, s. 5, being merely an ancillary proceeding to the award, which the arbitrator had still to make, not a judgment of the court as a tribunal, as a judgment upon a special case stated instead of a special verdict is. *Gumm v. Fowler*, 2 El. & El. 890; 29 L. J., Q. B. 189; 6 Jur., N. S. 1093; 2 L. T. 282; 8 W. R. 436.

Held, secondly, that, independently of the statute, the plaintiff was precluded by express agreement from bringing error. *Id.*

An arbitrator to whom a cause was referred, was required by the order of reference to state a case for the opinion of the court of Exchequer, at the request of either party; he stated a case accordingly, which was heard and decided by the court:—Held, that this decision was not a judgment on which error could be brought. *Courtauld v. Legh*, 4 L. R., Ex. 187; 38 L. J., Ex. 124.

### J. Proceedings before.

#### i. Hearing Counsel.

It is competent to arbitrators, under the Friendly Societies Act, to decline to hear counsel. *In re Macqueen*, 9 C. B., N. S. 793.

Semble, that all arbitrators have a like discretion. *Id.*

On a case being referred, the plaintiff attended before the arbitrator by counsel, without giving the defendant notice of his intention so to do. The defendant requested an adjournment to give him time to instruct counsel; but the plaintiff refused to consent unless the defendant paid the costs of the day. The arbitrator proceeded *ex parte*, and certified in the favour of the plaintiff. The court stayed the certificate, and referred the matter back to the arbitrator, and disallowed the plaintiff his costs of the day. *Whatley v. Morland*, 2 C. & M. 347; 2 D. P. C. 249; 4 Tyr. 255.

#### ii. Amending Pleadings, &c.

An order of reference of a cause by a judge at chambers, expressed to be made by consent, "on the usual terms," confers on the arbitrator the power of amending the pleadings. *Thompsett v. Bouyer*, 9 C. B., N. S. 284; 30 L. J., C. P. 1; 7 Jur., N. S. 243; 3 L. T. 276; 9 W. R. 35.

In an action against a lead mine company for damage to cattle, the cause was referred at nisi prius to an arbitrator, with power of a judge as to amendment, and the pleadings were withdrawn. At the reference the plaintiff produced particulars of damage amounting to a much greater sum than the claim sent to the defendant before action. Notwithstanding the defendant's objection, the arbitrator received evidence upon the new particulars, and awarded against the defendant:—Held, that as there were no particulars in the action, the arbitrator did only what is continually done at nisi prius, and had not exceeded his jurisdiction. *Hammond v. Kirkby*, 17 L. T. 147.

#### iii. Viewing Premises.

On a reference to an arbitrator of an action for work done by a builder, in respect of houses,

it is wholly in the discretion of the arbitrator whether he will have a view of the premises. *Munday v. Black*, 9 C. B., N. S. 557; 30 L. J., C. P. 193; 7 Jur., N. S. 709; 9 W. R. 274.

Where an arbitrator is to take a view previously to entering on the reference, and he takes such view, the non-recital of the view is no objection to his award. *Spence v. Eastern Counties Railway Company*, 7 D. P. C. 697; 3 Jur. 846.

#### iv. Accepting Hospitality from Parties.

**Effect of.]**—Matters in dispute were referred to three arbitrators, one to be chosen by each of the parties, and one by the two so chosen. On several occasions during the arbitration one of the parties provided luncheon at his expense, of which the arbitrator appointed by him and the third arbitrator, as well as his solicitor and one or two other persons, partook in the absence of the other party (who would not sit at the same table as his adversary) and of his arbitrator:—Held, that, inasmuch as it was not shewn that the parties were influenced by corrupt motives, or were affected by the luncheons, the award could not be set aside on the ground of the luncheons. *Moseley v. Simpson*, 16 L. R., Eq. 226; 42 L. J., Ch. 739; 28 L. T. 727; 21 W. R. 694.

On the invitation of one of the parties to an arbitration, two arbitrators, the umpire and the attorney of the party dined with him:—Held, that the entertainment of the umpire, though improper, was not a ground for setting aside the award or refusing to enforce it, as it did not appear that there was any intention to corrupt the umpire, or that his judgment was influenced. *Hopper, In re*, 8 B. & S. 100; 2 L. R., Q. B. 367; 36 L. J., Q. B. 97; 15 L. T. 566; 15 W. R. 443.

It is no ground for a rule, calling on a plaintiff to shew cause why an award made in his favour should not be set aside, that after the hearing and before making his award, he dined with one of the parties and his witnesses. *Crosley v. Clay*, 5 C. B. 581.

#### v. Employing Party's Solicitor to prepare Award.—See ante, DELEGATING AUTHORITY.

#### vi. Partice making false Representations before Arbitrator.

**Whether Action lies against.]**—It is no ground of action that one party to a reference made a fraudulent representation to an arbitrator, whereby he awarded to the other party a less sum than he would otherwise have done. *Blagrove v. Bristol Waterworks Company*, 1 H. & N. 369; 26 L. J., Ex. 57.

#### vii. Where Two or more Arbitrators.

**Award, how executed.]**—A cause and all matters in difference were referred to the arbitration of three persons, the award of the three, or of any two of them, to be final. The award purported on the face of it to be made by all three, but was executed by two only, the third having refused to sign it when requested to do so:—Held, that the award was good as the award of the two. *White v. Sharp*, 12 M. & W. 712; 1 D. & L. 1039; 1 C. & K. 848; 13 L. J., Ex. 215; 8 Jur. 344.



An award ought to be signed by all the arbitrators, in the presence of each other. *Stallworth v. Inns*, 13 M. & W. 466; 2 D. & L. 428; 14 L. J., Ex. 81; 9 Jur. 285.

Where a matter is referred to the award of three arbitrators, or any two of them, the two who execute the award must do so at the same time and place, and in the presence of each other, otherwise it is not what the parties stipulated for, viz., the joint judgment of the two. *Peterson v. Ayre*, 15 C. B. 724; 23 L. J., C. P. 129; *S. P.*, *Wade v. Douling*, 4 El. & Bl. 44; 2 C. L. R. 1642; 23 L. J., Q. B. 302; 18 Jur. 728; *Hinton v. Mead*, 24 L. J., Ex. 140; 1 Jur., N. S. 46.

Upon a reference to three arbitrators, or any two of them, an award made by two, in the absence of, and without finally consulting the third, cannot be supported. *Beek, In re*, 1 C. B., N. S. 695.

Where a cause was referred to two named, and to such third person as they should appoint, or any two of them, so that the two persons named, and such third person or any two of them, should make their award, and two signed the award on one day, and the third on the day following, the court refused to make absolute a rule on one of the parties to pay money in pursuance of the award. *Wright v. Graham*, 3 Ex. 131; 18 L. J., Ex. 29.

Matters in difference were referred to two arbitrators, one appointed by each party, and an umpire chosen before proceeding with the reference. The award was to be made by the three, or any two of them. They disagreed, and one of the arbitrators declined having anything more to do with the matter; but the other two afterwards sent to him for his opinion a draft of an award. He objected to this, and stated his objections to both the others:—Held, that an award made by the two, which differed from the one prepared, without considering the objections, and without consultation or discussion with the arbitrator who had objected, was bad. *Allen, In re*, 5 N. & M. 374; sub nom. *Perring, In re*, 3 A. & E. 245; 1 H. & W. 285.

#### viii. Attendance of Witnesses, &c.

**Statute.**—By 3 & 4 Will. 4, c. 42, s. 40, upon references by rule or order of court, or a judge, or of nisi prius, or by submission containing an agreement for making it a rule of court, the court by which the rule or order shall be made, or which shall be mentioned in the submission, or any judge, by rule or order may command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and disobedience shall be deemed a contempt, if in addition to the service of such rule or order an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with or after the service of such rule or order: Provided, that the witness shall be entitled to the like conduct money, and payment of expenses, and for loss of time, as for and upon attendances at any trial; and provided, that the application for the rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: Provided

also, that no person shall be compelled to produce any writing or other document that he would not be compelled to produce at a trial, or to attend on more than two consecutive days to be named in such order.

**Before statute.**—Before the statute, the court refused to compel a witness to attend before an arbitrator, although the reference was by order of nisi prius. *Wansel v. Southwood*, 4 M. & R. 359.

A partnership-deed contained a clause for referring disputes, and provided, that every award made from time to time should be made a rule of court:—Held, that as it did not appear that the word award was used by mistake for submission, and as there did not appear to have been any intention to make the submission a rule of court, the reference was not within 9 & 10 Will. 3, c. 15, and that, therefore, a judge could not require the attendance of witnesses before the arbitrator. *Woodcroft, In re*, 9 D. P. C. 538; 5 Jur. 771.

A cause and all matters in difference were referred: the arbitrator to make and publish his award, ready to be delivered to the parties, or either of them, "or if they or either of them should be dead before making the award, to their personal representatives who shall require the same," on or before a certain day. Several meetings were from time to time held, but one of the parties died before the reference was concluded. After his death the arbitrator was requested to proceed with the reference, but he declined doing so, an executrix of a deceased party having refused to attend, and protested against his proceeding:—Held, that the court had no power to compel the executrix to attend before him. *Lewin v. Holbrook*, 11 M. & W. 110; 2 D., N. S. 991; 12 L. J., Ex. 267; *S. P.*, *Edwards v. Davies*, 23 L. J., Q. B. 278; 18 Jur. 448.

**Rule absolute in first instance.**—A rule to compel the attendance of witnesses and the production of documents in their custody before an arbitrator, under 3 & 4 Will. 4, c. 42, s. 40, where the order of reference has been made a rule of court, is absolute in the first instance. *Guarantee Society, In re*, 1 D. & L. 907.

**Habeas corpus ad testificandum.**—The court or a judge has power to issue a habeas corpus ad testificandum to bring up a prisoner in execution for debt to be examined before an arbitrator. *Graham v. Glover*, 5 El. & Bl. 591; 25 L. J., Q. B. 10; 2 Jur., N. S. 160.

So where the prisoner is in criminal custody. *Marsden v. Overbury*, 18 C. B. 30; 25 L. J., C. P. 200. See also 16 & 17 Vict. c. 30, s. 9.

**Enforcing attendance of Witnesses.**—A reference of a cause and of "all matters in difference between the parties" to a referee empowered to enter judgment on the award, is not a "trial" within the meaning of 17 & 18 Vict. c. 84, s. 1, so as to enable a party to enforce by subpoena the attendance before the referee of a witness not within the jurisdiction. *Hall v. Brand*, 12 Q. B. D. 39; 49 L. T. 492; 32 W. R. 133—C. A.

**Witness out of England.**—The 17 & 18 Vict. c. 84, is not available to compel the attendance

of a person in Ireland as a witness before the master of the court upon a compulsory reference. *O'Flanagan v. Goghegan*, 16 C. B., N. S. 636.

**Action in Chancery Division.]**—An order may now be made on summons in the Chancery Division, under 3 & 4 Will. 4, c. 42, s. 40, requiring the attendance of a witness before an arbitrator appointed in an action in that division, and the order will be directed to be served as an ordinary subpoena. *Clarborough v. Toot-kill*, 17 Ch. D. 787; 50 L. J., Ch. 743.

**Postponement for Attendance of Material Witness.]**—It is a matter entirely in the discretion of an arbitrator whether he will or will not postpone the reference, in order to give one of the parties an opportunity of bringing a material witness from abroad. And the court will not interfere unless the circumstances under which he refuses to do so are such as to amount to misconduct. *Ginder v. Curtis*, 14 C. B., N. S. 723.

When an application has been made to arbitrators to afford time to obtain and examine a witness who is absent, and they have honestly (even although erroneously) exercised their discretion as to the materiality of his evidence, and have refused the postponement applied for, their award will not be set aside on that ground. *Larchin v. Ellis*, 11 W. R. 281.

**Discovery—Jurisdiction of Court.]**—An order was made in an action by consent referring the action and all matters in difference between the parties to an arbitrator, and the order provided that the parties should produce before the arbitrator all documents in their or either of their custody or power relating to the matters in difference. The plaintiff, whilst the arbitration was pending, took out a summons under Ord. XXXI. r. 12, for an affidavit of documents:—Held, that the court had no jurisdiction to make the order asked for, there not having been before it "any matter in question in the action" within the meaning of the rule. *Penrice v. Williams*, 23 Ch. D. 553; 52 L. J., Ch. 593; 48 L. T. 868; 31 W. R. 496.

#### ix. Conduct of Inquiry.

**Presence of Stranger to help Party.]**—An arbitrator has a general discretion as to the mode of conducting the inquiry before him. The court refused to set aside an award, on the ground that the arbitrator had declined to permit a stranger to be present, for the purpose of assisting the defendant's attorney with practical hints for the conduct of the defence. *Tillam v. Copp*, 5 C. B. 211.

**Legal Assistance expressly Forbidden.]**—Upon an order of nisi prius, the parties agreed to refer the cause to a lay arbitrator, a proposition to appoint a legal one having been expressly negatived. On the opening of the arbitration, the arbitrator claimed to have an attorney by his side during the proceedings, on which one of the parties withdrew, and the arbitration proceeded, and the award was made:—Held, that the award was void, and it was set aside at the instance of such party. *Procter v. Williams or Williamson*, 8 C. B., N. S. 386; 29 L. J., C. P. 357; 6 Jur. N. S. 758; 1 L. T. 872; 8 W. R. 190.

**Question of Fraud.]**—Where a compulsory reference is made to the master, he must proceed with the inquiry, even though a question of fraud should incidentally arise before him. *In-sull v. Moogen*, 8 C. B., N. S. 359; 27 L. J., C. P. 75.

**Evidence Struck Out.]**—Evidence having been received by arbitrators at a meeting improperly convened, at which neither the plaintiff nor the defendant attended, and it being subsequently agreed that it should be struck out, the court refused to set aside an award which had been made, the arbitrators swearing that they did not consider the evidence in making the award, and the parties subsequently proceeding with their case. *Kinguell v. Elliott*, 7 D. P. C. 423.

**Time to bring Witnesses not allowed.]**—Improper conduct of an arbitrator, in making his award without allowing the defendant further reasonable time to bring forward and examine his witnesses, cannot be pleaded in bar to an action on a bond conditioned for the performance of the award; though one of the terms of submission is, that the arbitrator shall examine the witnesses to be produced by the parties, and though the whole of the time limited for the making of the award is occupied in the examination of the plaintiff's witnesses. *Grazebrook v. Davis*, 8 D. & R. 295; 5 B. & C. 534.

**Discretion as to Examination of Parties.]**—Where a cause is referred, with power to the arbitrator to settle all matters in difference between the parties, the submission providing also that the parties are to be examined on oath, if thought necessary by him, it is in the discretion of the arbitrator to examine the parties, each in support of his own case, if he thinks fit. *Wells v. Benakin*, 9 M. & W. 45; 1 D., N. S. 343; 5 Jur. 1087.

**By whom Examined.]**—Parties to a reference mutually agreed to strike out the clause giving the arbitrator power to examine the parties. At the hearing the plaintiff's attorney tendered the plaintiff as a witness, and he was examined by the arbitrator. The defendant's counsel objected to his admission, but as the arbitrator decided against him he proceeded to cross-examine the plaintiff and went into his case:—Held, that the examining of the plaintiff under those circumstances was a good ground for setting aside the award, and that the objection was not waived by the defendant going on with the arbitration. *Smith v. Sparrow*, 4 D. & L. 604; 1 B. C. Rep. 240; 16 L. J., Q. B. 139; 11 Jur. 126.

**Waiving Irregularities.]**—Irregularities in the mode of conducting an arbitration may be waived by continuing the arbitration after they have been discovered. *Moseley v. Simpson*, 16 L. R., Eq. 226; 42 L. J., Ch. 739; 28 L. T. 727; 21 W. R. 694.

A reference was made to three arbitrators, one to be appointed by each of the parties, and one by the arbitrators so chosen. The parties selected their arbitrators, and the latter selected another whom they erroneously appointed as umpire, and the sittings were commenced without him:—Held, that the irregularity was waived by commencing the proceedings de novo after the mistake was discovered, and by an agreement signed

by the parties by which they agreed not to impugn the award on any ground. *Ib.*

An objection to an award for irregular and improper conduct on the part of the arbitrators is waived, where such conduct had been known to the injured party three weeks before the award was made without any objection being taken. *Rignall v. Gale*, 2 M. & G. 830; 3 Scott, N. R. 108; 9 D. P. C. 631; 5 Jur. 701.

**Administering Oath.**—By 3 & 4 Will. 4, c. 42, s. 41, when it shall be ordered or agreed in any rule or order of reference, or submission containing an agreement to make it a rule of court, that the witnesses shall be examined upon oath, the arbitrator or umpire, or any one arbitrator, may and are required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and perjury may be assigned on such oath or affirmation.

This statute does not exclude the power of the court or judge to administer the oath. They have a concurrent jurisdiction with the arbitrator to swear witnesses examined before them, notwithstanding the statute. *James v. Attwood*, 5 Bing. N. C. 628; 7 Scott, 841.

If, in a cause referred by order of nisi prius, the submission contains a clause that the "witnesses of each party respectively shall be sworn before a judge of a superior court, or a commissioner thereof," the arbitrator is, notwithstanding, entitled to swear the witnesses himself if he think proper to do so, as the above words are merely cumulative, and do not take away the power vested in him by 3 & 4 Will. 4, c. 42, s. 41. *Hodson v. Wilde* or *Wise*, 1 H. & H. 360; 7 D. P. C. 15; 4 M. & W. 536; 2 Jur. 992.

It is no ground for setting aside an award, that the arbitrator (a layman) has examined witnesses not upon oath or affirmation, if that mode of proceeding was not objected to at the time of their examination. *Biggs v. Hansell*, 16 C. B. 562; *S. P., Ridout v. Pye*, 1 B. & P. 91.

It is not absolutely necessary that the evidence before an arbitrator should be taken on oath; the parties may waive it. *Wakefield v. Llanelly Railway and Dock Company*, 34 Beav. 245.

A cause was referred by an order, which stated that the arbitrators should be at liberty, if they should think fit, to examine the parties and their witnesses on oath:—Held, that it was discretionary with the arbitrators whether they would examine the witnesses on oath or not; and that it was no objection to the award that the witnesses were examined without being sworn, although the party against whom the award was made required, at the time, that they should be sworn. *Smith v. Goff*, 14 M. & W. 264; 3 D. & L. 47.

Where a cause was referred by an order directing the witnesses to be sworn before a judge, and the arbitrator took the evidence of the plaintiff's witnesses not upon oath, which the defendant objected to, though he permitted his own witnesses to be examined unsworn:—Held, that, by this proceeding, the defendant had waived the objection, and that he could not on this ground impeach the award. *Allen v. Francis*, 9 Jur. 691.

**Evidence by Affidavit.**—If a submission to arbitration is "so that the witnesses be examined

on oath," affidavits cannot be read; if they are, the award may be set aside. *Banks v. Banks*, 1 Gale, 46.

**Reception of Evidence.**—Arbitrators are bound by those rules of evidence which govern the courts of law. *Att.-Gen. v. Davison*, M'Clel. & Y. 160.

A plaintiff tendered in evidence books containing entries made by himself, which being objected to as inadmissible, the arbitrator stated that the same strictness was not required as on a trial, and received the books:—Held, no ground for setting aside the award for misconduct on his part. *Hagger v. Baker*, 2 D. & L. 856; 14 M. & W. 9; 14 L. J., Ex. 227.

Action for two calls of 11. each upon 200 shares. The particulars claimed 330*l.*, viz. 150*l.* for a first call upon 150 shares, and 180*l.* for a second call upon 180 shares. The defendant pleaded payment. The cause being referred, the defendant proved the payment of more than 400*l.* It was shown that he was proprietor of 640 shares at the first call, and 1200 at the second; and the arbitrator awarded in favour of the plaintiff:—Held, that the arbitrator, by receiving evidence in respect of more than 200 shares, had not exceeded his authority, but had, at the most, received improper evidence. And a rule for setting aside the award was refused. *Eastern Counties Railway Company v. Robertson*, 6 M. & G. 38; 6 Scott, N. R. 802; 1 D. & L. 498.

A cause, and all matters in dispute at the time of the reference, were referred:—The arbitrator awarded that the defendant should pay to the plaintiff 184*l.* for a balance and interest found to be due at the date of the reference, "excluding from such an account a claim on the part of the plaintiff for a loss alleged to have been sustained to the amount of 32*l.* 19*s.*, on certain varnished hats;" and, as to the claim in respect of the varnished hats, he found "that no sufficient evidence had been laid before him by the plaintiff to shew that, at the date of the reference, he had sustained any loss on the hats, and upon that ground, and for want of sufficient evidence of such loss, he awarded that the plaintiff was not entitled to recover anything in respect thereof:"—Held, a final adjudication of the matters submitted. *Cockburn v. Newton*, 9 D. P. C. 671; 2 M. & G. 899; 3 Scott, N. R. 261.

Where, in an action on simple contract, to which the defendant pleaded *nunquam indebitatus* and a set-off, a verdict was taken for the plaintiff for the amount claimed, subject to a reference of the cause, the arbitrator having certified that the verdict entered for the plaintiff be vacated, and a verdict entered for the defendant on both the issues:—Held, that the court will not entertain an application to amend the certificate by entering a verdict for the plaintiff on the first issue, on the ground that the finding was not supported by evidence. *Williams v. Mouldsdale*, 7 M. & W. 134; 4 Jur. 1038.

A particular of set-off for 20*l.* 12*s.* 6*d.* was as follows:—"To fitting up a shop with one pair of glass doors, fanlight, lock, bolts and hinges, to a partition to ditto, and moulding, all complete, and fitting up shop window with glass case and linings, and sundry works, nails, &c. On the hearing of a reference of the cause before an arbitrator, the value of all the

specified work in the particular was proved to be worth 9*l.*; but under the words in the particular, "sundry works, nails," &c., the arbitrator (subject to the opinion of the court) admitted evidence of other work done about the premises to the amount of 10*l.* 1*s.* :—Held, that the evidence was rightly received; and that, if the plaintiff was misled or taken by surprise by the particular, he should have asked for an adjournment of the reference, to have enabled him to answer the evidence as to that claim. *Eastham v. Tyler*, 2 B. C. Rep. 136.

A verdict was taken for 3,000*l.* damages, subject to a barrister, to whom all matters in difference in the cause were referred, with power to decide on the admissibility of evidence, as a judge might, and to reserve points of law for the decision of the court. The arbitrator made a special statement of facts affecting the admissibility of certain depositions in evidence, and awarded that the verdict should be reduced to 1,358*l.*, if the court should be of opinion that the depositions of A. and B. were admissible; to 1,165*l.*, if the court should think the depositions of A. only admissible; and to 579*l.*, if the court should think neither of the depositions admissible :—Held, that the award was final. *Scott v. Van Sandau*, 6 Q. B. 237; 8 Jur. 114.

A submission referred the amount of loss by fire on "wool in the process of woolling, carding, scribbling, and spinning," but in other parts of the submission "raw wool" was spoken of. The arbitrator, conceiving that he was not justified in taking into his consideration wool which had undergone a part of the process of manufacture, but was not, at the time of the fire, in any of the engines, refused to receive evidence applicable to that wool :—Held, that he was justified in so doing; and the court refused to disturb an award made on that principle. *In re Hurst*, 1 H. & W. 275.

Where a defendant submitted all matters in difference, and the arbitrators required him, in pursuance of a power given them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them :—Held, that he could not, by affidavit, bring before the court the question, whether those books related to matters in difference between them or not, though it was expressly sworn that the books merely related to old accounts, which had been long since settled, and which it had been agreed between them should form no part of the reference, because, by the general terms of the submission of all matters in difference, it was left in the discretion of the arbitrator to say what were matters in difference, and what were not. *Arbuckle v. Price*, 4 D. P. C. 174.

If a cause is referred to a barrister, and he improperly admits evidence, the court will not disturb his award. *Perryman v. Steggall*, 2 D. P. C. 726.

It is no ground for impeaching an award that the arbitrator has been mistaken in point of law, as to the admissibility of certain evidence. *Armstrong v. Marshall*, 4 D. P. C. 593; 1 H. & W. 643.

An arbitrator's decision on the admissibility of evidence before him is final. *Symes v. Goodfellow*, 4 D. P. C. 642; 2 Scott, 769; 1 Hodges, 400; 2 Bing. N. C. 532.

**Rejection of Evidence.**—The refusal of an

arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he may think that he has sufficient evidence without them. *Phipps v. Ingram*, 3 D. P. C. 669.

Where all matters in difference in the cause between the parties, in an action against two defendants, were referred, and the arbitrator refused to hear evidence, or adjudicate upon the subject of four cheques drawn by one of the defendants alone, on the ground that it was not a matter in difference between the parties to the reference :—Held, that the award was not final and conclusive, and that it must be set aside. *Samuel v. Cooper*, 2 A. & E. 752; 1 H. & W. 86; *S. C.* nom. *Samuel v. Levey*, 4 N. & M. 520.

Parties had submitted their accounts to an arbitrator, and a report had been made, and a meeting was fixed to close the accounts. At that meeting one of the parties tendered in evidence fresh documents which he had discovered relating to the accounts, and the arbitrator, after looking at them, declined to go into them :—Held, not misconduct affecting the validity of the award, but a rejection of evidence within his, the arbitrator's, authority. *Marsh, In re*, 16 L. J., Q. B. 330.

Where an arbitrator refused to receive further evidence, tendered by the plaintiff after the close of his case, in consequence of the defendant declining to call evidence of his, and urging that no case had been made out, the court refused to set aside the award on that ground. *Hemming v. Parker*, 13 L. T. 795; 14 W. R. 328.

An affidavit to set aside an award on the ground that the arbitrator had refused to examine a material witness, should state what reason, if any, he gave for refusing to hear the witness. *Bradley v. Ibbetson*, 2 L. M. & P. 583.

**Receiving Evidence in absence of other Party.**—A submission was entered into by A. and B., of all matters in difference between them. The arbitrator gave notice to the parties of his intention to hold a meeting, which was holden and attended by one of the parties, and the solicitor of the other party. The parties met on the following day before the arbitrator, who after hearing both parties, and with their consent, took with him all the books for examination by an accountant. Shortly afterwards, and before making his award, the arbitrator was apprised by the accountant of a supposed error in the accounts as to a sum of money, upon which the arbitrator summoned A., who was more conversant with the accounts than B., to appear before him and the accountant, when the supposed error was explained and set right to the arbitrator's satisfaction. About a month afterwards, the accountant again discovered in the accounts what he supposed an error as to a sum of money, which was explained by A., in like manner as before, to the satisfaction of the arbitrator; but, in both instances, no notice was given to the other party of A.'s intended attendance on the arbitrator. The arbitrator shortly afterwards made his award. The award was set aside. *Harcey v. Shelton*, 7 Beav. 455; 13 L. J., Ch. 466.

It is no ground for a rule, calling upon a plaintiff to shew cause why an award made in his favour should not be set aside, that the arbitrator allowed the plaintiff's counsel to call the plaintiff to prove his own case; that, after

the case had been closed on both sides, he obtained information from each party in the absence of the other. *Crossley v. Clay*, 5 C. B. 581.

A usage for arbitrators appointed to determine, as between outgoing and incoming tenants of a farm, the value of the away-going crop and the deductions for want of repairs of the farm buildings and fences, to make an award, on inspection of the crops and premises, without notice to the parties, and without evidence may be good; but no usage can justify arbitrators in hearing one party and his witnesses only in the absence of and without notice to the other, *Oswald v. Grey (Earl)*, 24 L. J., Q. B. 69.

All the witnesses of a party against whom the award is made must have been examined, and in his presence, or it will be a ground for setting the award aside; but that must be made clearly to appear, *Bedington v. Southall*, 4 Price, 232.

An award is not necessarily bad because the arbitrator has taken evidence in the absence of both the parties, *Thomas v. Morris*, 16 L. T. 398.

Such an irregularity may be so treated by the disputants as to prevent them afterwards taking any objection to it. *Id.*

When an arbitrator questions a witness, and receives statements from him in the absence and without the consent of one party to the reference, the court will set aside the award, without taking into consideration the nature of the statements, or the probability of their having influenced the decision. *Dobson v. Groves*, 6 Q. B. 637; 14 L. J., Q. B. 17; 9 Jur. 86.

Unprofessional arbitrators ascertained at a meeting the balance due from A., one of the litigant parties, to B., the other, except a few pounds, which the arbitrators proposed to make payable by A. to B., on account of interest owing by A. to a third person, C., on a mortgage of land, the property of A., which A. was to assign to B. By arrangement between themselves, the arbitrators, without holding any further meeting, questioned C. separately, and in the absence of the parties, as to the amount of interest due; each stated the result of his inquiry to the other, and the reports agreeing, they made their award. The court set aside the award as procured by undue means contrary to 9 & 10 Will. 3, c. 16, s. 2, the course pursued having been inconsistent with natural justice. *Plews, In re*, 6 Q. B. 845; 14 L. J., Q. B. 139; 9 Jur. 160.

After the close of the case of both the parties to an arbitration in which a question arose, which affidavits to set aside the award alleged, but did not shew, to be material, whether the figures on the stern of a Spanish ship denoted English or Spanish feet, two of the three arbitrators, unattended by the parties, asked a person, who had not been called as a witness, whether the figures marked English or Spanish feet. He expressed ignorance of the matter, but another person standing by stated that the numbers marked English feet, as the ship had been lately coppered in England. The arbitrators afterwards made their award. The court refused to set aside the award on the ground of misconduct in the arbitrators. *Errazquin and Meek, In re*, 2 L. M. & P. 151.

Where arbitrators, who had proceeded in a reference, informed the defendant, who was present at the meeting, that they would suspend their proceedings till the books of account had been referred to:—Held, that having afterwards

made an award in his absence, without examining such books, was a ground for setting aside the award. *Pepper v. Gorham*, 4 Moore, 148.

On a cause being referred, the plaintiff attended before the arbitrator by counsel, without giving the defendant notice of his intention so to do. The defendant requested an adjournment, to give him time to instruct counsel; but the plaintiff refused to consent, unless the defendant paid the costs of the day. The arbitrator proceeded ex parte, and certified in favour of the plaintiff. The court stayed the certificate, and referred the cause back to the arbitrator, and disallowed the plaintiff his costs of the day. *Whalley v. Morland*, 2 C. & M. 347; 2 D. P. C. 249; 4 Tyr. 255.

An arbitrator greatly errs if he in any the minutest particular takes upon himself to listen to evidence behind the back of any of the parties to the submission. *Drew v. Leburn*, 2 Macq. H. L. Cas. 1.

On the evidence given by one of the parties at a meeting, of which the other had notice, but did not attend, the sum the party attending was to pay was decreased by the arbitrators. This private examination was held incorrect, and the award set aside. *Hick, In re*, 8 Taunt. 694.

It is no objection to an award that the arbitrators in the absence of one of the parties have called in the other, and asked him merely, whether he admitted or disputed certain items in an account. *Anderson v. Wallace*, 3 C. & F. 26.

A defendant moved to set aside an award made by two arbitrators against him, upon the grounds that they had improperly received evidence in his absence, and had also been guilty of improper conduct in holding meetings, and conferring with the plaintiff with respect to the matters in difference, in his absence. The defendant was aware of the existence of these grounds of objection many days before the award was made, but made no objection before the arbitrators. He had notice of the meetings at which the evidence was received, and had been summoned to produce books at them, but he had omitted to attend:—Held, that although it would have been more regular for the arbitrators to send notice of the result of the examinations to the defendant, yet that the court would not, under the circumstances, set aside the award for such irregularities as were disclosed. *Bignall v. Gale*, 9 D. P. C. 631; 2 M. & G. 830; 3 Scott, N. R. 108; 5 Jur. 701.

**Party should have opportunity of being heard.**—No custom or usage can justify an arbitrator or umpire in deciding on evidence laid before him without the knowledge of the party against whom he decides, and without giving him an opportunity of being heard. *Brook, In re*, 15 C. B., N. S. 403; 33 L. J., C. P. 246; 10 Jur., N. S. 704; 10 L. T. 378.

Where, in an action for not repairing, arbitrators made their award upon a view of the premises without calling the parties before them, it was set aside, as other facts might be necessary to be inquired into. *Axon*, 2 Chit. 44.

A., on the 7th of April, 1866, contracted to buy of B. 250 bales of cotton, "to arrive in Liverpool per ship or ships from Bombay," on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed on the contract, at a certain price per lb. for fair new merchants' Oomrawattee, March or April

shipment. By one of the rules referred to, it was provided that, upon such a contract, the name of the ship must be given to the buying broker within two calendar months next after the date of shipment named in the contract; and by other rules it was provided that, "in case of any dispute arising out of a contract," the matter was to be referred to two members of the association; and that in the event of one of the parties neglecting for three days after notice to appoint an arbitrator, the chairman of the association was to name two, whose award was to be final. On the 21st of June, the seller's broker gave the buyer's broker the name of a ship on board of which were 225 bales of the cotton, which was shipped at Bombay on the 19th of March. A. declined to accept the cotton, on the ground that the name of the ship had not been given within two calendar months next after the date of shipment. A dispute having arisen as to the meaning of the contract, A. appointed J. as arbitrator on his part. B. neglecting to appoint his arbitrator, the chairman of the association appointed two, viz., J. and D.; but B. objecting to J., inasmuch as he had been the person originally named by A., the chairman withdrew his name, and appointed H. in lieu of him; and the two arbitrators so appointed, having been furnished by A.'s broker with a copy of the contract and of the correspondence, without giving B. an opportunity of being heard, and within two hours of the receipt of notice that they had been appointed, made an award, holding that the declaration made on the 21st of June was not a proper one, and consequently that the buyer had power to cancel the contract:—Sembly, that the omission to give B. an opportunity of being heard before them was misconduct on the part of the arbitrators, and good ground of objection to the award if taken in the proper manner, viz., by motion to set it aside or refer it back. *Thorburn v. Barnes*, 2 L. R., C. P. 384; 36 L. J., C. P. 184; 16 L. T. 10; 15 W. R. 623.

**Notice of Meeting, when necessary.**—Where a submission has been made a rule of court, and a party to the submission revokes the authority without leave of the court, he still ought to have notice from the arbitrators to attend their meeting. *In re Kyle*, 2 Jur. 760.

After one of the parties has failed to attend a meeting, the arbitrator may, at the next, without a peremptory appointment, proceed in his absence. *Angus v. Smythies*, 2 F. & F. 381.

Where a plaintiff became insolvent after a cause was referred, and the arbitrator gave the attorney of both parties notice of his intention to proceed with the reference; and the plaintiff not attending, the arbitrator proceeded ex parte, the court refused an application by the assignee to set aside the award. *Hobbs v. Ferrars*, 8 D. P. C. 779; 4 Jur. 825.

Where an arbitrator proceeded in the absence of one of the parties at a third meeting which had been appointed, the absent party not having attended at either of the two previous meetings:—The court set aside the award, as no notice had been given, that, if the party did not attend, the arbitrator would proceed in his absence. *Gladwin v. Chilcote*, 9 D. P. C. 550; 5 Jur. 749.

Where an arbitrator has made an appointment, and one of the parties, although under the mistaken notion that there will be notice of another

meeting before an award is made, goes away without tendering evidence, or intimating that he intends to offer it, the arbitrator may proceed ex parte, and without further notice make an award. *Tryer v. Shaw*, 27 L. J., Ex. 320.

A party objected to an award, on the ground that he had not had notice of two meetings, at the first of which no evidence was received, but the arbitrator merely adjourned; and at the second of which he attended and handed in a formal protest against the proceedings, upon a ground totally different from that of want of notice:—Held, that he was not entitled to notice of the first meeting, and that he had, by his protest, waived the want of notice of the second. *Morphett, In re*, 2 D. & L. 967; 14 L. J., Q. B. 259; 10 Jur. 546.

All matters in difference in a cause were referred to a barrister, with power to proceed ex parte, if either of the parties should, by affected delay, prevent making the award, or should not attend after reasonable notice, and without such excuse as the arbitrator should adjudge reasonable. The arbitrator, having in the course of the reference appointed a meeting, was informed by the defendant that he did not intend to be present; one of his reasons being, that, on account of the non-admissibility of certain depositions, which the arbitrator had not rejected as evidence, no award he could make would be valid; and another reason being, that the notice was too short. The arbitrator (having postponed the meeting for a day, of which he gave the defendant notice, but without reference to his communication) proceeded ex parte:—Held, that he was warranted in so doing, though he had not warned the defendant, that, if he absented himself, he would proceed ex parte. *Scott v. Van Sandau*, 6 Q. B. 237; 8 Jur. 1114.

## 5. UMPIRE AND UMPIRAGE.

### a. Appointment of Umpire.

#### i. By Arbitrators.

(See 17 & 18 Vict. c. 125, s. 14.)

**When to be chosen.**—If a submission is, that, if arbitrators do not make their award by a day named, then to abide the award of an umpire, to be chosen by the arbitrators; the time for the arbitrators to appoint an umpire commences when the time for their making the award expires. *Beck v. Sargent*, 4 Taunt. 232.

Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire is chosen within the time limited for his umpirage. *Harding v. Watts*, 15 East, 556. And see *Doyley v. Pitslow*, 15 East, 557, n.

Arbitrators having power to appoint an umpire may elect one before they enter upon the matter referred to them. *Roe d. Wood v. Doe*, 2 T. R. 644; *S. P.*, *Bates v. Cooke*, 9 B. & C. 407.

Such an appointment of an umpire is good, though the arbitrators have before such appointment enlarged the time. *Cudliffe v. Walters*, 2 M. & Rob. 232.

If one of the arbitrators insists upon producing further evidence, and the other refuses to allow it to be done, this is a sufficient disagreement between the arbitrators to authorize the interference of the umpire. *Id.*

On a submission to two persons with power to

them, if they should not agree, to appoint a third person to be umpire in or to concur and join with them in considering and determining all or any of the matters referred, there is a power to appoint such third person before any difference has arisen, and before any proceedings have been taken on the reference: and that is, indeed, the proper course to pursue; and such third person, when so appointed, is not a third arbitrator, but an umpire, and the effect of his appointment is, that he is to sit with the arbitrators, and hear and consider the matters referred, and if they do not agree in an award, to make an award upon all matters referred, and not merely those in which they do not agree. And it is sufficient to enable him so to act, that at the conclusion of the evidence they arrive at different opinions in some of the matters referred; nor need he, if the time for making the award has expired, wait to see if they ever could agree; and, on the other hand, their sitting with him till the time has expired, and not then repudiating his authority, is a tacit exercise of their power to enlarge the time for making the award, so as to enable him to make it. *Winteringham v. Robertson*, 27 L. J., Ex. 301.

**How to be chosen or appointed.]**—Where a cause is referred to two arbitrators, and their umpire in case of dispute, and it is afterwards agreed to appoint an umpire, such appointment must in no case be decided by chance. *Ford v. Jones*, 3 B. & A. 248; *S. P., Cassell, In re*, 9 B. & C. 624; 4 M. & R. 555.

But where arbitrators, after tossing up for the choice, abandoned the choice made, and afterwards one of them, by consent of the other, appointed the umpire:—Held, that the appointment was good. *Vennikam, In re*, 5 Jur. 72.

An umpire may be appointed by lot, if the parties to the reference assent to such a mode of election. *Taylor v. Backhouse*, 2 L. J., M. & P. 70; 20 L. J., Q. B. 233; 15 Jur. 86. *S. P., Tunno, In re*, 2 N. & M. 328; 5 B. & Ad. 488; *Greenwood, In re*, 1 P. & D. 463; 9 A. & E. 699; *Jamieson, In re*, 4 A. & E. 945.

If a particular mode of appointment is prescribed, it must be followed. *Batey v. Townley*, 1 Ex. 572; 19 L. J., Ex. 396.

An appointment of an umpire, by lot, consented to by the attorneys' clerk, but not by the attorneys themselves, or their client, is bad, although the parties, in ignorance of the mode of appointment, had attended the arbitrator. *Hodson, In re*, 7 D. P. C. 569; *S. C.*, nom. *Hodson v. Drewry*, 1 W. W. & H. 540; 2 Jur. 1088.

Where two arbitrators are empowered to appoint an umpire, such appointment must be the act of the will and judgment of the two, and must not be the result of chance or lot. *European and American Steam Shipping Company v. Croskey*, 8 C. B., N. S. 397; 29 L. J., C. P. 155; 6 Jur., N. S. 896; 8 W. R. 236.

Where two arbitrators appointed an umpire by lot, and the agent and solicitor of A., a party to the reference, upon being told who had been appointed, and the mode of appointment, raised no objection, and approved of the person appointed, who made his award:—Held, that he was not entitled to have the award set aside upon the ground that the umpire had been irregularly appointed. *Blythe and Tyne Railway Company, In re*, 11 W. R. 705.

The appointment of an umpire made in writing

by two arbitrators requires no stamp. *Routledge v. Thornton*, 4 Taunt. 704.

The appointment of an umpire is a judicial act. *Lord v. Lord*, 5 El. & Bl. 404; 26 L. J., Q. B. 34; 1 Jur., N. S. 893.

Where the power to make the appointment was vested in two arbitrators, and where the appointment had not been made or signed by the arbitrators at the same time or in each other's presence, the court refused to make absolute a rule for an attachment for non-performance of the award of the umpire. *Ib.*

The signing the appointment of an umpire is not a judicial act, and therefore need not be done by the arbitrators at the same time or together. *Hopper, In re*, 8 B. & S. 100; 2 L. R., Q. B. 367; 36 L. J., Q. B. 97; 15 L. T. 566; 15 W. R. 443.

An appointment of an umpire by lot from two persons, each of whom is acknowledged by both arbitrators to be fit, is valid. *Ib.*

**Proof of Appointment.]**—To prove that an umpire was appointed by the arbitrators according to the terms of the submission, it is not sufficient to prove that he acted with them, and put in an award executed by all three, though the appointment of the umpire is recited in the award. *Still v. Halford*, 4 Camp. 17.

**Invalidity—Parties by appearing waive objection.]**—An award by an umpire is good, although the arbitrators had no authority to appoint one, and although he examined the parties separately, they having attended him, and made no objection at the time. *Matson v. Trouser*, R. & M. 17.

## ii. By a Court or Judge.

**In what Cases.]**—By the Companies Act of 1862, ss. 161, 162, on any company being voluntarily wound up, it is lawful, by special resolution, to transfer the business to a new company, provided that any dissentient shareholder may require the liquidators either to abstain from carrying the resolution into effect, or to take his shares at a price, if not agreed upon, to be determined by arbitration under the provisions of the Companies Clauses Act, 8 & 9 Vict. c. 16. That act, by ss. 128—130, provides for the appointment of two arbitrators, one by each party; and the arbitrators are to appoint an umpire; but, in case of their default, s. 131 only provides that, if one of the parties is a railway company, the appointment of an umpire is to be by the Board of Trade. A dispute as to the price to be paid for his shares having arisen between a shareholder and a company, not a railway company, and the arbitrators having neglected to appoint an umpire:—Held, that the case was within the C. L. P. Act of 1854, s. 12, and a judge could therefore appoint an umpire under that section. *Anglo-Italian Bank and De Rosaz, In re*, 2 L. R., Q. B. 452; *S. P., De Rosaz v. Anglo-Italian Bank*, 4 L. R., Q. B. 462; 38 L. J., Q. B. 161.

A vendor and purchaser entered into an agreement for the sale of property, at a price to be fixed by two valuers, and as to matters in difference between the valuers, by an umpire to be appointed by such valuers before entering upon the valuation. The valuers could not agree upon an umpire:—Held, that 17 & 18 Vict. c. 125, s. 12, did not empower the court to appoint an umpire, there being no case of arbitration within that section. *Collins v Collins*, 26 Beav. 306; 28 L.

J., Ch. 184; 5 Jur., N. S. 30; 32 L. T., O. S. 233; 7 W. R. 115.

The validity of a notice to dissolve a partnership was disputed, and it was agreed that that question, as well as the price to be paid by the continuing partners for the share of the outgoing partner, should be settled by two valuers named in the agreement or their umpire. One of the valuers died before the valuation was made, and the new valuer (appointed under protest) neglected to join with the other valuer in appointing an umpire. Under these circumstances, and by virtue of the C. L. P. Act, 1854, s. 12, the court appointed an umpire to act in the matter, in case his services should be required. *Boane, In re*, 22 L. T. 507; 18 W. R. 723.

Where surveyors have been nominated under the Metropolitan Building Act, 1855, s. 85, to settle differences in dispute between a building owner and an adjoining owner as to the erection of a party-wall, and such surveyors had refused to appoint an umpire, the court appointed an umpire under the Common Law Procedure Act, 1854, notwithstanding that an action was pending to settle the right of one of the parties to an ancient light in the party-wall. *McBryde, Ex parte*, 4 Ch. D. 200; 46 L. J., Ch. 153; 35 L. T. 543.

**Jurisdiction of Court to carry Agreement into effect.**—When two partners made an agreement containing a provision that on the determination of the partnership, one partner should purchase the share of the other at a valuation to be made by two persons, one to be appointed by each partner, and the partnership was carried on for some time under the agreement:—Held, that though the valuation could not be so made, because no umpire was provided, a court of equity would carry the partnership agreement into effect by ascertaining the value of the share. *Dinham v. Bradford*, 5 L. R., Ch. 519.

Where the fixing a value by arbitrators is not of the essence of an agreement, the court will carry the agreement into effect, and will itself, if necessary, ascertain the value. *Id.*

#### b. Proceedings before, &c.

**Commencement of Jurisdiction.**—When an umpire has once been summoned, the jurisdiction of the arbitrators is gone; and the court, in referring back the award, will send it to the umpire, and not to the arbitrators. *Westminster and Brynbo Coal and Coke Company v. Clayton*, 11 L. T. 366; 13 W. R. 134.

An umpire's appointment dates from the time when he is appointed by the arbitrators, and not from the time when the duty of determining devolves upon him by reason of the arbitrators disagreeing. *Killett and Tranmere Board of Health, In re*, 13 W. R. 207.

**Duty as to hearing Evidence, &c.**—Where an umpire refuses, on express request, either to rehear evidence already given before arbitrators, or to examine new witnesses, the court will set aside the award. *Jenkins v. Leggo*, 1 D., N. S. 277; 6 Jur. 397.

The not insisting on this objection at the time of making the award does not amount to a waiver of it. *Id.*

An umpire may make his award on the notes of the arbitrator if no objection is taken. *Id.*

Where matters are referred to arbitrators, and,

if they disagree, to an umpire, and the arbitrators, after hearing witnesses, disagree, the umpire must rehear the witnesses. *Salkeld, In re*, 12 A. & E. 767; 4 P. & D. 732.

If he omits doing so, and makes his award on the evidence taken down by the arbitrators, the award will be set aside. *Id.*

Objecting to such proceedings by the umpire may be waived; but, to prevent the award being set aside, clear proof must be given of the waiver. *Id.*

A cause and all matters in difference were referred to the award of two persons, and such third person as they should appoint, or of a majority of them. A difference having arisen between the originally-named arbitrators, a statement was made by each to the third as to what he thought the award should be. An award having been made by an umpire and one of the arbitrators, without any further meeting, the court set aside the award. *Templeman, In re*, 9 D. P. C. 962; 6 Jur. 324.

An umpire, being furnished by the arbitrators with the evidence taken before them, and having himself viewed the premises, the condition of which was in question, made his award, without calling for further evidence, or giving any notice on that subject to the parties:—Held, that the award could not be objected to on that ground by a party who knew that the case had gone before the umpire, and made no application to him to hear further evidence. *James, In re*, 2 N. & M. 328; 5 B. & Ad. 488.

Parties to a written submission agreed by parol that notes of the evidence should be taken in writing by a clerk, and signed by the arbitrators, and that in case of their disagreeing the umpire should be at liberty to make his award on the notes so taken, without examining the witnesses. The notes were so taken, and the arbitrators disagreed. The umpire having refused to examine any witness, though required to do so by one of the parties, and having made his award on reading the notes, the court refused to set aside the award. *Firth, In re*, 1 L., M. & P. 63; 19 L. J., Q. B. 169.

An order was made in an action referring the question in dispute, which was the rent to be paid under a lease of a mill, to two persons, who had acted as agents of the parties, as arbitrators, and in case of their disagreement to a person therein named as umpire. The arbitrators, having disagreed, submitted the matter to the umpire. The latter, without giving any notice to the parties or to their solicitors, and without any witnesses being examined before him, but having merely heard the statement of the two arbitrators and inspected the premises, made his award in writing, in which he recited, that he had "heard, examined, and considered the allegations, witnesses, and evidence of all the parties."

—Held, that there was no ground for disturbing the award, as the arbitrators and the umpire were all experts, and it was evidently the intention of the parties that they should settle the value and not act as formal arbitrators. *Bottomley v. Ambler*, 38 L. T. 545; 26 W. R. 566—C. A.

**Notice, when Necessary.**—A reference was made to two arbitrators and an umpire to be chosen by them, who was to be present and decide each reference as it might arise, and either might make an award. The umpire, in the presence of the arbitrators, disallowed the plain-



tiff part of his claim, which made the balance in favour of the defendant, and afterwards, without notice to the arbitrators or defendant, made his award in favour of the plaintiff. The court set aside the award. *Potter v. Newman*, 4 D. P. C. 504; 2 C., M. & R. 742; 1 T. & G. 29.

**Umpire and Arbitrators Sitting Together.]**—A submission was to two, and a third, to be named by them; and the parties treated the third arbitrator so named as an umpire throughout the proceedings:—Held, that the non-attendance of the third arbitrator at the meetings, and the want of notice to him, formed no ground for setting aside the award. *Marsh, In re, or Haywood v. Marsh*, 16 L. J., Q. B. 390; 11 Jur. 657.

Where a matter in difference is referred to two, one to be named by each of the parties, with a proviso that if they disagree they shall name an umpire, and that he shall make the award, and the two disagree and appoint an umpire, it is no ground of objection to the award that all three have sat and heard the evidence together, and then the umpire has made the award. *Flaglane Chapel v. Sunderland (Mayor, &c.)*, 5 Jur., N. S. 894.

**Duty to Decide Whole Question—Arbitrators Disagreeing as to Part Only.]**—If "all or any of the matters in difference between the parties" are referred to arbitrators, who disagree, but only as to the costs, yet the umpire must adjudicate on the whole question. *Wicks v. Cox*, 11 Jur. 542.

Where arbitrators determined on five points in dispute, and referred a sixth to an umpire, whom they were authorized to choose, the award made by the arbitrators and umpire was bad, the arbitrators not being authorized by the terms of the submission to make the award upon some points in dispute, and refer others to the umpire. *Tollit v. Saunders*, 9 Price, 612.

**Communication with One Party.]**—Pending a reference, the umpire held a communication with the agents of one of the parties; this fact being known to all the parties at the time, and not objected to by any of them, and the reference having proceeded, and the award having been subsequently made:—Held, that it was too late for either of the parties after the award was made to object to it, on the ground of such communication between the umpire and the agents of one of them. *Mills v. Bouwyer Society*, 3 Kay & J. 66.

**Enlargement of Time.]**—An umpire, immediately upon his appointment, may enlarge the time for making his award. *Killett and Transmere Board of Health, In re*, 13 W. R. 207.

Two arbitrators were to make an award by the 20th of August, or such other day as they should appoint; in case they disagreed an umpire was to decide by the 20th of September, or such other day as he should appoint. The arbitrators enlarged the time to the 1st of November, and in October gave the umpire notice of their being unable to agree. In September the umpire enlarged his time till December, in which month he made his award:—Held, that he had jurisdiction in September to enlarge the time. *Doddington v. Bailward*, 5 Bing. N. C. 591; 7 D. P. C. 640; 7 Scott, 733.

Held, also, that notice of the enlargement of the time in September by the umpire was sufficiently conveyed to the defendant by a verbal

intimation from the plaintiff, when the award was served on him, and its performance demanded; and that the non-agreement of the arbitrators, so as to entitle the umpire to act, was sufficiently notified at the same time by its appearing on the face of the award. *Ib.*

**The Award.]**—Before an award is made, the arbitrators and umpire ought to meet to discuss the question submitted to them, and there should be a joint judgment. Where, therefore, an umpire and one arbitrator in the absence of the other, without any default on his part, met and discussed the matter, and ultimately made their award:—Held, that the award was bad. *Morgan v. Bolt*, 7 L. T. 671; 11 W. R. 265.

Arbitrators, not agreeing in their award, choose an umpire, who makes umpirage: the arbitrators joining with him does not vitiate it. *Soulsby v. Hodgson*, 3 Burr. 1474; 1 W. Bl. 463.

Even although the arbitrators were functi officio. *Beck v. Sargent*, 4 Taunt. 232.

Nor by a stranger joining. *Ib.*

An award, after reciting that A. and B. had been appointed arbitrators, and that they had appointed C. umpire, proceeded, "We, the said arbitrators, do award," and was signed by the two arbitrators and the umpire:—Held, that the latter, by signing the award, adopted the language as his. *Bates v. Cooke*, 9 B. & C. 407.

Where arbitrators were to make their award on or before a day certain, and an umpire, if they should differ, before a subsequent day; and the umpire made his award before the time given to the arbitrators had expired:—Held, that the umpirage need not state that the arbitrators had disagreed. *Sprigens v. Nash*, 5 M. & S. 193.

## 6. THE AWARD.

### a. Form and Contents.

#### i. Form and Construction Generally.

**What is an Award.]**—After declaration, and before plea, a cause and all matters in difference between the parties were, by consent, referred, the costs to abide the event of the suit. The arbitrator awarded that a verdict should be entered for the plaintiff, with 55*l.* damages, and that in all the other matters in difference between the parties, there was not any sum of money due to either of the parties:—Held, that this was not equivalent to an award that the defendant should pay the plaintiff 55*l.* *Donlan v. Brett*, 4 N. & M. 854; 2 A. & E. 344.

**More Suggestion.]**—No precise form of words is necessary to constitute an award: it is sufficient if the arbitrator expresses by it a decision upon the matter submitted to him. But where an arbitrator, to whom a dispute between an architect and his clerk, respecting a claim by the latter to wages, was referred, stated in a letter that he had examined drawings made by the clerk, with an account of his time, which did not shew experience or ability to the extent to justify a demand for remuneration under the circumstances: but in consideration of the clerk's services out of the office on some occasions, and to meet the case in a liberal manner, he proposed that the architect should pay the clerk 10*l.*:—Held, that the latter part of the letter was a

mere suggestion of the arbitrator, and not a decided opinion that the clerk was or was not entitled to recover 10*l.*, and therefore not a good award. *Lock v. Vulliamy*, 2 N. & M. 336; 5 B. & Ad. 600.

**Opinion.**—An award may be in the shape of an opinion. *Matson v. Trouver*, R. & M. 17.

**In Words of Issue.**—Where a cause is referred, it is not necessary that the arbitrator should find for the plaintiff or defendant in the very words of the issue. It is sufficient if he decides substantially the question in dispute. *Wykes v. Shipton*, 3 N. & M. 240.

**Formalities.**—Upon a bond for the performance of an award, "so as it be made in writing under the hands of the arbitrators," by such a day, the declaration averred that the arbitrators did, in due manner, and within the time limited, duly make their award in writing:—Held, insufficient, because it did not allege that it was under their hands. *Everard v. Paterson* (in error), 2 Marsh. 304; 6 Taunt. 625.

**Two Certificates.**—A verdict was taken for the plaintiff in an action on all the issues joined, subject to a reference of that and another cross-action between the same parties. In the latter action issue had not been joined. By an order of reference the arbitrator was empowered to make "an award or a certificate." He signed two separate certificates, and delivered them to the parties:—Held, that as the certificates purported to be made at one and the same time, they might be considered as one instrument, containing the decision in each cause. *Smith, In re*, 6 D. & L. 20; 14 Jur. 483.

**Effect of Recitals.**—A cause was referred to three, and, in case they should differ, to an umpire. The award contained no statement that the arbitrators had differed, but recited that they had "considered the decision of the umpire":—Held, that it was not void in consequence of the mistake, but that the words were surplusage. *Harlow v. Read*, 3 D. & L. 203; 1 C. B. 733; 14 L. J. C. P. 239; 9 Jur. 642.

The recital in an award of the original agreement to refer will not invalidate the award where the parties have by agreement submitted matters to the arbitrator which were not included in the original agreement to refer. *Thames Iron Works and Shipbuilding Co. v. Reg.*, 10 B. & S. 33; 20 L. T. 318.

When an arbitrator appointed under the Lands Clauses Act, and having power to assess the amount of damage, but no power to decide the question of liability, made an award containing an order for payment, but the recitals shewed the extent of the arbitrator's authority:—Held, that this was an error of form only, and that the award could not be set aside on account of it. *Harper and Great Eastern Railway Company, In re*, 20 L. R., Eq. 39; 44 L. J., Ch. 507; 33 L. T. 214; 23 W. R. 371.

An award made within enlarged time is good, though it does not recite that the arbitrators did enlarge the time. *George v. Lonsley*, 8 East, 13.

**Publishing—Ready for Delivery.**—An award is to be considered as published when the parties

have notice that it is ready for delivery on payment of the reasonable charges. *Musselbrook v. Dunkin*, 9 Bing. 605; 2 M. & Scott, 740; 1 D. P. C. 722.

And so of the charges, whether reasonable or not. *McArthur v. Campbell*, 2 N. & M. 444; 5 B. & Ad. 518.

An award which is required to be made in writing, and ready to be delivered at such a time, is complete if made in writing, and ready to be delivered by the arbitrator within the time, though not actually delivered. *Brown v. Vauver*, 4 East, 584.

Where an order of reference required that the arbitrator should make and publish his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day:—Held, that the award was published and ready to be delivered within the meaning of the order, when it was executed by the arbitrator in the presence of and attested by witnesses; and that it could not be set aside, although the plaintiff died on the following day, and before he had notice that the award was ready. *Brooke v. Mitchell*, 6 M. & W. 473; 8 D. P. C. 392; 4 Jur. 656.

Where an award purports, and is attested by a subscribing witness, to have been published on a certain day, and the witness also makes an affidavit that he saw it published, but does not say when it was published, the court will presume it to have been published on the day in question. *Doe d. Clarke v. Stillwell*, 3 N. & P. 701; 1 W. W. & H. 532; 8 A. & E. 645; 2 Jur. 591.

**Time, how Computed.**—On a reference it was agreed that the award should be made by the umpire within the two calendar months next after the matters were referred to him; the umpire was appointed on the 29th of June, and the time for making his award was enlarged for three months:—Held, that, in computing this time, the 29th of June was to be excluded, and that consequently an award made on the 29th of November was within the time limited. *Higham, In re*, 1 W. P. C. 28; 9 D. P. C. 209.

The amount of damages sustained, and to be thereafter sustained, by reason of the working of a mine, was referred to an arbitrator, who was to make his award, as to the damages already sustained, on or before the 20th of December, 1830; and, as to the damages to be thereafter sustained, at the expiration of every two months from the 20th of December. The arbitrator made the first award, but the second was not made until the 13th of July, 1831, and it included damages sustained by the plaintiff from the 20th of December, 1830, to the 26th April, 1831:—Held, that this was not an award made in pursuance of the reference, and was therefore void. *Stephens v. Lowe*, 2 M. & Scott, 44; 9 Bing. 32.

Where, by deed of arbitration, dated 1st June, the arbitrators were to make their award on or before the 1st October, with power, in case they should not agree in making their award within the time, to appoint an umpire, and his award to be binding, so as it be made six months after the date of his appointment; and the arbitrators appointed an umpire within the time allowed to them, who made his umpirage within six calendar, but not within six lunar, months of his appointment:—Held, that the umpirage was ill made. *Swinford, In re*, 6 M. & S. 226.

By a deed of submission in the Scottish form, an award was to be made betwixt the and the day of next, or any other day to which the submission might be prorogated:—Held, that the absence of date was immaterial, as it was equivalent to a general authority to be executed within a reasonable time. *Macdougall v. Robertson (in error)*, 1 M. & P. 147; 2 Y. & J. 11; 4 Bing. 435.

If a cause is referred at the assizes, and a verdict taken for the plaintiff, with power to the arbitrator to certify for which party the verdict is to be entered, he may certify after the assizes are over, although no order of nisi prius is obtained. *Tomes v. Hawkes*, 2 P. & D. 248; 10 A. & E. 32; 3 Jur. 315; *S. P., Salter v. Yeates*, 5 D. P. C. 291; 2 Gale, 224; 2 M. & W. 67.

By deed matters in difference were referred; and the parties covenanted to perform the award, so as the award was made in writing, under the hands of the arbitrators; but no time within which the award was to be made was limited by the deed. By a memorandum, not under seal, indorsed on the deed after its execution, and signed by the arbitrators, but not by the parties, the arbitrators agreed that the award should be delivered on or before the 3rd of November:—Held, that the arbitrators could not, in the absence of any power to that effect in the deed, limit the time for making their award, so as to render an award made after the 3rd of November invalid. *Morphett, In re*, 2 D. & L. 967; 14 L. J., Q. B. 259; 10 Jur. 546.

**Jointly liable to pay sum awarded.**—Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm, and jointly and severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third:—Held, that they were jointly responsible for the sum awarded to be paid by each. *Manwell v. Burridge*, 7 T. R. 352.

**Award to assign to A.**—Semble, that a person cannot be required to assign an interest in premises to A., his executors, administrators, and assigns, where the terms of the award were that he should assign to A. *Russel v. Headington*, 1 Stark. 13.

**Directions as to Payment of Money awarded.**—By an award, dated the 13th of October, 1840, it was ordered that a sum of money be paid on the "28th day of October next":—Held, that the money was payable on the 28th day of that present month of October. *Brown v. Smith*, 8 D. P. C. 867.

Where the arbitrators requested the defendant to pay:—Held, that it was equivalent to an order to pay. *Smith v. Hartley*, 2 L. M. & P. 340; 10 C. B. 800; 20 L. J., C. P. 169; 15 Jur. 755.

To an action on a builder's bill, the particulars of demand being 104l. 12s., the defendant pleaded payment of 30l. before action, and payment into court of 45l. more. The cause was referred at nisi prius to a surveyor, who was to measure and value the plaintiff's work, and to certify for whom and for what amount the verdict should be entered; no order of nisi prius being drawn up. He certified that he was of opinion that 74l. 7s. was a fair and proper sum to be paid to

the plaintiff:—Held, that this amounted to a verdict for the defendant. *Salter v. Yates*, 2 M. & W. 67.

A direction to enter a verdict in favour of a plaintiff for a certain sum is equivalent to an order to pay that sum. *Cartwright v. Blackworth*, 1 D. P. C. 489.

On a submission not giving a power to raise questions of law for the opinion of the court, the arbitrators awarded 82l. as compensation for damages; and in a subsequent part of the award they stated, "for the purpose of raising the question for the determination of the court, in case it should be pleased to entertain the same," that they awarded the 82l. on a principle, which they explained; but if the court should think that the damage ought to be estimated on another principle, which they likewise stated, then they awarded a compensation of 102l. On an application to set aside the award as not final:—Held, that as the sum of 82l. was positively awarded, the hypothetical adjudication which followed might be rejected as surplusage, and the award sustained. *Wright, In re*, 4 P. & D. 730; 1 Q. B. 98.

A cause and all matters in difference having been referred, the arbitrator set out all the facts upon the face of his award, and then awarded that the plaintiff had no cause of action against the defendant, and stated that he determined the action in favour of the defendant. He then, after awarding by whom the costs of the reference should be paid, concluded as follows:—"But if the court should be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favour of the plaintiff, and order and award that the defendant pay damages to the plaintiff to the amount of 1s., and also pay to the plaintiff the costs of the reference:"—Held, that the arbitrator having come to a positive finding, and expressly declared his own opinion, the award was sufficiently final, and the latter clause might be rejected. *Barton v. Ranson*, 3 M. & W. 322.

An ejectment (in the old form, upon a demise of A., and the joint demise of B. and C.) after issue joined, was referred to the award, final end, and determination of an arbitrator, the costs of the cause and reference to abide the event. The arbitrator, after reciting the order of reference, made his award thus:—"I award and determine that the verdict in the cause be entered for the lessors of the plaintiff:"—Held, in an action by the lessors of the plaintiff against the defendant for costs, that as the words used had no technical meaning, they might be taken as an informal expression of the arbitrator's determination of the cause in favour of the lessors of the plaintiff generally, and that the award was therefore valid. *Law v. Blackburn*, 14 C. B. 77; 2 C. L. R. 28; 23 L. J., C. P. 28; 18 Jur. 130.

**Omission as to Mode of taking Evidence.**—Where an arbitrator omitted to state in his award that the evidence he had heard was upon oath:—Held, that the award was good. *Annan v. Job*, 10 Jur. 926.

**Plan and Contents Incorporated.**—A plan was made part of an award. There were figures on the plan, which referred to written descriptions at the foot of the plan, delineating certain places. Without these descriptions the plan was

unintelligible:—Held, that these written descriptions were part of the plan, and incorporated with the award. *Johnson v. Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 236.

**Setting out Evidence.**—An award, setting out a considerable portion of the evidence adduced before the arbitrator, and finding expressly the matters referred, is good, although that evidence does not seem to support the finding. *Arthur or Archer v. Owen*, 9 D. P. C. 341; 5 Jur. 340.

**Stamping.**—By 33 & 34 Vict. c. 97 (Stamp Act, 1870), Sched., award in England or Ireland,

Where the amount or value of the	£	s.	d.
matter in dispute does not exceed 5l.	0	0	3
Exceeds 5l. and does not exceed 10l.	...	0	6
" 10l.	"	20l.	...
" 20l.	"	30l.	...
" 30l.	"	40l.	...
" 40l.	"	50l.	...
" 50l.	"	100l.	...
" 100l.	"	200l.	...
" 200l.	"	500l.	...
" 500l.	"	750l.	...
" 750l.	"	1,000l.	...

And where it exceeds 1,000l., and in any other case not above provided for..... 1 15 0

In pursuance of articles of co-partnership, the accounts of a coaching concern were referred, at the end of every month, to a person appointed by the partners, for the purpose of ascertaining the profits made by each partner, and of determining what sum should be paid and received by each, in order to a proportionate distribution of the profits of the concern. Such an account was adjusted, and an action thereupon brought by one of the parties:—Held, that the partners not having assented to the account after it was made out, the account was binding only by virtue of the power conferred on the party appointed to adjust it, and required to be stamped as an award. *Carr v. Smith*, 5 Q. B. 128; D. & M. 192; 7 Jur. 600.

But where a number of coach proprietors, who horsed a coach, were in the habit of having monthly accounts made out, containing the name of proprietors, the amount of the receipts and disbursements, the number of miles worked by each, and the proportion of the earnings to which each was entitled, and these accounts were made out by the clerk of one of the proprietors, partly from materials furnished by them, and partly from the way-bills; and the practice was for the clerk to send to each proprietor a copy of the monthly account, shewing the amount which each had to receive or pay, and the proprietor or proprietors from or to whom he was to receive or pay such amount:—Held, that this account was not an award, and was admissible without a stamp. *Goodyear v. Simpson*, 15 M. & W. 16; 15 L. J., Ex. 191.

The appointment of an umpire made in writing by two arbitrators requires no stamp. *Routledge v. Thornton*, 4 Taunt. 704.

A bond conditioned for the due discharge by M. of the duties of clerk, provided that such discharge should be ascertained by the inspection of M.'s accounts by S.; and that the amount so ascertained should be liquidated damages. A paper by which S. has ascertained such amount

requires to be stamped as an award. *Jebb v. McKiernan*, M. & M. 340.

A. and B. having a dispute as to the liability of B. to pay money to A., agreed to submit the case to a barrister, and to be bound by his opinion. Semble, that in an action to enforce such payment, the opinion of a barrister upon a case so submitted is admissible in evidence without an award stamp. *Boyd v. Emmerson*, 4 N. & M. 99; 2 A. & E. 184.

On the fly-leaf of an arbitration bond was an indorsement, bearing date after the time limited by the bond for making the award, and stating the parties within named had met that day by consent, on the award:—Held, that this memorandum, being evidence of a new agreement to refer, was not admissible in evidence without a stamp. *Stephens v. Lowe*, 2 M. & Scott, 44; 9 Bing. 32.

Where it is sought to draw up a rule for an attachment, it is competent for the officer of the court to object to the absence of a stamp on the award, and therefore to refuse to draw up the rule. *Hill v. Slocumbe*, 9 D. P. C. 339.

If an award is made on an improper stamp, and no application is made to enforce the award, the court will not set it aside. *Preston v. Eastwood*, 7 T. R. 95.

## ii. Including Matters arising after Submission or Award.

**When can be Entertained by Arbitrator.**—To an action brought June 27, the defendant pleaded by way of set-off, a claim against the plaintiff, which was not payable till August 1st, though the consideration had been received by the plaintiff before her action was commenced. Under a judge's order of July 27th, by consent of both sides, all matters in difference between the parties, including the claim of the defendant in her set-off in the said action, were referred; the arbitrator made his award in November following:—Held, that the claim made in the set-off was properly entertained by the arbitrator as a matter in difference, though not payable till after the date of the action and the judge's order. *Petoh v. Fountain or Conlan*, 5 Bing. N. C. 442; 7 Scott, 441; 7 D. P. C. 427; 3 Jur. 436.

A rent-charge was devised to B., wife of A., not saying for her separate use. In replevin an avowry was made in the names of A. and B. for arrears; and issue being joined upon the title to such rent-charge, the cause and all matters in relation to the rent-charge were referred to D., who awarded that the arrears, including as well those due when the action was brought, as arrears which accrued between the action and the date of the reference, should be paid to B. This is not an excess of authority, either by reason of the arrears accruing subsequently to the action being included in the sum awarded, or by reason of the payment being directed to be made to B. only. *Wynne v. Wynne*, 4 M. & G. 253; 9 D. P. C. 901; 3 Sc., N. R. 435.

Declaration on an award, that an action in the county court for breaches of covenant to repair a mill and premises having been referred to an arbitrator under an order of reference giving him power to "decide all matters and questions to do justice between the parties," and power to order and direct what should be done by either or both of the parties, "either im-

mediately or prospectively whether relating to the action or to the other matters in difference," and directing that the costs of the action, reference and award should be in his discretion, he made his award, reciting that by a lease for seven years of the mills and premises, the defendant covenanted to repair and keep in repair the mill, weir and mill bank, and ordering that the defendant should pay a certain sum for damages claimed in the particulars of the action, and another sum for damages from the date of the summons to that of the award. Breach, non-payment:—Held, that the terms of the reference authorized the arbitrator to give damages accruing up to the date of the award, and that so much of the award was good. *Lewis v. Rossiter*, 44 L. J., Ex. 136; 33 L. T. 260; 23 W. R. 332.

Under the terms of a submission, the arbitrators may have power to dispose of a debt not due, but accruing between the parties. *Brown v. Watson*, 8 D. P. C. 22; 8 Scott, 386; 6 Bing. N. C. 118.

**Interest after Date of Award.**—On a submission to arbitration the parties agreed to abide by the award "of and concerning the premises or anything in anywise relating thereto." The arbitrators awarded that a certain sum should be paid with interest up to a day subsequent to the date of the award:—Held, that they had exceeded the powers of the submission in so awarding. *Morphett, In re*, 2 D. & L. 967; 14 L. J., Q. B. 259; 10 Jur. 546.

### iii. Giving Directions and Ordering Execution of Deeds.

**Express Power to give Directions.**—An ejectment (in the old form) upon the several demises of T. M. and A. M. was referred after issue joined, the costs of the action and of the reference and award to abide the event. There was a clause in the order, "that the arbitrator should, in the event of his finding in favour of the lessors of the plaintiff, have power to order immediate possession to be given of the land and premises in question in the action to the lessors of the plaintiff T. M. and also how and in what manner such possession should be given, and if not given, how it should be taken." The arbitrator awarded thus:—"I award in favour of the lessors of the plaintiff, and order that immediate possession be given of the land and premises in question in this action to the lessors of the plaintiff, and that the defendant pull or take down the wall forming the gable end of a room, and which wall he has erected upon the land of the lessors, or so much of the wall which now stands four inches and a half, or thereabouts, upon the land of the lessors, and upon a wall which divides the property of the lessors from that of the defendant:—"Held, that the award in favour of the lessors of the plaintiff generally was sufficiently final; and that, in the absence of proof to the contrary, it must be taken that there was a state of facts in the locus in quo to which the direction as to the wall would reasonably apply, and that the award was therefore sufficiently certain. *Mays v. Cannell*, 15 C. B. 107; 3 C. L. R. 218; 24 L. J., C. P. 41; 1 Jur., N. S. 183.

**Implied Power.**—When a question of suffi-

ciency of title is referred, an arbitrator exceeds his authority by awarding a conveyance accompanied with a bond stipulating for indemnity in case of eviction by reason of any defect in the title. *Ross v. Boards*, 3 N. & P. 382; 8 A. & E. 291; 1 W. W. & H. 876; 2 Jur. 567.

If a cause is referred, the costs to abide the event, and the arbitrator finds all the issues, some for the plaintiff and some for the defendant, this is an event to the cause, on which the costs can be taxed; but if the arbitrator goes on, and directs that no further proceedings shall be taken in the action, he exceeds his power, though the award is bad pro tanto only. *Ward v. Hall*, 9 D. P. C. 610; 5 Jur. 800. *S. P.*, *Hobson v. Stewart*, 4 D. & L. 589; 1 B. C. Rep. 288; 16 L. J., Q. B. 145.

An arbitrator, having authority to decide on what terms a partnership agreement should be cancelled, directed that the agreement should be cancelled; that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner:—Held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority. *Burton or Burt v. Wigley or Wigmore*, 1 Scott, 610; 1 Bing. N. C. 665; 1 Hodges, 81.

An action for injury to houses and lands was referred to an arbitrator, who was to settle at what price and on what terms the defendant should purchase the plaintiff's property. He fixed the sum and awarded that the defendant might use the plaintiff's name to enforce certain rights and remedies:—Held, that the award was not bad on the ground of an excess of authority in respect to the use of the plaintiff's name. *Round v. Hatton*, 10 M. & W. 660; 2 D. N. S. 446; 12 L. J., Ex. 7.

A submission being of all matters in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their banking account, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for no other matter in difference between them shall be intended unless it is shewn. *Ingram v. Milnes*, 8 East, 445. But see 2 Moore, 723.

By a reference, all matters in difference were submitted between the parties. It appeared before the arbitrators that the plaintiff and defendant were proprietors of a ship, and that disputes had arisen as to their liability to pay the expenses, the vessel having been arrested by process out of the court of Admiralty on the 24th March, 1835; the arbitrators directed the plaintiff to pay all debts incurred subsequently to that period, and ordered that he should give the defendant a bond of indemnity against the payment of these debts:—Held, that the award was good. *Brown v. Watson*, 8 D. P. C. 22; 8 Scott, 386; 6 Bing. N. C. 118.

A submission authorized arbitrators to discontinue certain actions, and to make any orders as to the time and terms of the discontinuance. They directed all the actions to cease, and that the defendant in one should give up the premises sought to be recovered, and if not, that judgment should be entered up against him:—Held, that this direction, as to entering up the judgment, was not a ground for setting aside the award. *James v. Powell*, 1 W. W. & H. 60.

An action by a reversioner was referred. The arbitrator awarded that the action was brought

to try a right, besides the mere right to recover damages:—Held, that he was not bound to state what was the right which the action was brought to try. *Angus v. Redford*, 11 M. & W. 69; 2 D., N. S. 735; 12 L. J., Ex. 180.

In an action for waste, a verdict was taken for the plaintiff for the damages in the declaration, subject to a reference: the arbitrator directed the verdict to stand for a reduced amount:—Held, that he was not bound to find expressly that the premises were out of repair. *Bacon v. Smith*, 5 Jur. 549.

**Directions must be Certain.**—An action for polluting the water of a watercourse was referred, with power to the arbitrator to regulate the enjoyment of the water:—Held, that an award directing a verdict to be entered for the plaintiff, and that the defendant should at all times take *all proper and reasonable precautions* for preventing the water from being rendered unfit for the plaintiff's use, *and in particular*, should use a process of filtering mentioned in the award, was bad for uncertainty. *Stonehewer v. Farrar*, 6 Q. B. 730; 14 L. J., Q. B. 122; 9 Jur. 203.

The direction as to the particular process was, that the water passing from the defendant's to the plaintiff's premises should be passed through filtering lodges made, or to be made, by the defendant, so as to be thereby purified and cleansed for the plaintiff's use, "so far as the same can be purified and cleansed *by the ordinary and most approved process* of filtering:—Held, that the description, by reference only to the "ordinary and most approved process," was uncertain, and the award bad in this respect. *Ib.*

On a submission of a cause and all matters in difference between lessor and lessee, the costs to abide the event, an award that certain fixtures have been wrongfully removed by lessor, to the value of 11l., and that the lessee shall set up others in their place, to be left for the lessor at the end of his term, and that the lessor shall pay the lessee 11l. on a specified day, is bad for want of authority, though the removal of such fixtures was, in fact, a matter in difference. *Price v. Popkin*, 10 A. & E. 139; 2 P. & D. 304; 3 Jur. 433.

Held, also, that such award was uncertain in not specifying the value, quality or description of fixtures to be set up by the lessee, and might be set aside by the lessor. *Ib.*

**Award of Mutual Releases.**—An arbitrator, by having awarded mutual and general releases; must be deemed to have adjudged and finally decided upon all matters, and the general release would be an answer to any action or claims founded upon them. *Wharton v. King*, 2 B. & Ad. 528.

Where all matters in difference are referred, an award directing the execution of general releases closes all accounts between the parties up to the time of the submission. *Trimingham v. Trimingham*, 4 N. & M. 786.

M. built a ship for G. and others, and purchased stores for the ship on his own credit. On a reference of all matters of difference between M. & G., G. took upon himself the payment of the bills, and requested the umpire to fix the liability in respect of them upon him. The umpire directed G. to pay to M. the balance which he found due to the latter after giving G. credit for the amount of the bills; he then awarded

that G. should be solely liable in respect of the bills, and should execute a bond to indemnify M. against them; and ordered that, after G. had paid the balance and the bills, the parties should execute mutual releases of all claims and demands whatsoever, and that the form of the releases should be settled by P. in case of dispute. The court refused to set aside the award, holding that the umpire had authority to order G. to be liable for and to pay the bills, and to execute the bond of indemnity; and that, although the delegation to P. of authority to settle the releases was void, it did not affect the validity of the award, even if it vitiated the whole of the direction as to the giving releases. *Goddard, In re*, 1 L., M. & P. 25; 19 L. J., Q. B. 305.

**Execution of Deeds.**—Where an arbitrator directed A. to sign, seal and deliver a deed forthwith to B., though it appeared on the face of the award that the execution of that deed was to depend upon the prior execution of award:—Held, that the award was not bad, the word "forthwith" meaning as soon as B. should be in a condition to call upon A. to execute. *Boyes v. Bluck*, 13 C. B. 652; S. C., sub nom. *Bluck, In re*, 22 L. J., C. P. 173.

General words in a release are limited by the recitals; and therefore, where an arbitrator, having power to settle deeds of indemnity with respect to the purchase of a rectory and tithes, settled a deed reciting that A. was to indemnify B. in respect of that purchase, and the release contained general words of indemnity with respect to all acts to be done in respect of the premises:—Held, that the award was not bad for excess, on account of the largeness of the indemnity, but that the indemnity must be taken to be in respect of lawful acts done in carrying out the recited provisions. *Ib.*

When an award directs a lease to be made containing certain specific covenants, and it is alleged, on the part of the defendant, that the plaintiff has acted in contravention of the terms of the covenant since the date of the award, the Court of Chancery will, if the case is at all doubtful, order the leases to be antedated, so as to enable the defendant to rely on the alleged breaches at law. *Blackett v. Bates*, 2 Hem. & M. 610.

In an agreement for a lease for a term of years from the 1st May, 1801, the lessee was to be allowed three years from that date, for winning a colliery, without payment of any rent: an arbitrator, being authorized to give such directions for a lease, according to the agreement, as he should think fit, directed a lease for years from the 1st May, 1804:—Held, that he had thereby exceeded his authority. *Bonner v. Liddell*, 1 B. & B. 80.

**Discretionary Power.**—Where an arbitrator is "to determine what he shall think fit to be done by either of the parties," he is not bound to direct affirmatively that something shall be done, unless he shall so think fit. *Angus v. Redford*, 2 D., N. S. 735; 11 M. & W. 69; 12 L. J., Ex. 180.

Where a submission contains a clause empowering an arbitrator to direct what, if anything, shall be done by the parties, an invalid execution of such power does not vitiate the whole award. Semble, it is otherwise where the

terms of the submission are obligatory. *Nicholls v. Jones*, 6 Ex. 373; 2 L. J., M. & P. 335; 20 L. J., Ex. 275.

*iv. Must Extend to all Matters Referred.*

**In what cases.**—Where one of the matters in difference between A. and B., parties to a submission, was, whether at the time of the submission, on a day therein named, a partnership existed between them; and if it ever did exist, whether it had been put an end to; and if so, at what time, and on what day; and the arbitrator found that if any partnership ever existed between them the same was dissolved and put an end to by mutual consent and agreement on a certain day (subsequently to that mentioned in the submission), and that nothing was due from A. to B. in respect of profits:—Held, that, as the arbitrator did not find whether the partnership did exist or not, the award was bad. *Bhear v. Harradine*, 7 Ex. 269; 21 L. J., Ex. 127.

A reference between the executors and A., the partner of a deceased person, recited that A. averred that partnership dealings had subsisted between the deceased and himself previously to 1837; that an agreement of partnership, to commence from January, 1837, was entered into; and that differences had ensued respecting the settlement of accounts. All matters and accounts were subsequently referred. The arbitrator found, that a partnership had existed from December, 1835, till the death of the testatrix, and that a balance was due to the estate:—Held, that the award was neither uncertain nor defective, in omitting to award specifically on the partnership mentioned under the agreement. *Warner, In re*, 2 D. & L. 148; 13 L. J., Q. B. 370; 8 Jur. 1097.

A cause and all matters in difference between the parties (there being no matters in difference except in the cause) were referred by order of nisi prius; the order providing, that the verdict should be entered for the plaintiff for the damages in the declaration, subject to be reduced or vacated, or instead thereof a verdict for the defendant or a nonsuit entered according to the award. The arbitrator directed that the verdict entered for the plaintiff should be vacated, and a nonsuit entered:—Held, that the award was bad, as not finally determining the matters in difference in the cause. *Wild v. Holt*, 9 M. & W. 161.

An award made upon a reference of a cause, and all matters in difference between the parties, is bad if it omits to assess damages upon a judgment of nil dicit upon a new assignment of excess. *Wykes v. Shipton*, 3 N. & M. 240; 8 A. & E. 246, n.

An action against a pawnbroker was referred, and his liability to damages depended on whether or not he had made sufficient inquiries when the goods were pledged. The arbitrator, in a case stated for the opinion of the court, having declared that he was unable to find whether or not the defendant had made sufficient inquiries, the court referred it back to him to find, affirmatively or negatively, whether or not sufficient inquiries had been made. *Ferguson v. Norman*, 4 Bing. N. C. 52; 5 Scott, 304; 1 Jur. 986.

Where an ejectment upon several demises of different lessors was referred, and the arbitrator awarded in favour of the plaintiff, it was not

sufficient for him to set out, by metes and bounds, the lands which he intended to be recovered; but he must have awarded on which of the demises it was to be recovered; he ought also to make an express award as to the residue which he intended the plaintiff not to recover. *Doe d. Madkins v. Horner*, 3 N. & P. 344; W. W. & H. 348; 8 A. & E. 235; 2 Jur. 417.

Where two substantial matters are referred, and the arbitrator finds only upon one of them, the award is bad altogether, as not being conclusive. *Hayward v. Phillips*, 1 N. & P. 288; 6 A. & E. 119; 1 Jur. 985.

Upon a reference of all actions, controversies, &c., and also of two distinct matters of difference, if the arbitrator omits to decide one of such distinct matters, that vitiates the whole award. *Randall v. Randall*, 7 East, 81; 3 Smith, 90.

A submission empowered an arbitrator to settle and judge of alleged defects in a house, and to determine what was necessary to put it in a perfect condition, and to settle certain claims for extra work by one of the parties, and the costs of the arbitration were to abide the result of the award. The award ordered a sum to be paid by one party to and received by the other, in satisfaction of all the matters in difference referred:—Held, uncertain, and not final, for not deciding upon the various matters referred. *Riders, In re*, 3 Bing. N. C. 874; 5 Scott, 86; 3 Hodges, 222; 1 Jur. 406.

A question referred was whether W. or P. ought to be ultimately liable upon a note of which P. was maker, and W. indorser as surety for P., and whether P. was entitled to an indemnity from W. against the liability of P. to pay the note when it became due. The arbitrator found that the liability of P. on the note as between P. and W. should remain unaffected by the award:—Held, that the award was not final. *Wilkinson v. Page*, 1 Hare, 276; 6 Jur. 567.

Four actions between distinct parties, and all matters in difference, were referred. Among the matters in difference was a fifth action, relating to a part of the premises in dispute, of which fifth action the award took no notice, notwithstanding it had been mentioned to the arbitrator:—Held, that the omission rendered the award bad in toto. *Stone v. Phillips*, 4 Bing. N. C. 87; 5 Scott, 275; 6 D. P. C. 247; 3 Hodges, 302.

An award which leaves some of the questions undecided, or leaves it in doubt whether some of the questions have been decided, cannot be maintained. *Wakefield v. Llanelly Railway and Dock Company*, 11 Jur., N. S. 456; 12 L. T. 509; 13 W. R. 823—L. J.

An award, made upon submission of all disputes, reciting "that there had been a suit at law between the parties, which had run to great expense on both sides, and being left to the arbitrator to make an end of, he did determine that they should each of them pay their own charges at law, and that the defendant should pay the plaintiff 5s. for his making the first breach in law;" this is certain and final. *Hawkins v. Colclough*, 1 Burr. 274; 2 Ld. Ken. 553.

An action having been brought for the recovery of a sum of money, but which had only proceeded as far as the writ and appearance, and the defendant claiming a larger sum to be due to him, it was agreed that the action, and the disputes arising out of the accounts and other matters in difference, should be referred, the costs of the action, of the reference and of the

award to abide the event of the award. The arbitrators awarded that the action should cease, and be no further prosecuted, and that on the balance of all accounts there was a sum of 661*l.* due to the defendant from the plaintiff, which they ordered him to pay on a particular day:—Held, that the award was sufficiently final, and decided the event of the action to prevent the plaintiff setting it aside. *Eardley v. Seer*, 4 D. P. C. 423; 1 C., M. & R. 327; 5 Tyr. 1071.

A. agreed to purchase land of B., the title to be made out to the satisfaction of B.'s attorney. The agreement being uncompleted, and disputes arising, all matters in difference between the parties, and the settlement of all questions on the agreement, were referred. The arbitrator awarded that B. should convey to A. the title to the land, contained in two abstracts given in evidence on the arbitration; he also prescribed the boundary of the land to be conveyed, and ordered that B. should execute an indemnity bond to A., to be forfeited if A. should be evicted by reason of defect in the title, and that, on execution of the premises, A. should pay the purchase-money; nothing further was awarded as to the validity of the title. The goodness of the title had been a matter of dispute before the arbitrator:—Held, that the award was bad, as not finally determining the questions referred. *Ross v. Boards*, 8 A. & E. 291.

**Chancery Matters Referred.**—By the terms of a submission, a chancery suit and all matters in difference between the parties were referred, and it was made an express matter of reference, whether an agreement between the parties should be rescinded or not. The arbitrator merely decided as to the chancery suit, that each party should pay his own costs; and gave no directions upon the subject of rescinding the agreement, but awarded specifically on every other subject-matter of the agreement:—Held, that the award was not sufficient. *Upperton v. Tribe*, 1 H. & W. 280; S. C. sub nom. *Upperton and Tribe, In re*, 3 A. & E. 295.

An arbitrator to whom all actions and causes of action and all matters in difference whatsoever, in two actions subsisting between the parties, have been referred, is not compelled to take matters of an equitable nature into consideration, but an award in reference to the two actions only is final. *Craven v. Craven*, 1 Moore, 403; 7 Taunt. 644.

A cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, so that he made his award by a certain day (with power of enlargement), to be delivered to the parties, or if either of them should be dead, to their personal representatives. The arbitrator was to be at liberty to make one or more awards at his discretion. At the time of the submission, two equity suits were pending, in which the parties to the action, and also certain infants, were concerned. Before any award was made, one of the parties to the equity suits died. The arbitrator ordered a verdict to be entered for the plaintiff, damages 500*l.*; and also that the defendants should pay to the plaintiff 350*l.*, for grievances not included in his declaration:—Held, first, that the award was sufficiently final, although it did not dispose of the equity suits; and, lastly, that the award of 350*l.* was sufficiently certain.

*Wrightson v. Bywater*, 6 D. P. C. 359; 3 M. & W. 199; 1 H. & H. 50.

**As to Payment of Costs.**—A replevin, and all matters in difference touching the distress, were referred, the costs of the suit to abide the event. The arbitrator awarded that the rent was 14*l.*, and that the sum of 6*l.* was due for rent at the time of the distress, that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed:—Held, that the award did not shew who ought to pay the costs, which were to abide the event of the suit; and, consequently, that it was not final. *Leeming, In re*, 5 B. & Ad. 403; S. C. sub nom. *Leeming v. Fearnley*, 2 N. & M. 232.

A cause was referred, the costs to abide the event, and the arbitrators found two issues for the plaintiff and two for the defendant; and directed that the costs of the cause, and of the several issues found therein, should be paid to the plaintiff, or to the party entitled thereto:—Held, that the award was void as to the adjudication of the costs. *Heatherington v. Robinson*, 4 M. & W. 608; 7 D. P. C. 192; 8 L. J. Ex. 148.

Where a cause is referred (the costs of the suit, and of the reference and award, to abide the event), the arbitrator need not notice the costs in his award. *Jupp v. Grayson*, 1 C., M. & R. 523; 3 D. P. C. 199; 5 Tyr. 150.

An action and all matters in difference were referred, the costs of the suit and of the reference to abide the event of the award. The arbitrator directed the defendant to deliver certain goods to the plaintiff, and the plaintiff to pay a sum of money to the defendant; that all proceedings in the action should cease, and a general release given:—Held, that the award was not uncertain as to costs, as the effect of it was that each party should pay his own. *Yates v. Knight*, 2 Scott, 470; 2 Bing. N. C. 277; 1 Hodges, 368.

To an action on an award, the defendant set out the agreement of reference and the award, and averred that the award was not final:—Held, that upon a special verdict finding the agreement and award as set out, the award might be held void for not finally deciding as to the costs of making the submission a rule of court, which by the submission was left in the ordinary way in the discretion of the arbitrator. *Williams v. Wilson*, 9 Ex. 90; 1 C. L. R. 921; 23 L. J., Ex. 17.

**Substantial Decision.**—By a submission, it was left to an arbitrator to find, whether the plaintiff was liable to discharge a sum of money secured by a mortgage executed by him on or about the 29th of September, 1818. He found that the plaintiff was not liable to discharge a sum of money secured by mortgage, executed by him on the 26th of September, 1817, which was by the defendant produced to me as the mortgage in the indenture mentioned as and by the plaintiff admitted to be the mortgage executed by the plaintiff on or about the 26th of September, 1818. One deed only was mentioned in the submission:—Held, that the arbitrator had substantially decided the matter referred to him. *Spooner v. Payne*, 4 C. B. 328; 16 L. J., C. P. 225.

Where two agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, and he gave his opinion in favour of one; such opinion was considered as



final and conclusive, though it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. *Price v. Hollis*, 1 M. & S. 105.

A reference, under the Lands Clauses Act, to determine what sum should be paid on the value of land, and "what other, if any," sum for severance damage. An award was made, which, reciting the submission, and alleging that the arbitrator had considered the several matters, awarded a sum to be paid for purchase-money of the land, but did not say anything as to the severance damage.—Held, a good award. *Beaufort (Duke) and Swansea Harbour (Trustees)*, *In re*, 8 C. B., N. S. 146; 29 L. J., C. P. 241; 6 Jur., N. S. 979; 1 L. T. 370; 8 W. R. 188.

**Part of Claim admitted by Parties.**—On a reference of all matters in difference, a demand on one side was laid before the arbitrators, and immediately admitted by the other party; no evidence was therefore given concerning it, or any adjudication upon it requested. The arbitrators made their award of and concerning the matters referred, directing payment of a sum of money (without saying on whose account) to the party against whom the above claim had been made, with costs, and it was proved that they left that claim out of consideration in making their award, as a matter not in dispute.—Held, that the award was bad, as the arbitrators ought to have taken notice of the admitted demand. *Robson & Railton, In re*, 1 B. & Ad. 723.

Where the parties covenanted to abide by the award of the arbitrator upon all points in difference between them, and eleven points were specifically referred, but the parties at the reference effected a settlement as to one of the eleven points, and withdrew it from the arbitrator's consideration:—Held, that the award was not bad for want of finality, because it did not find in favour of either party on this point, inasmuch as the conduct of the parties amounted to an admission that it was no longer a point in difference. *Lawrence v. Bristol and North Somerset Railway Company*, 16 L. T. 326.

**Matters in Difference must be brought before Arbitrator.**—An action of trespass in the Exchequer by a plaintiff against three, and all matters in difference between the parties, were referred, a verdict having been taken for the plaintiff. And by another order made at the same time, an action of replevin in the Queen's Bench by the same plaintiff against one only of the defendants, was also referred. The main question on both sides was, whether or not the plaintiff had become tenant to that party who was a defendant in both actions. No other tenancy was ever set up, or brought into question before the arbitrator. The reference of the replevin was first proceeded in, and the evidence taken in it was by consent read over as evidence in the action of trespass. The arbitrator awarded in the replevin that the plaintiff had good cause of action against the defendant, and was entitled to a verdict. In the action of trespass he awarded nothing as to the costs of the replevin, or whether at the date of the reference of either action a tenancy of the plaintiff to the party who was a defendant in both actions existed:—Held, that the award was good, these matters, if in difference, not having been brought before the

arbitrator. *Rees v. Waters*, 16 M. & W. 263; 4 D. & L. 567.

To an action on an arbitration bond of all matters in difference, averring that the arbitrators took upon themselves the arbitration, and awarded, &c., the defendant pleaded that all matters were submitted; that there were disputes as to moneys claimed by him of the other party, and that the arbitrators took upon themselves to arbitrate of and concerning, &c.; and that they made no award of those sums; the plaintiff replied, that the arbitrators made their award of and concerning, &c., as in the declaration; to which there was a demurrer:—Held, that the plea was bad, for want of averring that the arbitrators had notice of the claims of the defendant, and refused to arbitrate concerning them. *Elson v. Rolfe*, 2 Smith, 459.

Where matters have been referred, it is a matter of evidence whether a particular matter of complaint has been subjected to the arbitrator's consideration. *Martin v. Thornton*, 4 Esp. 180; *S. P., Race v. Farmer*, 4 T. R. 146. And see *Smith v. Johnson*, 15 East, 213.

Where cross actions and all matters in difference are referred, and the award decides the actions only, it is no objection to the award that a claim not included in either action was brought before the arbitrator, upon which he has not adjudicated, unless it is also averred that he did not take such claim into his consideration. *Re v. St. Katherine Dock Company*, 1 N. & M. 121; 4 B. & Ad. 360.

#### v. Several Claims and Issues.

##### a. Reference of all Matters in Difference.

##### Whether Finding on each Matter Necessary.]

—A declaration on an agreement to supply timber and slates for the building of a house, alleged as a breach the non-supply of the timber only. The defendant pleaded that he did not agree; that he did supply timber; and part payment. The cause and all matters in difference were referred, and the arbitrator, after reciting that he had heard the evidence produced "touching the matters in difference," stated that he made his award "of and concerning the premises," and proceeded to find specially on each of the issues:—Held, that the award was sufficient, although it appeared that there was a matter in difference submitted to the arbitrator as to the non-supply of slates. *Dunn v. Warristers*, 9 M. & W. 293; 1 D., N. S. 626.

Action on a deed. Pleas, non est factum and payment. After issue, the cause and all matters in difference were referred, the costs of the cause, of the reference and award and all other costs to abide the event. The arbitrator awarded, "of and concerning the matters referred, that on a settlement of all matters in difference, accounts, claims and demands between the parties, up to the date hereof, there is due from the defendant to the plaintiff 300*l.*," and he ordered the same to be forthwith paid:—Held, that the award was good on the face of it, as the arbitrator had awarded upon every matter in difference. *Bradley v. Phelps*, 6 Ex. 897; 21 L. J., Ex. 310.

Where parties by mutual bonds submitted all matters in difference to arbitration, and the award, after reciting the submission, awarded (without stating it to be of and concerning the premises) that a certain sum was due and owing

from one party to the other:—Held, that the award must be intended to be made on all the matters referred. *In re Brown*, 1 P. & D. 391; 9 A. & E. 522; 2 W. W. & H. 124.

Upon a reference of all matters in difference and a cause, the award was, that a gross sum should be paid, without distinguishing how much in respect of the matters in difference, and how much in respect of the cause:—Held sufficient. *Taylor v. Skuttleworth*, 8 Scott, 565; 6 Bing. N. C. 277; 8 D. P. C. 280.

By an order of nisi prius, an action and all matters between the parties at law and in equity, including a chancery suit, were referred to an arbitrator, who awarded that a sum of money should be paid to the plaintiff in the action, and that the bill in chancery should be dismissed, and that all proceedings therein should utterly cease and determine:—Held, that the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties, were thereby finally determined, although one of the matters in dispute in the chancery suit was brought before the arbitrator as a matter of difference between the parties, and was not otherwise disposed of than by the ending of the chancery suit. *Pearse v. Pearse*, 9 B. & C. 484.

An award that certain actions be discontinued, and each party pay his own costs, is final and good, being in effect an award of a stet processus. *Blanchard v. Lilly*, 9 East, 497.

Where an action for a breach of covenant was pending, which, with all the matters in difference, was referred, the costs of the suit to abide the event:—Held, that an award, that the plaintiff had no demand on the defendant, on account of any alleged breaches of covenant, or on any other account whatsoever, was final, although the suit was not in terms concluded. *Jackson v. Yabsley*, 5 B. & A. 848. But see *Winter v. White*, 2 Moore, 723; 1 B. & B. 350.

An agreement recited that a chancery suit for a dissolution of partnership existed between the parties, and that, in order to put an end to it, they had agreed to refer all matters in dispute arising out of their accounts or otherwise; and power was given to the arbitrator to assess and apportion the costs of the suit, as well as the other costs. The arbitrator found a sum of money to be due from one of the parties to the other, and apportioned the costs of the suit and the other costs:—Held, that the award was final, and had sufficiently adjudicated on the chancery suit. *Marsh, In re, or Haywood v. Marsh*, 16 L. J., Q. B. 330; 11 Jur. 657.

In an action on an award, the declaration stated the award to be made "of and concerning the premises." The submission recited, that the parties were relatives, and entitled to a distributive share of an intestate's (M.) effects. That his estate consisted of debts, farm-stock, cattle, corn, implements of husbandry, household goods, furniture, and other effects; that differences of opinion had arisen as to the value of the farm-stock, cattle, &c. (not naming the debts); and that it was agreed to refer the disputes. The award, which was made "touching and concerning the matters in difference," found that the defendant, who was the administrator of M., had moneys, farm-stock, cattle, corn, &c. of M., to the value of 926*l*. (but did not mention the effects). It awarded that the defendant should retain a certain sum, for the purpose of paying the rent and taxes of tenements in the occupation of M.

at the time of his decease; and that the defendant should pay to the parties their distributive shares of the residue of the estate of M. It was objected to the award that it was bad, on the grounds, first, that the arbitrator had omitted to find the value of the "effects," or of the tenements mentioned; secondly, that it did not state the amount of the debts; and, thirdly, that it did not find the amount of the distributive shares:—Held, that, upon these pleadings, as the award was expressly made "of and concerning the premises," the court would intend that the arbitrator had adjudicated upon all matters referred to him; and that, if he had not done so, the omission should have been shewn by plea. *Perry v. Mitchell*, 2 D. & L. 452; 12 M. & W. 792; 14 L. J., Ex. 88.

Upon the trial of an action, a verdict was found for the plaintiff, subject to a reference of all matters in difference. The defendant claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due. The award, without stating that it was made of and concerning the premises, directed a verdict to be entered for the plaintiff with damages:—Held, sufficient. *Gray v. Guennap*, 1 B. & A. 106.

Upon a declaration for negligence, and for money paid, an arbitrator, under an order of nisi prius, found that the plaintiff had "good cause" (not causes) of action for a certain sum, and directed a verdict to be entered up for that sum:—Held, sufficiently certain, as he had in effect ordered a general verdict to be entered for the plaintiff on the whole of the declaration. *Dicas v. Jay*, 2 M. & P. 448; 5 Bing. 281.

A cause and all matters in dispute between the parties being referred, the arbitrators, "having heard the proofs and allegations of the parties touching the matters in difference between them," awarded, "concerning the same, that the defendant should pay the plaintiff 11*l*. 5*s*. in full of all demands in the cause:—Held, sufficiently final. *Day v. Bonnin*, 3 Bing. N. C. 219; 3 Scott, 397; 2 Hodges, 207.

Where all matters in difference between the plaintiff and defendant were referred, and the defendant made several claims against the plaintiff, which might be the subject of a cross action, and the arbitrator found that the plaintiff had no cause of action against the defendant:—Held, that the award was sufficient; all matters in difference between the parties having been referred. *Hayllar v. Ellis*, 3 M. & P. 553; 6 Bing. 225.

A cause and all matters in difference between parties were referred. A cross claim was urged on the part of the defendant before the arbitrator. He, professing to make his award "of and concerning the several premises so referred as aforesaid," after disposing of all the issues in favour of the plaintiff, directed the defendant to pay a gross sum to the plaintiff, apportioned the costs of the reference and award, and on payment directed that the plaintiff should execute and deliver to the defendant a general release, but nothing was said in respect of the cross claim:—Held, that the award was nevertheless final; for that it must be intended, from the silence of the arbitrator upon the subject, that he had negatived the cross claim. *Harrison v. Cranwick* (in error), 13 C. B. 399; 21 L. J., C. P. 113; 16 Jur. 315—Ex. Ch.; affirming, 10 C. B. 441; 1 L. M. & P. 721; 20 L. J., C. P. 56; 15 Jur. 108.

Where an arbitrator, to whom all matters in difference in a cause are referred, professes by his award to deal with the whole matters, it is no objection that he omits specifically to dispose of one of the matters in difference, if it necessarily appears from the whole of the award that that matter was substantially disposed of. *Biggs v. Hansell*, 16 C. B. 562.

An action of covenant and trover was referred by an order of nisi prius directing that "the jury do find a verdict for the plaintiff for the claim in the declaration, subject to a reference to a valuer, who is to decide whether there is any damage to the plaintiff by reason of the premises not being in a sufficient state of repair under the terms of the lease, in which case the valuer is to award the amount of damage to the reversion. It is also ordered that the valuer is to say what compensation (if any) the plaintiff is entitled to in consequence of the alterations which have taken place in the premises, and that the valuer shall be attended by two witnesses only on each side to explain the past and present state of the premises. It is also ordered that the question of certificates as to costs of this action and the costs of the reference shall be left to the master, when the amount of the verdict is ascertained." Upon this a verdict was found for the plaintiff, subject to the reference. The arbitrator found as follows:—"I certify that beyond 17l. paid into court there is no damage to the plaintiff by reason of the premises not being in a sufficient state of repair under the terms of the lease; nor is he entitled to any compensation in consequence of the alterations which have taken place in the premises:—"Held, that the award was good as disposing of the only matters left to the arbitrator, though it did not dispose of all the issues upon the record, and that the plaintiff was thereupon entitled to nominal damages of 1s. *Sowdon v. Mills*, 30 L. J., Q. B. 175; 3 L. T. 754.

An award (entitled in the cause) recited a submission of "all claims, &c. in dispute in this action and of all matters in difference between the parties," and stated that the umpire, "having heard, examined and considered the allegations, witnesses, and evidence of the plaintiff and the defendant concerning the premises," made his award "of and concerning the premises," that the defendant should pay to the plaintiff the sum of 100l. in full of all demands in this case:—Held, that it sufficiently appeared on the face of the award that the umpire had disposed of all matters referred to him. *Mannion v. Harrison*, 11 Ir. R., C. L. 102.

#### B. When Extent of Cause or Issues must be Determined.

**On Account of Costs, &c.]**—A cause (the declaration containing eight counts) and all matters in difference between the plaintiff and defendant, were referred; the costs of the cause, and of the reference and award, to abide the event. The arbitrator found that the plaintiff had good cause of action in respect of the matters in five counts, and awarded damages, and directed that no further proceedings should be had in the cause, but made no specific award as to the three remaining counts:—Held, that the award was not final, there being no determination as to these counts, and consequently no legal event as to them to authorize

taxation of costs thereon. *Norris v. Daniel*, 4 M. & Scott, 383; 10 Bing. 507; 2 D. P. C. 798.

Where the costs of the cause are to abide the event of the award, the arbitrator is bound to find specially upon each issue. *Bourke v. Lloyd*, 2 D., N. S. 452; 10 M. & W. 550; 12 L. J., Ex. 4.

But where the costs of the reference and the award only are to abide the event, he is not bound so to find, unless required by the reference. *Id.*

A cause in which there were several issues was referred, the costs to abide the event. The arbitrator awarded on each issue separately, and partly for each party, but gave no directions for entering a verdict or nolle prosequi:—Held, that the award was sufficiently final, so that the costs could be taxed. *Clarke v. Owen*, 2 H. & W. 324.

Where three actions were referred, the costs to abide the event, and the award directed that a certain sum should be paid to each plaintiff, without awarding on each issue, and that the action should be discontinued:—Held, that the award was bad. *Hunt v. Hunt*, W. W. & D. 62; 5 D. P. C. 442; 1 Jur. 135.

A declaration contained counts for goods sold, money had and received, money paid, and money due on account stated. The defendant pleaded non assumpsit, payment and set-off. After issue joined, it was agreed that all proceedings in the action should be stayed, and the action and all matters in difference referred to two arbitrators, the costs of the action to abide the event of the award. The arbitrators awarded that the defendant was indebted to the plaintiff in a certain sum, and directed final judgment to be entered for the plaintiff for that sum:—Held, that the award was bad, there being no specific finding upon the issues raised on each of the counts in the declaration by the plea of non assumpsit. *Kilburn v. Kilburn*, 2 D. & L. 633; 15 M. & W. 671.

Where a reference directed a general verdict to be entered for the plaintiff, in a cause where there were several issues, "the costs of the cause to abide the event," and the arbitrator orders that the verdict should stand, but the damages be reduced to a sum named, a specific finding on each issue is not necessary. *Smith, In re*, 6 D. & L. 20; 14 Jur. 483.

A cause and all matters in difference were referred. The submission contained a clause that the costs of the reference and award should be in the discretion of the arbitrator. The arbitrator found that a specific sum was due to the plaintiff "in respect of all the matters in difference so referred to him":—Held, that the finding was sufficiently certain. *Baker v. Cotterill*, 7 D. & L. 20; 18 L. J., Q. B. 345; 14 Jur. 1120.

A cause, in which there were several issues, having been referred, the costs of the cause to abide the event, the arbitrator awarded that the plaintiff "had good cause of action" against the defendant, "as stated in the declaration," and assessed the damages at one sum:—Held, that it sufficiently appeared that all the issues were decided in the plaintiff's favour. *Phillips v. Higgins*, 2 L., M. & P. 355; 20 L. J., Q. B. 357.

In an action by an attorney on a bill of costs, a verdict was taken by consent, and the matter was referred together with all matters in difference. Another bill of costs was also disputed before the arbitrator. He merely awarded that

the verdict should be entered for a certain sum and the defendant should pay the costs of the reference, without saying that that sum was for the first bill of costs, or making any mention of the second bill.—Held, that the award was bad. *Gyde v. Boucher*, 2 H. & W. 127; 5 D. P. C. 127.

Two causes between the same parties, one action for mesne profits, in which the plaintiff had declared, the other in assumpsit, in which he had only issued his writ, were referred; the costs of the causes, and of the reference and award, to abide the event of the award. The arbitrator, after reciting the order of reference, and that he had duly considered the proofs concerning the premises, awarded concerning the same, that all further proceedings in the causes should cease and be no further prosecuted; and that the defendant should, on a certain day, pay to the plaintiff a certain sum, in full of all demands in the causes.—Held, a determination of both causes in favour of the plaintiff. *Wynne v. Edwards*, 12 M. & W. 708; 1 D. & L. 976; 13 L. J., Ex. 222.

Where one of the parties admits the claim of the other, but seeks to reduce the balance by a set-off, it is sufficient for the award to state that a sum is owing to one side or the other, without further noticing the set-off. *Brown, In re*, 1 P. & D. 391; 9 A. & E. 522.

A cause, in which there was a plea of the general issue, and also a plea of set-off, was referred, the costs of the reference and award to abide the event of the award. The arbitrator awarded, that "the plaintiff had not at the commencement of the action, or at any time afterwards, any cause of action against the defendant:—Held, that the arbitrator had determined the action, and that he was not bound to decide upon each issue, unless he was requested so to do. *Duckworth v. Harrison*, 7 D. P. C. 71; 4 M. & W. 432; 1 H. & H. 349; 2 Jur. 1090.

On a reference of all matters in difference in a cause which involves several issues, the costs of the cause to abide the event, the award is good, although there is no specific finding upon each issue, if it appears by necessary intendment that the arbitrator has disposed of all the issues. *Humphrey v. Pearce*, 7 Ex. 696; 22 L. J., Ex. 120; *S. P., Stonekewer v. Farrar*, 6 Q. B. 730; 9 Jur. 203.

To a declaration containing three counts, the defendant pleaded non assumpsit, tender, set-off and payment, upon which issues were joined. The cause being referred, the costs of the cause to abide the event of the award, the arbitrator found for plaintiff on the first, third and fourth issues; and on the second for defendant:—Held, that the finding was sufficient, and that it was not necessary there should be distinct findings on the issues raised by the plea of non assumpsit upon each separate count. *Adam v. Rowe*, 3 D. & L. 331; 15 L. J., Q. B. 223; 10 Jur. 840.

Where a cause in which there are several issues is referred, and the costs of the cause are to abide the event of the award, the arbitrator must award specifically on each issue; and an award, that the plaintiff had good cause of action against the defendant, and that the defendant should pay to the plaintiff a certain sum, together with the costs of the action and of the reference, is bad. *Bourke v. Lloyd*, 10 M. & W. 550; 2 D., N. S. 452; 12 L. J., Ex. 4.

In an action the defendant pleaded non assumpsit, payment, and a set-off; and issues having been joined thereon, the cause and all matters in difference were by a judge's order referred to arbitration, the costs of the cause to abide the event, and the costs of the reference and award to be at the discretion of the arbitrator. The arbitrator awarded, "that the plaintiff should pay to the defendant 16l. 10s. 2d., being the balance which I find to be due from plaintiff to the defendant;" and he further awarded that each party should pay his own costs of reference, and a moiety of the costs of the award:—Held, that the award was bad, on the ground of uncertainty as to the finding of the issues, and there being no adjudication at all upon the cause. *Pearson v. Archbold*, 11 M. & W. 477; 2 D., N. S. 1018; 12 L. J., Ex. 308; 7 Jur. 447.

An action of trover, with pleas not guilty and not possessed as to part, and payment into court as to the residue, was referred to an arbitrator, who adjudged that the verdict should stand, and that the damages should be reduced:—Held, that the award was good, the arbitrator having sufficiently decided on all the issues. *Wilcox v. Wilcox*, 4 Ex. 500; 19 L. J., Ex. 27.

A cause in which the defendant had pleaded never indebted, the Statute of Limitations, payment, set-off, and accord and satisfaction was referred to a county court judge; the costs of the cause to abide the event of the cause, and the costs of the reference to be in the discretion of the arbitrator. The county court judge having certified that the defendant was not, at the time of the commencement of the action, indebted to the plaintiff, and having found a general verdict for the defendant, and directed that the plaintiff should pay the costs of the reference, the court sent back the certificate to be amended by stating the manner in which the several issues were found. *Holland v. Judd*, 3 C. B., N. S. 826.

Where a cause containing a count on a promissory note for 22l. 11s. 9d., and another on an account stated for 30l., was referred to a barrister, who found that the plaintiff had good cause of action for, and was legally entitled to recover from the defendant, the sum of 22l. 11s. 9d., being the amount of the promissory note mentioned in the pleading in the cause:—Held, that the award was bad, as not containing any adjudication on the account stated. *Giaburne v. Hart*, 5 M. & W. 50; 7 D. P. C. 402; 3 Jur. 536.

A count for non-performance of an award stated the pending of an action between the plaintiff and the defendant, wherein the plaintiff claimed damages from the defendant for work and labour, materials and goods sold and delivered, a reference by judge's order to an arbitrator, the award to be made on or before the 16th April next ensuing, with liberty to the arbitrator to enlarge the time, but not beyond the 1st of May; the costs of the cause to abide the event. The declaration alleged mutual promises to perform the award so to be made and published, and stated two enlargements by judge's order and consent, made on the 18th April and the 19th May, until the 29th May, and an award made on that day, whereby the arbitrator ordered and determined that there was due from the defendant to the plaintiff, after balancing the accounts between them, and giving credit for all sums paid by the defendant to the plaintiff, and every item of set-off, 220l. 8s., the clear balance, and ordered payment thereof, and also of the costs of the reference and award. It then

stated the amount of the costs of the cause and award, and averred non-payment by the defendant:—Held, that even if it had appeared that there were pleas of payment and set-off in the action, the award was final. *Armitage v. Coates*, 4 Ex. 641; 19 L. J., Ex. 95.

Where the costs of a cause and of the special jury are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each, or the award is bad. *George v. Lawsley*, 8 East, 13.

In an agreement to refer an action and all matters in difference, the parties to abide by the award "of and concerning the action, and of and concerning the other matters in difference:—"—Held, that the arbitrator ought to have made an award concerning the action and the other matters separately. *Rule v. Bryde*, 1 Ex. 151; 16 L. J., Ex. 256.

An action by A. against B., and a cross action by B. against A., were referred by separate orders of reference under 17 & 18 Vict. c. 125, s. 3. The action by B. against A. contained counts for not using a farm in a tenant-like manner, and for goods sold; and the defendant pleaded a denial of the tenancy and performance of the agreement; and never indebted, payment and set-off. The arbitrator made his award on one piece of paper, awarding for the plaintiff in the first action, and that in the second action there was nothing due or payable from the defendant to the plaintiff; and he ordered that the costs of the award should be paid by B. The court remitted the award to the arbitrator that he might make two awards and find the issues specifically. *Hellaby v. Brown*, 1 H. & N. 729; 26 L. J., Ex. 217.

Where several issues are referred, it is not indispensably necessary for an arbitrator to award on each issue, if his intention as to each of them is sufficiently clear from the general language of the award. *Hunt v. Hunt*, 5 D. P. C. 442; W. W. & D. 62; 1 Jur. 835.

Where the whole cause and all matters in difference are referred, the arbitrator is in the character of a jury, and shall find for the defendant on those issues only which are proved by him; even although it is directed that if the arbitrator shall find that the plaintiff is not entitled to recover any damages at all, a verdict shall be entered for the defendant. *Woolfe v. Cooper*, 6 D. P. C. 617; 4 Bing. N. C. 449; 1 Arn. 199; *S. C.*, sub nom. *Woolfe v. Hooper*, 6 Scott, 281.

By a judge's order, a cause and all matters in difference were referred. The award, after reciting the order, professed to be made "of and concerning all the matters referred in the cause and under the order," and disposed of the issues in the action; and awarded that the defendants had no claim to certain bills accepted by the plaintiff, but was silent as to a claim by one of the defendants for money due to him for goods sold to the plaintiff, though such claim had been brought to the notice of the arbitrator:—Held, that the award sufficiently disposed of everything, as it amounted to an adjudication against the validity of such a claim. *Jewell v. Christie*, 2 L. R., C. P. 296; 36 L. J., C. P. 168; 15 L. T. 580.

Action on an agreement to build a house for the plaintiff, according to drawings, plans, and specifications, and to the satisfaction of the plaintiff. Pleas: first, non assumpsit; second,

that the defendant did the work to the satisfaction of the plaintiff; third, that before the breach the contract was rescinded; fourth, leave and licence; and other pleas, alleging deviations from the contract, by agreement with, and direction of, the plaintiff. Issues having been joined, the cause was referred at nisi prius to an arbitrator, who awarded a general verdict for the defendant. Judgment having been entered up for the defendant on that verdict:—Held, that the record was not repugnant so as to afford ground of error. *Cooper v. Langdon (in error)*, 2 D., N. S. 826; 10 M. & W. 785; 12 L. J., Ex. 485—Ex. Ch.

Where a cause and matters in dispute are referred, it is sufficient for the arbitrator to state that he finds the plaintiff "has no cause of action," without making any reference to matters in dispute, independently of the action, it not being shewn that any matters in dispute beyond the action are brought before him. *Wyatt v. Curnell*, 1 D., N. S. 327.

**Clause in Submission allowing Arbitrator to find generally.**—Where a cause, in which several issues are joined, is referred, a clause may be introduced into the order, that it shall be sufficient for the arbitrator to award in favour of the plaintiff, or defendant generally, unless either party requests him to find some particular issue. *Morgan v. Thomas*, 9 Jur. 92.

In an order of reference power was given to the arbitrator to find generally, or to find specific issues in favour of either party if required. The defendant succeeded in disproving the plaintiff's right to recover in respect of one of the matters in difference, but the arbitrator was not asked, either expressly or impliedly, to find the specific issues. He therefore found generally for the plaintiff, thus fixing the defendant with the whole of the costs, including his own costs of disproving one issue, and the costs incurred by the plaintiff in unsuccessfully endeavouring to establish it:—Held, that this was no ground for sending back the award. *Wilson v. Hinckley*, 18 L. T. 695.

**Reference before Plea pleaded.**—Where a declaration contains certain counts, and, before plea pleaded, the cause is referred, the arbitrator is not bound to find specifically upon each count. *Bearup v. Peacock*, 2 D. & L. 850; 14 M. & W. 149; 14 L. J., Ex. 232.

After writ issued (there being no pleadings), a cause and all matters in difference were referred; the costs of the cause were to abide the event, and the costs of the reference and award were to be in the discretion of the arbitrator. He ordered that all further proceedings in the cause should cease and be no further prosecuted, and that the defendant should pay to the plaintiff 190*l.*, to be received by him in satisfaction and discharge of and for all claims and demands in the cause and matters in difference referred; and he further awarded with respect to the payment of the costs of the reference and award:—Held, that it was to be presumed from the terms of the award, that the arbitrator found something to be due in respect of the cause referred to him, and that although it did not appear how much was due, still as the directions to the masters for taxing, by which they are directed, where less than 20*l.* is recovered, to tax the costs on a lower scale do. not apply to awards,

the award was good, as sufficiently disposing of the cause and as being final and certain. *Nicholson v. Sykes*, 9 Ex. 357; 2 C. L. R. 992; 23 L. J., Ex. 193.

A. commenced an action against B., and delivered a declaration, consisting of two counts. Before plea all matters in difference between the parties to the cause were referred, the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the arbitrator's discretion. The award, which did not purport to have been made "of and concerning the premises," directed that B. should pay to A. a certain sum of money, without saying upon what account:—Held, bad for uncertainty, as it did not shew in respect of what matters in difference the money was to be paid, and did not contain any finding upon which the master could tax costs. *Crosbie v. Holmes*, 3 D. & L. 566; 1 B. C. Rep. 20; 15 L. J., Q. B. 125; 10 Jur. 139.

**When Amounts should be found separately.]**

—A plaintiff declared in assumpsit, and the damages laid in the declaration amounted to 700*l.*; the defendant pleaded several pleas, and before issue joined, the cause, and all matters in difference were referred. The arbitrator made his award thus:—"I award that the plaintiff is entitled to judgment on the whole declaration, and that judgment be entered up accordingly for him; and I award that the defendant shall pay to the plaintiff 5*l.* 2*s.* 8*d.*, which I find to be due and owing to the plaintiff on the balance of all accounts and transactions between them."—Held, that the award was bad for uncertainty, for not awarding to what amount the plaintiff was entitled to recover in respect of the action, so that it might be ascertained whether the costs should be taxed on the higher or lower scale. *Lund v. Hudson*, 1 D. & L. 236.

Where particular questions of value are submitted, the award should find those matters specifically, and not a sum in gross. *Richards v. Browne*, 9 Ir. C. L. R. 199.

A., having entered into distinct contracts for constructing as many distinct portions of a line of railway, brought an action for the amount of those contracts. Upon a reference at which distinct and separate defences were set up in respect of the claim upon each contract, the arbitrator awarded generally as to the whole action:—Held, that the award was good, and that it was unnecessary for him to find separately upon each contract. *Crawshaw v. York and North Midland Railway Company*, 1 B. C. C. 45; 21 L. J., Q. B. 274; 16 Jur. 668.

At a trial a verdict was taken for the plaintiff, subject to the award of a legal arbitrator, who was authorized to award the verdict to be entered for the plaintiff or defendant, or a non-suit, as he should think fit, and who was directed at the request of either party to state any point of law upon the face of his award for the opinion of the court:—Held, that it was not necessary for him to decide as to the amount of damages to be finally recovered, and to direct how judgment should be entered up, but that, having disposed of all the issues separately, and having assessed damages separately in respect of each subject-matter of complaint, and having at the request of both parties raised questions for the opinion of the court, his award was good. *Bradbos v. Christ's Hospital*, 2 D., N. S. 164; 4 M. & G. 714; 5 Scott, N. R. 79.

Action for money had and received: pleas, *nunquam indebitatus*, payment, and set-off. An award, that a verdict be entered for the defendant on all the issues, is insufficient, as not deciding the set-off. *Maloney v. Stockley*, 4 M. & G. 647; 2 D., N. S. 122; 12 L. J., C. P. 92.

But upon a reference, by order of nisi prius, of a cause and all matters in difference, one of the issues in the cause being joined on a plea of set-off, the arbitrator ordered the verdict to be (with an immaterial exception) entered for the plaintiff on all the issues, assessing the damages severally:—Held good. *Hobdell v. Miller*, 6 Bing. N. C. 292; 8 Scott, 165.

An award that the sum of 230*l.* is due from defendants to plaintiffs, and that out of that sum defendants should pay to the arbitrators 93*l.*, being the expenses of preparing the agreement of reference and their award, and for their charge, trouble, and attendance on the reference and arbitration, and certain costs which they award to be paid to the solicitors of plaintiffs, in respect of certain actions mentioned in the agreement of reference, leaving the sum of 136*l.* which they award to be paid to plaintiffs:—Held, that the award was void for uncertainty in directing a sum in gross to be paid to the arbitrators for the objects above mentioned, without specifying the particular sum to be appropriated to each object. *Robinson v. Henderson*, 6 M. & S. 276.

An award is not bad for not deciding several items separately, unless either they were referred separately in form, or it clearly appears from the reference that the parties intended that they should be separately decided. *Whitworth v. Hulse*, 1 L. R., Ex. 251; 35 L. J., Ex. 149; 12 Jur. N. S. 652; 14 L. T. 445; 14 W. R. 736.

A submission, after reciting that disputes had existed between W. and H., and that it had been agreed that W. should purchase H.'s shares in an incorporated company, and that an arbitrator should determine what sum he should pay to H. upon the balance of accounts between them for the transfer of the shares, and should decide and determine all matters in difference between them, submitted to the arbitrator "the claims of H. against W. in respect of the differences and matters aforesaid, and all other matters in dispute between them, and the amount to be paid for the shares." The arbitrator directed that a lump sum should be paid by W. to H. in respect of all the matters in difference, including the amount to be paid for the purchase of the shares:—Held, that the arbitrator was not bound to find the sum to be paid in respect of the shares separately from that to be paid in respect of other matters in difference. *Id.*

In an action on an award the fact, but not the validity of the award was traversed. The defendants' special act enacted that the times, conditions, and regulations to which they should be liable in respect of using certain premises belonging to the plaintiffs, and "the tolls and other consideration to be paid by them for the same" should, if not agreed upon, be determined by an arbitrator to be appointed by the Board of Trade. The defendants used the plaintiffs' premises for a long time, but the terms, &c., had not been agreed upon, and an arbitrator, duly appointed, having, in respect of the past user and enjoyment, specified in his award the time and nature of the defendants' user, awarded a lump sum to be paid by them:—Held, that the

awarded the plaintiff damages:—Held, that as the arbitrator had no power to award judgment non obstante verdicto, and as no writ of error could be sued out, the final event of the award was for the defendant, and consequently he was entitled to the postea. *Linegar v. Price*, 9 Ex. 417; 2 C. L. R. 1251; 23 L. J., Ex. 225.

#### viii. Where Damages or Amount should be Awarded.

**In what Cases.**—A cause in which there were seven issues joined, was referred by an order of nisi prius, the costs of the award and reference to abide the event. The arbitrator found for the plaintiff on five of the issues, and for the defendant on the other two, neither of which latter covered the whole cause of action; but did not either award any damages, or say for whom the verdict generally should be entered up:—Held, that the award was insufficient. *Wood v. Duncan*, 1 H. & H. 338; 7 D. P. C. 91; 2 Jur. 969.

Where the costs are to abide the event, and the arbitrator finds in favour of the defendant upon a plea which covers the whole cause of action, it is no objection to the award that on other issues he has found for the plaintiff without damages. *Surage v. Ashwin*, 4 M. & W. 530.

An award is not necessarily bad for want of finality or inconsistency because the arbitrator has found for the plaintiff on one of the issues, in respect of which he has given no damages. It may be a ground for moving to set aside the award at the instance of the plaintiff, but not by the defendant, for he cannot be prejudiced by the omission to award damages. *Cox v. Kerslake*, 16 L. T. 396.

To an action on the common counts, the defendant pleaded, as to part, the general issue, and to the residue payment after action brought, together with a set-off to the whole. The cause and all matters in difference having been referred, the arbitrator awarded that a verdict be entered for the defendant on all the issues except the first; and on that issue for the plaintiff, without any damages, and that there were no other matters in difference:—Held, first, that, the plea of set-off covering the whole cause of action, the finding the general issue without any damages was good. *Warwick v. Cox*, 12 M. & W. 774; 1 D. & L. 986; 13 L. J., Ex. 314; 8 Jur. 713.

Held, secondly, that the finding a payment by the defendant, since action brought, of part of the sum claimed was not inconsistent with finding the set-off in his favour. *Id.*

An order referring an action on a money bond (where the issue was payment by a co-obligor), and all matters in difference, does not require the arbitrator to direct for what sum the verdict shall be entered. *Cayme v. Watts*, 3 D. & R. 224.

A verdict for 3,000*l.* damages, and 40*s.* costs, is taken by consent, subject to a reference of the cause and all matters in difference between the parties. An award directing the entering of a verdict for the plaintiff, and the payment of 260*l.* 12*s.* 6*d.* from the defendant to the plaintiff, but not expressly stating for what amount the verdict is to be entered, is bad for uncertainty. *Martin v. Burge*, 6 N. & M. 201; 4 A. & E. 973.

#### ix. Limit to Amount awarded.

**In what Cases.**—Where a verdict is taken for

a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred, he cannot award a greater sum than that for which the verdict was taken; and if he do, no assumption by implication will arise to pay even to the extent of the verdict so taken. *Bonner v. Charlton*, 5 East, 189; 1 Smith, 369.

If an arbitrator awards a greater sum than the amount of the verdict, and judgment is entered for the whole, and it appears that a part of the sum is covered by a countervailing demand which never was a subject of dispute, so that only a balance less than the amount of the verdict is ultimately to be paid over; the court will reduce the judgment to the amount of the verdict, and grant execution for the sum really due. *Prentice v. Reed*, 1 Taunt. 151.

In an action on a lease, in which the plaintiff assigned breaches for rent arrear, for non-repair, for not painting, and for not repairing after notice; and the defendant pleaded, that the lease was obtained by fraud, and performance of the several covenants; a verdict was taken for the plaintiff on the issue (fraud), and damages assessed on the breach (for rent), at 10*l.*, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred, to order what he should think fit to be done by the parties, and with liberty to amend the record, the issue not having been perfected on the 4th plea. The arbitrator directed that the verdict entered on the first issue should stand, and assessed the damages on the several breaches at 249*l.*, in addition to the 10*l.* found on the first breach, for which sum he directed the verdict was to be for the plaintiff. No verdict was taken at the trial for the sum given by the arbitrator:—Held, that as the amount of damages was fixed by the order of reference, and as the arbitrator had no power given him to enter a verdict upon the other breaches, he had exceeded his authority, and therefore that the award was bad. *Hayward v. Phillips*, 1 N. & P. 288; 6 A. & E. 119; W. W. & D. 1; 1 Jur. 102.

A cause was referred at nisi prius, and a verdict entered for the plaintiff, by consent, for the damages in the declaration, which exceeded the amount claimed in the particulars of demand. The arbitrator awarded that the verdict should stand at the amount for which it was entered:—Semble, that the particulars were not necessarily before the arbitrator, and that if the defendant intended to limit the demand to the amount claimed by the particulars, he ought to have brought the particulars before the arbitrator. *Kenrick v. Phillips*, 7 M. & W. 415; 9 D. P. C. 308.

On a dissolution of partnership between A. and B., A. offered to sell his interest to B. for 20,000*l.*; B. refused, but offered to buy at 18,000*l.*, which A. refused. By a written agreement, reciting the offers and the refusals, it was left to C. to say what price should be paid by B. for A.'s interest:—Held, that C. had no authority to name a sum outside of the limits, 18,000*l.* and 20,000*l.* *Thomson v. Anderson*, 9 L. R., Eq. 523; 39 L. J., Ch. 468; 22 L. T. 570; 18 W. R. 445.

#### x. The Order to Pay.

**To what Persons.**—An award that one of the parties to the submission shall pay money to a stranger, for the benefit of the other party, is

good. *Wood v. Adcock*, 7 Ex. 468; 21 L. J., Ex. 204; 16 Jur. 251—Ex. Ch.

The onus of shewing that payment awarded to be made to a stranger is for the benefit of a party to the submission, lies upon the party who seeks to enforce the award. *Ib.*

But an award directing payment of a sum of money to a stranger is not good, unless it appears on the face of the award that such payment is for the benefit of a party to the submission. *Laing, In re*, 13 C. B. 276.

In an action by H. and C. upon an award, the declaration stated that an action of trespass, and all matters in difference between H. & B. relating to certain premises, and all matters in difference between C. and B. relating to the same premises, C. consenting to be made a party thereto, were referred by a judge's order, which ordered that a verdict should be entered for H. for 50*l.* subject to the award of the arbitrator. The arbitrator awarded that H. was entitled to a verdict in the action, and assessed the damages at 40*l.*, to be paid by B. to H. and C.:—Held, that the award was not bad for directing the 40*l.* to be paid as damages by B. to H. and C. jointly. *Hawkins v. Benton*, 8 Q. B. 479; 15 L. J., Q. B. 139; 10 Jur. 95.

An award ordering the defendant to pay the sum awarded to the plaintiff or his attorney, S., is good, without any power of attorney to S. to demand the money. *Hare v. Flay*, 2 L. M. & P. 392; 11 C. B. 472; 20 L. J., C. P. 249; 15 Jur. 1038.

By a submission between W. and B. on the one side, and A. on the other, disputes and differences between the parties were referred. The award ordered a sum of money to be paid by W. to S. (one of the arbitrators), and directed him to pay over that sum immediately to A.:—Held, that the arbitrators were justified in awarding one of the two parties on the one side to pay money to the other. *Wood v. Adcock (in error)*, 7 Ex. 468; 21 L. J., Ex. 204; 16 Jur. 251—Ex. Ch.

The direction of the arbitrators that the money should be paid to one of them, and by him paid over to the party in whose favour the award was made, did not vitiate the award, as it sufficiently appeared that such payment was for the benefit of one of the parties to the submission. *Ib.*

**At what time to be paid.**—An arbitrator to whom all matters in difference in a cause were referred, found that a sum of money was due from the defendant to the plaintiff, which he directed to be paid on or before a particular day, and that upon payment of that sum all proceedings should cease:—Held, that the award was final and not conditional; but that the arbitrator had exceeded his authority in giving a particular day of payment. *Bennell v. Hurman*, 1 C., M. & R. 935; 5 Tyr. 509; 3 D. P. C. 500.

**Contingent Assessment.**—An arbitrator directed two issues to be entered for the plaintiff, and all the other issues for the defendant, and then declared, "I assess the damages of the plaintiff upon the two several issues which I have ordered to be entered for him at 1*l.*, which sum, except for my finding upon the other issues, the plaintiff would be entitled to recover in the cause:—"—Held, that the award was not bad for such contingent assessment. *Toby v. Lovibond*,

5. C. B. 770; 5 D. & L. 769; 17 L. J., C. P. 201; 12 Jur. 436.

**By whom paid.**—An award is not void for uncertainty, which directs an executor to pay a sum of money out of assets, but which does not determine whether in point of fact he has assets. *Love v. Honeybourne*, 4 D. & R. 814.

**Set-off contrary to Law not allowed.**—An action to recover for work done by two attorneys was referred. It appeared before the arbitrator, that the work was done for the defendant, but that one of the attorneys had received various sums, previously to his entering into partnership with the other, which were more than sufficient to cover the demand; that the latter had been clerk to the former at the time of the receipt of such money, and that the former, since the partnership, had admitted that it remained in his hands. The defendant having pleaded a set-off of the money so received against the joint debt, the arbitrator directed a verdict to be entered for him:—Held, that the award was bad. *France v. White*, 8 D. P. C. 53; 8 Scott, 257; 6 Bing. N. C. 33.

#### xi. Other Points relating to.

Where parties intend to refer all disputes, the terms of the reference should be "of all matters in difference between the parties;" and when the reference is only intended to be of the matter in the particular cause, "of all matters in difference in the cause." *Smith v. Muller*, 3 T. R. 624.

Where a cause only was referred in which a plaintiff claimed, by his particulars, upon the balance of an account, 34*l.* 17*s.* 4*d.*, and the defendant paid into court 9*l.* 3*s.* 3*d.*; but the arbitrator, upon a supposition that he was entitled to settle all matters in difference between the parties, awarded to the plaintiff 33*l.* 7*s.* 10*d.*, the court set aside the award, upon the ground that the arbitrator had exceeded his authority. *Atkinson v. Jones*, 1 D. & L. 225; 7 Jur. 881.

An arbitrator does not exceed his jurisdiction when a cause and all matters in difference are referred to him, by making an award "in respect of matters in difference," which could not have been decided at the trial of the action, but might have arisen out of it. *Cox v. Kerlake*, 16 L. T. 398.

A submission to arbitration of all matters in difference between the parties in the cause is not confined to the subject-matter in the particular action then depending, but will extend to cross demands between the parties, though not pleaded by way of set-off; and the costs being to abide the event makes no difference. *Malcolm v. Fullerton*, 2 T. R. 645.

But a reference of all matters in dispute in the cause between the parties is confined solely to the matters in dispute in that trial. *Ib.*

In a reference it was agreed that the arbitrator "shall or may" award a certain matter, with a proviso, &c.:—Held, that the words "shall or may" were imperative on the arbitrator, and that he was bound to insert the proviso in his award, the context of the agreement, and the situation of the parties, requiring such a construction. *Crump v. Adney*, 1 C. & M. 355; 3 Tyr. 270.

An arbitrator, to whom the question of the right of two rectors to the tithe of certain lands



was referred, had power to devise all means to prevent future litigation between the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties touching the matters in dispute:—Held, that he did not exceed his power by awarding undivided moieties of the tithes to the two rectors. *Prosser v. Gorringe*, 3 Taunt. 426.

**Pure Question of Law.]**—A contract entered into between the plaintiffs and defendants for the purchase of some wheat contained the following clause: "Should any dispute arise, the same to be submitted for settlement to the arbitration of two London corn factors respectively chosen, whose decision shall be final and binding:—"—Held, that the clause in question formed part of the consideration for the contract, and was intended to include questions of law as well as of fact which might arise upon the construction of the contract. *Forwood v. Watney*, 49 L. J., Q. B. 447.

**Construction of Contract.]**—B. contracted to buy of A. certain cotton, to arrive in Liverpool, per ship or ships from Bombay, March or April shipment, on the terms of the rules of the Cotton Brokers' Association of Liverpool, by which it was stipulated that the name of the ship should be given to the buyer within two calendar months "after the date of shipment named in the contract," and that in default the buyer might cancel the contract; and also that in case of any dispute arising out of any contract, the matter should be referred to two members of the Cotton Brokers' Association for settlement. A. gave the name of the ship on which the cotton was shipped within two calendar months after April, but not within two calendar months after March, when the cotton was actually shipped. B. therefore disputed his liability to accept the cotton, and caused arbitrators to be appointed in the mode provided for by the rules, who, upon having the documents, but neither of the parties, before them, and without giving A. any opportunity of being heard, made an award in favour of B., on the ground that the shipment was not declared in time. A., however, sued B. for not accepting the cotton, and he pleaded the award in bar to such action:—Held, that the dispute, though involving the question as to the construction of the contract, was one which by the rules the parties agreed to refer. *Thorburn v. Barnes*, 2 L. R., C. P. 384; 36 L. J., C. P. 184; 16 L. T. 10; 15 W. R. 623.

**Clause applying to Quality not Species.]**—Upon a cotton contract to arrive, the seller guaranteed the cotton to be equal to sample, and it was agreed, that in case the quality proved inferior to the guarantee, a fair allowance should be made by arbitration. The bulk turned out to be composed of a different and an inferior kind of cotton from that in the sample, and required different machinery for working it. The seller offered to submit to an arbitrator the difference in value between the sample and bulk, in order to estimate the allowance to be made; the purchaser declined arbitration upon any point, unless the question as to whether he might refuse to accept the cotton should also be submitted. To this the seller refused to consent, and the purchaser then repudiated the contract:—Held,

in an action by the seller against the purchaser for not accepting, that the latter was not answerable for the failure to arbitrate; that the guarantee related to the quality and not to the species of cotton, and that the repudiation of the contract was justifiable. *Azemar v. Casella*, 2 L. R., C. P. 431; 36 L. J., C. P. 124; 16 L. T. 14; affirmed on appeal, 2 L. R., C. P. 677; 36 L. J., C. P. 263; 16 L. T. 571; 15 W. R. 998—Ex. Ch.

**Matters Submitted not within Submission.]**—Where an arbitrator has, by agreement of the parties, jurisdiction to determine disputes which may arise as to certain matters specified in the agreement, and the parties submit to him for adjudication matters not within his jurisdiction, both the arbitrator and the parties being under the misapprehension that the matters so submitted are within his jurisdiction, the award of the arbitrator is good. *Thames Iron Works and Shipbuilding Company v. Reg.*, 20 L. T. 318; 10 B. & S. 33.

**Contrary to Submission.]**—To an action for money lent, the defendant pleaded non assumption and the Statute of Limitations. The cause and all matters in difference were afterwards referred, upon the terms, that "the action should be decided according to the pleadings, but that, under the reference, so far as it related to matters in difference, the plea of the Statute of Limitations was not to be set up by either party." The arbitrator directed a verdict to be entered for the plaintiff for a sum, excluding items that were barred by the statute, and he allowed those items as matters in difference. The court refused to disturb the award. *Stowman v. Wiggins*, 6 C. B. 276.

**Cases of Partnership.]**—If an arbitrator is appointed to arbitrate a certain measure contemplated between two parties, as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved. *Simmonds v. Swaine*, 1 Taunt. 549.

If two enter into partnership, and covenant, in case of a dissolution, to submit all matters relating thereto to arbitration, the arbitrators are not thereby authorized to determine whether any part of the sum of money which was the consideration of the partnership should be refunded. *Tattersall v. Groote*, 2 B. & P. 131.

Upon a reference of partnership disputes, a direction in the award that some of the parties to the reference do pay a sum of money (which is one of the matters included in the submission) to the arbitrator, and that he apply the same to the payment of certain specified demands (also part of the matters submitted), is bad, and vitiates the award, although the payments appear, by the tenor of the award, to be for the benefit of the parties submitting, and not of the arbitrator. *Machay, In re*, 2 A. & E. 356.

By a submission, it was agreed between two partners to dissolve partnership, and that all matters in difference between them, and the terms and conditions on which the partnership should be dissolved, should be referred. The arbitrator awarded, that it should not be lawful for one, during the lifetime of the other, to carry on business at the place they had done, or within thirteen miles:—Held, no excess of his authority. *Morley v. Newman*, 5 D. & R. 317.

Six partners entered into two bonds of submission; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award; and the latter gave a similar bond to the three former: the arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. In an action on the award by the one against the other alone:—Held, that he might recover the sum awarded. *Winter v. White*, 3 Moore, 674; 1 B. & B. 350.

By a bond of submission dated the 19th of March, 1859, it was referred to an arbitrator to determine of and concerning all matters of account pending between A. and B. The arbitrator, after reciting the submission, awarded, "of and concerning the premises," that, "up to the 31st of October, 1857, the accounts between A. and B., in reference to the Wouldham Court Farm, were adjusted, and that the balance due from A. to B. amounted to 4,314*l.* 14*s.* 10*d.*; and that no partnership existed between A. and B. in respect of the Wouldham Court Farm;" and "that A. do pay to B. 781*l.* 5*s.* 3*d.*, the amount due from him in respect of the Wouldham Court Farm; and that A. do pay to B. 1,137*l.* 17*s.* due from him to B., in respect of shares in the Wouldham Cement Company, and that, on payment of such last-mentioned sum, B. do deliver to A. 118 shares in the Wouldham Cement Company, held by him as collateral security for the said sum." In an action by B. to enforce payment of the two sums so awarded:—Held, that the award was not uncertain, and that the arbitrator had not exceeded the authority given to him by the submission, in awarding that no partnership existed between A. & B., or that the shares held by B. as collateral security for the 1,137*l.* 17*s.* should be delivered up to A. on payment of that sum. *Harrison v. Lay*, 13 C. B., N. S. 528.

**Character of Parties.]**—By a submission between G. M., J. M., and W., as trustees and executors of G. M. deceased, and R. M., matters in difference were referred; and the parties agreed to abide by their award of and concerning the premises, or anything in anywise relating thereto. The arbitrators awarded that R. M. should pay a certain sum to G. M., J. M., and W., but they did not state whether it was payable to them in their character of trustees and executors, or of trustees. They awarded, that it should be payable with interest up to a day subsequent to the date of the award, and, if not paid by that day, G. M., J. M., and W. were empowered to withhold the payment of an annuity directed by the award to be paid by them to R. M., until, out of such annuity, the sum should be liquidated:—Held, that the award was bad for not distinguishing whether it was payable to them in the character of trustees and executors, or of trustees, nor the periods to which it was to be referred. *Morphett, In re*, 2 D. & L. 967; 14 L. J., Q. B. 259; 10 Jur. 546.

**Matters in Difference between all Parties.]**—By an order all matters in difference in a cause between A. & B. were referred, and, by a subsequent order, C. was made a party, and it was directed that all matters in difference between A., B. and C. should be referred to the same arbitrator, and that the costs of the suit should abide the event of the award. The arbitrator made two awards, in the one of which he awarded

that A., at the date thereof, was indebted to B., without mentioning C., and in the other that A. was indebted to C., without mentioning B.:—Held that both awards were bad, as he had not decided all the matters in difference between all the parties. *Winter v. White*, 2 Moore, 723. But see *Jackson v. Talsby*, 5 B. & A. 848.

Where two parties of the one part, and one of the other, submit to arbitration all matters in difference between them, the arbitrator may award on matters in difference which the two parties, or either of them, have or has with the other, jointly or severally. *Wood v. Adcock*, 7 Ex. 468; 21 L. J., Ex. 204; 16 Jur. 251—Ex. Ch.

**Award affecting Strangers to Reference.]**—Arbitrators cannot cancel a deed of apprenticeship, where the apprentices are not parties to the submission. *Wicks v. Cork*, 11 Jur. 542.

Under a submission of all matters in difference between A. and B., an award on matters in difference between A. and B., and C. and D. jointly, directing A. to pay B. a certain sum as a compensation for coals gotten by A. belonging to B., or to B. and others, and directing B. to give A. a bond to indemnify him against the claims of C. and D., is bad. *Fisher v. Pimbley*, 11 East, 188.

By agreement between A. and B., certain matters in dispute between them were referred to an arbitrator, who should decide whether a note made by A. and M., and which was "in the hands of R., who had brought actions against A. and M. upon it, should be cancelled, and upon what conditions. The arbitrator directed that the note should be cancelled, upon condition that A. and M. should not, by judgment of non pros or other step, force R. or any other plaintiff to prosecute the actions or pay costs:—Held good, since the award did not require any act to be done by M., who was a stranger, but only made it a condition precedent to the delivery up of the note that A. and M. should incapacitate themselves from compelling R. to proceed with the action or pay costs. *Kirk v. Unwin*, 6 Ex. 908; 2 L., M. & P. 519; 20 L. J., Ex. 345.

**Powers Incidental to Final Determination of Matters.]**—Where an arbitrator, in regulating the future use of a stream of water, the right to which was divided between two parties, interfered with the customary enjoyment by one of them of another stream, which exclusively belonged to him, and was not a matter in difference, and which joined the first:—Held, that he was empowered so to do, as being incidental to, and resulting from, his former direct and larger power. *Winter v. Lethbridge*, 1 McClell. 253; 13 Price, 533.

**Effect of Recital.]**—A., in partnership with two others, carried on business as the owner of a colliery up to January, 1840, when the partnership was dissolved, and notice published in the Gazette. The firm having had dealings with C. & W., A., in April, 1840, wrote to them to furnish their account; and in answer they wrote, "We beg to annex account with owners of the colliery up to the period to which you were liable as a partner; balance due to us 201*l.* 9*s.* 10*d.* at that time, agreeably to account handed on the 6th of January, which we doubt not you will find correct." In January, 1840, after the dissolution, a bill for 120*l.* was drawn upon, and accepted

by, C. & W., for payment of that sum to A. and his late partners, in their partnership name. Upon the 14th March, 1842, the balance of 201*l.* 9*s.* 10*d.* remaining unsatisfied, articles of reference were agreed to between C. and W. and A., which, after reciting that C. and W. claimed a balance of 201*l.* 9*s.* 10*d.* to be due to them from A., witnessed that all disputes and differences which existed between the parties should be referred. Upon the 30th of March, 1842, before the reference commenced, a second bill, including 120*l.*, as due to C. and W., was delivered:—Held, that the recital as to 201*l.* 9*s.* 10*d.*, in the articles of reference, did not confine the arbitrator to the consideration of that sum only, but that, under the words "all disputes and differences," he was at liberty also to award upon the bill for 120*l.* *Charleton v. Spencer*, 3 Q. B. 693; 12 L. J., Q. B. 23; 6 Jur. 1013.

**Arbitrator holding that Dispute "a Claim in the Action."**—A writ was issued in an action against an incorporated company, and their attorney consented to an order, referring "the claims of the plaintiff in the action." The plaintiff claimed a sum for extra work, occasioned by the company's breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The arbitrator entertained this claim though objected to, and awarded to the plaintiff in respect of it:—Held, that if the matter in dispute were not within the jurisdiction of the arbitrator, the company should have applied to the court to revoke the submission; but not having done so, and the plaintiff having set up this matter as "a claim in the action," and the arbitrator having so decided in respect of it, his award was binding, however erroneous. *Faviell v. Eastern Counties Railway Company*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 297.

**Where Award may be rendered Certain.**—Action against an attorney for negligent conduct of a cause. Pleas: non assumpsit and a traverse of the negligence. The cause was referred; the costs of the cause to abide the event and determination of the award. Award: that the defendant did promise; and that he was not negligent. A rule to set aside the award, on the ground that it did not finally determine the cause, inasmuch as the arbitrator, by finding in the terms of the issues, without stating the result of the cause, had merely performed the functions of a jury, and had not adjudicated as to the cause of action, was discharged. *Lowe v. Allen*, 3 G. & D. 395; 4 Q. B. 66; 12 L. J., Q. B. 115; 7 Jur. 416.

An award stated that the plaintiff was entitled to demand of the defendant 90*l.* in respect of the causes of action mentioned in the declaration, and that the defendant was entitled to set off 35*l.* in respect of certain matters mentioned in a set-off:—Held, that the award was sufficiently certain, and that it was not necessary to go through the process of deducting the less sum from the greater. *Platt v. Hale*, 2 M. & W. 391; M. & H. 191; 1 Jur. 358.

Where two issues were raised upon one breach, and an arbitrator directed a verdict to be entered for the plaintiff upon the first issue, with 1*s.* damages; and upon the second issue, with 13*s.* 4*d.* damages:—Held, that the award was good,

and that the verdict might be considered as entered for 14*s.* 4*d.* *Smith v. Festiniog Railway Company*, 6 D. P. C. 190; 5 Scott, 255; 4 Bing. N. C. 23; 3 Hodges, 305; 1 Jur. 844.

A *prima facie* uncertainty, or want of conclusiveness in an award, does not vitiate, if capable of being rendered certain or conclusive; and the award may be good or bad according to the event. *Aitcheson v. Cargey (in error)*, 9 Moore, 381; 2 Bing. 199; M'Clell. 367; 13 Price, 639.

An award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the ratio of their shares not being a subject of dispute, is sufficiently certain. *Wohl-enberg v. Lageman*, 6 Taunt. 254; 1 Marsh. 579.

An award for fixing the rule for calculating the amount of money to be paid, without stating the result of such calculation, is sufficiently certain. *Higgins v. Willes*, 3 M. & R. 382.

**Doubt as to Matters Decided.**—A company having given notice to take a leasehold hotel belonging to and occupied by the plaintiff, it was referred to arbitration to ascertain the value of the hotel and premises, and the damages sustained or to be sustained by the plaintiff by reason of the company's works, and the amount of compensation to be paid by the company to the plaintiff in respect thereof; the arbitrator awarded a sum to the plaintiff as the compensation to be paid by the company to him for all his interest of whatever nature in the leasehold:—Held, that it was impossible to say with certainty whether the arbitrator intended or not to include the damages in this award, and that the award was too uncertain for the court to act upon, and that the bill for specific performance of it had rightly been dismissed, though the plaintiff offered to waive all claims for damages beyond the award. *Wakefield v. Llanelly Railway Dock Company*, 3 De G., J. & S. 11.

After a dissolution of partnership between A. and B., they referred all matters in difference between them by a deed, which recited that B. had deposited with C. & Co. (bankers), securities for advances to B., as sureties for A., and that A. being indebted to C. & Co. in 4,000*l.*, B. had mortgaged to them securities for a sum not exceeding 3,000*l.*; there was a proviso that, if the arbitrators should award any money to be paid by B. to A., they should, if the mortgages were outstanding, authorize such payment to be made to C. & Co. in reduction of the mortgaged debts, and should further award that A. should, at the time to be named by the arbitrators, pay into C. & Co.'s such a sum as would be sufficient to entitle B. to have the mortgage discharged, and the securities deposited by him released. The arbitrators found that 3,221*l.* was due from B. to A., and that the mortgage was outstanding, and ordered B. to pay that sum on certain days, with liberty to pay it into C. & Co. It was also ordered, that, within one month from such payment, A. should pay into C. & Co.'s such a sum as would be sufficient to entitle B. to have the mortgage discharged, and the securities deposited by him released:—Held, bad, for want of finality. *Hewitt v. Hewitt*, 4 P. & D. 598; 1 Q. B. 110.

By a submission between A. and B., it was recited that all matters in difference between the parties had been amicably adjusted, except one relating to a transaction for a quantity of yarn,

"for which five bills of exchange for 1,000*l.* each were drawn," and as to the nature and circumstances of and attending such transactions and bills, and it was agreed that the same, and all matters in question touching and concerning or in anywise relating thereto, should be referred to an arbitrator. The arbitrator awarded that the bills and moneys thereby secured were the property of A., and that the bills and moneys should be forthwith delivered and paid to A.; and that, in case B. should have received the whole or any part of the money secured on the bills, B. should pay such money to A., with interest:—Held, that the award was not final and conclusive; the latter part not being immaterial, but within the authority given by the submission. *Marshall, In re*, 3 Q. B. 879; 3 G. & D. 253; 12 L. J., Q. B. 104.

**Reasonable Precision Requisite.**—An arbitrator had to decide upon the depth at which a defendant was entitled to keep a weir which penned back the water of a river, so as to interfere with the plaintiff's mill higher up the stream, and to determine all manner of rights of water between the parties: he awarded that the defendant was entitled to maintain his weir to the depth of fourteen inches and no more, and added that he had caused marks to be placed, which marks pointed out the depth the defendant was to keep his weir, and that a plan annexed to the award correctly defined and described the depth of the weir and the marks:—Held, that the award sufficiently pointed out the depth of the weir and was sufficiently precise, although it made no provision for floods, or for regulating the depth of the paddle in the defendant's weir, by which the water could be let off. *Johnson v. Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 236.

Upon a reference of a cause and all other matters in difference, the costs of the cause and of the reference and award were to abide the result of the award. The arbitrator found that the plaintiff had no cause of action in respect of the first count; but that, in respect of the other counts, the defendant was indebted to the plaintiff in 68*l.* 9*s.* 7*d.*; and that, on the taking of all the accounts, including that sum, the plaintiff was indebted to the defendant in 17*l.* 7*s.* 5*d.*; which sum he ordered the plaintiff to pay, but said nothing about the costs:—Held, that this finding was sufficiently certain, the matter really referred being the state of the accounts between the parties, which was the result to be ascertained; and, consequently, that the defendant was entitled to his costs. *Hemsworth v. Brian*, 2 D. & L. 844; 1 C. B. 131; 14 L. J., C. P. 134.

A cause, and the rights of the parties in relation thereto, as well at law as in equity, were referred to an arbitrator, with power to order what he should think fit to be done by either of the parties respecting the matter in dispute. The arbitrator awarded that the plaintiffs would be entitled to receive from the defendants two specified sums of money so soon as they should have discharged the demands of certain local agents of a company, which the plaintiffs had undertaken to satisfy, and upon production by the plaintiffs to the defendants of the vouchers of the local agents, and upon proof that the demands had been discharged, the defendants were to pay the sums to the plaintiffs:—Held, that the award was final, for, that either the words

"upon proof" might be rejected as surplusage, or that it was a part of the matter itself which the parties had agreed should be done, and therefore was correctly stated in the award. *Miller v. De Burgh*, 4 Ex. 809; 1 L. M. & P. 177; 19 L. J., Ex. 127.

Where an award was, that "nothing was due to the plaintiff," it must be considered as intending that he had no right to recover in the action referred. *Dickins v. Smith*, 8 D. & R. 285; 8 C., nom. *Dickins v. Jarvis*, 5 B. & C. 528.

If an award directs one of two things to be done in the alternative, and either of the two is uncertain or impossible, it is incumbent on the party to perform the other of them which is capable of being performed. *Simmonds v. Swaine*, 1 Taunt. 549.

Although it might be impossible for a party to perform certain parts of an award, yet if the award in each instance gives an alternative which he could perform it is sufficient. *Wharton v. King*, 2 B. & Ad. 528.

An award that A. or B. shall do a certain act is bad for uncertainty. *Laurence v. Hodgson*, 1 Y. & J. 16.

An action for injury to houses and lands was referred to an arbitrator, who was to settle at what price and on what terms the defendant should purchase the plaintiff's property. The order of reference gave the arbitrator no power to determine what the property was, nor was there any dispute on the subject. He fixed a certain sum as the price at which the defendant should purchase the plaintiff's said property, and awarded that he might use the plaintiff's name to enforce certain rights and remedies:—Held, that the award was not bad, on the ground of its not specifying what the "property" was. *Round v. Hatton*, 10 M. & W. 660; 2 D., N. S. 446; 12 L. J., Ex. 7.

### b. Altering an Award.

**By Arbitrator.**—After delivery of an award an arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures, by making another award. *Irvine v. Elton*, 8 East, 54.

An alteration by an umpire of the sum awarded, though made on the same day, and after notice of making, but before delivery of the award, is void; but the award is good for the original sum awarded, which is still legible. *Henfree v. Bromley*, 6 East, 309; 2 Smith, 400.

When an arbitrator has executed an instrument as and for his award, he is functus officio and cannot of his own authority remedy any mistake that he may have made in executing it. *Mordue v. Palmer*, 6 L. R., Ch. 22; 40 L. J., Ch. 8; 23 L. T. 752; 19 W. R. 86.

Words were omitted in the engrossment, which were in the draft of an intended award. The arbitrator executed the erroneous engrossment. After service on one party, the arbitrator discovered the mistake and, before the time for making his award had expired, executed a fresh award:—Held, that the first instrument was the award of the arbitrator. *Id.*

An arbitrator awarded that a plaintiff had no cause of action, and that a verdict should be entered for the defendant; and, by mistake, directed that the costs of the reference and award should be paid by the defendant, meaning the

plaintiff:—Held, that having executed his award in this form he could not rectify it. *Ward v. Dean*, 3 B. & Ad. 234.

**By Court.**—An arbitrator delivered with his award the following written statement:—"If either party should desire to have the grounds upon which I have proceeded in making my award, they are as follows." He then stated his grounds. The award directed a verdict for the plaintiff in an ejectment to recover two distinct closes, and the written statement shewed that he was entitled to one of them only. On an application to amend the postea, so as to confine it to the close to which the plaintiff was entitled, the court refused to correct the award by the collateral statement. *Doe d. Osenden v. Cropper*, 2 P. & D. 490; 10 A. & E. 197; 3 Jur. 578.

**Referring Back by Court.**—*See infra.*

### c. Referring back an Award.

#### i. Jurisdiction of Court.

**Statute.**—By 17 & 18 Vict. c. 125, s. 8, it is provided that *in any case where reference shall be made to arbitration as aforesaid, the court or judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and re-determination of the said arbitrator, upon such terms as to costs and otherwise, as to the said court or judge may seem proper.*

**In what Cases applicable.**—Sect. 8 of 17 & 18 Vict. c. 125, by which "in any case where reference shall be made to arbitration as aforesaid," the court or a judge shall have power to remit the matters to the arbitrator, applies not only to compulsory references provided for in sect. 6, but to all references previously provided for, and therefore to references by consent within sect. 5. *Morris v. Morris*, 2 Jur., N. S. 542; *S. C.*, sub nom. *Morris*, *In re*, 6 El. & Bl. 383; 25 L. J., Q. B. 261.

A submission contained a clause, that, "in case of any motion to set aside the award," the court might remit the matters referred:—Held, that such clause did not exclude the general power of the court to remit the matters under sect. 8. *Ib.*

The object of that section was, where any error, formal or otherwise, had occurred which would vitiate the award, to enable the courts to send it back, if they thought fit, to the arbitrators to correct such error, instead of setting the award wholly aside. *Mills v. Bowyers (Society)*, 3 Kay & J. 66.

The reference to arbitration of a question of disputed compensation, pursuant to section 180 of the Public Health Act, 1875, is a submission to arbitration by consent, within the meaning of the Common Law Procedure Act, 1854, and the court has a discretionary power, under section 8 of that act, "at any time" to remit the award back to the reconsideration of the arbitrator. *Warburton v. Haslingden Local Board*, 48 L. J. C. P. 451.

The arbitrators appointed under a submission (with no power of extending the time for making the award), which was made a rule of the court of Chancery, having made their award after the time specified, the court, under 3 & 4 Will. 4, c. 42, s. 39, and the C. L. P. Act of

1854, s. 8, enlarged the time and remitted the matter back to the arbitrators. *Warner, In re*, 3 L. R. Eq. 261; 15 W. R. 303.

The 17 & 18 Vict. c. 125, s. 8, does not authorize the court to send back an award for reconsideration by the arbitrators, on any ground except such as before that statute would have induced it to set aside the award, or to treat it as a nullity in an action brought upon it. *Mills v. Bowyers (Society)*, 3 Kay & J. 66.

The rules of law as to setting aside awards under ordinary references, apply to compulsory references; and the 8th section of the 17 & 18 Vict. c. 125, only enables the court to remit the matters referred to the arbitrator, in cases where they would otherwise set aside the award. *Hogge or Hogg v. Burgess*, 3 H. & N. 293; 27 L. J., Ex. 318; 4 Jur., N. S. 668.

Therefore where a defendant set up the Statute of Limitations, and the plaintiff relied on a running account, and the arbitrator certified that he was entitled to recover, the court refused to remit the matter to the arbitrator, on an affidavit that he was mistaken as to the law and fact. *Ib.*

Or where before the act the court might have remitted the matters referred if the submission had contained a clause empowering the court to do so. *Hodgkinson v. Fernie*, 3 C. B., N. S. 189; 27 L. J., C. P. 66.

A compulsory reference confers upon the master the same powers, and imposes upon the parties the same liabilities, as a reference under ordinary submission, rule, or order. *Baggalay v. Borthwick*, 10 C. B., N. S. 61; *S. C.*, nom. *Baguly v. Markwick*, 30 L. J., C. P. 342; 9 W. R. 537.

Therefore the court will not remit the matter to the master for reconsideration, except where there is ground for setting aside his certificate. *Ib.*

#### ii. The Application.

**Time.**—When a cause was referred, with all matters in difference at nisi prius, and the order of reference empowered the court, in the event of any application being made on the subject of the award, to refer the matter back to the arbitrator for further consideration:—Held, that the application to refer back must be made within the same time as an application to set aside an award. *Doe d. Bankes v. Holmes*, 12 Q. B. 951.

The court will not refer matters back to an arbitrator where there has been a long delay (e.g. three years) since the last step was taken upon the award, and such delay is not satisfactorily explained; because the position of the parties may be altered, and they may be unable to produce their witnesses. *Doe d. Maynes or Mays v. Cannew or Cannell*, 1 B. C. C. 161; 22 L. J., Q. B. 321; 17 Jur. 347.

The court, in the exercise of its discretion, will take into consideration the lapse of time between the making of the award and the application to remit, and refuse the order to remit on the ground that it is too late. *Warburton v. Haslingden Local Board*, 48 L. J., C. P. 451.

The court has discretion to entertain an application to refer back an award if made within reasonable time or for good cause shewn, though made after the time fixed for such applications under the old system of terms. *Leicester v. Grazebrook*, 40 L. T. 883.

**Must be a Motion.]**—But the court will refuse to send back an award for a clerical error in the absence of a motion to impeach the award. *Davies v. Pratt*, 16 C. B. 162.

**To what Court made.]**—When a court of law has referred an action to arbitration, and the arbitrator makes a mistake in his award, any application to remedy the mistake must be made to the court of law in which the arbitration originated, and not to a court of equity. *Graham v. Turnbull*, 44 L. J., Ch. 538; 23 W. R. 645.

### iii. In what Cases allowed.

**To Re-consider Evidence.]**—Where a letter-book, containing copies of letters which had been adduced in evidence before an arbitrator, and marked by him as read, was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced; and he referred to a copy of a letter contained in the book which had not been marked as having been adduced in evidence, the court directed that the case should be referred back to the arbitrator, in order that the party against whom the letter complained of had been used might have an opportunity of explaining its contents; but refused to set aside the award. *Darvport v. Vickery*, 9 W. R. 701.

**Charges Excessive.]**—The court will not send back an award to arbitrators merely because their charges for making the award are excessive, and are calculated on a principle differing from that which either of the parties believed they would adopt. *Baker v. Sterens*, 14 L. T. 448.

**To find Separate Issues.]**—Action for money payable for board and lodging, and for several other claims. Pleas: never indebted, and set-off for use and occupation and other debts. The cause being referred, with power to the court to remit it to the arbitrator in case of the award being objected to, the arbitrator directed a verdict for the plaintiff on the first issue, and for the defendant on the second. The defendant applied to the arbitrator to know how much he had allowed the plaintiff to deduct from the rent in arrear; the arbitrator in answer stated that he had made only a rough estimate, finding that the rent in arrear far exceeded the board and lodging, which he said was the only claim which the plaintiff had made out. On taxation, the master allowed all the plaintiff's costs incurred in support of any part of his claim as costs of the first issue. The court referred the case back to the arbitrator, in order that he might, if he thought fit, find separately as to the different items contained in the declaration. *Gore v. Baker*, 4 El. & Bl. 470; 24 L. J., Q. B. 94; 1 Jur., N. S. 425. *S. P., Hellaby v. Brown*, 1 H. & N. 729; 26 L. J. Ex. 217.

### Statement of Facts inconsistent with Award.]

—An action against an attorney, for negligently preparing a conveyance of land to the plaintiff, was referred with all matters in difference. The plaintiff's case was, that many words in the deed were written on erasures, which were not noticed in the attestation; that the deed was in other respects incorrect and improperly prepared; and that, by reason thereof, the plaintiff was prevented from mortgaging. The arbitrator

ordered a verdict to be entered for the defendant, and awarded that it was proved before him, that the erasures in the conveyance were made before the deed was executed. On motion to set aside the award, on the ground that the facts therein stated did not warrant a finding for the defendant:—Held, that the statement of facts by the arbitrator did not shew that his decision proceeded on that fact, and therefore that no ground appeared for reviewing his award. *Lancaster v. Hemington*, 4 A. & E. 345; 5 N. & M. 538.

**Clerical Error.]**—Where an arbitrator made an award describing the plaintiff by a wrong Christian name, the court sent it back to him for correction. *Ilwett v. Clements*, 7 M. & G. 1045; 8 Scott, N. R. 851; 2 D. & L. 549; 14 L. J., Q. B. 75; 9 Jur. 10, 17.

Where an arbitrator, in making his award, described the defendant by a wrong Christian name, the court sent the award back to be amended. *Davies v. Pratt*, 16 C. B. 586.

**Rule for Payment of Money.]**—A reference contained a clause, that in the event of any application being made to the court on the subject of the award, the court should have power to remit the matter to the arbitrator for reconsideration:—Held, that a rule for payment of money under the award was "an application on the subject of the award" within the clause, and empowered the court to remit the matters to the arbitrator. *Johnson v. Latham*, 1 L., M. & P. 848; 19 L. J., Q. B. 329.

**Matter not Brought before Arbitrator.]**—An application to remit an award upon a reference of all matters in difference upon the ground that the arbitrator had omitted to decide upon a cross-claim was refused, upon the ground that it did not appear that the matter had been brought before the arbitrator. *Erskin v. Wal-lace*, 12 W. R. 134.

**To Certify for Costs.]**—Where an arbitrator had awarded a plaintiff less than 20*l.* in an action of contract, but by inadvertence had omitted to certify that the cause was fit to be tried before a judge of a superior court, the court allowed the matter to go back to the arbitrator for amendment at the expense of the plaintiff. *Cross v. Cross*, 13 C. B., N. S. 253.

A cause was referred at nisi prius, and the order contained a clause enabling the court to refer it back to the arbitrator. The arbitrator certified that less than 20*l.* was due, and expressed an opinion that the cause was a proper one to be tried in the superior court:—Held, that the court had no power to refer it back to the arbitrator to certify as to the propriety of its being tried in the superior court, but that the proper course was to lay the arbitrator's certificate before the judge at nisi prius, who would then exercise his discretion. *Webber v. Lee*, 1 D. & L. 585.

Where an action for injury to a mill-stream, to which the defendant pleaded, denying the rights set up in the declaration, was referred, and the arbitrator found for the plaintiff on every issue, but awarded only a farthing damages, and refused, after the award was made, to grant a certificate for costs, the court declined to send back the award to the arbitrator, under a clause in the reference, that, in the event of any dispute arising upon the award, it might be sent

back to be reconsidered and amended. *Bury v. Dunn*, 1 D. & L. 141; 12 L. J., Q. B. 351; 7 Jur. 703.

An action of trespass was referred, the arbitrator found for the plaintiff for 2l. 14s. and gave no certificate. After some time the plaintiff obtained *ex parte* from the arbitrator a document stating that there was sufficient reason for bringing the action:—Held, that the court would not act on the document merely, and remitted the award to the arbitrator. *Harland v. Newcastle-upon-Tyne (Mayor)*, 39 L. J., Q. B. 67.

**On ground of Mistake.**—If a mistake has been made in an award, not apparent on the face of it, and such mistake is admitted in an affidavit by the arbitrators, such an admission is sufficient to authorize the court to set aside the award under the former practice, or to refer it back under the statute. *Mills v. Bowyers (Society)*, 3 Kay & J. 66.

So also if the arbitrators insist that they have made no mistake, but state the principle upon which they made the award, and the court is of opinion that such principle is not consistent with the reference. *Id.*

The court will admit evidence of an arbitrator in explanation of his award; and when it appears from such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back to the arbitrator. *Dare Valley Railway Company, In re*, 6 L. R., Eq. 429; 37 L. J., Ch. 719.

Where a submission contains a clause which gives power to an arbitrator to state a special case, and he is not desired by either party before the award is made to exercise that power, the court will not, on a letter of his written after the award, disclosing the legal principle on which he made his award, set it aside or send it to him for revision, although the letter was written with a view of raising the question whether the principle on which it was based was sound. *London Dock Company, In re*, 32 L. J., Q. B. 30; 7 L. T. 581; 11 W. R. 89.

An arbitrator, to whom an action for a claim above 20l. had been referred as a matter of account, awarded to the plaintiff a sum less than 20l., and certified that the action was fit to be brought in a superior court, but gave no other certificate. The master having taxed the costs on the lower scale, the arbitrator on being applied to on behalf of the plaintiff, stated in effect that he intended by his certificate to give the plaintiff his costs. The court gave the plaintiff leave, at his own expense, to refer the matter back to the arbitrator. *Caswell v. Groucott*, 31 L. J., Ex. 361; 6 L. T. 290.

Words were omitted in the engrossment of an award which were in the draft. The arbitrator executed the erroneous engrossment. After service on one party, the arbitrator discovered the mistake, and before the time for making his award had expired, executed a fresh award:—Held, that the first instrument was the award of the arbitrator, but that it must be referred back to him to reconsider and redetermine the matter with regard to the mistake made therein. *Mordue v. Palmer*, 6 L. R., Ch. 22; 40 L. J., Ch. 8; 23 L. T. 752; 19 W. R. 36.

After an award in favour of B. against W. on a submission between them, which contained a

clause empowering the court to remit the matters to the reconsideration of the arbitrators, W. moved to send back the award to the arbitrators, on the ground that since the award he had discovered a letter in the handwriting of B., which contained material evidence in his favour. The arbitrators deposed, that had such a letter in the handwriting of B. been produced at the reference, their decision would have been materially affected. B., in answer, swore that the letter was not in his handwriting, but was an absolute forgery. The court remitted the case to the arbitrators for them to say if the letter was in B.'s handwriting, and if they found that it was, then for them to reconsider the matters in difference. *Burnard v. Wainwright*, 1 L. M. & P. 455; 19 L. J., Q. B. 423.

An award will not be sent back to the arbitrator on the ground that he has made a mistake in the legal principle upon which his award is based, except where the arbitrator himself admits the mistake. *Dinn v. Blake*, 10 L. R., C. P. 388; 44 L. J., C. P. 276; 32 L. T. 489.

An action for the balance of an account was referred to two local engineers. The arbitrators, believing that they had power over costs, awarded the plaintiff the full amount claimed, and adjudged that each party should pay his own costs. When they discovered that costs followed the event, they concurred in an affidavit to the effect that they would have awarded the plaintiff a less sum if they had thought that the whole costs would fall upon the defendant:—Held, that the mistake of the arbitrators was no ground for sending back the award. *Allen v. Greenslade*, 33 L. T. 567.

A cause was referred to a master. At the arbitration it was admitted that something was due to the plaintiff. The master certified that nothing was due. It was admitted on all hands and stated by the master that he had made a mistake. The defendant, however, objected to the matter going back to the arbitrator:—Held, that the court had power, and ought to send it back. *Flynn v. Robertson*, 4 L. R., C. P. 324; 32 L. J., C. P. 240; 17 W. R. 767.

When an award is good upon the face of it the court will not send it back to the arbitrator upon affidavits shewing that the arbitrator has wrongly decided a point of law. *Fuller v. Fenwick*, 3 C. B. 705; 16 L. J., C. P. 79; 10 Jur. 1057.

Nor for an alleged mistake, not manifest or apparent on the face of it, or admitted by any affidavit or statement of the arbitrator. *Lockwood v. Smith*, 10 W. R. 628.

The court will not send an award back to an arbitrator to correct an alleged mistake, which, when applied to, he does not admit, although in a matter not within the original submission, but included in the award by virtue of some new agreement between the parties pending the reference. *Walton v. Swanage Pier Company*, 10 W. R. 629.

**For Re-execution by Arbitrators.**—When an award has been executed by one of several arbitrators at a different time and place from the others, or when any similar error has occurred, involving no misconduct in the arbitrators or substantial injustice to the parties, the award will not be set aside, but will be sent back to the same arbitrators to be re-executed or corrected. *Anning v. Hartley*, 27 L. J., Ex. 145.

This course was taken even when a third arbitrator, called in by two others, had not only heard the whole of the evidence already taken read over to him, but had asked questions of the witnesses without notice to and in the absence of the parties and their attorneys. *Id.*

**To state Case.]**—The court will not, where the master has declined to state a case, remit the matter to him, in order to give one of the parties an opportunity of applying to the court to direct a case to be stated. *Baggalay v. Borthwick*, 10 C. B., N. S. 61; *S. C.*, nom. *Baguly v. Markwick*, 30 L. J., C. P. 342; 9 W. R. 537. *S. P.*, *Holloyay v. Francis*, 9 C. B., N. S. 559; *Giblon v. Parker*, 6 L. T. 584.

**Form of Deed settled by Court instead of reference back.]**—Cross petitions for divorce by husband and wife were withdrawn at the hearing, upon terms which included the execution of a separation deed to be settled by a counsel agreed upon in case of difference, and to contain "all usual terms as to access to children, &c." The parties could not agree, and the counsel settled a deed, providing that the wife should have the sole custody of the children, two boys of thirteen and fourteen, for half their vacations:—Held, in an action by the wife for specific performance of the agreement, that these provisions related to custody and not access, and it was beyond the powers of the counsel to insert them. That the court had power to settle the proper form of deed instead of referring it back. *Evershed v. Evershed*, 46 L. T. 690; 30 W. R. 732.

#### iv. Duty of Arbitrator when Award sent back.

**Notice to Attend.]**—When an award is sent back the arbitrator is not bound to give the parties notice to attend him thereon. *Howett v. Clements*, 1 C. B. 128.

By a reference the court had power, on the validity of an award being disputed, to remit the matters referred to the reconsideration of the arbitrator. An award having been made, and containing a defect, the attorneys agreed verbally that the arbitrator should amend it; subsequently to which the attorney of one party obtained a judge's order that the matters referred should be remitted to the arbitrator for his reconsideration. The arbitrator altered the award without giving notice to either party of his intention so to do; neither party having requested him to hear fresh evidence, and he did not recite the judge's order:—Held, that the arbitrator was not bound to give notice to the parties, or to recite the judge's order. *Baker v. Hunter*, 4 D. & L. 696; 16 M. & W. 672; 16 L. J., Ex. 203; *S. P.*, *Johnson v. Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 238.

**Fresh Evidence.]**—Where an order of reference has a clause empowering the court, if the award is disputed, to remit the matters for the reconsideration of the arbitrator, and the case is remitted, the arbitrator must hear fresh evidence, if tendered, as on the original reference. *Nicholls v. Warren*, 6 Q. B. 615; 2 D. & L. 549.

But where a case had been once so remitted, and the arbitrator had declined to hear more evidence, but amended his award, deciding in favour of the same party as before, and on

motion to set aside such award the other party opposed a further reference to the same arbitrator, the court set aside the award. *Id.*

An award, uncertain in respect of a direction as to the payment of costs, was sent back to the arbitrator to set it right on the face of it: he made a supplemental award for that purpose, and ordered that the costs occasioned by sending it back should be paid by the party who resisted the award:—Held, that the supplemental award might be made without hearing the parties. *Morris, In re*, 6 El. & Bl. 383; 25 L. J., Q. B. 261; 2 Jur., N. S. 542.

Where an award is referred back for the purpose of a specific alteration in or addition to such award (as the determination of the amount of costs awarded by the arbitrator to be paid by one of the parties), he is not bound to hear further evidence on the general merits discovered and tendered after the making of the original award. *Huntley, In re*, 1 El. & Bl. 787; 22 L. J., Q. B. 277; 17 Jur. 571.

**Award sent back on One Point.]**—An arbitrator had to decide upon the depth at which a defendant was entitled to keep a weir, which penned back the water of a river so as to interfere with the plaintiffs' mill higher up the stream, and to determine all manner of rights of water between the parties. The costs of the reference and award were in the arbitrator's discretion, and in the event of any application being made the court might send the matters referred, or any of them, back for reconsideration. The award, after deciding all matters in difference, added: that for the better defining the height of the weir such permanent marks should be placed as B. should direct. This direction being held bad as a delegation of authority, the court remitted the award to the arbitrator for the purpose of reconsidering the prospective directions that should be given for defining the depth at which the defendant might maintain his weir. The arbitrator, without calling the parties before him, made a new award, repeating verbatim the terms of the old award, that the plaintiff should pay the costs "of this my reference and of this my award," and as to all other matters except as to the prospective directions, on which he awarded as above stated:—Held, that the arbitrator had adopted a proper course in making a new award, repeating the old adjudication as to the matters not sent back to him, and the adjudication on the matters remitted for consideration. *Johnson v. Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 236.

**What Amendment sufficient.]**—An arbitrator in making his award in favour of a party, by mistake called him David instead of Daniel. The award having been sent back to him for amendment, he wrote at the bottom of it the following certificate: "In pursuance of a rule of court, I do hereby certify that this my award ought to be amended by substituting the name of Daniel P. for the name of David P., the name David P. having been inserted therein by mistake, instead of Daniel P."—Held a sufficient amendment. *Davies v. Pratt*, 17 C. B. 183; 25 L. J., C. P. 71.

**To whom Remitted.]**—By an order an action was referred to the award of twelve persons, six to be named by each party, and in the event of



either of the parties disputing the validity of the award, the court should have power to remit the matters referred, or any of them, to the reconsideration of the twelve persons; and in the event of either of the parties declining to act, or dying before they or he should have made their or his award, the parties might, or if they could not agree, one of the barons of the court might, appoint fresh arbitrators. After the arbitrators had made an award one of the twelve died:—Held, that the court had power to remit the matters referred to the surviving eleven, and a fresh arbitrator to be appointed in pursuance of the power of the submission. *Lord v. Hawkins*, 2 H. & N. 55.

#### d. Setting aside Award.

##### i. On what Grounds.

**Mistake must be Apparent on Award.**—An award made by a barrister cannot be questioned, on the ground of any statement not appearing on the face of the award, or annexed to it. *Williams v. Jones*, 5 M. & R. 3; *S. P.*, *Wade v. Malpas*, 2 D. P. C. 638.

It is final between the parties, unless the objection is apparent on the face of it. *Sharman v. Bell*, 5 M. & S. 504.

No objection can be taken on the ground of a mistake in point of law, unless the grounds of the objection appear upon the award, or in some authentic shape before the court. *Price v. Jones*, 2 Y. & J. 114.

A mistake of the arbitrator is no ground for setting aside an award good on the face of it. *Phillips v. Evans or Edwards*, 12 M. & W. 309; 1 D. & L. 463; 13 L. J., Ex. 80; *S. P.*, *Delter v. Barnes*, 1 Taunt. 48.

The court will not set aside an award for an objection in point of law not apparent on the face of it, as upon a suggestion that the arbitrator improperly treated as a penalty that which was by the express contract of the parties stipulated as ascertained damages. *Fuller v. Penwick*, 3 C. B. 705; 16 L. J., C. P. 78; 10 Jur. 1057.

So, whether it is the award of a professional or of a lay arbitrator. *Id.*

**Or by Contemporaneous Document.**—A mistake by the arbitrator as to the legal effect of his finding is no ground for setting aside an award. An action was referred, the costs of the cause to abide the event. The award gave damages to the plaintiffs, but directed that the defendants should retain certain goods; as to the defendant's counter-claim the finding was for the plaintiffs. The defendants applied to refer back the award on an affidavit by the arbitrator that it did not carry out his instructions or effect his intentions, that when he signed it he thought the effect of the defendant's retaining the goods would be to give them the costs of their counter-claim, and that he wished the award referred back to him:—Held, that no grounds were disclosed for disturbing the award. *Greenwood v. Brownhill*, 44 L. T. 47—C. A.

By an order under 17 & 18 Vict. c. 125, s. 3, a cause was referred, nothing being said about costs. The umpire "adjudged that the defendant should pay to the plaintiff 159*l.* 0*s.* 9*d.* in full of all demands in the action." The award was accompanied by a note from the umpire to

the plaintiff, on a separate piece of paper, but not annexed to the award, in which the umpire expressed an opinion that the costs of the action, and of the reference and award, should be paid by the defendant, and that he would have so ordered, but that he could not do so, inasmuch as the order of reference was silent as to costs:—Held, that the parties were bound by the award, and that the accompanying note could not be looked at. *Leggo v. Young*, 16 C. B. 626; 24 L. J., C. P. 200.

Upon a compulsory reference to the master, he made his award, and wrote a letter (without referring to his letter in the award) of the same date to the parties, expressing his opinion upon the matter generally. Upon motion to set aside the award or refer it back to the master for reconsideration, on the ground that his letter, contemporaneous with the award, clearly shewed the award to be bad:—Held, that the letter formed no part of the award, and unless it substantially formed part of the award and was intended to do so, there was no ground for the rule. *Holdgate v. Killick*, 7 H. & N. 418; 31 L. J., Ex. 7; 5 L. T. 358; 10 W. R. 19.

If an arbitrator professes to decide upon the law, and he mistakes it, the court will set aside the award, although his reasons do not appear upon the face of the award, but only upon another paper delivered therewith. *Aent v. Elstob*, 3 East, 18.

An arbitrator, with a view of enabling one of the parties to make an application to the court, after the publication of his award, stated matters which shewed he had put a mistaken construction on the rule of reference, and had misdecided accordingly; the court received affidavits of these facts, and set aside the award, notwithstanding on the face of it there was no objection. *Jones v. Curry*, 5 Bing. N. C. 187; 7 D. P. C. 299; 7 Scott, 106; 3 Jur. 149.

The court will not set aside an award on the ground that the arbitrator has made a mistake in law or fact, unless, perhaps, the mistake is either apparent on the face of the award, or appears in some document delivered by the arbitrator contemporaneously with it, or perhaps by the affidavit of the arbitrator. *Hogge or Hogg v. Burgess*, 3 H. & N. 293; 27 L. J., Ex. 318; 4 Jur., N. S. 668.

If a mistake has been made in an award, not apparent on the face of it, and such mistake is admitted in an affidavit by the arbitrators, such an admission is sufficient to authorize the court to set aside the award. *Mills v. Bowyers (Society)*, 3 Kay & J. 66.

The decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there is some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award. *Hodgkinson v. Fernie*, 3 C. B., N. S. 189; 27 L. J., C. P. 66. *S. P.*, *London Dock Company, In re*, 32 L. J. Q. B. 30; 7 L. T. 381; 11 W. R. 89.

Compare cases *ante*, cols. 347, 348.

**Mistake as to Effect of Evidence.**—The court will not set aside the certificate of an arbitrator, any more than an award, on the ground of a mistake as to the effect of evidence. *Price v. Price*, 9 D. P. C. 334; 5 Jur. 6; *S. P.*, *Wilson v. King*, 2 C. & M. 689; 4 Tyr. 997.

**Matters of Law.**—The court will not open an award on a suggestion that the arbitrator is mistaken in the law; facts as well as law having been referred to him, and his award being silent as to the grounds of his decision. *Boutillier v. Thick*, 1 D. & R. 366.

In such case the award is final and conclusive; and the court will not open it or set it aside, unless the principles upon which he has decided are apparent on the face of the award. *Payne v. Massey*, 9 Moore, 666.

An award made by a barrister cannot be impeached on the ground of his having decided contrary to law. *Wade v. Malpas*, 2 D. P. C. 638. See *Symes v. Goodfellow*, 1 Hodges, 400; 2 Bing., N. C. 532; 4 D. P. C. 642; 2 Scott, 769.

The law recognizes no distinction between professional and non-professional arbitrators; so that, if a case is referred to one of the latter, and he makes a mistake in law, the parties to the reference are as much bound by it as if he had belonged to the former class. *Huntig v. Ralling, or Henty v. Rally*, 2 H. & W. 2; 8 D. P. C. 879; 4 Jur. 1091; *S. P. Jupp v. Grayson*, 1 C. M. & R. 523; 3 D. P. C. 199; 5 Tyr. 150; *Haydock v. Beard*, 2 Jur. 1069; *Ashton v. Pointer*, 2 D. P. C. 651; 3 D. P. C. 201.

Where a cause involving a question of law was referred to a barrister and the question did not appear on his award, the court refused to open the award again on a suggestion of the barrister's mistake on a point of law, considering it the intention of the parties to refer questions of fact as well as of law. *Chace v. Westmore*, 13 East, 357; And see *Price v. Hollis*, 1 M. & S. 105.

Where a cause is referred to a layman, and he assumes to decide upon a point of law, and errs, the court will set aside his award; but, where the arbitrator is a barrister, both the law and the fact are left to his discretion; even though a question of law arises incidentally on the hearing, which could not have been in the contemplation of the parties at the time of referring. *Perryman v. Steggall*, 3 M. & Scott, 93; 9 Bing. 679.

The mistake of an arbitrator on a point of law is no ground for setting aside an award. *Allen v. Greenslade*, 33 L. T. 567.

A plaintiff agreed with a railway company by deed to execute a portion of the railway for them at certain prices stipulated therein, and the company covenanted to give the plaintiff possession of certain land for the above purpose within a specified time. The plaintiff having brought an action against the company to recover a sum of money for extra work rendered necessary, as he alleged, by the omission to give him possession of the land within a specified time, an order was made for referring "the claims made in the action." It was objected before the arbitrator, that the plaintiff could not in the present form of action, recover for the extra work, his remedy being by an action for damages for a breach of covenant. The arbitrator received the evidence, and awarded a sum to the plaintiff in respect of extra work:—Held, that, as the arbitrator had not been guilty of misconduct, and had acted within his jurisdiction, his mistake in point of law was no ground for setting aside the award. *Parcell v. Eastern Counties Railway Company*, 2 Ex. 344; 17 L. J., Ex. 223.

**Matter of fact.**—It is not an invariable rule that the courts will not set aside an award on the ground that the arbitrator has, by mistake, VQL. I.

adjudicated wrongly on a matter in difference. *Hutchinson v. Shepperton*, 13 Q. B. 955; 13 Jur. 1098.

Where, on a question of account, both parties to an action agreed before an arbitrator that a given sum was due to the plaintiff on a particular item, and it appeared by the arbitrator's affidavit that he, conceiving this to be no longer a matter in difference, omitted the sum in the amount which he awarded to the plaintiff, the court, on motion by the plaintiff (who had objected to the adjudication without loss of time after the delivery of the award) set aside the award. *Ib.*

The courts will not interfere with the decision of lay arbitrators on a point of law, dependent upon a question of fact, when such fact has been left for their determination. *Simpson, In re*, 17 L. T. 617.

A defendant having brought several actions against the plaintiff, he filed a bill for an account, and to restrain the actions. The court made an order referring the matters, which involved questions of foreign law, to arbitration. An award was made in the defendant's favour, and the plaintiff objected to it on the ground that the arbitrator had made a mistake as to foreign law, and that, on certain affidavits being tendered to him on behalf of the plaintiff, he had said that he would take and look at them, but that they would not weigh on his mind as evidence:—Held, that the mistake as to the foreign law was a mistake of fact, and was, therefore, no ground for setting aside the award; and that the arbitrator's statement that the affidavits would not weigh on his mind as evidence was no ground for setting the award aside, there being no evidence of misconduct on the part of the arbitrator. *Imperial Royal Chartered Azienda Assicuratrice of Trieste v. Funder*, 27 L. T. 637; 21 W. R. 116—L. J. Affirming 27 L. T. 438; 21 W. R. 67.

**Gross Mistake.**—Where a gross mistake is made by arbitrators, though not apparent on the face of the award, the court will sometimes set aside the award, as for misconduct of the arbitrators. *Hall, In re*, 3 Scott, N. R. 250; 2 M. & G. 847.

As where A., claiming two sums to be due to him from B., the contention before the arbitrators is merely whether A. is entitled to both or to one only of those sums, and the arbitrators, meaning to give A. both sums, instead of adding them together, deduct the smaller from the larger, and instead of directing the payment to be made by B. to A., award that the payment shall be made by A. to B. *Ib.*

**Misconduct.**—Neither a court of law nor of equity will interfere to set aside an award, unless corruption, partiality, misconduct or irregularity is distinctly proved against the arbitrator. Mere suspicion is not sufficient. *Moseley v. Simpson*, 16 L. R., Eq. 226; 42 L. J., Ch. 739; 28 L. T. 727; 21 W. R. 694.

An arbitrator does not necessarily misconduct himself by expressing an opinion on the subject-matter of a reference before formally entering upon it, even though such expression is made in writing, and is identical in terms with the award finally made. *Hutchinson v. Hayward*, 15 L. T. 291.

**False Evidence.**—The court refused to set

aside an award, or to stay the proceedings, on the ground that the arbitrator had been imposed upon by false evidence of a witness who might have been cross-examined before the arbitrator, especially when the award had been made two terms before the application. *Pilmore v. Hood*, 8 Scott, 182; 8 D. P. C. 21; 3 Jur. 1153. See *Blagrove v. Bristol Waterworks Company*, 1 H. & N. 369; 26 L. J., Ex. 57.

**Surprise.]**—It is no ground for setting aside an award that the unsuccessful party suffered a surprise, as an arbitrator would have power to postpone the proceedings upon any reasonable application for that purpose. *Solomon v. Solomon*, 28 L. J., Ex. 129.

**Claim of Party to be heard after Assessment—Refusal to re-open before Publication.]**—By the lease of a farm the lessor undertook to pay the lessee at the end of the term whatever is usually valued between an incoming and outgoing tenant at a valuation, the amount to be ascertained by two indifferent persons or their umpire, pursuant to the Common Law Procedure Act, 1854. The lessor and lessee duly appointed each an arbitrator, the lessor at the time of his appointment stating that he would leave the matter in his arbitrator's hands, and that the amount of the valuation would be paid. The two arbitrators, together with the umpire whom they nominated, proceeded to inspect the farm under the guidance of the lessee, and to examine the lessee, in the absence of the lessor, and without notice to him of the meeting. On the same day the umpire, arbitrators, and lessee dined together at a village inn; and after the lessee left them the umpire fixed all matters in dispute between the arbitrators except two, upon which he afterwards took the opinion of his solicitor. When the lessor was informed by his arbitrator of the approximate amount fixed at the valuation, and the points of law reserved, he immediately applied to the umpire to be heard in person, but the umpire refused to reopen the arbitration, and about ten days afterwards signed and published his award:—Held, upon a rule to set aside the award, that during the reservation of the points of law the arbitration was not practically nor legally concluded, so that upon his application the lessor was entitled to be heard personally by the umpire, and therefore the refusal to hear the lessor rendered the arbitration invalid. *Maunder, In re*, 49 L. T. 535. *S. P., Nicholls v. Warren*, 6 Q. B. 615; 2 D. & L. 549.

**Award void.]**—Where an award is void, and nothing can be done upon it without suit, the court will not interfere to set it aside, because such suit must fail. But, where a cause is referred by order of nisi prius, and the arbitrator has power to order a verdict to be entered for either party, and he makes an award, ordering a verdict to be entered; notwithstanding such award is void, the court will set it aside, for otherwise the party in whose favour the award is made will have judgment upon the verdict, without any new proceeding to enforce the award. *Doe d. Turnbull v. Brown*, 5 B. & C. 384; 8 D. & R. 100.

**Umpire not a disinterested Person—Waiver of Objection.]**—In an arbitration under the Lands Clauses Consolidation Act, 1845, Y., the arbi-

trator, on behalf of the claimants, selected W. to act as umpire from the names of three persons submitted to him by R., the arbitrator on behalf of the respondents. On the 11th October, 1881, the parties went before the umpire. The award was made on the 22nd November, taken up by the respondents, and served upon the claimants on the 10th December. W. had given evidence on behalf of the respondents on the 3rd and 30th November with respect to the value of other property in the same neighbourhood, on claims against the respondents. Y. saw in the newspapers that W. was giving evidence in the other cases, and on the 11th October, when the arbitrators and umpire went to view the premises, he had noticed that R. shewed W. other property in the same neighbourhood, but he did not know at the time he selected W. to act as umpire that he was about to be retained by the respondents to give evidence in other and similar cases. No objection was made by the claimants, nor any one on their behalf, that W. was not a disinterested person until the 20th December:—Held, that the claimant had sufficient knowledge of the position of W. before the award was made, and having given no notice of objection until the 20th December, he must be taken to have consented to W. acting as umpire. *Clout and Metropolitan and District Railway Companies, In re*, 46 L. T. 141.

By Stephen J., that the objection was a proper one had it been taken in time. *Ib.*

**Submission obtained by Fraud.]**—The court on motion refused a rule to set aside an award, on the ground that the submission had been obtained by fraud; as the application should have been made to set aside the order. *Sackett v. Owen*, 2 Chit. 39.

**Suggestion that erroneous Principle adopted.]**—Upon a reference to arbitrators, or an umpire, to ascertain the amount due for fire damage upon a policy of assurance, the court will not interfere to set aside or to send back the award on a mere suggestion that the arbitrators have, or the umpire has, adopted an erroneous principle of valuation. *Oldfield v. Price*, 6 C. B., N. S. 539.

## ii. Practice thereon.

**To what Courts Application made.]**—The courts at Westminster have no authority to set aside an award made in an action depending in the Common Pleas at Lancaster, and referred by order of nisi prius. *Plumley v. Inkerwood*, 12 M. & W. 190; *S. C. nom. Smethurst v. Taylor*, 13 L. J., Ex. 38.

A motion to set aside an award made in the Common Pleas at Lancaster, under an order of nisi prius, cannot be made in banco, under 4 & 5 Will. 4, c. 62, s. 26, though a verdict was taken subject to the award, but must be made before a single judge. *Byrne v. Fitzhugh*, 5 Tyr. 221.

Semble, where an action is referred by an order at nisi prius, the Court of Chancery has no jurisdiction to interfere with the certificate of the referee or the judgment entered up pursuant thereto, on any ground on which it would not have such jurisdiction, if the judgment had been obtained in the ordinary course upon the verdict of a jury. *Chuck v. Cremer*, 2 Ph. 477; 17 L. J., Ch. 287.

The Court of Chancery has no jurisdiction to set aside an award made under a reference of an action whether the same is or is not under 9 & 10 Will. 3, c. 15. *Harding v. Wickham*, 2 Johns. & H. 676; 4 L. T. 738; 9 W. R. 652.

Award made under an act of parliament for an inclosure; whether it can be set aside in the Court of Chancery.—*Quære. Doncaster (Incorporation) v. Milbourn*, Romilly's Notes of Cases, 106.

Where, in a reference under 9 & 10 Will. 3, c. 15, an award has been made, the jurisdiction in the matters of the award of every superior court, except that before which the reference is pending, is excluded. *Choke v. Cooke*, 4 L. R., Eq. 77; 30 L. J., Ch. 480; 15 W. R. 981.

**To what Division to be made.**—Where it was agreed to make a submission to arbitration a rule of court of any divisional court of the High Court of Justice, and the submission was made a rule of the Queen's Bench Division:—Held, on an application to the Chancery Division, that under the Judicature Acts the matter was one which the parties might attach to any division they thought fit, but that as they had attached it to the Queen's Bench Division any motion concerning it must be made there. *Lomas's Arbitration, In re*, 42 L. T. 391; 28 W. R. 485.

**Who may move to set aside Award.**—Where, by the terms of an order of nisi prius, referring matters in dispute to the award of an arbitrator, on the terms of the defendant paying the costs of the cause, and of the reference and award, the plaintiff, after having accepted the costs of the reference and of the award, was dissatisfied with the award:—Held, that he was precluded from moving to set it aside. *Kennard v. Harris*, 4 D. & R. 272; 2 B. & C. 801.

An award, published nine days before the end of Hilary Term, directed the defendant to pay the plaintiff a certain sum of money, and the plaintiff to lay out a certain sum of money on the premises, which the defendant held as lessee of the plaintiff:—Held, that the defendant had not waived any objections that might be taken to the award, by not giving notice to the plaintiff of his intention to apply to the court after he had heard that the plaintiff had commenced the repairs, nor by the defendant's attorney requesting a week's time to pay the money, which the plaintiff granted, on conditions to which the defendant appeared to have assented. *Hayward v. Phillips*, 1 N. & P. 288; 6 A. & E. 119.

A clause in a deed of submission "that no action or suit at law or in equity shall be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach the award, unless some collusion or other fraud be discovered or appear therein," does not prevent a party to the deed from moving to set aside the award (for illegality upon the face of it), though no fraud or collusion appears. *Mackay, In re*, 2 A. & E. 356.

A verdict was taken for the plaintiff for the damages in the declaration, subject to a reference. At the first meeting before the arbitrator, the defendant objected that the order of reference was not drawn according to the terms agreed upon, inasmuch as it did not authorize the arbitrator to direct a verdict to be entered for him on an issue of payment, but only to reduce the

damages, and he applied to have the hearing postponed till an application could be made to amend the order. The plaintiff contended, that the arbitrator had authority to direct a verdict for the defendant upon that issue, as it stood, and the arbitrator himself was of that opinion. The arbitration was accordingly proceeded with upon that view, and an award was made, directing a verdict to be entered for the defendant on the issue of payment:—Held, that it was not competent for the plaintiff to object to the misconstruction (if any) of the order of reference. *Gracutt v. Attwood*, 1 L. M. & P. 392; 19 L. J., Q. B. 474.

**Hearing, on what Days.**—The court will not allow cause to be shewn against a rule for setting aside an award on the last day of term. *Bignall or Bignold v. Gale*, 2 Scott, N. R. 582; 9 D. P. O. 393; 2 M. & G. 364.

No motion involving an award can be heard on the last day of term. *Brooke v. Parsons*, 7 Jur. 1016.

**Notice of Application to set aside.**—An application to set aside an award may be made without notice to the other side; for it is a motion for an order to shew cause within Ord. XL. rr. 5, 6. *Robinson v. Robinson*, 35 L. T. 337; 24 W. R. 675.

Notice of motion to set aside an award ought not to be served upon the arbitrators. *Moalely v. Simpson*, 16 L. R. Eq. 226; 42 L. J. Ch. 739; 28 L. T. 727; 21 W. R. 694.

**Not set aside unless clearly Bad.**—The court will not set aside an award on motion, unless it is clear that it is bad. *Cook v. Gent*, 14 M. & W. 680; 3 D. & L. 271; 15 L. J., Ex. 33.

Where there is a doubt about the validity of an award, the court will neither set it aside, nor grant an attachment, but leave the party to bring an action: secus, when a verdict has been taken. *Burley v. Stevens*, 4 D. P. C. 770; 1 M. & W. 156. See *Doe d. Turnbull v. Brown* 5 B. & C. 384; 8 D. & R. 100.

**Order for Security for Costs—Effect of.**—In a cause which had been referred by an order nisi prius, the arbitrator made an award in favour of the defendant, who thereupon signed judgment. The plaintiff obtained a rule to set aside the award, notice of which was served upon the defendant. The defendant afterwards, and before the argument of the rule, obtained an order to stay all further proceedings until the plaintiff should have given security for costs:—Held, that the court could not entertain the application for setting aside the award whilst this order remained in force. *Badham v. Badham*, 1 Ex. 824.

**Affidavits, Form and Contents of.**—Affidavits in support of or in answer to a rule for setting aside an award made a rule of court under the statute, need not be intitled. *Bainbridge v. Hamilton*, 5 East, 21.

On motions to set aside awards where there is no cause pending, it is not necessary that the affidavits, on shewing cause, should be intitled with the Christian and surnames of the parties, although the rule is generally drawn up with the names of the parties as if there was a cause pending. *Anon.*, 1 Smith, 358.

If affidavits used on a rule with respect to a matter of arbitration, where there is no cause in court, improperly introduced the words "plaintiff" and "defendant," after the names of the parties, in the title of the affidavits, those words may be treated as surplusage. *Imeson and Horner, In re*, 8 D. P. C. 651.

On motion to set aside an award as not final, in respect of the pleadings in the action, the pleadings should be brought before the court by affidavit. *Louce v. Allen*, 4 Q. B. 66; 12 L. J. Q. B. 115; 7 Jur. 417.

A rule to set aside an award was drawn up on reading a copy of the award, verified by affidavit as a true copy, but not identified as the copy before the court; the only reference to it being "the paper writing hereunto annexed was delivered by T. W. R., as a copy of the award made by him."—Held sufficient. *Lund v. Hodson*, 1 D. & L. 236; 12 L. J. Q. B. 365; 7 Jur. 992.

An affidavit, verifying a copy of an award to be a true copy, need not state that the copy has been compared with the original award. *Hawks or Hawkyard v. Stocks*, 2 D. & L. 936; 14 L. J. Q. B. 236; 9 Jur. 451.

An affidavit of the managing clerk of the plaintiff's town agent, which states "that the paper writing annexed is a true copy of the award of G. T. L., to whom all matters in difference were referred, as this deponent has been informed and believes, and that this deponent has received the said paper from G. H., of B., in the county of York," sufficiently verifies the copy of the award. *Id.*

A motion to set aside an award founded upon a judge's order, made under 17 & 18 Vict. c. 125, s. 3, may be made on an affidavit setting out the order without making the order a rule of court. *Watson v. Bennett*, 5 H. & W. 831.

On a motion to set aside an award on the ground that it is not final because there were other matters in difference than those dealt with by the arbitrator, the applicant must shew affirmatively by his affidavit that there were such other matters in difference, and the court will not allow the affidavit to be amended. *Bennett v. Brighton (Mayor &c.)*, 17 L. T. 509; 16 W. R. 361.

Where a cause and all matters in dispute are referred, a recital in the award that the action was referred, without mentioning other matters in difference, does not constitute an objection to the award on the face of it. *Paull v. Paull*, 2 D. P. C. 340; 2 C. & M. 235; 4 Tyr. 72.

Such an objection should be made the ground of a separate application to set aside the award, supported by affidavits shewing what were the other matters in difference. *Id.*

**Rule to shew Cause—Stating Objections.**—Rule 169 of Hilary Term, 1853, applies to the certificate as well as to an award of an arbitrator empowered to ascertain the amount due from the defendant to the plaintiff, and to certify the same to the associate, by whom a verdict is to be entered accordingly. *Carmichael v. Houchen*, 3 N. & M. 203.

It is sufficient to state the grounds of objection in general terms, as, that the award is not final; that the arbitrator has exceeded his authority; that the award is uncertain, or that the arbitrator has not awarded on all matters referred to him. *Gray v. Leaf*, 8 D. P. C. 654.

In a rule nisi for setting aside an award, an

objection, "that the arbitrator has not awarded on a matter in difference submitted to him," is sufficiently specific. *Dunn v. Walters*, 1 D., N. S. 626; 9 M. & W. 293.

But where a rule is obtained to set aside an award, on the ground "that the arbitrator has exceeded his authority," this general statement of objection is insufficient; for the affidavits should specifically state in what points the excess consists. *Staple or Staples v. Hey*, 1 D. & L. 711; 13 L. J. Q. B. 60; 8 Jur. 315; *S. P.* *Rauothorn v. Arnold*, 6 B. & C. 629; 9 D. & R. 556.

A notice of motion in the Chancery Division to set aside the award of an arbitrator should specify the grounds of objection, by analogy to the practice under the Common Law Procedure Act, 1852; Reg. Gen. Hil. Term, 1853, r. 169: an objection on "good grounds" being insufficient. *Mercier v. Pepperell*, 19 Ch. D. 58; 51 L. J., Ch. 63; 45 L. T. 609; 30 W. R. 228.

**What Court may look at.**—The original agreement of reference may be looked at on a motion to set aside an award, though the rule nisi is not drawn up on reading it; for the rule nisi is drawn up on reading the rule making the agreement of reference a rule of court, and the agreement of reference is in law part of the rule embodying it. *Onwald v. Grey (Earl)*, 24 L. J., Q. B. 69.

The court will not look at the notes of an arbitrator, nor at a copy of them verified by affidavit. *Doe d. Hazby v. Preston*, 1 B. C. Rep. 77.

**The Rule—Contents of.**—Where it is sought to set aside and not to enforce an award, it is not necessary for the party applying to make the enlargement of the time for making the award part of the rule. *Walsh, In re*, 1 D., N. S. 331.

A rule to set aside an award must appear to be drawn up on reading the award itself. *Barton v. Ransom*, 5 D. P. C. 597.

Or a copy of it; and the court will not allow it to be amended. *Sherry v. Oke*, 3 D. P. C. 349; 1 H. & W. 119.

A rule to set aside an award made after action commenced, on account of objections to the declaration, need not refer to the declaration, as it is sufficiently before the court. *Id.*

A rule to set aside an award was drawn up—on reading "the affidavit of the defendant, and the paper writing thereto annexed;" and an affidavit, in support of the rule, stated facts to shew that the paper writing was a copy of the award:—Held, sufficient. *Hayward v. Phillips*, 6 A. & E. 119.

A rule to set aside a void award, may be drawn up without reading the award, the party seeking to set aside the award not being bound to incur the expense of taking up a void award. *Hinton v. Meade*, 3 C. L. R. 325; 24 L. J., Ex. 140; 1 Jur., N. S. 46.

**Setting aside Judgments on Award.**—When judgment has been entered up under an award:—Held, upon an application to set aside the judgment and restrain execution, that the defendants must be confined to objections appearing on the face of the award, as if they were shewing cause in a rule for an attachment. *Doe d. Madkins v. Horner*, 3 N. & P. 344; 8 A. & E. 235; W. W. & H. 348; 2 Jur. 417.

The court is not, however, precluded by the omission from entering into any valid objection

that may be raised to the award. *Dicas v. Jay*, 2 M. & P. 448; 5 Bing. 281.

**Partial Validity of Award.]**—An award may be good in part, and bad in part, where the subject is clearly capable of being separated. *Addiam v. Gray*, 2 Wils. 293; *S. P., Armitage v. Walker*, 2 Kay & J. 211; 2 Jur. N. S. 13; *Winter v. Lethbridge*, 1 M'Clel. 253; 13 Price, 533.

Where an arbitrator has exceeded his power by awarding costs to be taxed as between attorney and client, if that part of the award is separable from the rest, it may be rejected, and the award stand; but if it is so connected with the rest as not to be separable, the whole is vitiated. *Seckham v. Babb*, 8 D. P. C. 167; 6 M. & W. 129; 4 Jur. 90.

Certain matters being referred to an umpire, in some of which the defendant was absolute possessor of the property in respect of which the dispute arose, while in others he held a share of it only, an award directing him to do certain works in respect of all, but providing that the directions of the award should only affect the latter so far as his interest in it extended:—Held, good as to all but that part in respect of which the defendant might shew his inability to proceed. *Dodding v. Bailward*, 7 D. P. C. 640; 5 Bing. 591.

If an arbitrator exceeds his authority in going beyond the terms of the submission, to direct the mode in which any of the matters ordered by the award is to be done, that direction may be rejected as a nullity, forming no part of, and consequently not affecting, the award. *Aitchison v. Cargy (in error)*, 13 Price, 639; 2 Bing. 199; 9 Moore, 381; 1 M'Clel. 367.

An arbitrator, to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff, and certain works to be done by the defendant. He added, that, as disputes might arise respecting the performance, the plaintiff, if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but, if no proceeding were taken by the plaintiff within two months after the work was done, the award then made should be final, and he enlarged the time for making his further and final award, if requested, to six months:—Held, that the latter part of this award was bad, as it assumed to reserve a power over future differences; but that it might be rejected, and the former part was final, and might stand. *Manser v. Hecker*, 3 B. & Ad. 295.

An arbitrator, to whom a cause in which several issues were joined was referred, the costs to abide the event, disposed of such issues, and, although no power for that purpose was given to him, awarded a stet processus:—Held, that although this was an excess of authority, the award was only bad as to that part, and good as to the rest. *Ward v. Hall*, 9 D. P. C. 610; 5 Jur. 800.

On a rule to set aside an award, if any part of the award is bad, but can be clearly separated from the rest, and treated as surplusage, the rule will be discharged generally. *Goddard, In re*, 1 L., M. & P. 25; 19 L. J., Q. B. 305.

If an arbitrator directs mutual releases on payment of a sum of money, over which he has

jurisdiction, as well as of a sum over which he has none, the award is good as to the former. *Kendrick v. Davis*, 5 D. P. C. 693; W. W. & D. 376; *S. P., Doe d. Williams v. Richardson*, 8 Taunt. 697; *Pickering v. Watson*, 2 W. Bl. 1117.

An arbitrator reserved to himself power to appoint counsel or a solicitor to settle any disputes which might arise as to the proper form of the conveyances which he had ordered to be executed:—Held, that he had exceeded his authority, and that, as this part of the award could not be separated from the rest, the whole was bad. *Tandy, In re*, 9 D. P. C. 1044; 5 Jur. 726.

An arbitrator had the power of a judge *ad nisi prius*; he did not award execution, but ordered the damages and costs in actions referred to be paid at a stated time and place: that part of the award was held void *pro tanto*, as surplusage. *Rees v. Waters*, 16 M. & W. 263; 4 D. & L. 567.

A cause after issue joined having been referred, but no power given to award a verdict, the arbitrator directed a verdict to be entered for the defendant, and the plaintiff and defendant to execute mutual releases:—Held, that the award was bad for excess of authority, and that the portion of it ordering a verdict to be entered could not be rejected as redundant; since, if struck out, the meaning of the award would be altered. *Hayward or Hawks v. Stocks*, 2 D. & L. 937; 14 L. J., Q. B. 236; 9 Jur. 451; 10 Jur. 14.

On demurrer to a declaration on an award generally and to a plea of want of finality:—Held, that the good part of the award was separable from the bad, which therefore did not vitiate the rest, and that it was sufficiently final. *Lewis v. Rosniter*, 44 L. J., Ex. 136; 33 L. T. 260; 23 W. R. 832.

Matters at issue in an ejectment, with all claims in respect of mesne profits and all matters in difference between the parties, and of the costs of the action and of the reference, were referred after issue joined. The award directed judgment to be entered for the plaintiff with 1*s.* damages, and that he should recover under the same judgment a plot of land, describing it by metes and bounds, and that the defendant should pay 12*s.* mesne profits and the plaintiff's costs in the action, to be taxed by the proper officer, and part of the costs of the reference and award:—Held, that the arbitrator had no authority to direct judgment to be entered up, and final judgment which had been signed was set aside, but that, rejecting all that related to the judgment, the award, nevertheless, sufficiently decided the matters referred. *Doe d. Body v. Cor*, 4 D. & L. 75; 15 L. J., Q. B. 317; 10 Jur. 982.

### iii. Time within which Application made.

**Before Last Day of Next Term.]**—By 9 & 10 Will. 3, c. 15, awards procured by corruption, or undue means, are void, and may be set aside by any court or law of equity, if complaint be made in the court where the rule is made before the last day of the next term after such award published.

The motion under this statute must be made before the last day of the next term after such award is published, or it is too late, and an attachment for the non-performance of it may issue. *Fream v. Pinneger*, Cowp. 23.

And so also, although the submission is not

made a rule of court until a subsequent term, it is too late to disturb the award. *Reynolds v. Askew*, 5 D. P. C. 682; W. W. & D. 366.

In a submission, made in a pending cause, by consent of parties, under which an award has been made and published, the 9 & 10 Will. 3, c. 15, prevents the application to set the award aside being effectual, unless made before the last day of the term next following such publication. *Dodd v. Platt*, 6 Jur., N. S. 631; 1 L. T. 135.

A rule nisi to set aside an award need not be moved for within the first four days of the term next after the publication of the award. *Martin v. Burge*, 6 N. & M. 201.

An application to set aside an award for objections apparent on the face of it, must be brought within the time limited by the statute. *Lowndes v. Lowndes*, 1 East, 276; *S. P., Anon.*, 1 Ld. Ken. 118; *Anon.*, Lofft, 437.

Where an arbitrator, to whom a cause was referred by order of nisi prius, directed that a verdict should be entered for the plaintiff for 254*l.*, and then set forth certain facts raising a question for the opinion of the court, and awarded that if, upon such facts, the court should be of opinion that the verdict should be for 125*l.* only, then the damages should be reduced to that sum:—Held, that a motion to enter the verdict for the latter sum upon the facts so stated by the arbitrator, was in effect a motion to set aside the award, and must be made within the term next following that in which the award was made. *Anderson v. Fuller*, 7 D. P. C. 51; 4 M. & W. 470; 1 H. & H. 352.

Applications to set aside awards made under a judge's order of reference are put on the same footing as to time as if the awards were made under 9 & 10 Will. 3, c. 15; but if the party affected has not had notice of the award sufficiently early to enable him to move within the time allowed by the act, he may move to set it aside in the term next after the notice. *Potter v. Newman*, 4 D. P. C. 504; 2 C., M. & R. 742; 1 Tyr. & G. 29.

Where a submission does not contain an express agreement enabling the parties to make it a rule of court, the award is not brought within 9 & 10 Will. 3, c. 15, by force of the 15 & 16 Vict. c. 76, s. 17, nor has the 12 & 13 Vict. c. 106, s. 32, this effect. *Smith v. Whitmore*, 1 H. & M. 576; 32 L. J., Ch. 218; 10 Jur., N. S. 65; 10 L. T., 128. Affirmed on appeal, 2 De G., J. & S. 297; 33 L. J., Ch. 713; 10 Jur., N. S. 1190; 11 L. T. 169; 13 W. R. 2.

But in such a case the court of chancery will follow the course taken by the courts of common law, and adopt a rule of its own in analogy to the limitations of the statute. *Ib.*

Therefore, where a plaintiff had suffered the next term after the publication of the award to elapse without taking any steps to set it aside, and had afterwards unsuccessfully pleaded null tiel agard in an action on the award:—Held, that although the award could not have stood if the matter had been fresh, it was too late for the court to interfere. *Ib.*

Although it has been held that an arbitration under the Lands Clauses Consolidation Act is not a submission by consent within the meaning of the Common Law Procedure Act, nevertheless, when an award is made a rule of court under the Lands Clauses Consolidation Act, s. 36, the court has the same jurisdiction with respect to setting it aside and enforcing it as in other

cases; that is to say, the jurisdiction conferred by 9 & 10 Will. 3, c. 15, is let in. It follows, therefore, that a motion to set aside the award must be made before the end of the term next after the publication of the award. *Harper and Great Eastern Railway Company, In re*, 20 L. R., Eq. 39; 44 L. J., Ch. 507; 33 L. T. 214; 23 W. R. 371.

By 9 & 10 Will. 3, c. 15, s. 2, a motion to set aside an award on a reference by consent must be made before the last day of the next term after publication of the award, and such a motion must still be made before the last day of the next term according to the division of the legal year existing before the Judicature Acts. *Christ's College (Governors), Brecknock v. Martin*, 3 Q. B. D. 16; 46 L. J., Q. B. 591; 36 L. T. 537; 25 W. R. 637—C. A.

Where a submission was made in a cause by agreement, and not by a judge's order, and after the award was published, the submission was made a rule of court; the court considered itself bound by analogy to the 9 & 10 Will. 3, c. 15, and refused to set aside the award after the period of limitation had expired. *Rushworth v. Barron*, 3 D. P. C. 317; 1 H. & W. 122.

But it is competent to the parties to object to an award, for any illegality apparent upon the face of it, though the time limited by 9 & 10 Will. 3, c. 15, for applying to set it aside is expired. *Pedley v. Goddard*, 7 T. R. 73.

When two terms have elapsed after the publication of an award, it is too late to move to set aside the award, notwithstanding that both parties to the reference may have agreed to the motion being then made. *North British Railway Company and Trowsdale, In re*, L. R., C. P. 401; 35 L. J., C. P. 262; 12 Jur., N. S. 786.

Setting aside award in equity. *Smith v. Whitmore*, 2 De G., J. & S. 297.

**Cause and all Matters in Difference.**—Where a cause and all matters in difference are referred, it would seem to be within the statute, and a motion may be made to set aside the award at any time before the end of the term next after the publication of the award. *Hayward v. Phillips*, 1 N. & P. 288; 6 A. & E. 119.

So, an award made in pursuance of an order of nisi prius, referring a cause and other matters in difference, may be objected to within the same time. *Allenby v. Proudlock*, 4 D. P. C. 54; 1 H. & W. 357.

The motion in such a case is not too late, although made more than four days in the term after its publication. *Moore v. Bullin*, 2 N. & P. 436; W. W. & D. 638; 7 A. & E. 595.

**Cause Referred.**—But where a cause, and all matters of difference in the cause only, are referred by order of nisi prius, the verdict being ordered to stand for a sum named, subject to the award, and the award is, that the verdict shall stand for a certain sum: an application to set the award aside must be made within four days of notice being given that the award is made, unless some excuse for delay be shewn, such as would, in the case of a verdict, induce the court to allow a motion for a new trial after the expiration of four days. *Paxton v. Great North of England Railway Company*, 8 Q. B. 938; 15 L. J., Q. B. 270; 10 Jur. 430.

**Reference by Order of Nisi Prius.**—A motion

to set aside an award made under an order of nisi prius, not under 9 & 10 Will. 3, c. 15, must be made within the time allowed for moving for a new trial, unless sufficient reason for delay is shewn. *Rawsthorn v. Arnold*, 6 B. & C. 629; 9 D. & R. 556; *S. P.*, *Hayward v. Phillips*, 1 N. & P. 288; 6 A. & E. 119.

A motion to set aside an award, made under an order of nisi prius, must be made within the first four days of the next term, though it is for objections apparent on the face of the award. *Sell v. Carter*, 2 D. P. C. 245.

Motion to set aside an award under a reference at nisi prius, allowed to be made after the first four days of term, where the award was published too late in the vacation to take the necessary proceedings before. *Bennett v. Skardon*, 5 M. & R. 10.

The time limited by the statute for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of nisi prius. *Synge v. Jerroise*, 8 East, 466.

Where a cause is referred and a verdict entered, a motion to impeach the award must be made within the first four days of the following term. *Lung v. Sutton*, 3 Scott, 187; 5 D. P. C. 39; 2 Hodges, 106.

A cause only was referred: a motion to set aside the award, after the fourth day of the term following its publication, was too late, and the court refused to allow affidavits to be filed accounting for the delay. *Riccard v. Kingdon*, 3 D. & L. 773; 1 B. C. Rep. 122; 15 L. J., Q. B. 269.

In order to set aside an award at common law, very strong reasons must be shewn for not applying within the first four days of the term next after the making of the award. *Reynolds v. Askew*, 5 D. P. C. 682; W. W. & D. 366.

**Extension of Time.**—The court has no discretionary power under 9 & 10 Will. 4, c. 15, s. 2, to extend the time for making a motion to set aside an award. *Smith v. Blake*, 1 W. W. & H. 406; 8 D. P. C. 133; 2 Jur. 1015.

An application on the last day but one of the term for leave to move on the last day of the term to set aside an award, on the ground that the affidavit on which the motion was to be founded had not arrived from the country, was refused. *Erans, In re*, 4 M. & G. 767; 5 Scott, N. R. 240.

An award was made on the 23rd of March: the plaintiff moved to set it aside on the last day but one of the following Michaelmas Term, for an objection of which he had knowledge on the 8th of May:—Held, that the application was too late, notwithstanding a fiat had issued against the plaintiff before the date of the award, and he did not receive a copy of it until the 8th of November. *Hemsworth v. Brian*, 8 Scott, N. R. 842; 7 M. & G. 1009; 14 L. J., C. P. 36.

It is no excuse for not applying within the proper time to set aside an award, that the party had been prevented from obtaining a knowledge of its contents by the arbitrator's improperly demanding an extortionate sum for his fees. *Moore v. Darby*, 1 C. B. 445.

Where, from the misconduct of one of the parties, the submission cannot be made a rule of court, so as to enable the opposite party to make it a rule of court before the last day but one of the first term after the award, the time for a

motion to set it aside will be enlarged until the following term. *Perring, In re*, 3 D. P. C. 98.

A rule nisi to set aside an award under an order of nisi prius having been discharged on a mere technical objection:—Held, not too late to move for a second rule after the first four days of the term next after the award was made. *Sherry v. Oke*, 3 D. P. C. 349; 1 H. & W. 119.

An award made under a reference by order of nisi prius was published on the 31st July, and within the first four days of the following Hilary Term the unsuccessful party applied to set it aside. During the months of August, September, October and November preceding he was in bad health, and passed the October on the continent for that reason; and an affidavit of his physician stated that during the whole of November he was unfit to attend to any business:—Held, no sufficient excuse to take the case out of the rule which requires that application to set aside an award must be made during the term subsequent to the publication of an award. *Guadinao v. Broun*, 2 Jur., N. S. 358.

Where a rule nisi to set aside an award had been granted on the last day but one of term, but was stayed in the office, because the reference had not been made a rule of court, of which it appeared that the parties were aware at the time of making the motion, the court refused in the following term (the agreement of reference having, in the meantime, been made a rule of court), to antedate the latter rule as of the day when the motion to set aside the award was made, and to draw up the rule to set aside the award on reading the rule making the agreement of reference a rule of court, although it appeared that the party moving had no copy of the agreement, which was in the hands of the opposite party, who had refused to make it a rule of court in time. *Ross v. Ross*, 4 D. & L. 648; 16 L. J., Q. B. 138.

Defendant gave plaintiff to understand he intended to move to set aside an award between them. Plaintiff, who intended to make the same motion, allowed a term to elapse, and then moved, the defendant having omitted to do so:—Held, no sufficient reason for the delay. *Emet v. Ogden*, 7 Bing. 258.

Where a cause is referred by a judge's order, an application to set aside the award must, in general, be made within two terms; but under special circumstances, the court will entertain the application after the time. *Hobbs v. Ferrars*, 8 D. P. C. 779; 4 Jur. 825; *S. P.*, *Brooke v. Mitchell*, 8 D. P. C. 392.

A motion to set aside an award under a judge's order must be made within the term ensuing the making of the award, although the arbitrator demands an excessive fee, and a copy is not, in consequence, obtained by either party until a few days before the time when the application is made. *McArthur v. Campbell*, 2 N. & M. 444; 5 B. & Ad. 518.

**"Complaint," what is.**—When a submission has been made a rule of the Court of Chancery, service of a notice of motion to set aside the award is a complaint within the meaning of 9 & 10 Will., 3, c. 15, s. 2, and is in time, although the motion will not be heard until after the time limited by the act. *Muddersfield Corporation and Jacomb, In re*, 10 L. R., Ch. 92; 44 L. J., Ch. 96; 31 L. T. 466; 23 W. R. 100.



Affirming 17 L. R., Eq. 476; 43 L. J., Ch. 748; 29 L. T. 824; 22 W. R. 255.

An *ex parte* application to set aside or vary an award published on July 14, was made in court on November 24, but not entertained, because no notice of motion had been given. On the same day notice was given that the court would be moved on the 27th. On the motion being made accordingly, it was objected that the motion was out of time:—Held, that the motion could be heard, as the notice of motion given on the 24th of November was a complaint in court within 9 & 10 Will. 3, c. 15, s. 2. *Smith v. Parkside Company*, 6 Q. B. D. 67; 50 L. J., Q. B. 144; 29 W. R. 154.

**Rule, Enlargement of.**—When a rule had been granted to set aside an award involving certain accounts, and before it came on for argument cross bills had been filed in chancery by each party for the taking of the accounts, the court, with the consent of the parties, enlarged the rule generally until the first term after the chief clerk's certificate had become final. *Stafford v. Stafford*, 25 L. T. 572.

**Application to set aside Judgment.**—A defendant having omitted to apply to set aside an award in the next term after it was made, and the plaintiff having afterwards signed judgment:—Held, that the defendant was at liberty to move to set aside the judgment in the next term after it had been signed. *Brooks v. Parson*, 1 D. & L. 691; 13 L. J., Q. B. 50; 8 Jur. 81.

A defendant may move to set aside a judgment entered up on an irregular award, though the time of setting aside the award itself has elapsed, if the defect insisted on is apparent on the face of it; and an objection grounded on such defect need not be stated in the rule nisi. *Manser v. Heaver*, 3 B. & Ad. 295.

**Compulsory References.**—By 17 & 18 Vict. c. 125, s. 9, "All applications to set aside any award made on a compulsory reference under this act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties."

This section only requires that the rule should be moved for within the seven days, not that it should be granted within that time. *Bennett v. Watson*, or *Watson v. Bennett*, 5 H. & N. 831; 29 L. J. Ex. 357; 6 Jur. N. S. 637; 8 W. R. 612.

## e. Enforcing Award.

### i. By Attachment.

#### a. When Granted.

**Duty must be clear.**—An attachment will not be granted for disobedience of an award unless the duty to be performed or the money to be paid is distinctly ascertained therein. *Graham v. Darcey*, 6 C. B. 337; 6 D. & L. 385; 18 L. J., C. P. 61.

Where an award finds a certain sum to be due, but does not order that sum to be paid, an attachment cannot be obtained for the non-pay-

ment of that sum. *Seward v. Houcey*, 7 D. P. C. 318; 1 W. W. & H. 410; 3 Jur. 9; S. P., *Edgell v. Dalimore*, 3 Bing. 634; 11 Moore, 541.

An award having directed the delivery up of a particular box which was a matter not specifically referred, but which had been parted with before the date of the submission, an attachment could not be granted for non-performance of that part of the award. *Smith v. Reeves*, 2 H. & W. 306.

**Counter Claim arising afterwards.**—If after an award directing payment of money to the plaintiff matter arises which gives the defendant a counter claim against the plaintiff for an equal amount, the court will not grant an attachment on the application of the plaintiff to enforce payment of the money to him. *Rees v. Rees*, 25 L. J., Q. B. 352.

**Offer to pay after Taxation.**—An attachment cannot be granted for non-payment of a sum pursuant to an award, if, on a demand made, the party offers to pay on the costs, which were to follow the result of the award, being taxed. *Kendrick v. Davis*, W. W. & D. 587.

**For Non-payment of Costs.**—Where one only of two defendants who attended an arbitrator under a reference by order of nisi prius made the order a rule of court, and demanded costs from the plaintiff under a taxation to him only:—Held, that an attachment would not lie for the non-payment of the costs to the one defendant only. *Dickins v. Smith*, 8 D. & R. 285; S. C. nom. *Dickins v. Jarvis*, 5 B. & C. 528.

If an arbitrator awards that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court; and one party, in order to get the award out of the hands of the arbitrator, pays the whole, he may have an attachment against the other party, if he refuses to pay his moiety. *Hicks v. Richardson*, 1 B. & P. 93.

An attachment may be obtained to enforce the repayment of the moiety of the costs of an award, where it is part of the submission itself, and not of the award, that each party should pay the moiety. *Powell, In re*, 1 Wol. P. C. 23.

So, where an arbitrator awarded a sum together with the costs of the award, the party to whom the money was awarded was allowed, upon taking up the award, and paying the whole costs, to have an attachment against the defendant for the sum awarded, and his share of the costs. *Stokes v. Lewis*, 2 Smith, 12.

#### When Action commenced and discontinued.]—

The court will grant an attachment for the non-payment on demand of money awarded, after an action on the award commenced, and discontinued, where the action was not pending at the time of the demand. *Higgins v. Willes*, 3 M. & R. 382.

**When Action pending.**—The court will not grant an attachment pending an action on the award, nor allow the plaintiff to waive the action in order to apply for the attachment. *Badly v. Loveday*, 1 B. & P. 31; S. P., *Paul v. Paul*, 2 C. & M. 235; 2 D. P. C. 340; 4 Tyr. 72.

**Denial by Defendant that acts done contrary to Award.**—Two actions of trespass, and all

matters in difference between the parties, touching a disputed right of way, were referred. The arbitrator directed that the defendant should give an undertaking to discontinue the user of the way. On a motion for an attachment for non-performance of the award, the defendant swore that he had not himself used the way, nor had it been used by any of his servants with his consent or knowledge. The court refused to grant the attachment. *Russell v. York*, 4 Scott, 422.

**Price of Land.]**—Where, in articles of agreement for the sale of land by A. to B., it is stipulated that the price shall be fixed by an arbitrator, and the agreement is made a rule of court, the award being published, and the agreement made a rule of court, A. cannot have an attachment against B. for non-payment of the price awarded. A.'s remedy is by action on the articles. *Lec, In re*, 3 N. & M. 860.

**Clerical Error.]**—An arbitrator having made a mistake in his award, in the Christian name of the defendant, the court refused to enforce it by attachment. *Lec v. Hartley*, 8 D. P. C. 883.

**Reciprocal Duties.]**—Where an award directed that the defendant, in consideration of a certain sum, should forthwith, at the costs and charges of the plaintiff, surrender to him an estate, and defendant was afterwards informed that upon such surrender being made, she should thereupon be paid the said sum and the costs of the surrender:—Held, that she was in contempt for not making a surrender, although such sum and costs had not been paid. *Doe d. Clarke v. Stillwell*, 3 N. & P. 701; 8 A. & E. 645; 2 Jur. 691.

H. and L. agreed, by deed, that H. should purchase property of L., at a price to be ascertained by arbitration, the conveyance to be made on payment of the money. The agreement was made a rule of court. The arbitrator having awarded the sum, L. tendered a conveyance to H., and demanded the money of him, but he would not pay. The court refused to grant an attachment against H., as for non-performance of an award, under 9 & 10 Will. 3, c. 15. *Hemingway, In re*, 3 N. & M. 860; 15 Q. B. 305, n.

**Payment to Wrong Person.]**—Where in replevin against a defendant and his wife, they avowed for an annuity charged upon an estate in which the plaintiff had a life interest, and the court at various stages of the proceedings interfered to enable the wife to continue the suit, in opposition to the wishes of the husband, and the cause and all matters in difference were referred, and the arbitrator directed a verdict to be entered for the defendant in the action, and ordered a further sum to be paid to the wife by the plaintiff in respect of arrears which had accrued due since the commencement of the suit, the court granted an attachment for the non-payment of those arrears to the wife, even though it was sworn that the arrears had been paid to the husband upon demand made by him. *Wynne v. Wynne*, 1 D., N. S. 723; 3 Scott, N. B. 442; 4 M. & G. 253.

**Error in Title of Actions.]**—Two actions of A. r. B. and B. r. A., and all matters in difference between the parties, were referred, the costs of the reference and award as to the actions to be

within the discretion of the arbitrator. The award found that there was due from B. to A. the sum of 52l. 18s., and directed that B. should bear his own costs in the action by him against A., and also A.'s costs of that action; that A. was entitled to recover 52l. 18s. in the action by him against B., and that B. should pay that sum on demand to A., together with A.'s costs of the action; and that each party should bear his own costs of the reference and half the expenses of the award. The action of B. r. A. had not proceeded beyond the writ, and consequently there were no costs due therein to A. The agreement of reference having been made a rule of court, —the rule being intitled "In the matter of the arbitration between A. and B.: A. r. B."—and the 52l. 18s., and taxed costs of the action of A. v. B. having been duly demanded, the court granted an attachment against B. for the non-payment of those two sums. *Pike and Newman, In re*, 14 C. B. 425.

**In respect of some Matters.]**—An award ordered H. to pay, on a day and at a place named, to the attorney of C. for C.'s use, one sum for debt and another for C.'s costs of the reference, and then directed that C. should pay to the arbitrator's attorney, at or before the delivery of the award, 62l. 10s. for the costs of the arbitrator and of the award; and that H. should, on a day and at a place named, repay the sum of 62l. 10s. to the attorney of C. for C.'s use. H. not complying with the award, a demand was duly made on him on C.'s behalf for payment of the specific sums, but H. did not pay any of them. On an application by C. against H. for an attachment for not paying the three sums:—Held, that assuming the direction to pay the 62l. 10s. to be valid, no attachment could issue in respect of that sum, as it was not shewn that C. had paid it in the first instance for the arbitrator's use; but the court could mould the rule, and that the attachment might issue in respect of the other two sums. *Cardigan (Earl), In re*, 1 B. C. C. 98; 22 L. J., Q. B. 83.

**Compulsory Reference.]**—Quære, whether an award made upon a compulsory reference is enforceable by attachment. *Tulbot v. Fisher*, 2 C. B., N. S. 471.

**Arbitrator exceeding Powers.]**—Where a cause was referred by an order, which gave no express power to direct a verdict to be entered, but the arbitrator awarded a verdict to be entered with damages and costs, the court discharged a rule which had been obtained to enforce the award by attachment, leaving the plaintiff to his remedy by action. *Cock v. Gent*, 14 M. & W. 680; 3 D. & L. 271; 15 L. J., Ex. 33.

#### B. By and Against whom Granted.

**In whose favour Order made.]**—An executor may have, without scire facias, or other process of revivor, an attachment for non-performance of an award made in favour of his testator in a cause referred and decided in his lifetime, though the suit abated by his decease. *Rogers v. Stanton*, 7 Taunt. 575.

So, if a stranger to a cause becomes, by rule of court, a party to a reference made in the cause before any jury are sworn, and if, after the award made, but before judgment, one of

the parties to the cause dies, though the cause abates, the rule of court is not vacated as to the stranger, but an attachment will go thereon for non-performance of the award. *Id.*

The court will not grant an attachment for the non-payment of costs payable under an award, at the instance of the personal representative of a deceased party, to which party they were to have been paid. *Alex v. Maffey*, 1 D. P. C. 538.

An arbitrator having ordered the defendant to pay to the plaintiff a sum of money, the plaintiff filed an affidavit of debt in the Court of Bankruptcy, and the defendant gave a bond, with sureties, conditioned for payment of the money, but omitting the alternative in the statute, of rendering himself to custody:—Held, that the plaintiff's having adopted this proceeding did not preclude him from applying for an attachment for non-performance of the award and rule of court thereon. *Mendell v. Tyrrell*, 9 M. & W. 217; 1 D., N. S. 453; 6 Jur. 18; 12 L. J., Ex. 121.

An attachment for non-payment of a sum of money cannot be obtained on the part of a person who is not a party to the submission, to whom the money is directed to be paid. *Skeete, In re*, 2 W., W. & H. 49; 7 D. P. C. 618; 3 Jur. 870.

**Against whom Granted.**—The court will not grant an attachment against a peer for not paying a sum of money awarded, though he consents on condition that the attachment shall lie in the office for a certain time. *Walker v. Grosvenor (Earl)*, 7 T. R. 171.

Nor against a member of parliament. *Cutmur v. Knatchbull*, 7 T. R. 448.

The court will not grant an attachment nor make absolute a rule for payment of money found due by a party to an action, which was referred without his consent, and who did not authorize the action which was referred, nor the reference, and had no notice of it until after the award; and although he might be liable on an implied authority by reason of the action and reference relating to partnership transactions in a firm of which he was a member, yet, if it appears that he had retired from the firm, the applicant will be left to enforce the award in an action, and the court will not enforce it by the exercise of a summary jurisdiction. *Robertson v. Hutton*, 26 L. J., Ex. 293.

An attachment was issued against a party for non-performance of an award, which had been made a rule of court, although such party resided out of the jurisdiction of the court, as it was in the nature of a civil process; and the court was not bound to inquire whether it could be served with effect or not. *Hopcroft v. Fernor*, 8 Moore, 424; 1 Bing. 378.

Where a submission between A. & B., the parties on the record, had been made a rule of court, and the award not having been made in time, the dispute had been referred to a second arbitrator, by B. and C., who were the real parties in the suit:—Held, that no attachment could issue against B. for not obeying the award made by the second arbitrator, because the reference should have been made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*, 2 T. R. 643.

An attachment does not lie against a corpora-

tion (e. g. an incorporated railway company), for non-performance of an award. *Mackenzie v. Sligo and Shannon Railway Company*, 9 C. B. 250.

#### γ. Previous Demand.

**Demand must be Personal.**—An attachment for not paying a sum of money pursuant to an award cannot issue before a personal demand has been made, even though the time and place for payment of the money are specified in the award. *Brandon v. Brandon*, 1 B. & P. 394.

**When to be made.**—If a demand is not made for a sum of money, pursuant to an award, until some months after the day on which it is directed to be paid, an attachment for non-payment may nevertheless be granted. *Craik, In re*, 2 W., W. & H. 52; 7 D. P. C. 603.

An award made in an action, in which A. and B. were plaintiffs, and C. defendant, ordered that the defendant should pay the plaintiffs a certain sum of money, and directed that the defendant should pay the costs of the reference and award (not saying to whom the costs were to be paid). After more than two years from the making of the award, one of the plaintiffs demanded payment of the amount awarded from the defendant. The defendant did not pay:—Held, that the plaintiffs were entitled to an attachment to compel payment, although the plaintiffs had given no explanation of the delay in coming to the court. *Baily v. Curling*, 2 L., M. & P. 161; 20 L. J., Q. B. 235.

An action having by an order of nisi prius been referred to an arbitrator, who was to settle all matters in difference between the parties, and to order and direct as to the proper distribution of certain property, as to him should seem fit, he accordingly made his award, and awarded that the plaintiff do, on or before the 23rd of March next, duly execute an indenture, to be prepared by the defendant in the words and figures following (setting it out). No demand of the execution of the instrument was made upon the plaintiff before or on the day mentioned in the award:—Held, that the plaintiff was not liable to an attachment for refusing to execute the deed on demand, made after the 23rd of March. *Durd. Williams v. Howell*, 5 Ex. 299; 19 L. J. Ex. 232.

**Sufficiency of.**—Where an award between A. and B. directed that the costs of the arbitrator should, in the first instance, be paid by A., and afterwards reimbursed and paid by B. to A., and by the master's allocatur, after giving A. credit for having paid the arbitrator's costs, a certain sum was specified as the "balance to be paid by B. to A.:"—Held, that it was not sufficient, in order to support an attachment against B., for non-payment of such sum, to shew a demand of it, as due by virtue of the allocatur, without also shewing by affidavit that A. had first paid the arbitrator's costs. *Masters v. Butler*, 6 Q. B. 341; 18 L. J., Q. B. 328; 13 Jur. 869.

An award ordered a defendant to pay to the arbitrator the costs of the award, and if the plaintiff paid them, it ordered the defendant to repay them. On making a demand for these costs, in order to entitle the plaintiff to move for an attachment, notice should be given to the

defendant that the plaintiff had paid them. *Kendrick v. Davis*, W., W. & D. 587.

**When Part of Demand Good.**—An award directed that the plaintiff should deliver to the defendant a warrant for a hoghead of wine marked 2260. The defendant having demanded the delivery of the wine:—Held, that the demand ought to have been made of the warrant, but that an attachment might issue for the non-performance of the other parts of the award. *Hemsworth v. Brian*, 2 D. & L. 844; 1 C. B. 131; 14 L. J., C. P. 134.

If three separate demands are made for three sums ordered to be paid by an award, one of which is improperly awarded, the party may yet have an attachment for the other two. *Kendrick v. Davis*, W., W. & D., 587.

**For Larger Amount.**—If the party in whose favour an award is made demand more than is due to him, he cannot have an attachment for the non-payment on that occasion of the sum which is due. *Strutt v. Rogers*, 7 Taunt. 213; 2 Marsh. 524.

**Amount Reduced—Fresh Demand.**—Though a party is at one time in contempt for not paying costs which have been duly demanded; yet if, before an attachment is moved for, the sum due become reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment. *Spiry v. Webster*, 1 D. P. C. 696.

**By one Party on behalf of several.**—An award made in an action, in which A. & B. were plaintiffs, ordered that the defendant should pay them a sum of money; a demand by one is sufficient whereon to found an attachment for non-payment of the sum. *Baily v. Curling*, 2 L., M. & P. 161; 20 L. J., Q. B. 235.

An award directed that a bond should be delivered up to the plaintiffs upon demand:—Held, that a demand made by one plaintiff without a power of attorney from the others, was insufficient to obtain an attachment. *Sykes v. Haque* or *Haigh*, 2 Scott, 193; 4 D. P. C. 114; 1 Hodges, 197.

**By Third Person or Agent.**—The court will not grant an attachment for the non-performance of an award, the performance of which is demanded by a third person acting under a power of attorney, unless the subscribing witness makes an affidavit of its execution, and a copy of the power of attorney is left with the party upon whom the demand is made. *Laugher v. Laugher*, 1 D. P. C. 284; 1 C. & J. 398; 1 Tyr. 352.

On a motion for an attachment for non-payment of money pursuant to an award, where the demand is made under a power of attorney, it must appear that the power of attorney was produced to the party at the time the demand was made. *Boyes v. Hewetson*, 2 Scott, 837.

Where a demand is made under a power of attorney, for payment of money, pursuant to an award, it is sufficient to found a rule for an attachment, if the attorney swears to the demand and refusal, and that the sum remains unpaid; and it is not necessary that the party himself should swear that the money was not paid. *Reg. v. Paget*, 9 D. P. C. 946; 5 Jur. 872.

Although a demand of money payable under

an award by a stranger, not a party to the arbitration, must be made under the authority of a power of attorney given by the party to whom the money is to be paid, yet this rule does not apply where a demand of the execution of deeds under an award is to be made; therefore where an arbitrator directed the plaintiff to execute deeds of release and assignment, and the demand of such execution was made by an agent to the defendant's attorney, who was not authorized by a power of attorney, but the plaintiff refused to comply with the award:—Held, that he was liable to an attachment for such non-compliance. *Tebbutt v. Ambler*, 2 D., N. S. 677; 12 L. J., Q. B. 220; 7 Jur. 304.

On demanding the execution of a deed, directed by an arbitrator, where such demand is made by a third person, it is not necessary that such person should be empowered by deed or power of attorney, in order to enable the party to have an attachment. *Kenyon v. Grayson*, 2 Smith, 61.

### 3. Practice relating to.

**Nature of the Proceeding.**—All attachments for non-performance of awards are only in the nature of civil executions. *Rea v. Meyers*, 1 T. R. 266.

**When it may Issue.**—An attachment may issue if a motion to set aside an award is not made before the last day of the next term after the award is published. *Preame v. Pinneger*, Cowp. 23.

The court will not grant an attachment for non-performance of an award after a delay of four years, unless such delay is satisfactorily accounted for. *Storrey v. Galley*, 8 D. P. C. 299; 4 Jur. 73.

**Personal Service.**—The court will not infer personal service of an award to bring a party into contempt. *Brander v. Penleaze*, 5 Taunt. 813.

But personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he has not been personally served with such award and rule. *Boucev, In re*, 1 B. & C. 264.

To constitute a proper service of an award, a copy must be delivered to the party, and the original must at the same time be shewn to him. *Lloyd v. Harris*, 8 C. B. 63.

Where a defendant refused to take the copy of an award, rule and allocatur, which were tendered him, the court granted a rule for an attachment. *Ellis v. Giles*, 2 H. & W. 329.

**Verification of Enlargement of Time.**—The court refused an attachment for non-performance of an award, where the award was made out of the time originally allowed, but authority had been reserved to the arbitrator to enlarge the time, and though the award stated upon the face of it that the arbitrator had enlarged the time; because there was no affidavit of that fact, and it did not appear to them judicially, that the arbitrator had any authority to make the award, without which the court had no jurisdiction. *Moule v. Stowell*, 15 East, 99, n.

Where an award appears to have been made out of the time originally given to the arbitrator by a rule of court, but which rule reserved to him the power of enlarging the time, it is not

enough, for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement of the time within which the award was made, when served with the rule for an attachment. *Davis v. Vass*, 15 East, 97.

By the terms of a submission, an arbitrator had power to enlarge the time for making his award; the order of reference, on which there was an indorsement enlarging the time, dated previously to the expiration of the time for making the award, was made a rule of court:—Held, that an attachment for non-performance of the award might be moved for without an affidavit that the enlargement was duly made. *Barton v. Ranson*, 3 M. & W. 322; 6 D. P. C. 384; H. & H. 11; *N. P., Smith, In re*, 5 D. P. C. 513; 2 H. & W. 306.

Where arbitrators have power to enlarge the time for making their award, and have enlarged it, and make their award in the additional time, in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, and that the defendant has been personally served with notice of those facts. *Wohlenberg v. Lagerman*, 6 Taunt. 254; 1 Marsh. 579.

**Enlargement of Time by Consent.**—Where the time for making an award is enlarged by agreement, there being no authority for such an enlargement in the original submission, the new agreement must be made a rule of court before an attachment can issue for non-performance of an award made during the enlarged period. *McArthur v. Campbell*, 2 N. & M. 444; 5 B. & Ad. 518.

**Affidavits.**—The court granted an attachment for not performing an award, the submission having been made a rule of court, notwithstanding it did not appear that the award and rule of court were annexed to the affidavit of service, or exhibited to the plaintiff on being sworn to his affidavit of service and demand. *Butler, In re*, 13 Q. B. 841; 18 L. J., Q. B. 328; 13 Jur. 869.

An affidavit of the execution of a power of attorney to demand the performance of an award, must be intitled in the cause. *Doe d. Clarke v. Stilwell*, 6 D. P. C. 305; 1 W. W. & H. 44; 2 Jur. 418.

A cause having been referred, the arbitrator awarded that the action should cease, and that the plaintiff should pay to the defendant a certain sum. On motion for an attachment, an affidavit stated that the defendant demanded the sum awarded, and also 30% for costs, but that the plaintiff did not pay the same sums, or any part thereof, omitting the words "or either of them." The court discharged the rule for an attachment. *Poyner v. Hatton*, 7 M. & W. 211; 8 D. P. C. 891.

If to an affidavit for an attachment for non-performance of an award there be annexed a copy of the award, from which, and from the submission which has been made a rule of court, it appears that the award was within the time limited by the submission, it is not necessary that the affidavit should state the execution of the award within that time. *Higgins v. Street*, 25 L. J., Ex. 285.

Where an arbitrator awarded that A. should fulfil an agreement for the purchase of land of B., and should pay the purchase-money on B. conveying the land with a good title, the court refused to grant an attachment against A. for non-performance on an affidavit that B. had required A. to pay the money, assuring him of his readiness to convey with a good title, without further stating that B. had tendered a conveyance executed. *Stanley v. Hemington*, 2 Marsh. 276; 6 Taunt. 561.

**Submission made Rule of Court.**—To warrant a motion for an attachment against a party for non-performance of an award, the order of nisi prius, or the submission, must appear to have been previously made a rule of court. *Bath (Mayor, &c.) v. Pinch*, 4 Scott, 299.

**The Rule.**—A rule absolute for an attachment for non-payment of the costs of a cause, and of an award made in that cause, will not be granted in the first instance, though the reference is of the cause only. *Daniell v. Beadle*, 2 Scott, N. R. 155; 1 M. & G. 960.

A rule for an attachment for non-performance of an award is only a rule to shew cause, even though the award only directs the payment of costs. *Dickenson v. Allsop*, 8 Jur. 1033.

A cause was referred to an arbitrator, the costs of the suit being directed to abide the event of the award. The award was in favour of the defendant, who taxed the costs of the cause, which the plaintiff had neglected to pay. The court granted a rule for an attachment absolute in the first instance. *Daniels v. Wealds*, 9 D. P. C. 44.

Where an award directs that three defendants should each pay one-third of certain costs, it is necessary to have separate rules for attachments for non-payment. *Doe d. Hodgson v. Summerfield*, 2 H. & W. 291.

Where an affidavit verifying an award could not be obtained, in consequence of the barrister's clerk having left him, and his residence being unknown, the court granted a rule nisi for an attachment for non-payment of the award, but directed that the rule should not be drawn up till an affidavit had been obtained and filed by some person acquainted with the clerk's handwriting. *Belton v. Jarrett*, 8 Jur. 83.

**Drawing up Rule.**—Where a rule nisi for an attachment for non-payment of costs, pursuant to an award, has been obtained in one term, and dropped in consequence of negotiations between the parties, and part of the costs is paid, it is sought to obtain an attachment for the non-payment of the residue, the rule for that purpose cannot be drawn up on merely reading the dropped rule, and an affidavit of a fresh demand. *Baker v. Wells*, 9 D. P. C. 323; 5 Jur. 41.

Where it is sought to draw up a rule for an attachment for non-performance of an award, it is competent for the officer of the court to object to the absence of a stamp on the award, and, therefore, to refuse to draw up the rule. *Hill v. Slocomb*, 9 D. P. C. 339; 5 Jur. 120.

**Costs of Rule.**—When, on shewing cause against a rule for an attachment, the court discharges the rule without costs, on a preliminary objection to the insufficiency of the affidavit demanding the performance of the award, the

objecting party has a right to enter into the merits in order to have the rule discharged with costs, and does not therefore waive his right to the discharge of the rule without costs. *Chamberlain, In re*, 8 D. P. C. 686.

The costs of an attachment include all such as are fairly incidental to the attachment, and those of proceedings to clear the defendant of his contempt. *Tyler v. Campbell*, 7 Scott, 116; 5 Bing. N. C. 192; 1 Arn. 465.

**Objections.—What may be raised.**—On a rule nisi for an attachment, no objection can be taken to it that does not appear on the face of the award. *Paul v. Paul*, 2 C. & M. 235; 2 D. P. C. 340; 4 Tyr. 72; *N. P., Macey v. Macey*. W. W. & D. 371.

An omission to adjudicate upon a matter or dispute brought before the arbitrator cannot be shown for cause against a rule for an attachment for non-performance of an award. *M'Arthur v. Campbell*, 4 N. & M. 208; 2 A. & E. 52.

A party cannot, in showing cause against an attachment for not performing an award, impeach the award for defects not appearing on it. *Holland v. Brooks*, 6 T. R. 161.

And affidavits cannot be used to shew that the award is impracticable, uncertain or not final, nor can the award be impeached except for defects apparent on the face of it. *Butler, In re*, 13 Q. B. 341; 18 L. J., Q. B. 328; 13 Jur. 869.

Where an award directed that A. should pay the arbitrator's costs, and should be reimbursed by B., a rule for an attachment against B. for not reimbursing A. was discharged, because the affidavits did not shew that A. had paid them to the arbitrator. A. had not paid them, but had given his note for the amount, which he afterwards paid. On a second motion, an attachment was granted, on the ground that the payment by A. was a new fact, which took the case out of the ordinary rule, it appearing also that there had been contumacy in the party against whom the rule was directed, and hardship on the applicant. *Id.*

A reference directed, that the costs of the award should be in the discretion of the arbitrator. The arbitrator awarded, that the costs of the award should be borne by the defendant, "which costs I do assess at 39l. 17s. 4d." Part of that sum was the amount of charges of an attorney, whom the arbitrator, who was a layman, had employed to assist him in taking the evidence and drawing up the award. The plaintiff took up the award, and afterwards demanded payment of the 39l. 17s. 4d. of the defendant, who refused to pay it. On motion for an attachment against the defendant:—Held, that the arbitrator had power in the first instance to name the sum to be paid for the costs of the award, and that if the defendant did not proceed with due diligence to procure a taxation, and insist on the necessity of it, he could not set up the want of taxation as a ground for opposing an attachment for non-payment. *Threlfall v. Fanshawe*, 1 L., M. & P. 140; 19 L. J., Q. B. 334.

Partiality and improper conduct in an arbitrator is no answer to a motion for an attachment for non-performance of an award, although good reason for setting it aside. *Brazier v. Bryant*, 3 Bing. 167; 10 Moore. 587.

It is no objection, in answer to a motion for an attachment for disobedience to an award, which directs the execution of certain deeds, that

it was the duty of the arbitrator to have prepared such deeds. *Tebbutt v. Ambler*, 2 D., N. S. 677; 12 L. J., Q. B. 220; 7 Jur. 304.

## ii. By Execution under 1 § 2 Vict. c. 110.

**Statute.**—By 1 & 2 Vict. c. 110, s. 18, all rules of courts of common law, whereby any sum of money or any costs shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs shall be payable shall be deemed judgment creditors.

**When granted.**—Quære, whether an award made upon a compulsory reference is enforceable by order under 1 & 2 Vict. c. 110, s. 18. *Tulbot v. Fisher*, 2 C. B., N. S. 471.

The court refused a rule for payment of money under an award, where it appeared that the costs (unascertained) of proceedings in Chancery were payable to the other party under the same award. *Lambe v. Jones*, 9 C. B., N. S. 471; 9 W. R. 202.

If a person ordered to pay money under an award satisfies the court that he has a bona fide claim for a cross demand, larger than the sum awarded, which he might reasonably hope to support by way of set-off in an action on the award, the court will not grant a rule ordering him to pay the sum awarded. *Swayne v. White*, 31 L. J., Q. B. 260; 10 W. R. 759.

Where an award found that the plaintiff was "entitled to recover" a sum of money from the defendant, but contained no direction to the latter to pay that sum:—Held, that although the defendant was not liable to an attachment for non-payment of the amount, yet the plaintiff was entitled to a rule ordering the payment. *Bower v. Bower*, or *Bowen v. Bowen*, 31 L. J., Q. B. 193; 8 Jur., N. S. 193; 5 L. T. 684.

If there is doubt as to the validity of an award the court will not grant a rule to pay the sum awarded. *Diekenham v. Allsop*, 2 D. & L. 657; 13 M. & W. 722; 14 L. J., Ex. 136; *S. P., Tattersall v. Parkinson*, 2 Ex. 342; 17 L. J., Ex. 208; *Shorner v. Payne*, 11 Jur. 242.

The court will not make an order for payment of money directed by an award to be paid, except where the case is clear and free from doubt. *Mackenzie v. Sligo Railway Company*, 9 C. B. 250; 19 L. J., C. P. 142.

Or except where an attachment would have been granted. *Laing, In re*, 13 C. B. 276.

The court refused to make an order for the payment of a sum alleged to have become payable under an award, where the money was not ascertained to be due and payable at the time of the making of the award. *Graham v. Darcy*, 6 C. B. 337; 6 D. & L. 385; 18 L. J., C. P. 61.

It is not necessary, in order to obtain a rule for payment of a sum awarded, that the award should contain an order to pay the money. *Baker v. Cotterill*, 7 D. & L. 20.

**Service of Rule or Order.**—The court, in general, requires the same formalities to be observed as to personal service, where the application is with a view to issue execution under an award, as in cases of attachment. *Hawkins v. Benton*, 2 D. & L. 465; 14 L. J., Q. B. 9; 9 Jur. 110.

Where, however, it clearly appeared, from the admission of the party, that he was aware of the

award and its contents, the court, under special circumstances, granted a rule calling upon him to shew cause why he should not pay the sum awarded. *Ib.*

A defendant, who was abroad, was directed by an award to pay a sum of money, and it did not appear that he had been served with the award, though a letter from him shewed he was aware of its effect; the court refused to grant a rule calling upon him to pay the money, and ordering and directing that service thereof, by sticking it up in the master's office, should be sufficient. *Wilson v. Foster*, 6 M. & G. 149; 6 Scott, N. R. 936; 1 D. & L. 496; 12 L. J., C. P. 330.

Where a party applying at the house of the person ordered to pay the money was told that the latter had assigned his effects to his daughter-in-law and gone abroad, the court granted the rule nisi to be served on the daughter-in-law. *Doe v. Amey*, 1 D., N. S. 23; 8 M. & W. 565.

Where a party had said that he would not pay under an award, a rule nisi to pay the money was made absolute, upon proof that it had been served by leaving it at his house, in the hands of his sister-in-law, who said that his wife was upstairs in bed, and that he had gone to America. *Styring v. Lloyd*, 12 W. R. 384.

Personal service of the rule nisi cannot be dispensed with, unless it appears that the party is evading service. Service on his attorney is not sufficient. *Beans v. Prosser*, 34 L. J., Q. B. 256; 11 Jur., N. S. 182; 11 L. T. 718; 13 W. R. 351.

**Previous Demand of Money.**—An award, made upon a reference of an action by two to recover a debt from a defendant, ordered the defendant to pay a sum of money to the plaintiffs. One plaintiff alone demanded the money, and swore that the defendant had not paid him, and, to the best of his belief, had not paid his co-plaintiff or the attorney, and that the money was still unpaid. On an application on the part of the plaintiffs for a rule calling on the defendant to pay the money pursuant to the award:—Held, that the demand by one was sufficient to warrant the granting of the rule. *Drew v. Woodcock*, 3 C. L. R. 78; 24 L. J., Q. B. 22.

A personal demand of money payable under an award, with a view to a proceeding on a rule of court, may be dispensed with where the party is evidently keeping out of the way to avoid the demand. *Smith v. Troupe*, 7 C. B. 757; 6 D. & L. 679; 18 L. J., C. P. 209.

**Who may apply for Order.**—A cause and all matters in difference between A. and B. were referred, C. consenting to be made a party to the reference. The arbitrator directed a verdict to be entered for B., but that C. should pay to A. 52l. 10s., and the costs of the reference and award. A. having become bankrupt, C. declined to pay without authority from A.'s assignee:—Held, that A.'s attorney, who had a lien upon the award for his costs, was not entitled to an order upon C. *Halcroft v. Manby*, 7 M. & G. 843; 2 D. & L. 319; 8 Scott, N. R. 473; 13 L. J., C. P. 208.

Where an arbitrator has awarded a sum to be paid to A., in respect of matters in difference between him and B., and the costs of an action [a smaller sum] to be paid to B. at the same time and place, the court has no jurisdiction to order B. to pay the whole sum awarded to A. to A.'s attorney, on account of his lien for A.'s

costs. *Dunn v. West*, 10 C. B. 420; 20 L. J., C. P. 1; 15 Jur. 88.

**At what time granted.**—The courts have power to call upon a party to an award (the submission to which has been made a rule of court) to shew cause why he should not pay the amount awarded, and such rule may be moved before the time limited for applying to set aside the award has expired, and upon its being made absolute execution may issue. *Doe v. Amey*, 1 D., N. S. 23; 8 M. & W. 565; 5 Jur. 898.

Where all matters in difference in a cause between the parties are referred by an order, the court will enforce the award by a rule before the time for moving to set it aside has expired. *Hare v. Fleay*, 17 C. B. 472; 2 L., M. & P. 392; 20 L. J., C. P. 249; 15 Jur. 1038.

**Execution, by whom issued.**—Upon a rule ordering the defendant so to pay, execution can be issued by the plaintiff only, and not by his attorney. *Ib.*

**Affidavit—Enlargement of Time.**—An affidavit of the due enlargement of the time for making the award is not necessary. *Doe v. Amey*, 1 D., N. S. 23; 8 M. & W. 565; 5 Jur. 891. *S. P.*, *Prebles v. Hay*, 8 Jur. 338.

**Whether Order carries Interest.**—An arbitrator made his award on the 1st of September, 1841, directing payment on the 25th of January, 1842, of a certain sum with interest:—Held, that under that award, upon a rule under 1 & 2 Vict. c. 110, s. 18, the plaintiff could recover no interest accruing subsequently to the 25th of January. *Doe d. Moody v. Squire*, 2 D., N. S. 327; 7 Jur. 236.

**Service of Copy of Award.**—In order to obtain a rule for payment of money pursuant to an award, a copy of the award should be served, and the original shewn to the party at the same time that the demand is made, and it is not sufficient that a copy of the award has been served on a previous occasion, when a demand was made of another sum of money due under the same award. *Lloyd v. Harris*, 7 D. & L. 118; 18 L. J., C. P. 346.

The motion should be made upon affidavit of service of a copy of the award and allocatur, or the court will not grant the application. *Pearson v. Archbold*, 2 D., N. S. 769; 11 M. & W. 108; 12 L. J., Ex. 230; 7 Jur. 402.

**Lodging Award with Master.**—When the rule is granted the original award must be produced to and deposited with the master at the time of drawing up the rule. *Davis v. Potter*, 1 B. C. C. 11; 21 L. J., Q. B. 134.

**Rule.**—A rule to issue execution for money due upon an award and the master's allocatur, is a rule nisi only in the first instance. *Winnwood v. Holt*, 14 M. & W. 197; 3 D. & L. 85; 9 Jur. 451.

According to the practice of the Queen's Bench, a rule nisi may be granted to shew cause at chambers. *Drew v. Woodcock*, 24 L. J., Q. B. 22.

It may be moved for on the last day of term. *Leblé v. Carroll*, 24 L. J., Q. B. 96.

It is a six-day rule; and the court will not, in the absence of any special reasons, make it re-

turnable at a shorter date to save the term, nor will the court make it returnable at chambers. *Arthur v. Marshall*, 13 M. & W. 465; 2 D. & L. 376; 14 L. J., Ex. 46; 8 Jur. 1011.

On a motion for the rule the parties cannot go into any matter debors the award itself. *Davies v. Pratt*, 17 C. B. 183; 25 L. J., C. P. 71.

The court will only look to what appears upon the face of the award, and will not depart from this rule, although the party in whose favour the award has been made has, subsequently to the award, been committed to take his trial for perjury committed during the proceedings on the reference. *Bradford v. Wollam*, 33 L. J., Q. B. 129; 10 Jur., N. S. 206; 9 L. T. 371; 12 W. R. 384.

In moving for a rule nisi it is not necessary to make it part of the rule that the applicant should be at liberty to issue execution, or that he forgoes his remedy by attachment. *Burton v. Mendizabel*, 1 D., N. S. 336.

Where a cause was agreed to be referred, but the agreement was not made a rule of court, the court refused to compel the payment of a sum awarded against the party who proposed the reference. *Clarke v. Baker*, 1 H. & W. 215.

**Effect of Judicature Act.**—Where an action has been referred to an arbitrator by the Chancery Division it is not necessary to make the award a rule of court before an order can be made founded on the award. *Jones v. Wedgewood*, 19 Ch. D. 56; 51 L. J., Ch. 206; 30 W. R. 228. *S. P. Forrest, In re, Forrest v. Burrows*, 19 Ch. D. 57, n.

A rule to pay money awarded under an agreement of reference (which has been made a rule of court) is a rule to shew cause, and no notice of application for such rule need be given. *Phillips and Gill, In re*, 1 Q. B. D. 78; 45 L. J., Q. B. 136; 24 W. R. 158.

Where a reference to arbitration had been directed by the Judge of the Chancery Division at the trial, and afterwards the award had been made an order of court, and that order was not appealed from, it was held by the Court of Appeal that the award could not be disputed even though it was bad on the face of it. *Jones v. Jones*, 14 Ch. D. 593; 43 L. T. 76; 29 W. R. 65—C. A.

### iii. By Judgment and Execution in pursuance of Verdict.

**No Leave necessary.**—Where a verdict is taken pro forma at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount without applying to the court for leave so to do. *Lee v. Lingard*, 1 East, 401; *S. P., Grimes v. Naish*, 1 B. & P. 480.

If a verdict is taken at nisi prius, subject to the award of an arbitrator, and the rule of reference is made a rule of court, the verdict may be entered according to his award, without any application to the court. *Borrowdale v. Mitchever*, 3 B. & P. 244.

An order of reference directed that the party in whose favour the award should be made, should be at liberty to sign final judgment for the amount payable thereunder, and tax his costs, and issue execution:—Held, that the

award being in favour of the defendant, he might sign judgment for his costs. *Magg v. Yorton*, 6 D. P. C. 481; 1 W. W. & H. 185; 2 Jur. 744.

**Judgment must be first Signed.**—But execution cannot issue upon an award made under a compulsory reference without first signing judgment. *Kendil v. Merrett*, 18 C. B. 173; 25 L. J., C. P. 251; 2 Jur., N. S. 523.

**When Judgment may be Signed.**—When a verdict is taken for the plaintiff in an action, subject to a reference of the cause and all matters in difference by order of nisi prius, and an award is made directing the verdict in the action to stand for the plaintiff for a certain sum, and finding another sum to be due to the defendant in respect of the matters in difference, the plaintiff is entitled to sign judgment for the sum awarded to him in the action in fourteen days after the making of the award. *O'Toole v. Pott*, 7 El. & Bl. 102; 3 Jur., N. S. 361; 26 L. J., Q. B. 88.

Where a verdict has been found subject to a reference, and the award has not been made until some terms afterwards, judgment cannot be entered up as of the term next after the verdict, without a special application to the court. *Brooke v. Fearns*, 2 D. P. C. 144.

Where a cause and all matters in difference are referred by an order of nisi prius, which directs that the costs of the cause shall abide the event, and the costs of the reference and award to be taxed shall be in the discretion of the arbitrator, judgment cannot be signed, or the master's allocatur for the costs obtained, until the end of the term next after the making of the award. *Jones v. Ives*, 10 C. B. 429; 20 L. J., C. P. 69; 1 L., M. & P. 689.

When a verdict is taken at nisi prius by consent, subject to the certificate of an arbitrator, the certificate relates back to the time when the verdict was pronounced by the jury. *Cramer v. Churt*, 3 D. & L. 672; 15 M. & W. 310; 15 L. J., Ex. 263; 10 Jur. 671.

Therefore, where such a certificate was given in vacation after more than four days had elapsed from the return-day of the distringas jurors:—Held, that the successful party was entitled to sign judgment immediately, and was not bound to wait until the expiration of the first four days of the next term. *Ib.*

**Clause in Agreement—Construction.**—A reference contained a clause restraining either party from bringing or prosecuting any action or suit in any court concerning the premises referred:—Held, that the finding of the arbitrator was conclusive, and that the plaintiff could not afterwards move for judgment non obstante veredicto. *Britt v. Pashley*, 5 D. & L. 97; 1 Ex. 64; 16 L. J., Ex. 240.

So where a reference contains a clause restraining the parties from bringing error, they are precluded from moving in arrest of judgment. *Chownes v. Brown*, 2 D. & L. 706; 14 L. J., Ex. 219.

**Effect of Judicature Acts.**—The old law and practice in connexion with arbitration still exist as to references made under the old system, and such references are not governed by the Judicature Act or the rules of court made under



that Act. *Lloyd v. Lewis*, 2 Ex. D. 7; 46 L. J., Ex. 81; 35 L. T. 539; 25 W. R. 102—C. A.

An order of reference was made prior to, but the award after, the passing of the Judicature Act:—Held, that the successful party was entitled to sign judgment on the award, and that as the rules of court did not apply to such a case, he was not bound to set down the case on motion for judgment. *Ib.*

**Execution and Judgment set Aside.]**—A cause and all matters in difference between a plaintiff and a defendant were by an order of nisi prius and a subsequent rule of court referred, the costs of the cause to abide the event, and those of the reference and award to be in the discretion of the arbitrator, who was to be at liberty to make two several awards, at different times, by the first of which he was to raise questions of law for the court; and it was by the rule of court ordered, that neither party should enforce payment of anything which might be found to be due under the first award until the arbitrator should have made his final award. The arbitrator stated a case for the opinion of the court, and in the result the plaintiff became entitled to damages to a large amount. The defendants afterwards obtained an act of parliament for regulating their affairs, and under that act the plaintiff received an allotment of shares in lieu of the damages so awarded to him. It having become unnecessary and impracticable to proceed further with the reference, no second award was ever made. The plaintiff, however, signed judgment, and issued an execution against the defendants thereon for the costs of the action. The court set aside the judgment with costs, holding that in the absence of a final award the plaintiff was, by the rule of court, precluded from enforcing his remedy for such costs. *Wood v. Copper Miners in England*, 15 C. B. 464; 24 L. J., C. P. 34.

**Lost Award.]**—If an award is lost, the court will, nevertheless, permit judgment to be entered accordingly, upon an affidavit of its contents. *Hill v. Townsend*, 3 Taunt. 45.

**Service of Award.]**—Personal service of the award is not necessary to warrant the issuing of execution, if the attorney of the defendant has been served with the award. *Borrowdale v. Hitchenor*, 3 B. & P. 244.

**Rule.]**—On shewing cause against a rule, it was agreed by indorsements on the counsel's brief, that the matters should be referred to a barrister, who should be at liberty to certify what rule, if any, should be drawn up. The arbitrator certified that a rule should be drawn up in certain terms. The court thereupon permitted a rule of reference to be drawn up in the terms of the indorsements, and then a second rule pursuant to the certificate of the barrister. *Brandon v. Smith*, 1 B. C. C. 181; 22 L. J., Q. B. 321.

A rule for delivering the postea to the plaintiff, that he may enter the verdict pursuant to an award of an arbitrator, may be drawn up on reading the affidavit "and the paper writing thereunto annexed," provided the affidavit verifies the paper writing as being a copy of the award. *Platt v. Hall*, 2 M. & W. 391; 5 D. P. C. 583.

**Entry of Verdict where no Award.]**—Where a plaintiff recovered a verdict for 5*l.*, subject to a reference at nisi prius whether such verdict should stand, or be reduced to 20*s.*, and the arbitrator refused to make an award, the court would not allow a verdict to be entered for the lesser sum, until such order was made a rule of court. *Kirkus v. Hodgson*, 3 Moore, 64.

#### iv. Specific Performance.

**Jurisdiction of Court of Chancery.]**—The court of Chancery is one of the courts of record to which 9 & 10 Will. 3, c. 15, gives summary jurisdiction for the enforcement of awards. The statute excludes every jurisdiction to interfere with the execution of awards made under it, except the summary jurisdiction expressly given by it. And a bill will not lie to impeach an award made under the statute, whether the submission under which it was made has or has not been made a rule or order of court before bill filed. *Heming v. Swinnerton*, 2 Ph. 79; 14 Sim. 588; 1 Coop. 386; 16 L. J., Ch. 90; 10 Jur. 907.

**When Granted.]**—An award was enforced in equity, although the submission was to be made a rule of a court of common law. *Hawksworth v. Brammall*, 5 Myl. & C. 281.

The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous engagement between the parties; and although the illegality of the acts, of which it directs the execution, will afford a ground for refusing to decree the performance. *Wood v. Griffith*, 1 Swans. 43; Wils. C. C. 34.

The court of Chancery has jurisdiction to entertain a suit for specific performance of an award, although the submission has been made a rule of a court of law. It is no defence that the plaintiff has ineffectually endeavoured to set aside the award on motion. *Blackett v. Bates*, 2 H. M. 610; 11 Jur., N. S. 500; see 12 Jur., N. S. 874, n., and *S. C.* on appeal, 1 L. R., Ch. 117; 35 L. J., Ch. 324; 12 Jur., N. S. 151; 13 L. T., 656.

#### v. By Action.

**When Maintainable.]**—An action may be maintained on an award made under a submission by a judge's order, the parties having attended at the reference. *Wharton v. King*, 1 M. & Rob. 96.

Two persons assigned to B. all debts due to them, and gave him a power of attorney to receive and compound for the same; under which B. submitted to arbitration the matters in difference subsisting between his principals and the defendant:—Held, that B. might maintain an action on the award in his own name. *Banfill v. Leigh*, 8 T. R. 571.

By a judge's order, made by consent of both plaintiff and defendant, an action of trespass and other matters in difference were referred, and, by the like consent, the parties were ordered to perform the award of the arbitrator. Afterwards an indorsement was made on the order by both parties agreeing that the arbitrator should have power to order what the parties, or either of them, should do to prevent a repetition of the trespass complained of. The arbitrator ordered a wall to be built by the defendant:—Held, that

the judge's order embodied an agreement by the parties to do what the arbitrator should so order, and that an action lay for its breach in not building the wall as ordered. *Lierlesley v. Gilmore*, 1 L. R., C. P. 570; 35 L. J., C. P. 351; 12 Jur., N. S. 874; 15 L. T. 386; 1 H. & R. 849.

**Pleadings—Declarations.**—Counts on an award may be joined with counts for a breach of an agreement to stand by, perform, and not revoke an award to be made. *Brown v. Tanner*, 1 C. & P. 651; *McCl. & Y.* 464.

In an action for non-performance of an award, the declaration alleged mutual promises to perform the award, and stated two enlargements of time by judge's order and consent:—Held, that the promise was well laid, the enlargement of time not affecting the original promise. *Armistage v. Coates*, 4 Ex. 641; 19 L. J. Ex. 95.

A declaration stated that a difference had arisen between the plaintiff and the defendant concerning twenty shares purchased by the plaintiff for the defendant at his request, and for which the plaintiff had paid 122*l.*; that they had submitted themselves to the award of W. and P.; that the arbitrators made their award of and concerning the differences, and did thereby award "that they decided in favour of the plaintiff, and that 50*l.*, which had been deposited by the defendant with the plaintiff, was in part payment of the twenty shares;" and the arbitrators, "by their award, did then request the defendant to pay the balance of the account forthwith." The declaration averred a request to pay the plaintiff the balance of the account, amounting to 72*l.*, and assigned for breach the non-payment thereof:—Held, that it was sufficiently shewn that the arbitrators had authority to determine the payment of a sum of money. *Smith v. Hartley*, 2 L., M. & P. 340; 10 C. B. 800; 20 L. J., C. P. 169; 15 Jur. 755.

In an action on an award, the declaration stated that the arbitrator awarded that the costs of the arbitration and award should be paid as follows, that is to say, two-third parts by the defendants, and one-third part by the plaintiff. Breach, that two-third parts of the costs attending the arbitration amounted to a certain sum, and that the defendant had not paid two-third parts of the costs:—Held, that the breach was bad, since it left it uncertain in what way the costs were to be computed. *Kirk v. Unwin*, 6 Ex. 908; 2 L. M. & P. 519; 20 L. J., Ex. 345.

—**Plea.**—In an action upon an award, the declaration alleged that differences between the plaintiff and defendant had been referred, and that the arbitrator had awarded that certain sums should be paid at certain times by the defendant to the plaintiff, and assigned for breach non-payment of an instalment. The defendant pleaded, setting out the award verbatim, and concluding in the form of a demurrer, that the declaration was not sufficient in law, and the plaintiff joined in demurrer:—Held, that the demurrer was informal; the instrument as set out forming part of the plea, and consequently there being nothing to shew the declaration bad. *Sims v. Edmonds*, 15 C. B. 240; 2 C. L. R. 749; 23 L. J., C. P. 229; 18 Jur. 1024.

The plea of no award, means no valid award. *Dresser v. Stansfield*, 14 M. & W. 822; 15 L. J., Ex. 274.

Where an award is made upon all the matters  
VOL. I.

in difference, and is in the required form, and intended by the arbitrators to express their decision, an objection that they adopted the opinion of a third person, by which they agreed to be bound, cannot be raised under a plea of nul tiel agard, to an action on the award. *Whitmore v. Smith*, 7 H. & N. 509; 31 L. J., Ex. 107; 8 Jur., N. S. 514; 6 L. T., 618; 10 W. R. 253—Ex. Ch.

A declaration, after stating that differences had arisen between the plaintiff on the one part and the defendant and A. on the other, alleged that it was agreed between the plaintiff, the defendant and A., mutually and reciprocally, to refer the same differences to S. and J., who made their award concerning the said matters in difference, and awarded that the defendant should pay 150*l.* 18*s.* 6*d.* to S., who should immediately pay it to the plaintiff. Plea, that S. and J. did not make their award concerning the matters in difference referred to them:—Held, that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue. *Adcock v. Wood*, 2 L., M. & P. 501; 6 Ex. 814; 20 L. J., Ex. 435. Affirmed in error, 7 Ex. 468; 21 L. J., Ex. 204—Ex. Ch.

To a declaration containing the ordinary money counts, a plea, except as to 145*l.* 3*s.* 1*d.*, parcel of the money claimed, that the plaintiff ought not to be admitted to allege that at the commencement of the suit more than the sum of 145*l.* 3*s.* 1*d.* was due in respect of the causes of action, because after the accruing of the causes of action, and before action, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement between them before action they referred the question of how much was due to the award of W., and agreed to be bound by his award as to such amount, and that he made his award in writing of and concerning the premises so referred to him, and thereby awarded that the amount due in respect of the causes of action was 145*l.* 3*s.* 1*d.*, is good, though pleaded by way of estoppel. *Commings v. Heard*, 4 L. R., Q. B. 669; 20 L. T. 975; 18 W. R. 16; 10 B. & S. 606.

By an award made under the Lands Clauses Act, 8 & 9 Vict. c. 18, the arbitrator awarded one entire sum as the amount of damage sustained by a party by reason of his messuage being injuriously affected by the execution of the works of a railway company, to wit, by the erection of an embankment, and by the narrowing of the road in front of the messuage. To a declaration on the award for not paying the sum awarded, a plea by the company, that the messuage was not injuriously affected by the narrowing of the road, is a good plea. *Beckett v. Midland Railway Company*, 35 L. J., C. P. 163; 14 W. R. 393; 1 H. & R. 189; 1 L. R., C. P. 241.

Where lessees of land and of coal-mines covenanted forthwith to proceed to sink for coal as far as could and ought to be accomplished, or in default to pay so much to the lessor as arbitrators should award, and the lessees gave a bond to the lessor, conditioned to perform the award which was made:—Held, that to an action on the bond, it was a sufficient answer, that they had proceeded to sink as far, &c. (in the words of the covenant), but that none could be found. *Hanson v. Boothman*, 13 East. 22.

In an action by A. against B. for not accepting goods, B. pleaded an award made in respect of

that Act. *Lloyd v. Lewis*, 2 Ex. D. 7; 46 L. J., Ex. 81; 35 L. T. 539; 25 W. R. 102—C. A.

An order of reference was made prior to, but the award after, the passing of the Judicature Act:—Held, that the successful party was entitled to sign judgment on the award, and that as the rules of court did not apply to such a case, he was not bound to set down the case on motion for judgment. *Ib.*

**Execution and Judgment set Aside.]**—A cause and all matters in difference between a plaintiff and a defendant were by an order of nisi prius and a subsequent rule of court referred, the costs of the cause to abide the event, and those of the reference and award to be in the discretion of the arbitrator, who was to be at liberty to make two several awards, at different times, by the first of which he was to raise questions of law for the court; and it was by the rule of court ordered, that neither party should enforce payment of anything which might be found to be due under the first award until the arbitrator should have made his final award. The arbitrator stated a case for the opinion of the court, and in the result the plaintiff became entitled to damages to a large amount. The defendants afterwards obtained an act of parliament for regulating their affairs, and under that act the plaintiff received an allotment of shares in lieu of the damages so awarded to him. It having become unnecessary and impracticable to proceed further with the reference, no second award was ever made. The plaintiff, however, signed judgment, and issued an execution against the defendants thereon for the costs of the action. The court set aside the judgment with costs, holding that in the absence of a final award the plaintiff was, by the rule of court, precluded from enforcing his remedy for such costs. *Wood v. Copper Miners in England*, 15 C. B. 464; 24 L. J., C. P. 34.

**Lost Award.]**—If an award is lost, the court will, nevertheless, permit judgment to be entered accordingly, upon an affidavit of its contents. *Hill v. Townsend*, 3 Taunt. 45.

**Service of Award.]**—Personal service of the award is not necessary to warrant the issuing of execution, if the attorney of the defendant has been served with the award. *Borrowdale v. Hitchenner*, 3 B. & P. 244.

**Rule.]**—On shewing cause against a rule, it was agreed by indorsements on the counsel's brief, that the matters should be referred to a barrister, who should be at liberty to certify what rule, if any, should be drawn up. The arbitrator certified that a rule should be drawn up in certain terms. The court thereupon permitted a rule of reference to be drawn up in the terms of the indorsements, and then a second rule pursuant to the certificate of the barrister. *Brandon v. Smith*, 1 B. C. C. 181; 22 L. J., Q. B. 321.

A rule for delivering the postea to the plaintiff, that he may enter the verdict pursuant to an award of an arbitrator, may be drawn up on reading the affidavit "and the paper writing thereunto annexed," provided the affidavit verifies the paper writing as being a copy of the award. *Platt v. Hall*, 2 M. & W. 391; 5 D. P. C. 583.

**Entry of Verdict where no Award.]**—Where a plaintiff recovered a verdict for 5*l.*, subject to a reference at nisi prius whether such verdict should stand, or be reduced to 20*s.*, and the arbitrator refused to make an award, the court would not allow a verdict to be entered for the lesser sum, until such order was made a rule of court. *Kirkus v. Hodgson*, 3 Moore, 64.

#### iv. Specific Performance.

**Jurisdiction of Court of Chancery.]**—The court of Chancery is one of the courts of record to which 9 & 10 Will. 3, c. 15, gives summary jurisdiction for the enforcement of awards. The statute excludes every jurisdiction to interfere with the execution of awards made under it, except the summary jurisdiction expressly given by it. And a bill will not lie to impeach an award made under the statute, whether the submission under which it was made has or has not been made a rule or order of court before bill filed. *Heming v. Swinnerton*, 2 Ph. 79; 14 Sim. 588; 1 Coop. 386; 16 L. J., Ch. 90; 10 Jur. 907.

**When Granted.]**—An award was enforced in equity, although the submission was to be made a rule of a court of common law. *Hawkeworth v. Brammell*, 5 Myl. & C. 281.

The specific performance of an award may be compelled in equity, on the principle that the award only ascertains the terms of a previous engagement between the parties; and although the illegality of the acts, of which it directs the execution, will afford a ground for refusing to decree the performance. *Wood v. Griffith*, 1 Swans. 43; Wils. C. C. 34.

The court of Chancery has jurisdiction to entertain a suit for specific performance of an award, although the submission has been made a rule of a court of law. It is no defence that the plaintiff has ineffectually endeavoured to set aside the award on motion. *Blackett v. Bates*, 2 H. M. 610; 11 Jur., N. S. 500; see 12 Jur., N. S. 874, n., and *S. C.* on appeal, 1 L. R., Ch. 117; 35 L. J., Ch. 324; 12 Jur., N. S. 151; 13 L. T., 656.

#### v. By Action.

**When Maintainable.]**—An action may be maintained on an award made under a submission by a judge's order, the parties having attended at the reference. *Wharton v. King*, 1 M. & Rob. 96.

Two persons assigned to B. all debts due to them, and gave him a power of attorney to receive and compound for the same; under which B. submitted to arbitration the matters in difference subsisting between his principals and the defendant:—Held, that B. might maintain an action on the award in his own name. *Barrell v. Leigh*, 8 T. R. 571.

By a judge's order, made by consent of both plaintiff and defendant, an action of trespass and other matters in difference were referred, and, by the like consent, the parties were ordered to perform the award of the arbitrator. Afterwards an indorsement was made on the order by both parties agreeing that the arbitrator should have power to order what the parties, or either of them, should do to prevent a repetition of the trespass complained of. The arbitrator ordered a wall to be built by the defendant:—Held, that

the judge's order embodied an agreement by the parties to do what the arbitrator should so order, and that an action lay for its breach in not building the wall as ordered. *Liccesley v. Gilmore*, 1 L. R., C. P. 570; 35 L. J., C. P. 351; 12 Jur., N. S. 874; 15 L. T. 386; 1 H. & R. 849.

**Pleadings—Declarations.]**—Counts on an award may be joined with counts for a breach of an agreement to stand by, perform, and not revoke an award to be made. *Brown v. Tunner*, 1 C. & P. 651; M'Clel. & Y. 464.

In an action for non-performance of an award, the declaration alleged mutual promises to perform the award, and stated two enlargements of time by judge's order and consent:—Held, that the promise was well laid, the enlargement of time not affecting the original promise. *Armistage v. Coates*, 4 Ex. 641; 19 L. J. Ex. 95.

A declaration stated that a difference had arisen between the plaintiff and the defendant concerning twenty shares purchased by the plaintiff for the defendant at his request, and for which the plaintiff had paid 122l.; that they had submitted themselves to the award of W. and P.; that the arbitrators made their award of and concerning the differences, and did thereby award "that they decided in favour of the plaintiff, and that 50l., which had been deposited by the defendant with the plaintiff, was in part payment of the twenty shares;" and the arbitrators, "by their award, did then request the defendant to pay the balance of the account forthwith." The declaration averred a request to pay the plaintiff the balance of the account, amounting to 72l., and assigned for breach the non-payment thereof:—Held, that it was sufficiently shewn that the arbitrators had authority to determine the payment of a sum of money. *Smith v. Hartley*, 2 L., M. & P. 340; 10 C. B. 800; 20 L. J., C. P. 169; 15 Jur. 755.

In an action on an award, the declaration stated that the arbitrator awarded that the costs of the arbitration and award should be paid as follows, that is to say, two-third parts by the defendants, and one-third part by the plaintiff. Breach, that two-third parts of the costs attending the arbitration amounted to a certain sum, and that the defendant had not paid two-third parts of the costs:—Held, that the breach was bad, since it left it uncertain in what way the costs were to be computed. *Kirk v. Unwin*, 6 Ex. 908; 2 L. M. & P. 519; 20 L. J., Ex. 345.

**—Plea.]**—In an action upon an award, the declaration alleged that differences between the plaintiff and defendant had been referred, and that the arbitrator had awarded that certain sums should be paid at certain times by the defendant to the plaintiff, and assigned for breach non-payment of an instalment. The defendant pleaded, setting out the award verbatim, and concluding in the form of a demurrer, that the declaration was not sufficient in law, and the plaintiff joined in demurrer:—Held, that the demurrer was informal; the instrument as set out forming part of the plea, and consequently there being nothing to shew the declaration bad. *Sims v. Edmonds*, 15 C. B. 240; 2 C. L. R. 749; 23 L. J., C. P. 229; 18 Jur. 1024.

The plea of no award, means no valid award. *Dresser v. Stansfield*, 14 M. & W. 822; 15 L. J., Ex. 274.

Where an award is made upon all the matters

in difference, and is in the required form, and intended by the arbitrators to express their decision, an objection that they adopted the opinion of a third person, by which they agreed to be bound, cannot be raised under a plea of nul tiel agard, to an action on the award. *Whitmore v. Smith*, 7 H. & N. 509; 31 L. J., Ex. 107; 8 Jur., N. S. 514; 6 L. T., 618; 10 W. R. 253—Ex. Ch.

A declaration, after stating that differences had arisen between the plaintiff on the one part and the defendant and A. on the other, alleged that it was agreed between the plaintiff, the defendant and A., mutually and reciprocally, to refer the same differences to S. and J., who made their award concerning the said matters in difference, and awarded that the defendant should pay 150l. 18s. 6d. to S., who should immediately pay it to the plaintiff. Plea, that S. and J. did not make their award concerning the matters in difference referred to them:—Held, that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue. *Adcock v. Wood*, 2 L., M. & P. 501; 6 Ex. 814; 20 L. J., Ex. 435. Affirmed in error, 7 Ex. 468; 21 L. J., Ex. 204—Ex. Ch.

To a declaration containing the ordinary money counts, a plea, except as to 145l. 3s. 1d., parcel of the money claimed, that the plaintiff ought not to be admitted to allege that at the commencement of the suit more than the sum of 145l. 3s. 1d. was due in respect of the causes of action, because after the accruing of the causes of action, and before action, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement between them before action they referred the question of how much was due to the award of W., and agreed to be bound by his award as to such amount, and that he made his award in writing of and concerning the premises so referred to him, and thereby awarded that the amount due in respect of the causes of action was 145l. 3s. 1d., is good, though pleaded by way of estoppel. *Commings v. Heard*, 4 L. R., Q. B. 669; 20 L. T. 975; 18 W. R. 16; 10 B. & S. 606.

By an award made under the Lands Clauses Act, 8 & 9 Vict. c. 18, the arbitrator awarded one entire sum as the amount of damage sustained by a party by reason of his message being injuriously affected by the execution of the works of a railway company, to wit, by the erection of an embankment, and by the narrowing of the road in front of the message. To a declaration on the award for not paying the sum awarded, a plea by the company, that the message was not injuriously affected by the narrowing of the road, is a good plea. *Beckett v. Midland Railway Company*, 35 L. J., C. P. 163; 14 W. R. 393; 1 H. & R. 189; 1 L. R., C. P. 241.

Where lessees of land and of coal-mines covenanted forthwith to proceed to sink for coal as far as could and ought to be accomplished, or in default to pay so much to the lessor as arbitrators should award, and the lessees gave a bond to the lessor, conditioned to perform the award which was made:—Held, that to an action on the bond, it was a sufficient answer, that they had proceeded to sink as far, &c. (in the words of the covenant), but that none could be found. *Hanson v. Boothman*, 13 East, 22.

In an action by A. against B. for not accepting goods, B. pleaded an award made in respect of

the matters for which the action was brought:—Held, that the fact of A. not having had any opportunity of being heard before the arbitrators, was no answer to the plea of the award, but was only a ground for applying to the equitable jurisdiction of the court to have the award set aside. *Thorburn v. Barnes*, 2 L. R., C. P. 384; 36 L. J., C. P. 184; 16 L. T. 10; 15 W. R. 623.

Partiality and improper conduct in an arbitrator in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on a bond conditioned for the performance of the award, but is only matter for application to the equitable jurisdiction of the court to set aside the award; neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action. *Braddick v. Thompson*, 8 East, 344.

By an agreement, after reciting that divers disputes and differences had arisen and were depending between the plaintiff and the defendant as executrix respecting certain unsettled accounts between them, it was agreed that, for finally settling such differences, the matters in dispute should be referred to the final award of two arbitrators. Plea by the executrix, that no evidence was offered of assets before the arbitrators, nor did she admit that she had any:—Held, ill on general demurrer, as it imputed misconduct to the arbitrators, which is not the subject of a plea, but only a ground to apply to the court to set aside the award. *Riddell v. Sutton*, 2 M. & P. 345.

The objection to an award, that the arbitrator had left undetermined any of the matters submitted to him (though fatal), cannot be taken advantage of upon demurrer to a declaration in an action on the award, unless it appears on the face of the submission and award. *Aitcheson v. Cargay* (*in error*), 13 Price, 639; 9 Moore, 381; 2 Bing. 199; M'Clel. 367; affirming *S. C.*, *nom. Cargay v. Aitcheson*, 3 D. & R. 433; 2 B. & C. 170.

But it may be raised by plea, with proper averments. *Ib.*

To an action on a bond conditioned to perform an award, under a reference of all matters in difference between the parties, it is a good plea, that, at the time of submission, certain negotiable bills of exchange, drawn by the defendant and accepted by the plaintiff, were outstanding, and that an indemnity of the defendant against such bills was a matter in difference between the parties, which was notified to the arbitrators, and that they made no award concerning it, and that some of the bills had not been paid by the plaintiff, and the defendant was liable to the holders; though it appeared by the award, that the arbitrators had heard the allegations of the parties, and examined all the accounts, bills of exchange, and all other evidence and proofs produced to them, touching the matters in difference, and awarded of and concerning the same, that the defendant should pay to the plaintiff a sum of money in full of all claims and demands upon him; and so proceeded to award concerning other specific matters; but without mentioning such outstanding bills, or any indemnity concerning the same. *Mitchell v. Staveley*, 16 East, 58.

—**Replications.**—Where there was a plea of no award to an action on an arbitration bond, to which the replication showed an award, and assigned a breach, and the rejoinder averred that

there were other matters pending, of which the arbitrators took no notice; this was a departure in the rejoinder from the plea. *Harding v. Holmes*, 1 Wils. 122.

Action on a bond, which was conditioned to perform an award: plea, no award: replication setting out an award: rejoinder stating the whole award, (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission), and then demurring:—Held, that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher v. Pimbley*, 11 East, 188.

A replication shewing an award to pay 16l. 10s. and costs, and assigning as breach the non-payment of the 16l. 10s. only:—Held, good on demurrer to a plea of no award to an action upon an arbitration bond. *Fox v. Smith*, 2 Wils. 267.

To an action for goods sold, the defendant pleaded that an action having been brought in a county court in respect of the same causes of action, the plaintiff and defendant mutually submitted themselves to refer the action; that the umpire awarded that the defendant should pay into the county court to the plaintiff 4l. 10s. 6<sup>1</sup>/<sub>2</sub>d., in satisfaction of all matters referred; and that the plaintiff refused to receive the sum, and discharged the defendant from paying it into court. Replication, *nul tiel agard*:—Held, that under these pleadings the plaintiff was not at liberty to shew that the award had been set aside. *Roper v. Levi*, 7 Ex. 55; 21 L. J., Ex. 29; 2 L. M. & P. 621.

**Evidence, Proof of.**—In an action upon an award, a declaration stated that the original action was referred by a rule of court to A., who duly made his award of and concerning the premises so referred to him; and did thereby find, &c. The defendant pleaded that A. did not duly make and publish his award of and concerning the premises referred:—Held, that the production of the award and the rule of court was sufficient *prima facie* evidence to support the issue on the part of the plaintiff without producing the record of the cause until the validity of the award was impeached by evidence dehors on the part of the defendant. *Gisbourne v. Hart*, 5 M. & W. 50; 7 D. P. C. 402; 3 Jur. 536.

In an action on an award made under a judge's order, to prove the order it is enough to put in the office copy of the rule making it a rule of court. *Still v. Halford*, 4 Camp. 17.

Where a submission is to A. and B., and such third person as they shall appoint, to satisfy an allegation that A. and B. appointed C., it is not enough to put in an award executed by all three, reciting that A. and B. did appoint C., and to prove that C. acted along with them. *Ib.*

By an award, a defendant was directed to pay a certain sum to the plaintiff, and to sign a memorandum, containing an engagement on the part of the defendants to abstain for a time from pirating the plaintiff's patterns:—Held, that the signature of this memorandum by both defendants was a sufficient recognition of the arbitrator's authority to dispense with proof of a formal submission by both. *Stuart v. Nicholson*, 3 Scott, 536; 2 Hodges, 191; 3 Bing. N. C. 113.

An agreement of reference, to which the plaintiff was a party, was attested by two subscribing witnesses, upon an issue joined, in which the plaintiff denied the agreement of

reference:—Held, that the rule of court, by which, pursuant to the agreement, it was made a rule of court, and which recited and incorporated it, was not the proper evidence of it, but that it should have been proved by one of the subscribing witnesses. *Bernie or Berney v. Reid or Read*, 7 Q. B. 79; 14 L. J., Q. B. 247; 9 Jur. 620. [This decision was before the 17 & 18 Vict. c. 125, s. 26, which dispenses with the necessity of proving by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.]

A plea that the plaintiff sued the defendant in a county court, and that they mutually referred the action and all matters in difference therein, is proved by an order of reference made by the judge of the county court by consent of the plaintiff and the defendant. *Roper v. Leti*, 2 L. M. & P. 621; 7 Ex. 55; 21 L. J., Ex. 28.

In an action on an award, the execution of the submission by all the parties on both sides must be proved, if traversed. *Ferrer v. Ozen*, 7 B. & C. 427; 1 M. & R. 222; *Brazier v. Jones*, 8 B. & C. 124.

#### 7. EFFECT OF SUBMISSION OR AWARD.

**Finality of Decision.**—When differences arose in a winding-up between persons claiming a charge upon the company's estate, and the official liquidator and the parties agreed that their rights should be determined in a summary way by the judge acting in the matter of the winding-up:—Held, that this was a submission to arbitration by the judge personally, and there was no appeal from his decision as an arbitrator. *Durham County Permanent Benefit Building Society, In re, Wilson, Ex parte*, 7 L. R., Ch. 45; 41 L. J. Ch. 164.

The decision of a county court judge refusing to set aside an award under the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 77, is final. *Mayer v. Farmer*, 3 Ex. D. 235; 47 L. J., Ex. 760; 26 W. R. 760.

**Injunction, when entitled to.**—An award of an arbitrator finding a damage done by a nuisance is to be treated as a verdict, establishing a legal right, so as to entitle the party in whose favour it is made to an injunction. *Imperial Gas Light and Coke Company v. Broadbent*, 7 H. L. Cas. 600; 29 L. J., Ch. 377; 5 Jur. N. S. 1319—H. L.

**Conveyance of Lands.**—An award cannot, per se, operate as a conveyance of lands. *Henry v. Kirwan*, 9 Ir. C. L. R. 459. See 17 & 18 Vict. c. 125, s. 16.

Therefore, where two persons were desirous of effecting an exchange of portions of their estates, and submitted to arbitration what amount of land should be given to each, and the award found accordingly:—Held, that the award did not operate as an actual conveyance of the legal estate, although it might be decisive upon the question of right, so as to enable either party to enforce specific performance of the agreement contained in the submission. *Id.*

**Passing Property in Goods.**—Under a submission of all matters in difference between a landlord and a tenant, the arbitrator awarded that a stack of hay, left upon the premises by the

tenant, should be delivered up by him to the landlord within a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it:—Held, that the property in the hay did not pass to the landlord on his tender of the money, so that the landlord could not maintain trover for it, but his remedy was upon the award. *Hunter v. Rice*, 15 East, 100.

In an action between A., tenant of Whiteacre, and B. his landlord, all matters in dispute were referred to C., who was to determine what should be done with respect to the land. C. awarded, with respect to the land, that from the date of his award the tenancy should cease, and that A. should, within a month, deliver up possession to B. Possession was taken accordingly. D., a creditor of A., afterwards issued execution against A., and took the crops growing on Whiteacre:—Held, that the award was admissible in evidence upon the trial of an issue between B. and D., upon the question, whether, at the time of the execution, the crops were the property of A. or B. *Thorpe v. Eyre*, 3 N. & M. 214.

**Between what Parties conclusive.**—In an action for injuring a reversionary interest, in a several fishery in an estuary of the sea, and in the soil of the bottom of the sea, both in the possession of A., as tenant, issues were taken on the plaintiff's right to the fishery and ownership of the soil. The controversy was whether the soil belonged to the plaintiff or to B. The plaintiff gave in evidence proceedings in an action by A. against B. One count was for injuring A.'s fishery, by tearing up the soil, described as being the soil of the plaintiff, and thereby destroying fish. To this there was a plea of not guilty. The amount of damages was referred, and the arbitrator awarded nominal damages. The act complained of in that action was committed in a part of the same estuary, and the soil there was claimed by the same title as the soil the subject of the present action, and the defendant in the present action became tenant to B. subsequently to the award. The proceedings were admitted:—Held, that they were improperly admitted, the award not being evidence of reputation, and the proceedings not being admissible for the plaintiff, who was not a party, or shewn to be privy to A., though the defendant was privy to B. *Wenman (Lady) v. Mackenzie*, 5 El. & Bl. 447; 25 L. J., Q. B. 44.

By an agreement between master printers and journeymen, fixing the amount and mode of calculating work done, and the price to be paid for it according to a certain rule, arbitrators were appointed to decide disputes. On a dispute between A., a journeyman, and B., a master printer, on the construction of the rule, the arbitrator decided in favour of the master. A journeyman printer, after this decision, came into the employ of a master printer, and raised the same question:—Held, that he was not bound by the award between A. and B. *Hill v. Levey*, 3 H. & N. 7; 28 L. J., Ex. 80; 4 Jur. N. S. 286,—Ex. Ch.

**Effect as an Admission.**—Agreeing to refer the quantum of damages to arbitration, after a question of law has been reserved by the judge at the trial, does not waive an objection to the defendant's liability in the action, after the arbitrator has made his award. *Oxenham v. Lemon*, 2 D. & R. 461.

of a cause involving an inquiry into a mass of accounts, an order was made by a judge, on the application of the plaintiff, that an accountant, to be named by the arbitrator, should inspect the defendant's books and take copies or extracts from them relating to the matters in question in them. This was done, and the charges of the accountant were paid by the plaintiff. The result of the investigation and report of the accountant to the arbitrator was that much expense in the inquiry was saved:—Held, that the plaintiff, in whose favour the award was made, was not entitled to have the costs of the accountant taxed against the defendant. *Nolan v. Copeman*, 8 L. R., Q. B. 84; 42 L. J., Q. B. 44; 27 L. T. 789; 21 W. R. 263.

**Waiver of Objection.**—A cause and all matters in difference having been referred to arbitration, an award was made directing the payment of a sum by the defendant, together with the costs of the cause and of the award; at the taxation of costs, the allocatur was made by the master, without objection by the defendant, for the aggregate amount of both classes of costs, for which sum, the same day, 4th June, judgment was entered up. The plaintiff having died on the 18th November, a scire facias was sued out on the 12th January following, to which the defendant pleaded on the 19th. On an application made on the 24th, to set aside the judgment, on the ground of its falsity, by reason of its including the costs of the award which were not properly recoverable in the cause:—Held, that the objection resolved itself into a point of irregularity upon the allocatur, which was answered, first, by the consent of the defendant to the master's taxation; and, secondly, by a waiver arising upon the lapse of time permitted to intervene between the period of the allocatur being made and the application. *Signall v. Gale*, 1 D., N. S. 497; 4 Scott, N. R. 570; 3 M. & G. 858.

**On what Scale Taxed.**—An action in contract for 50*l.* 3*s.* having been referred to nisi prius to an arbitrator, he awarded the plaintiff 15*l.* 12*s.* 6*d.*, and certified "that there was sufficient reason for bringing the action." On taxation, the master held the case to be within the 7th of the directions to taxing masters of Hilary Term, 1853, and taxed on the lower scale:—Held, that such practice was good, for the case was within the enacting words of the direction, not within its exception, and unaffected by its proviso. *Smith v. Hailey*, 27 L. T. 426; 21 W. R. 76.

An action of trespass was referred, by consent, to nisi prius, and by an order of nisi prius, drawn up in the usual form, the verdict was, by consent, entered for the plaintiffs, with damages 40*s.*, costs 40*s.*; and, by the like consent, it was also ordered that the costs of the reference and award should be paid by the defendants. The award having been made, the master taxed the costs of the action as between party and party on the ordinary scale; and then proceeded to tax the costs of the reference and award on the same scale, but the plaintiffs objected that the proceedings on the reference were virtually under the Lands Clauses Act, and that the costs ought to be taxed on the scale usually allowed in proceedings under that act:—Held, that the costs which the defendants had stipulated to pay, and which they were bound to pay under the order

of nisi prius, were ordinary costs as between party and party, and ought to be taxed on such, and on no other scale. *Eccles v. Blackburn (Mayor)*, 30 L. J., Ex. 358.

**Proportion of Costs.**—The plaintiff instituted a suit to take the accounts of a partnership between himself and the defendant, the terms of the partnership being that the plaintiff was to receive one-twelfth of the profits and to bear one-twelfth of the losses, and that the defendant was to receive and bear the remaining eleven-twelfths. The partnership articles contained an arbitration clause; and an order was made in the suit, under the Common Law Procedure Act, 1854, s. 11, that the matters in difference between the parties be referred to arbitration and the proceedings in the suit stayed, the costs being reserved. Under this order an award was made finding a considerable sum due to the plaintiff:—Held, that the costs of both parties of the suit, reference, and award ought to be taxed and paid as to one-twelfth by the plaintiff and as to eleven-twelfths by the defendant. *Newton v. Taylor*, 19 L. R., Eq. 14; 23 W. R. 330.

**When Taxation Unnecessary.**—Where an arbitrator finds the amount of the costs of an award, it is not necessary that they should be taxed previously to the court ordering them to be paid. *Dirie v. Alexander*, 1 L. M. & P. 338.

**Taxing by Arbitrator.**—An arbitrator, authorized to tax costs in a cause, allowed an item which it was insisted ought not to have been charged; the court would not refer the matter to the master. *Anon.* 1 Chit. 38.

**When Taxation by Officer may be Ordered.**—Upon a reference with a clause, that the submission may be made a rule of court, the arbitrator, under a power to award the costs of the reference and award, may direct such costs to be taxed by the officer of the court, although no cause was pending at the time of the reference. *Bhear v. Harradine*, 7 Ex. 269; 21 L. J., Ex. 127.

**Award sent back—Fresh Taxation.**—The costs of a reference had been taxed before the award was sent back to the arbitrator by the court. After the second award the defendant demanded the same costs without any new taxation:—Held, that by the reference back the allocatur became null, and that there ought to have been a fresh taxation after the new award before any demand for costs could be enforced. *Johanson v. Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 236.

**Practice—Separate Taxations.**—Where the costs of the cause are to abide the event, the costs of the reference and award to be in the discretion of the arbitrator, the practice is for the master to tax each set of costs separately, and give two allocaturs, unless the parties agree that the taxation shall be in one sum. *Bower v. Bower*, 8 Jur., N. S. 193; 5 L. T. 684.

**Order to Review Taxation.**—An action upon money counts and for trover was referred to the master, "costs of the cause, reference, and award to abide the event." It was awarded that the defendant had proved his set-off of an equal amount to the plaintiff's claim in the money counts, 37*l.* 10*s.*; and that he owed the defendant

21. 10s. Upon the trover count the plaintiff was awarded 43*l.* 7*s.* 7*d.* The master gave to the plaintiff the costs of the action, to the defendant the costs of proving the plea of set-off, but to neither party the costs of the reference and award. The court refused to review the taxation. *Woodhams v. Woodhams*, 25 L. T. 460.

A plaintiff declared upon a special contract for the delivery of goods to the defendant, of which he alleged breaches, which were, that the defendant did not pay for goods delivered according to agreement, that he refused to accept goods which were tendered, and as to the remainder, that he did not accept them. There was a count for goods sold. The cause was referred, and the arbitrator ordered the defendant to pay 75*l.* less 39*l.* paid into court on the second count; and he also found that certain timber mentioned in the special count was the property of the plaintiff:—Held, that a finding on both counts was involved in this award; and the master having taxed the costs on both issues for the plaintiff, the court refused to send the taxation to be reviewed. *Rennie v. Mills*, 7 D. P. C. 295; 5 Bing. N. C. 249; 7 Scott, 276; 1 Arn. 534.

Where the master has taxed costs as between attorney and client pursuant to the directions of an award, which directions, it is suggested, are an excess of authority on the part of an arbitrator, the court will not direct the taxation to be reviewed, the proper preliminary step being to move to set aside the award. *Bartle v. Musgrave*, 1 D., N. S. 235; 5 Jur. 1661.

**Suing for, before Taxation.**—Where an umpire appointed under 11 & 12 Vict. c. 63, s. 125, awarded the amount of compensation and that the costs of the reference should be paid by the local board of health:—Held, that the plaintiff was entitled to maintain an action for the costs before taxation. *Holdsworth v. Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289; 10 Jur., N. S. 171; 8 L. T. 434; 11 W. R. 733—Ex. Ch.

The right to costs is entirely independent of the taxation of them, and an action can be maintained for the costs of a reference though the amount of such costs has not been previously settled or ascertained by taxation. *Metropolitan District Railway Company v. Sharpe*, 5 App. Cas. 425; 44 J. P. 716; 50 L. J., Q. B. 14; 43 L. T. 130; 29 W. R. 617—H. L. (E.).

A declaration on an award alleged a direction that the costs of the action, reference and award should be paid by the defendant. Breach, non-payment. Plea, that they were not before action ascertained or taxed:—Held, the award was good and the plea bad. *Lewis v. Rossiter*, 44 L. J., Ex. 136; 33 L. T. 260; 23 W. R. 832.

## II. REFERENCE TO REFEREE UNDER JUDICATURE ACT, 1873, ss. 56, 57.

(See *Rules of Supreme Court, Order XXXVI., Rules 45–55.*)

### 1. IN WHAT CASES.

**Questions of Account.**—Semble, that the "prolonged examination of documents," intended by sect. 57 of the Judicature Act, 1873, is an examination required to enable the judge to leave questions of fact to the jury; and not an examination to enable him to determine a ques-

tion of legal right. *Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664; 51 L. J., Q. B. 348; 46 L. T. 669; 30 W. R. 805.

The expression "questions of account" in the 57th section of the Judicature Act, 1873, will receive a large construction. *Leigh, In re, Rowcliffe v. Leigh*, 3 Ch. D. 292; 24 W. R. 782.

A claim made in an administration suit by a dealer in works of art against the estate of the testator for 19,000*l.*, the aggregate prices of twenty-four items, consisting of pictures and of articles of vertu supplied to the testator in his lifetime, and specified in an account delivered to his executor, was, on the application of the executor under that section, ordered to be tried before the official referee. *Ib.*

Any question of account which may be referred compulsorily to a master under s. 3 of the Common Law Procedure Act, 1854, may also be referred compulsorily to an official referee under s. 57 of the Judicature Act, 1873. *Ward v. Pilley*, 5 Q. B. D. 427; 49 L. J., Q. B. 705; 43 L. T. 301; 28 W. R. 937—C. A.

**Reference of all Issues in the Action to Official Referee.**—In any case in which the court has jurisdiction to refer compulsorily a question of account, to an official referee, it has also jurisdiction so to refer all the other issues in the action. *Ib.*

To an action for money had and received, the defendant pleaded, amongst other matters, that "the plaintiff and defendant still are partners, or co-adventurers in holding certain horse races and race meetings, which said partnership still subsists, and the alleged causes of action arose out of such partnership and not otherwise." An order having been made by a judge at chambers, referring all the issues in the action to an official referee:—Held, that the order was right. *Goodwin v. Budden*, 42 L. T. 536.

**Issues—Not whole Action.**—The court or a judge has no power under the Judicature Act, 1873, ss. 56 and 57, to refer the whole action for trial to an official or special referee. Under s. 57 the court may, by consent, refer any question or issue of fact in an action to an official or special referee for trial, but the power of compulsory reference for trial under that section is confined to questions or issues in an action requiring prolonged examination of documents or local investigation, or questions of account, and any other matters so involved with such issues as to be incapable of being tried separately. *Longman v. East—Pontifer v. Severn—Mellin v. Monico*, 3 C. P. D. 142; 47 L. J., C. P. 211; 38 L. T. 1; 26 W. R. 183—C. A.

**Action for Wrongful Dismissal and Matters of Account—Charges of Misconduct.**—The plaintiff brought an action against the defendants for damages for wrongful dismissal, for balance of account for money paid to defendants' use, and for an account of profits on sales on which the plaintiff claimed commission. The defendants justified the dismissal, on the ground that the plaintiff had misconducted himself by wilfully disobeying the reasonable orders of defendants, and by habitually neglecting his duties, and by converting to his own use money which he had received to the use of the defendant. By order of a judge at chambers the issues in the action were referred to an official referee pursuant to



costs of the reference and not in the cause. *Brown v. Nelson*, 13 M. & W. 397; 2 D. & L. 405; 14 L. J., Ex. 62.

**Costs of Reference or of Umpirage.]**—By an agreement matters were referred to two arbitrators, and if they failed to make an award within a limited time, to an umpire. The costs of the reference and award and umpirage were to be in the discretion of the arbitrators and umpire respectively. The parties agreed that the umpire should sit with the arbitrators, so that if they did not make an award it would not be necessary for him to re-hear the evidence. The arbitrators did not conclude the reference within the time limited. The parties then further agreed that the arbitrators should sit with the umpire, and assist him in taking the evidence, which they did. The award ordered the losing party to pay the other the costs "of the umpirage, and of this my award;" and that each party should "pay their own costs of the reference other than the costs of my umpirage, and of this my award." The umpire included the charges of the two arbitrators in his costs of umpirage and award, and the same were paid by the successful party on taking up the award:—Held, that the charges of the arbitrators were costs of the umpirage, and not costs of the reference; and that the successful party was entitled to have such amount as was duly charged by the arbitrators, and paid by him on taking up the award, allowed on the taxation of costs, and to have the same repaid to him by his opponent. *Ellison v. Ackroyd*, 1 L. M. & P. 806; 20 L. J., Q. B. 193.

**No Amount named.]**—There was a partnership as traders, and also as solicitors, between A. and B. C. was appointed by deed by A. and the executrix of B., who died, to act as attorney in completing the dissolution of the partnership, and as receiver in respect of the law partnership estate, and as arbitrator in respect of all differences arising as to both partnerships. C. was empowered "to dispose of the estate, money, and effects of the law partnership, in such manner as he should think best for the interests of A. and of the executrix." He was authorized to make one or more awards, and the costs of the reference and awards were left in his discretion. In the award he stated that he had received the estate and effects of the law partnership, and had disposed of them in such manner as he thought best for the interests of A. and of the executrix, and awarded that a certain sum was due to A. from the executrix, and ordered the latter to pay it. The only statement in the award, as to the costs, was this: "I certify that I have deducted and retained to myself the costs of my award out of the moneys which have been received by me as receiver. I award and determine that each of the parties shall bear and pay his and her own costs of the reference respectively."—Held, that the award was good, although the arbitrator had stated that he had deducted the costs of his award out of the money in his hands as receiver, and had not stated what the amount of those costs was, or which party he charged with them. *Roberts v. Eberhardt*, 3 C. B., N. S. 482; 28 L. J., C. P. 74; 4 Jur., N. S. 898—Ex. Ch.

**When referred back to Arbitrator.]**—A cause was referred to an arbitrator, to ascertain what verdict ought to be given, and his certificate was

to be entered as the verdict of a jury, and he certified that a verdict should be entered for the plaintiff for a certain sum; and told the parties that each should pay his own costs of reference, which was acceded to; and upon a motion to set aside the certificate, the cause was referred back to him, when he certified to the same effect, but omitted to give any directions as to the costs of the second reference:—Held, that the plaintiff was entitled to such costs, as, in the absence of any specific direction, the costs must follow the verdict. *Mackintosh v. Blyth*, 8 Moore, 211; 1 Bing. 269.

Where an award, being defective, is referred back to the arbitrator, who hears fresh evidence and makes a second award the arbitrator's charges for the first award are to be borne equally by each party. *Blair v. Jones*, 6 Ex. 701; 20 L. J., Ex. 295.

An order of reference gave the arbitrator a discretion as to the costs of the reference and award, and contained a clause giving the court power to refer the award back to the arbitrator, in case of an application to set aside the award. The arbitrator made his award, directing each party to bear his own costs. On the application by the defendant, it was referred back to the arbitrator to find as to a specific matter not disposed of by the award. The arbitrator directed the defendant to pay the costs of the amended award:—Held, that, by virtue of the order of reference, the arbitrator had power to award as to the costs of the amended award. *McRae v. McLean*, 2 El. & Bl. 946; 2 C. L. R. 391; 18 Jur. 244.

An action for an illegal arrest was referred, the costs of the reference being in the arbitrator's discretion. The award directed that final judgment should be entered for the plaintiff, with damages, and gave him the costs of the reference and award. The arbitrator had no authority to direct judgment to be entered, and for this excess the award was remitted to the arbitrator, who in a second award recited that he had made a former award, that it had been referred back, and gave the plaintiff the same damages and costs of the reference and award, and also the costs of the amended award:—Held, that the arbitrator had a discretionary power over the costs of the second reference. *Breary v. Kemp*, 24 L. J., Q. B. 310.

Where a submission gives an arbitrator power over costs, the court, on sending the award back to him, may direct that the costs of the rule shall be in his discretion. *Pearson v. Overell*, 12 W. R. 709.

#### b. Costs of Cause.

##### Who Entitled to—Part of Award Surplusage.]

—A cause was referred to an arbitrator under an order of nisi prius, the costs of the cause to abide the event of the award. The arbitrator directed a verdict to be entered for the defendant on the first and sixth issues, one of which went to the whole cause of action, and for the plaintiff on all the other issues, with 7s. damages:—Held, that, notwithstanding the finding of such damages for the plaintiff, the defendant was entitled to the general costs of the cause, for that the assessment of damages must be treated as surplusage. *Ross v. Clifton*, 2 D., N. S. 983; 12 L. J., Q. B. 265; 7 Jur. 601.

**What are.]**—Where a cause was referred before trial, and an arbitration bond entered into, but which could not be made a rule of court, and

the reference proving abortive the cause was afterwards tried:—Held, that the successful party was not entitled to the costs of the abortive reference as costs in the cause. *Doe d. Davies v. Morgan*, 4 M. & W. 171; 2 Jur. 684.

The costs in the cause are those which are incurred up to the time of the reference. *Brown v. Nelson*, 13 M. & W. 397; 2 D. & L. 405; 14 L. J., Ex. 62.

Where a verdict is taken subject to a reference of the action to an arbitrator, who is to certify for whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the verdict. *Deere v. Kirkhouse*, 1 L. M. & P. 783; 20 L. J., Q. B. 195.

In an action by a carrier against a railway company, to recover back expensive and unequal charges made upon him for the conveyance of his goods, a verdict was entered for the plaintiff for 10,000*l.*, subject to a special case to be settled by a barrister, who, in the event of the court deciding in favour of the plaintiff, was by the order of reference empowered to direct for what amount the verdict should be entered, and to whom the cause and all matters in difference between the parties were referred, and subject to the special case, the costs of the action to abide the event of the award, and the costs of and incident to the reference and award to be in the discretion of the arbitrator. The special case as settled by the referee divided the plaintiff's claim into six several heads, and the court having decided in the plaintiff's favour upon four of them, and for the defendant on the rest of the case, the matter went back to the arbitrator, who ultimately directed that the verdict should be entered for the plaintiff for 3,115*l.*, and that so much of the issue as related to that sum should be found for the plaintiff, and the residue thereof for the defendant; and he further directed that all the costs of and incident to the reference and award should be paid by the defendants:—Held, that the costs of the attendances before the referee, to settle the special case, were costs in the cause, and therefore that the master was justified in apportioning them, according to the decision of the court, upon the several heads of claim in the special case. *Edwards v. Great Western Railway Company*, 12 C. B. 419.

Costs of an arbitration under an order of nisi prius are not costs in the cause. *Taylor v. Gordon*, 9 Bing. 570; 2 M. & Scott, 725; 1 D. P. C. 720.

Costs of a reference are costs in the cause, where the reference is for the benefit of the unsuccessful party. *Tregoning v. Attenborough*, 1 D. P. C. 225; 5 M. & P. 453; 7 Bing. 733.

An award of costs sustained in the action does not include the costs of the reference. *Brown v. Maraden*, 1 H. Bl. 223.

An order was obtained by a plaintiff for a reference to the master, but he declining to take it, the plaintiff obtained an order to rescind the reference and to proceed to trial:—Held, that he was not entitled to these costs as costs in the cause. *Gribble v. Buchanan*, 18 C. B. 691; 26 L. J., C. P. 24.

Where a verdict is taken for the plaintiff for a given sum, subject to a reference to an arbitrator, who is to reduce it to such amount as he may think proper, and he directs the verdict to be reduced by a nominal sum, his determination,

though in form an award, is in substance a certificate, and consequently the plaintiff is entitled to the expenses incurred before him as costs in the cause. *Sim v. Edwards*, 17 C. B. 527; 25 L. J., C. P. 175.

In an action on the case, it was referred to an arbitrator to find the facts and state a case, the costs of the reference and arbitration to be costs in the cause, and abide the event thereof. The judgment of the court was for the plaintiff, but was ultimately arrested by the court of error:—Held, that under the order of reference, coupled with s. 145 of the 15 & 16 Vict. c. 76, the plaintiff was entitled to the costs of the arbitration, as if they had been costs of a trial at nisi prius, and also to the costs in the court below. *Whaley v. Laing*, 5 H. & N. 480; 29 L. J., Ex. 313.

**Power to vary Terms of Submission.**—An order stayed proceedings in an action on a contract containing an agreement to refer disputes arising thereunder. The order made no provision as to the costs of the action. The matter in dispute being afterwards referred, an award was made in favour of the plaintiff:—Held, that there was jurisdiction under the Common Law Procedure Act, 1854, s. 11, after the award had been made, to make an order varying the terms of the original order by directing that the defendant should pay the costs of the action. *Bustros v. Lenders*, 6 L. R., C. P. 259; 40 L. J., C. P. 193; 24 L. T. 472; 19 W. R. 757.

A cause having been referred to a master, under the provisions of the Common Law Procedure Act, 1854, as a matter of account, and the order of reference being silent as to the costs, the court refused an application for an order for costs on behalf of the party in whose favour the award of the master was made. *Wimshurst v. Barrow Shipbuilding Company*, 2 Q. B. D. 335; 46 L. J., Q. B. 477; 25 W. R. 557.

### c. Effect of County Courts Act.

**Costs of Cause but not of Reference affected.**—A cause having been referred, together with all matters in difference between the parties, the costs of the cause to abide the event of the reference, the arbitrator awarded—first, as to the cause, that there was due to the plaintiff from the defendant the sum of 259*l.* 1*s.*; and secondly, as to the matters in difference other than the cause, that there was due from the plaintiff to the defendant the sum of 242*l.* 13*s.* 10*d.*, and the arbitrator directed the latter sum to be allowed out of and deducted from the damages and costs recoverable by the plaintiff in the action, and the balance to be paid to the plaintiff:—Held, that the event of the reference was in favour of the plaintiff, and that he was not precluded from recovering his costs of the action by the County Courts Act, 1867, s. 5. *Stevens v. Chapman*, 6 L. R., Ex. 213; 40 L. J., Ex. 123; 24 L. T. 478; 19 W. R. 958.

In an action of trover and of debt a verdict was taken for the plaintiff for the damages claimed, subject to a reference, "the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator." The arbitrator awarded that the verdict should be entered for 2*l.* 10*s.* as to the claim in trover, and for 7*l.* 12*s.* 8*d.* as to the claim in debt, and directed the defendant to pay the costs of the

reference and award. He had the power of certifying for costs, but gave no certificate. The master declined to tax on behalf of the plaintiff either his costs of the cause or of the reference and award:—Held, that the plaintiff was not entitled to the costs of the cause, but that he was entitled to those of the reference and award, although he had recovered in the cause sums not exceeding 10*l.* in tort and 20*l.* in contract. *Forshaw v. De Wette*, 6 L. R., Ex. 200; 40 L. J., Ex. 153; 24 L. T. 397; 19 W. R. 777.

When an action is referred by consent to arbitration upon the terms that the costs of the cause shall abide the event, and the costs of the award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of the plaintiff he may lawfully direct the defendant to pay the costs of the reference and award, although the plaintiff may be deprived of the costs of the cause under the County Courts Act, 1867, s. 5:—Quære, whether *Moore v. Watson* (2 L. R., C. P. 314) was correctly decided. *Gallati v. Wakefield*, 4 Ex. D. 249; 48 L. J., Ex. 70; 40 L. T. 30.—C. A.

If a judge, under 17 & 18 Vict. c. 125, s. 3, refers a cause compulsorily, "costs of the cause to abide the event, costs of the reference to be in the discretion of the master," and the master certifies for not more than 20*l.*, and directs the costs of reference to be paid by the defendant, the plaintiff is prevented by 13 & 14 Vict. c. 61, s. 11, from recovering such costs. *Moore v. Watson*, 2 L. R., C. P. 314; 36 L. J., C. P. 122; 15 L. T. 662; 15 W. R. 429.

By an order made by consent of the parties, an action on a building contract was referred to an arbitrator to ascertain the amount, if any, due from the defendant to the plaintiff, "the costs of the action, reference, and award, to abide the event." The arbitrator found the sum due to the plaintiff was 19*l.* 2*s.* 7*d.* upon which an order was made for judgment for the plaintiff for that sum without costs:—Held, that the plaintiff had recovered in the action by judgment a sum not exceeding 20*l.*, and that he was therefore deprived of his costs of the action by the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, unless he got a certificate or order for costs under that section. *Jones v. Jones* (7 C. B., N. S. 832) overruled. *Fergusson v. Davison*, 8 Q. B. D. 470; 51 L. J., Q. B. 266; 46 L. T. 191; 30 W. R. 462.—C. A.

The act does not apply to the case of a reference without any action. *Ib.*

A cause was referred before verdict, the costs of the cause, and of the reference and award, to abide the event. The arbitrator found for the plaintiff upon certain issues, damages 12*l.* 12*s.*, and that there was due to the defendant, on a plea of set-off, 9*l.* 7*s.* 9*d.*; and he awarded that the defendant should forthwith pay to the plaintiff the balance of 3*l.* 4*s.* 3*d.*:—Held, that, the event of the cause being in favour of the plaintiff, he was entitled to the costs. *Jones v. Jones*, 7 C. B., N. S. 832; 29 L. J., C. P. 151; 6 Jur., N. S. 826.

An action having been referred by consent, after verdict had been entered for the plaintiff, the amount to be corrected by the award, with power to the arbitrator to certify for costs:—Held, the arbitrator having found that less than 20*l.* was due, and not having certified, that the plaintiff was not entitled to his costs. *Smith v. Edge*, 2 H. & C. 659; 33 L. J., Ex. 9; 9 Jur., N. S. 1300; 9 L. T. 445,

Issue having been joined in an action, by order of a judge, and by consent of the parties the cause was referred; the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator found that the plaintiff had sustained damages to an amount under 20*l.*; whereupon the master taxed the plaintiff's costs of suit:—Held, that the plaintiff, not having recovered 20*l.*, was deprived of his costs by virtue of 13 & 14 Vict. c. 61, s. 11. *Crowell v. Amman Aberdare Colliery Company*, 6 B. & S. 333; 34 L. J., Q. B. 161; 11 Jur., N. S. 687; 12 L. T. 418.

A compulsory order of reference made by a judge, and containing a term that the costs of the cause should abide the event, does not prevent the operation of the London Small Debts Act, which disentitles a plaintiff in such case to costs; for the plaintiff having had, in an action of contract, awarded to him, upon a compulsory reference, a sum not exceeding 20*l.*, is held to be a plaintiff who "recovers a sum not exceeding 20*l.*," within the meaning of the London Small Debts Act, and thereby becomes liable to be deprived of his costs by virtue of it. *Robertson v. Sterne*, 13 C. B., N. S. 248; 31 L. J., C. P. 362; 9 Jur., N. S. 332; 7 L. T. 462.

The plaintiff and defendant residing more than twenty miles apart, an action was brought in the superior court for a sum less than 20*l.* It was referred to the master, the costs to abide the event. The master awarded 9*s.* 6*d.* to the plaintiff:—Held, that the plaintiff had recovered that sum and was entitled to his costs. *Webb v. Saunderson*, 8 L. T. 464.

An action of defamation was by consent referred to two arbitrators, and the costs of the cause were to abide the event, and the costs of the reference were to be in the discretion of the arbitrators. The arbitrators found one of the issues in favour of the plaintiff with 20*s.* damages, and the other issues in favour of the defendant, and directed the defendant to pay all the costs of the reference, and the costs were taxed. On a motion to review the taxation, the court refused a rule. *Frean v. Sargent*, 32 L. J., Ex. 281; 8 L. T. 467; 11 W. R. 808.

A declaration contained several counts, one in trover for converting two separate articles, and to this the defendant pleaded not guilty, and not possessed, and to the other counts other pleas. At the trial the record was withdrawn, and by order of nisi prius, by consent, the cause and all matters in difference were referred to an arbitrator, who was to have all the powers of certifying of a judge at nisi prius; the costs of the cause to abide the event of the award, the costs of the reference to be in the discretion of the arbitrator. The arbitrator found all the issues in favour of the defendant, except as to the conversion of one of the articles mentioned in the count in trover, and as to that he found for the plaintiff, with one farthing damages. He gave the defendant the costs of the reference, and did not certify:—Held, that the plaintiff was entitled to the costs of the cause. *Wigens v. Cook*, 6 C. B., N. S. 784; 28 L. J., C. P. 312; 6 Jur., N. S. 72.

In an action of trespass, a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to have the powers of a judge at nisi prius, and to enter the verdict as he thought fit. He entered it for the plaintiff, with less damages than 40*s.*, and did not certify:—Held,

that this was a recovery, by the verdict of a jury. within 3 & 4 Vict. c. 24, s. 2; and the plaintiff was therefore entitled to no costs. *Cooper v. Pegg*, 16 C. B. 264, 454; 24 L. J., C. P. 167.

**Certificate for Costs.**—An action of trespass was referred by consent to an arbitrator, who was to have all the powers of a judge at nisi prius as to certifying, and the costs of the cause were to abide the event. The arbitrator awarded to the plaintiff 2*l.* 14*s.*, and gave no certificate for costs. After a considerable lapse of time the plaintiff obtained ex parte from the arbitrator a document in which he stated that it appeared to him at the reference that there was sufficient reason for bringing the action:—Held, that the court or a judge had power under 30 & 31 Vict. c. 142, s. 5, to order that the plaintiff be allowed his costs, but that the court would not act upon the document merely, and that under those circumstances the award ought to be remitted to the arbitrator. *Harland v. Newcastle-upon-Tyne (Mayor, &c.)*, 39 L. J., Q. B. 67.

An action of trespass was referred, and the arbitrator was to have the same power to certify as a judge at nisi prius. The arbitrator found for the defendant, with 1*s.* damages, and certified in his award, under 3 & 4 Vict. c. 24, that the action was brought to try a right, besides the mere right to recover damages:—Held, that the certificate was valid, and that it need not be indorsed on the back of the record. *Spain v. Cadell*, 8 M. & W. 129; 9 D. P. C. 745; 5 Jur. 322.

Held, also, that in such case the certificate must be given at the time of making the award. *Ib.*

**Addition of Parties.**—A plaintiff sued L. for 365*l.* for goods sold and delivered. On the day after the writ was issued L. paid to the plaintiff 319*l.*, which he accepted on account of his claim. After declaration L. pleaded in abatement the non-joinder of H., whereupon the plaintiff amended the writ and declaration under the Common Law Procedure Act, 1852, s. 38, by adding the name of H. as joint contractor. Both defendants pleaded never indebted, and also a plea that after the writ in the action had been issued against the defendant L. and before the action was commenced against the other defendant by amendment pursuant to s. 38, the defendants satisfied the plaintiff's claim by payment. The cause having been referred to an arbitrator, costs to abide the event, with power to the arbitrator to certify as a judge at nisi prius, the arbitrator by his award found that the defendants were indebted to the plaintiff in 322*l.*, and that the defendants did, as in their plea alleged, satisfy 319*l.*, part of such debt, by payment, and the arbitrator directed that the verdict should therefore be entered for the plaintiff for 3*l.*, being the difference between the two sums of 322*l.* and 319*l.*, and he gave no certificate as to costs:—Held, that the only action in which the plaintiff recovered, being the action against both defendants, he was deprived of his costs by the County Courts Act, 1867, s. 5, inasmuch as he recovered in that action less than 20*l.*, and he was not allowed to tax his costs of the cause against L. alone. *Balmain v. Lickfold*, 10 L. R., C. P. 203; 44 L. J., C. P. 94; 32 L. T. 67; 23 W. R. 310.

See further, *post*, *sub tit.* COSTS.

#### d. To abide Event.

**Claim and Counter-claim.**—An action was brought, claiming first 10*l.* for rent; secondly—100*l.* as damages for breach of covenant in a lease of premises; and, thirdly, 30*l.* for conversion of the plaintiff's goods. The defendant pleaded, admitting that the rent was due, but denying the breach of covenant and conversion, and setting up a counter-claim for 100*l.* damages for breach of covenant by the plaintiff, and 15*l.* for money due for the use and occupation of other premises. The action was referred to an arbitrator by an order made by consent upon the terms that "the costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator." The arbitrator found that the plaintiff was entitled to 10*l.* for rent; that the defendant had broken his covenant in the lease, and had been guilty of the conversion charged, and he awarded that the plaintiff was entitled to recover in respect of such breach of covenant and conversion the sum of 25*l.*, making together 35*l.* awarded to the plaintiff; that the plaintiff had broken his covenant, and that the defendant was entitled to recover in respect of that breach 20*l.*; and upon the whole matter he found that the plaintiff was entitled to recover in the action 15*l.* and no more:—Held, by the majority of the court (Cockburn, C. J., and Manisty, J.), Field, J., dissenting, that the provision in the order of reference as to costs did not alter the rights of the parties, and that upon the true construction of s. 67 of the Judicature Act, 1873, the plaintiff was entitled to the costs on his claim, and the defendant to his costs on the counter-claim.—By Field, J., that the case was governed by the provision as to costs in the order of reference, and that the plaintiff was entitled to the costs of the action, and that the defendant was not entitled to any. *Staples v. Young* (2 Ex. D. 324) questioned. *Chatfield v. Sedgwick*, 4 C. P. D. 459) discussed. *Stooke v. Taylor*, 5 Q. B. D. 569; 49 L. J., Q. B. 857; 43 L. T. 200; 29 W. R. 49; 44 J. P. 748.

The plaintiff claimed on a balance of account a sum of money exceeding 50*l.* The defendant pleaded a set-off, and also made a counter-claim for goods supplied to the amount of about 24*l.* The action was referred, the costs of the action to abide the event. It was found that 16*l.* was due on the claim, and 23*l.* on the counter-claim, leaving a balance of 7*l.* due from the plaintiff to the defendant:—Held, that the defendant was entitled to his costs. *Chatfield v. Sedgwick*, 4 C. P. D. 459; 27 W. R. 790—C. A.

The plaintiffs claimed on a balance of account a sum exceeding 50*l.* The defendants denied their indebtedness, and set up a counter-claim for more than 50*l.* on the balance of account. The cause was referred, costs to abide the event. The arbitrator found that more than 50*l.* was due on the claim, and more than 50*l.* on the counter-claim, but that a balance was due to the plaintiffs of 11*l.* odd:—Held by Kelly, C. B., that the plaintiffs were each entitled to the costs of the issues on which they succeeded, on the ground that the relief sought could not be given in a county court; and by Hawkins, J., contrary to his own opinion, but on the authority of *Potter v. Chambers* (4 C. P. D. 457), that the plaintiffs were entitled to their general costs of action. *Neale v. Clarke*, 4 Ex. D. 286; 41 L. T. 438.

The plaintiffs sued for 40*l.* 7*s.* 9*d.* and interest for goods sold and delivered, for work, labour, and materials, and for making and delivering a steam engine for the defendants. The defendants paid 8*l.* 11*s.* into court, pleaded that the work had been improperly done, and counter-claimed for loss of trade profits through defects in the engine supplied by the plaintiffs. The action and counter-claim were referred to a district registrar, the costs of cause and counter-claim to follow the event, the party in whose favour the award was made to be at liberty, ten days after its service on the other party, to sign judgment for the sum found due and the costs to which he should be entitled under the order of reference and award, with costs of judgment. The arbitrator awarded a balance of 4*l.* in favour of the defendants, and the district registrar ordered judgment to be signed for the defendants for 5*l.* and the taxed costs of the action, counter-claim, and reference:—Held, that the district registrar had no authority to give the defendants the costs of the action, but that the defendants must pay the costs of proving the claim, and the plaintiffs must pay the costs of proving the counter-claim. *Cole v. Firth*, 40 L. T. 851.

— **General Award in favour of Defendant on Counter-claim — Reference back to find Specific Issues.**—The plaintiff, who had built two houses for the defendant at a contract price of 1,135*l.*, sued for 169*l.* 16*s.*, the balance of the price, and for other small items. The defendant raised various defences, and also counter-claimed 1,200*l.* for penalties for delay and for damages arising from bad work. The pleadings went as far as surrejoinder, after which the cause with all matters in difference, was referred to an architect as arbitrator, upon the terms, *inter alia*, that the costs of action, reference, and award, should follow the event, unless the arbitrator should otherwise order. The arbitrator by an award, silent as to costs, awarded 3*l.* 2*s.* 6*d.* to the defendant in respect of the action and matters in difference:—Held, that the word "event" ought to be construed distributively, and the award was remitted to the arbitrator to find specific issues. *Ellis v. Deslira*, 6 Q. B. D. 521; 50 L. J., Q. B. 328; 44 L. T. 209; 29 W. R. 493—C. A.

*Compare cases post, sub tit.* COSTS.

"Event," what is.]—A declaration in an action of M. v. W. contained two counts, the first, on an agreement by W. to sell a surgeon's business to M., alleging three breaches; and the second for fraud by W. in inducing M. to enter into the agreement. By the pleas, W. denied the first two breaches in the first count, paid money into court as to the third breach, and pleaded not guilty as to the second count. After issue joined, the parties referred all disputes, differences and accounts between them to an arbitrator; the costs of the reference and award, including such costs of the cause as might be taxed, to abide the event of the award. The disputes, differences and accounts referred, all arose out of the agreement sued on. The arbitrator awarded in favour of W. in respect of the charges of fraud, in favour of M. on the accounts; awarding that W. should pay M. a certain sum in respect of the latter, and that, except as to the matters decided, neither party

had any claim against the other:—Held, that, upon this finding, neither party was entitled to any costs; Wightman, Crompton and Hill, JJ., holding that where two parties agree to refer several disputes to arbitration, and use the words "the costs of the reference and award are to abide the event of the award," the costs are not distributable, but there must be a general event of the award altogether in favour of one party, to entitle him to costs; Cockburn, C. J., agreeing in the decision, on the ground that all the matters referred had arisen out of one dispute with respect to one original subject matter; but declining to decide whether or not, where the matters referred are clearly distinct and separate, the event of the award may be construed as events, so as to make the costs distributable according to the finding. *Marsack and Webber, In re*, 2 El. & El. 637; 29 L. J., Q. B. 109; 6 Jur., N. S. 507; 2 L. T. 54; 8 W. R. 306.

A cause having been referred, together with all matters in difference between the parties, the costs of the cause to abide the event, the arbitrator awarded as to the cause that there was due from the defendant to the plaintiff 259*l.* 1*s.*; and as to the matters in difference that there was due to the defendant from the plaintiff the sum of 242*l.* 13*s.* 10*d.*; the arbitrator directed the latter sum to be deducted from the former, and the balance to be paid to the plaintiff:—Held, that the event of the reference was in the plaintiff's favour. *Stevens v. Chapman*, 6 L. R., Ex. 213; 40 L. J., Ex. 123; 24 L. T. 478; 19 W. R. 958.

A cause and all matters in difference were referred by an order at nisi prius, which provided that the costs of the reference and award should abide the event of the award. The arbitrator decided the cause in favour of the defendant, and with respect to the matters in difference, awarded that the plaintiff had a valid claim against the defendant, and that the defendant had a valid claim against the plaintiff of larger amount, and directed the plaintiff to pay the difference to the defendant. The claims were unliquidated, and could not have been set off against one another:—Held, that the event of the award was wholly in the defendant's favour, and the defendant therefore entitled to the costs of the reference and award. *Dunhill v. Ford*, 3 L. R., C. P. 36; 37 L. J., C. P. 32; 17 L. T. 148.

An action, and a suit in equity by the defendants in the action for an injunction to restrain the plaintiffs from proceeding in it, were referred, the costs of the action and of the suit to abide the event of the award. There were several issues in the action. As to some of them the arbitrator found for the defendants, and as to so much of the suit as regarded them, against the defendants, on the ground that they had a defence at law. As to the other issues, he found for the plaintiffs, with damages, but as to so much of the suit as regarded them, he awarded that the plaintiffs should not proceed to recover damages or costs:—Held, that the arbitrator had not exercised such a discretion over the costs as the reference meant to exclude; but that he had merely exercised a power over them necessarily resulting from the reference, and without which he could not properly have adjudicated upon the suit in equity. *Reeves v. Mc Gregor*, 1 P. & D. 372; 2 W. W. & H. 127; 9 A. & E. 576.

Upon reference of an action for several

breaches of a farming agreement, after plea, and before issue joined, it was ordered that the costs of the reference should abide the event. The arbitrator found, as to one breach, that the plaintiff had sustained damages to the extent of 16s., and on all other breaches substantially in the defendant's favour:—Held, that the plaintiff was not entitled to any costs of the reference, as the event was not in his favour; and there being no issues, the costs were not apportionable. *Kelcey v. Stupples*, 1 H. & C. 576; 32 L. J., Ex. 6; 9 Jur., N. S. 256; 7 L. T. 338; 11 W. R. 121.

A verdict was entered for a plaintiff, subject to a reference of the cause and all matters in difference, with power to the arbitrator to direct for whom the verdict should be entered, the costs of the cause to abide the event of the award, and the costs of the reference and award to be in his discretion. He awarded that the verdict should stand, with damages, which he ordered to be paid to the plaintiff, and he directed that certain lamps in respect of which the plaintiff claimed damages should be delivered by the plaintiff to the defendant:—Held, that the plaintiff was entitled to the costs of the action. *Matlock Gaslight and Coke Company v. Peters*, 6 El. & Bl. 215; 25 L. J., Q. B. 273; 2 Jur. N. S. 377.

But where the costs of the reference and award are to abide the event of the award, and the event is partly in favour of the plaintiff and partly in favour of the defendant, no costs are payable on either side. *Gribble v. Buchanan*, 18 C. B. 691; 26 L. J., C. P. 24.

An order of reference "of all matters in difference in the cause, the costs of the cause, and also of the order and of the reference and award, to abide the event of the award, the arbitrator to have the power to direct how the verdict in the cause should be entered," implies that the costs of the cause should abide the event of the award with reference to the cause. *Reynolds v. Harris*, 3 C. B., N. S. 267; 28 L. J., C. P. 26; 5 Jur., N. S. 365.

Where the order makes the costs of the award to abide the event of the award, and the event is divided between the parties, neither of them can claim the costs; the event of the award, meaning ordinarily the general event of the award. *Id.*

A cause (in which money had been paid into court) was referred, with all matters in difference, the costs to abide the event. The arbitrator found that the plaintiff had no cause of action, but that there was a sum due from the defendant for money lent to his wife, which was paid into court:—Held, that the plaintiff was liable to pay the costs. *Dawson v. Garrett*, 2 D. P. C. 624.

Where a cause is referred to an arbitrator, and the costs are to abide the event, and the arbitrator awards a specific performance of something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs, although the arbitrator does not award a verdict to be entered in form. *Anon.*, 1 Smith, 426.

Where, by an order of reference, the costs of the causes referred were to abide the event of them, and in one, which was not at issue, the arbitrator found that the plaintiff had no cause of action against the defendant:—Held, that the costs of the pleadings followed the event of the cause, as in case of a nonsuit. *Dibben v.*

*Anglesea (Marquis)*, 2 C. & M. 722; 4 Tyr. 927; 10 Bing. 568.

Parties in a cause referred all matters in difference to an arbitrator, with power to him to direct a verdict or nonsuit, and to order the defendant, although there should be a nonsuit or a verdict for him, to pay any money, or do any other act which should be just and equitable; the costs of the suit, and the costs of the reference to abide and follow the event of the award. The arbitrator directed a nonsuit; but awarded that the defendant ought to pay the plaintiff 25*l.*, and ordered him to do so:—Held, that the defendant was entitled to his costs of the suit, and the plaintiff to those of the reference. *Chittenden v. Walker*, 3 A. & E. 691.

#### e. Power of Arbitrator over Costs.

**Reference "on Usual Terms."**—When the issues in an action are tried and found for the plaintiff, and thereupon it is agreed that the question of the amount of damages shall be referred to an arbitrator on the "usual terms," the arbitrator will have discretion over the costs of the reference; and it does not matter that, if the plaintiff had gone on at the trial to prove his damages, he would have been entitled to his whole costs as of right. *Morel v. Byrne*, 28 L. T. 627; 21 W. R. 673.

**Order silent as to.]**—When an order of reference drawn up by consent provides that the costs of the action and of the application to refer, made at chambers, are to abide the event of the award as if it were a verdict, but is silent as to the costs of the reference, the arbitrator has no power over the costs of the reference, but each party must pay his own costs. *Bullen v. King*, 36 L. T. 732.

An arbitrator under 17 & 18 Vict. c. 125, s. 3, has no power over the costs either of the cause, reference, or award, unless the rule or order appointing him gives it to him, and, where the rule is silent, the successful party is not entitled to costs. *Bell v. Postlethwaite*, 5 El. & Bl. 695; 25 L. J., Q. B. 63; 1 Jur., N. S. 1167; *S. P.*, *Leggo v. Young*, 16 C. B. 626; 24 L. J., C. P. 200.

Where an order of nisi prius is silent upon the subject of the costs of the reference and award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expenses of the reference, and the half of the award. *Taylor v. Gordon*, 2 M. & Scott, 725; 9 Bing. 570; *S. P.*, *Grove v. Cox*, 1 Taunt. 165.

A cause and all matters in difference were referred, but nothing was said about costs:—Held, that the arbitrator had power over the costs of the cause, but not those of the reference. *Firth v. Robinson*, 1 B. & C. 277.

Where all matters in difference are referred, except the costs of the action, and no notice is taken of the costs of reference, the latter are not in the discretion of the arbitrator. *Strutt v. Rogers*, 2 Marsh. 524; 7 Taunt. 213.

An arbitrator may award costs of the action without any express authority for that purpose. *Roe d. Wood v. Doe*, 2 T. R. 644.

**All Costs to abide Event.]**—Where by a reference after action, but before declaration, "all the costs are to abide the event of the award," the arbitrator has no power over the

costs. *Boodle v. Davies*, 4 N. & M. 788; 3 A. & E. 200; 1 H. & W. 420.

If the costs of an arbitration are to abide the event, it is an excess of jurisdiction for the arbitrator to determine their amount. *Kendrick v. Davies*, 5 D. P. C. 693; W. W. & D. 366.

**Discretion, how Exercised.]**—A special jury having been obtained by the defendant, the cause was referred, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator:—Held, that he could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury. *Finlayson v. McLeod*, 1 B. & A. 663.

By reference the costs of the cause were ordered to abide the event of the award; the arbitrator decided the cause in favour of the defendant, and directed the plaintiff, on a certain day, to pay him those costs:—Held, no objection to the award for that the defendant was not deprived of any right which he possessed to recover the costs at an earlier date. *Cockburn v. Newton*, 9 D. P. C. 671; 2 M. & G. 899; 3 Scott, N. R. 261.

**Party causing Delay.]**—Where there is a clause, that if either party, by affected delay or otherwise, shall prevent the arbitrator from making his award, he shall be liable to costs; the party will be liable to costs where the arbitrator is prevented from making his award in consequence of the party not being prepared with proper evidence, though he is ready to be examined in support of his own case. *Morgan v. Williams*, 2 D. P. C. 123.

A submission contained a clause that "if either party by affected delay or otherwise should wilfully delay, or otherwise wilfully prevent the arbitrator from making an award, he should pay costs:—"Semble, that this clause is confined to cases where the completion of the award is prevented, and does not apply where an award has been in fact made. *Bradley v. Phelps*, 6 Ex. 897; 21 L. J., Ex. 310.

**Amount to be named by Arbitrator.]**—By the terms of an order of reference ad nisi prius, the costs of the cause were to abide the event, "the costs of the reference and award to be in the discretion of the arbitrator, who shall ascertain the same:—"Held, that he was bound to ascertain and determine the amount of the costs of the reference and award. *Morgan v. Smith*, 9 M. & W. 427; 1 D., N. S. 617.

A reference was, "that the costs of the agreement and of the reference and award should be in the discretion of the arbitrator, and be defrayed as he should direct." The arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs:—Held, that the award was therefore bad. *Richardson v. Worsley*, 5 Ex. 613; 19 L. J., Ex. 317.

**Person to pay Costs must be named.]**—A submission was entered into between A. and others, partners, of the first part, and B. of the second part. By a written agreement disputes were referred, "the costs of the submission, reference, award, and of making the submission a rule of court, to be in the discretion of the arbitrators." The arbitrators awarded that the costs of the

submission, reference and award should be borne by the parties in equal proportions; and that the costs of making the submission a rule of court should be paid by such of the parties through whose default, in performance of the award, it should become necessary:—Held, that the award was not final or certain as to the costs of making the submission a rule of court, and therefore bad. *Smith v. Wilson*, 2 Ex. 327; 18 L. J., Ex. 320.

A submission to which the plaintiff and defendants, who were executors, and two other persons were parties, provided that the costs of the agreement, and of the reference, and of the arbitration, and of the award, and of making the submission a rule of court, should be in the discretion of the arbitrator. The award, after directing certain things to be done by each party, provided that the costs of the agreement, and of the reference, and of the award, should be paid equally by the plaintiff and the defendants, and that the costs of making the submission a rule of court should be paid by the party disobeying the award and obliging the same to be made such rule of court:—Held, that the award was not void for not finally ascertaining who was to pay the last-mentioned costs. *Williams v. Wilson*, 9 Ex. 90; 1 C. L. R. 921; 23 L. J., Ex. 17.

By an agreement between A., B., and C., it was provided that "the costs of the reference and of the award to be made in pursuance thereof, including a reasonable compensation to the arbitrators for their trouble, shall be in the discretion of the arbitrators, or any two of them, who shall by their award order and direct by whom, to whom, and in what proportions and manner the same shall be paid." The arbitrators having disposed of the matters in difference, awarded the costs as follows: "That A., B., and C. respectively pay for the attendance of his and her own witnesses, and that the other costs of the reference, and this our award, and also the compensation of the arbitrators, be paid by B. and C. in equal proportions:—"Held, that the costs were sufficiently disposed of by this direction, as it sufficiently indicated that each of the three parties was to pay one-third of them to the arbitrator. *Young, In re*, 22 L. J., C. P. 160; 13 C. B. 623.

**Powers exceeded—Effect on Award.]**—Although the arbitrators may have exceeded their authority as to costs, it does not necessarily invalidate the whole of the award. *Aitchison v. Cargay*, 9 Moore, 381; 2 Bing. 199; M'Clel. 376; 13 Price, 639.

**Power to Order Third Party to Pay.]**—An action was brought by the plaintiff against the defendant for pulling down a wall. Upon the cause coming on for trial it was agreed between the parties that it should be referred, and as one Burton had authorized the defendant to pull down the wall, and he was subpoenaed at the trial, it was further agreed, with his consent, that he should be a party to the reference, he signing a memorandum as follows:—"Record withdrawn and stet processus entered. Cause and all matters in difference referred to Mr. R. E. Turner, with power to say what shall be done by the parties, on all the usual terms. Messrs. Cutbush and Burton to be parties to the reference." The order of reference directed that the costs of the cause should abide the event, and

that the costs of the reference and award should be in the discretion of the arbitrator, and that Messrs. Cutbush and Burton should be parties to the reference. The arbitrator awarded that the plaintiff was entitled to 40s. damages from the defendant, and that the defendant should bear and pay one moiety of the plaintiff's costs of the reference and award, and that Burton should pay the other moiety; and also that Burton should pay to the defendant one moiety of his, the defendant's, costs of the action, and one moiety of the defendant's costs of the reference:—Held, upon an objection that the arbitrator had no jurisdiction to require Burton to pay any portion of the costs of the action, that he had such jurisdiction. *Stockley v. Shopland*, 26 L. T. 586.

**Collateral Writing.**—By an order made under the 17 & 18 Vict. c. 125, s. 3, a cause was referred, nothing being said about the costs. The umpire, by his award, "adjudged that the defendant should pay to the plaintiff a certain (named) sum in full of all demands in the action." The award was accompanied by a note from the umpire to the plaintiff on a separate piece of paper, but not annexed to the award, in which he expressed an opinion that the costs of the action, and of the reference and award, should be paid by the defendant, and that he would have so ordered but that he could not do so, inasmuch as the order of reference was silent as to costs:—Held, that the parties were to be bound by the award, and that the accompanying note could not be looked at. *Leggo v. Young*, 16 C. B. 626; 24 L. J., C. P. 200.

**As between Solicitor and Client.**—Upon a submission of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between solicitor and client. *Whitehead v. Firth*, 12 East, 165; *S. P., Seckham v. Babb*, 8 D. P. C. 167; 6 M. & W. 129; 4 Jur. 90.

An arbitrator, to whom the matters at issue in a suit, including the costs of the cause, have been referred by the Court of Chancery, has power to award costs as between solicitor and client. *Mordue v. Palmer*, 8 L. R., Ch. 22; 40 L. J., Ch. 8; 23 L. T. 752; 19 W. R. 86.

**Setting off.**—An arbitrator, under a reference, which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against costs in a prior cause, although all matters in difference are referred. *Hunsted v. Kidd*, 1 Chit. 526.

**After Payment of Money into Court.**—After a payment of money into court, the parties agreed to refer the settlement of the accounts between them:—Held, that the arbitrator had no power over the costs in the cause up to the payment into court. *Stratton v. Green*, 1 M. & Scott, 668; 8 Bing. 437.

## f. Taxation.

**At what Time allowed.**—Where upon a reference of a cause and all matters in difference, by articles of agreement, an award is made, under which the costs of the cause and of the award are to be paid by the defendant, the plaintiff is

entitled to have the costs taxed without waiting for the period during which the defendant would be at liberty to move to set the award aside. *Little v. Newton*, 2 Scott, N. R. 159; 1 M. & G. 976.

A cause and all matters in difference between the parties were referred by an order of nisi prius, by which a verdict was taken for the plaintiff, subject to an award; the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator ordered that the verdict entered for the plaintiff should stand, and directed that the defendant should pay to the plaintiff the costs of the reference and award:—Held, that the plaintiff was not entitled to have an allocatur for the costs or to sign judgment, until the expiration of the proper time for moving to set aside the award. *Jones v. Lees*, 10 C. B. 429; 20 L. J., C. P. 69; 15 Jur. 107; *S. P., Hobdell v. Miller*, 2 Scott, N. R. 163.

**In what Cases.**—Upon the reference of a cause and all matters in difference, though the arbitrator finds no damages, and orders no damages to be entered, the costs may be taxed upon the award. *Taylor v. Marling*, 2 M. & G. 55.

**What allowed on Taxation.**—Where a plaintiff, who did not give distinct notice of attending an arbitrator by counsel, attended by counsel, and refused to consent to an adjournment, except on the defendant's paying the costs of the meeting: the court held the plaintiff not entitled to such costs. *Whitley v. Morland*, 2 C. & M. 347; 4 Tyr. 255; 2 D. P. C. 249.

**Number of Counsel.**—It is the practice on taxation of the costs of a reference to allow one counsel only on each side; but this is not an inflexible rule, and each case must depend upon its own particular circumstances. *Sinclair v. Great Eastern Railway Company*, 5 L. R., C. P. 135; 39 L. J., C. P. 165; 21 L. T. 752; 18 W. R. 491.

The master, on the taxation of the costs of a reference which involved a large sum of money and a long and complicated inquiry, allowed the fees of one only of two counsel retained by the plaintiff, assuming that there was an inflexible rule that only one counsel should be allowed:—Held, that he should review his taxation in order that he might have an opportunity of exercising his discretion in the matter. *Id.*

**Fees.**—When a Queen's counsel acts as an arbitrator, the ordinary scale of fees applies as in other cases. *Id.*

But it is competent to the master, in his discretion, to increase the usual allowance where he thinks that allowance is insufficient. *Id.*

**Several Actions—Same Plaintiff.**—Three actions by the same plaintiff were referred, the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that each party should pay half the costs of the reference. One attorney attended for all defendants, and the master allowed him one-third of his travelling expenses:—Held, that the taxation was wrong, and that the master should have calculated the costs on both sides, and then have divided them. *Day v. Harris*, 1 D., N. S. 353.

**Costs of Accountant.**—On a reference



of a cause involving an inquiry into a mass of accounts, an order was made by a judge, on the application of the plaintiff, that an accountant, to be named by the arbitrator, should inspect the defendant's books and take copies or extracts from them relating to the matters in question in them. This was done, and the charges of the accountant were paid by the plaintiff. The result of the investigation and report of the accountant to the arbitrator was that much expense in the inquiry was saved:—Held, that the plaintiff, in whose favour the award was made, was not entitled to have the costs of the accountant taxed against the defendant. *Nolan v. Copeman*, 8 L. R., Q. B. 84; 42 L. J., Q. B. 44; 27 L. T. 789; 21 W. R. 263.

**Waiver of Objection.**—A cause and all matters in difference having been referred to arbitration, an award was made directing the payment of a sum by the defendant, together with the costs of the cause and of the award; at the taxation of costs, the allocatur was made by the master, without objection by the defendant, for the aggregate amount of both classes of costs, for which sum, the same day, 4th June, judgment was entered up. The plaintiff having died on the 18th November, a scire facias was sued out on the 12th January following, to which the defendant pleaded on the 19th. On an application made on the 24th, to set aside the judgment, on the ground of its falsity, by reason of its including the costs of the award which were not properly recoverable in the cause:—Held, that the objection resolved itself into a point of irregularity upon the allocatur, which was answered, first, by the consent of the defendant to the master's taxation; and, secondly, by a waiver arising upon the lapse of time permitted to intervene between the period of the allocatur being made and the application. *Bignall v. Gale*, 1 D., N. S. 497; 4 Scott, N. R. 570; 3 M. & G. 858.

**On what Scale Taxed.**—An action in contract for 50l. 3s. having been referred to an arbitrator, he awarded the plaintiff 15l. 12s. 6d., and certified "that there was sufficient reason for bringing the action." On taxation, the master held the case to be within the 7th of the directions to taxing masters of Hilary Term, 1853, and taxed on the lower scale:—Held, that such practice was good, for the case was within the enacting words of the direction, not within its exception, and unaffected by its proviso. *Smith v. Hailey*, 27 L. T. 426; 21 W. R. 76.

An action of trespass was referred, by consent, at nisi prius, and by an order of nisi prius, drawn up in the usual form, the verdict was, by consent, entered for the plaintiffs, with damages 40s., costs 40s.; and, by the like consent, it was also ordered that the costs of the reference and award should be paid by the defendants. The award having been made, the master taxed the costs of the action as between party and party on the ordinary scale; and then proceeded to tax the costs of the reference and award on the same scale, but the plaintiffs objected that the proceedings on the reference were virtually under the Lands Clauses Act, and that the costs ought to be taxed on the scale usually allowed in proceedings under that act:—Held, that the costs which the defendants had stipulated to pay, and which they were bound to pay under the order

of nisi prius, were ordinary costs as between party and party, and ought to be taxed on such, and on no other scale. *Eccles v. Blackburn (Mayor)*, 5 C., 30 L. J., Ex. 358.

**Proportion of Costs.**—The plaintiff instituted a suit to take the accounts of a partnership between himself and the defendant, the terms of the partnership being that the plaintiff was to receive one-twelfth of the profits and to bear one-twelfth of the losses, and that the defendant was to receive and bear the remaining eleven-twelfths. The partnership articles contained an arbitration clause; and an order was made in the suit, under the Common Law Procedure Act, 1854, s. 11, that the matters in difference between the parties be referred to arbitration and the proceedings in the suit stayed, the costs being reserved. Under this order an award was made finding a considerable sum due to the plaintiff:—Held, that the costs of both parties of the suit, reference, and award ought to be taxed and paid as to one-twelfth by the plaintiff and as to eleven-twelfths by the defendant. *Newton v. Taylor*, 19 L. R., Eq. 14; 23 W. R. 330.

**When Taxation Unnecessary.**—Where an arbitrator finds the amount of the costs of an award, it is not necessary that they should be taxed previously to the court ordering them to be paid. *Dirie v. Alexander*, 1 L. M. & P. 338.

**Taxing by Arbitrator.**—An arbitrator, authorized to tax costs in a cause, allowed an item which it was insisted ought not to have been charged; the court would not refer the matter to the master. *Anon.* 1 Chit. 38.

**When Taxation by Officer may be Ordered.**—Upon a reference with a clause, that the submission may be made a rule of court, the arbitrator, under a power to award the costs of the reference and award, may direct such costs to be taxed by the officer of the court, although no cause was pending at the time of the reference. *Bhear v. Harradine*, 7 Ex. 269; 21 L. J., Ex. 127.

**Award sent back—Fresh Taxation.**—The costs of a reference had been taxed before the award was sent back to the arbitrator by the court. After the second award the defendant demanded the same costs without any new taxation:—Held, that by the reference back the allocatur became null, and that there ought to have been a fresh taxation after the new award before any demand for costs could be enforced. *Johanson v. Latham*, 2 L. M. & P. 205; 20 L. J., Q. B. 236.

**Practice—Separate Taxations.**—Where the costs of the cause are to abide the event, the costs of the reference and award to be in the discretion of the arbitrator, the practice is for the master to tax each set of costs separately, and give two allocaturs, unless the parties agree that the taxation shall be in one sum. *Bower v. Bower*, 8 Jur., N. S. 193; 5 L. T. 684.

**Order to Review Taxation.**—An action upon money counts and for trover was referred to the master, "costs of the cause, reference, and award to abide the event." It was awarded that the defendant had proved his set-off of an equal amount to the plaintiff's claim in the money counts, 37l. 10s.; and that he owed the defendant

2l. 10s. Upon the trover count the plaintiff was awarded 43l. 7s. 7d. The master gave to the plaintiff the costs of the action, to the defendant the costs of proving the plea of set-off, but to neither party the costs of the reference and award. The court refused to review the taxation. *Woodhams v. Woodhams*, 25 L. T. 460.

A plaintiff declared upon a special contract for the delivery of goods to the defendant, of which he alleged breaches, which were, that the defendant did not pay for goods delivered according to agreement, that he refused to accept goods which were tendered, and as to the remainder, that he did not accept them. There was a count for goods sold. The cause was referred, and the arbitrator ordered the defendant to pay 75l. less 39l. paid into court on the second count; and he also found that certain timber mentioned in the special count was the property of the plaintiff:—Held, that a finding on both counts was involved in this award; and the master having taxed the costs on both issues for the plaintiff, the court refused to send the taxation to be reviewed. *Rennie v. Mills*, 7 D. P. C. 295; 5 Bing. N. C. 249; 7 Scott, 276; 1 Arn. 534.

Where the master has taxed costs as between attorney and client pursuant to the directions of an award, which directions, it is suggested, are an excess of authority on the part of an arbitrator, the court will not direct the taxation to be reviewed, the proper preliminary step being to move to set aside the award. *Bartle v. Muirgrave*, 1 D., N. S. 235; 5 Jur. 1661.

**Suing for, before Taxation.**—Where an umpire appointed under 11 & 12 Vict. c. 63, s. 125, awarded the amount of compensation and that the costs of the reference should be paid by the local board of health:—Held, that the plaintiff was entitled to maintain an action for the costs before taxation. *Holdsworth v. Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289; 10 Jur., N. S. 171; 8 L. T. 434; 11 W. R. 733—Ex. Ch.

The right to costs is entirely independent of the taxation of them, and an action can be maintained for the costs of a reference though the amount of such costs has not been previously settled or ascertained by taxation. *Metropolitan District Railway Company v. Sharpe*, 5 App. Cas. 425; 44 J. P. 716; 50 L. J., Q. B. 14; 43 L. T. 130; 29 W. R. 617—H. L. (E.).

A declaration on an award alleged a direction that the costs of the action, reference and award should be paid by the defendant. Breach, non-payment. Plea, that they were not before action ascertained or taxed:—Held, the award was good and the plea bad. *Lewis v. Rossiter*, 44 L. J., Ex. 136; 33 L. T. 260; 23 W. R. 832.

## II. REFERENCE TO REFEREE UNDER JUDICATURE ACT, 1873, ss. 56, 57.

(See *Rules of Supreme Court, Order XXXVI, Rules 45—55.*)

### 1. IN WHAT CASES.

**Questions of Account.**—Semble, that the "prolonged examination of documents," intended by sect. 57 of the Judicature Act, 1873, is an examination required to enable the judge to leave questions of fact to the jury; and not an examination to enable him to determine a ques-

tion of legal right. *Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664; 51 L. J., Q. B. 348; 46 L. T. 669; 30 W. R. 805.

The expression "questions of account" in the 57th section of the Judicature Act, 1873, will receive a large construction. *Leigh, In re, Rowcliffe v. Leigh*, 3 Ch. D. 292; 24 W. R. 782.

A claim made in an administration suit by a dealer in works of art against the estate of the testator for 19,000l., the aggregate prices of twenty-four items, consisting of pictures and of articles of vertu supplied to the testator in his lifetime, and specified in an account delivered to his executor, was, on the application of the executor under that section, ordered to be tried before the official referee. *Ib.*

Any question of account which may be referred compulsorily to a master under s. 3 of the Common Law Procedure Act, 1854, may also be referred compulsorily to an official referee under s. 57 of the Judicature Act, 1873. *Ward v. Pilley*, 5 Q. B. D. 427; 49 L. J., Q. B. 705; 43 L. T. 301; 28 W. R. 937—C. A.

**Reference of all Issues in the Action to Official Referee.**—In any case in which the court has jurisdiction to refer compulsorily a question of account to an official referee, it has also jurisdiction so to refer all the other issues in the action. *Ib.*

To an action for money had and received, the defendant pleaded, amongst other matters, that "the plaintiff and defendant still are partners, or co-adventurers in holding certain horse races and race meetings, which said partnership still subsists, and the alleged causes of action arose out of such partnership and not otherwise." An order having been made by a judge at chambers, referring all the issues in the action to an official referee:—Held, that the order was right. *Goodwin v. Budden*, 42 L. T. 536.

**Issues—Not whole Action.**—The court or a judge has no power under the Judicature Act, 1873, ss. 56 and 57, to refer the whole action for trial to an official or special referee. Under s. 57 the court may, by consent, refer any question or issue of fact in an action to an official or special referee for trial, but the power of compulsory reference for trial under that section is confined to questions or issues in an action requiring prolonged examination of documents or local investigation, or questions of account, and any other matters so involved with such issues as to be incapable of being tried separately. *Longman v. East—Pontifex v. Severn—Mellin v. Monico*, 3 C. P. D. 142; 47 L. J., C. P. 211; 38 L. T. 1; 26 W. R. 183—C. A.

**Action for Wrongful Dismissal and Matters of Account—Charges of Misconduct.**—The plaintiff brought an action against the defendants for damages for wrongful dismissal, for balance of account for money paid to defendants' use, and for an account of profits on sales on which the plaintiff claimed commission. The defendants justified the dismissal, on the ground that the plaintiff had misconducted himself by wilfully disobeying the reasonable orders of defendants, and by habitually neglecting his duties, and by converting to his own use money which he had received to the use of the defendant. By order of a judge at chambers the issues in the action were referred to an official referee pursuant to

s. 57 of the Judicature Act, 1873, the statement of defence being amended by omitting the allegations that the plaintiff converted money to his own use:—Held, that the order of the learned judge at chambers was right. *Sacker v. Ilagazine*, 44 L. T. 308.

**Issues involving Charges of Fraud.**—A judge has jurisdiction, under s. 57, to refer compulsorily issues which involve questions of fraud affecting the character and reputation of the parties, though, as a general rule, such issues ought not to be referred. *Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 425—C. A.

An executrix brought an action to set aside for fraud the sale by the defendant to her testator of about 130 pictures for prices amounting in the whole to 50,000*l*. The defence denied the fraud. The plaintiff moved to have the questions referred to a special referee under the Judicature Act, 1873, s. 57, on the ground that the examination of the pictures required a scientific investigation, which could not conveniently be had before a jury. The defendant opposed, and stated his wish for a trial by a jury:—Held, that the case was not within the purview of s. 57, so as to give jurisdiction, without the consent of all parties, to send it to a referee; and that if there had been jurisdiction, still as the case involved questions of fraud seriously affecting the character and fortune of the defendant, it ought not, against his will, to be tried otherwise than in open court. *Leigh v. Brooks*, 5 Ch. D. 592; 46 L. J., Ch. 344; 25 W. R. 401—C. A.

**To find Materials on which Court to act.**—Any question arising in a cause may be referred by the court or a judge for inquiry or report to an official or special referee, whose duty is not to determine any question in issue, whether of fact or of law, but to find the materials upon which the court is to act. *Badische Anilin und Soda Fabrik v. Levinstein*, 52 L. J., Ch. 704; 48 L. T. 822; 31 W. R. 913.

**Preliminary Question of Law to be decided.**—A plaintiff, in a suit to ascertain the boundaries between his land and the adjacent land of the defendant, after the commencement of the Judicature Act, gave notice of trial before a judge. At that time no official referees had been appointed as provided by the act; but upon their appointment shortly afterwards, the plaintiff applied by summons for an order that the cause might be tried before one of such referees. Bacon, V.-C., dismissed the summons on the ground that, besides the matters of fact in dispute, a preliminary question of law had been raised upon the pleadings as to the jurisdiction of the court to entertain the suit. *Lascelles v. Butt*, 2 Ch. D. 588; 35 L. T. 122. Affirmed, (24 W. R. 659—C. A.), on the ground that it was a matter within the judge's discretion.

**Damages in Action for Specific Performance.**—In an action for specific performance, where, on an inquiry as to damages, it was necessary to examine witnesses, the inquiry was referred to an official referee. *Stafford v. Coxon*, 25 W. R. 788.

## 2. THE APPLICATION AND PROCEEDINGS THEREON.

**Time for Application.**—In a suit to ascertain

boundaries the plaintiff gave notice of trial before a judge and obtained an order that the evidence should be taken *viva voce* at the trial. Five weeks afterwards he applied that the suit might be referred to an official referee, on the ground of saving expense, and that a local investigation was necessary:—Held, that the application was out of time. *Lascelles v. Butt*, 2 Ch. D. 588; 35 L. T. 122.

This decision was affirmed on appeal, the court holding that it was a matter within the judge's discretion. S. C.; 24 W. R. 659—C. A.

**Appeal from Order, to what Court made.**—An appeal from a compulsory order of reference, made under s. 57 of the Judicature Act, 1873, by a judge, sitting at nisi prius or assizes, must be brought direct to the Court of Appeal. *Hoch v. Boor*, 49 L. J., C. P. 665; 43 L. T. 425—C. A.

**Appeal from Judicial Discretion.**—The Court of Appeal has power to review the order made by a judge under sect. 57 of the Judicature Act, 1873, who, having jurisdiction to make such order, has in the exercise of his discretion ordered the issues of fact in an action to be tried by an official referee, on the ground that they required prolonged examination of documents and also scientific and local investigation; but the Court of Appeal, whose discretion in such cases is to be substituted for that of the judge, will not exercise such discretion except in a strong case where it clearly thinks the judge has wrongly exercised his discretion, and that an injustice has been done by the order he has so made.—So held by Brett and Holker, L.J.J. (Lord Coleridge, C. J., doubting if the court had jurisdiction to review the discretion of the judge). *Ormerod v. Todd-morden Mill Company*, 8 Q. B. D. 664; 51 L. J., Q. B. 348; 46 L. T. 669; 30 W. R. 805—C. A.

## 3. POWERS AND DUTIES OF REFEREE.

**Findings—Entering Judgment.**—A referee under the Judicature Acts to whom the issues in an action are referred for trial has no power to order judgment to be entered. His findings should be separate on each of the issues submitted to him. *Longman v. East*, 3 C. P. D. 142; 47 L. J., C. P. 211; 38 L. T. 1; 26 W. R. 183—C. A.

**Where Arbitrator by Consent.**—When a reference had been ordered to an official referee, and the order of reference was drawn up in the form known as the "Long Order," under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and the parties with knowledge of the terms of the order appeared before the referee, who gave his award:—Held, that the referee must be taken to have sat as arbitrator by consent, and that his award was binding on the parties, neither of whom could obtain a new trial. *Longman v. East*, 3 C. P. D. 142; 47 L. J., C. P. 211; 38 L. T. 1; 26 W. R. 183—C. A.

**Jurisdiction of Official Referee to order Production of Documents.**—The official referees have no jurisdiction to make an order for the production of documents, the proper course being to take out a summons for the purpose in the chambers of the judge to whom the action is attached. *Danvillier v. Myers*, 17 Ch. D. 346; 29 W. R. 535.

**Discovery.]**—The court does not, by directing a reference, deprive itself of the power of making any order which may facilitate the reference, and the judge, not the referee, is the proper person to make an order for discovery of documents which may be necessary for the purposes of the reference. *Roucliffe v. Leigh*, 4 Ch. D. 661; 46 L. J., Ch. 60; 25 W. R. 56.

**Sittings of Referee.]**—The words of Ord. XXXVI. r. 30, requiring a referee to sit *de die in diem*, are directory only, and though a neglect to comply with such requirement would be misconduct in the referee, a party who has at the time acquiesced in such non-compliance cannot move to set aside the award on that ground merely. *Robinson v. Robinson*, 35 L. T. 337; 24 W. R. 675.

#### 4. THE REPORT AND PROCEEDINGS THEREON.

**Form of Report—Reasons.]**—A referee under the Supreme Court of Judicature Act, 1873, s. 57, is not bound to give his reasons for his findings; he may simply find the affirmative or the negative of the issues, and the issues in an action cannot be sent back to him for re-trial or further consideration merely on the ground that his report does not set out the reasons for his findings. *Miller v. Pilling*, 9 Q. B. D. 736; 51 L. J., Q. B. 481; 47 L. T. 536—C. A.

An official referee is not required to state reasons for his findings. *Walker v. Bunkell*, 31 W. R. 138.

**— In case of Accounts.]**—Where at the trial a certain account arising in the action is ordered to be taken before the official referee, and further consideration is adjourned; the report must not simply state the result of the account, but must set it out, stating what items have been allowed, and what items have been disallowed. *Burrard v. Callisher* (No. 1), 51 L. J., Ch. 223; 45 L. T. 793; 30 W. R. 321.

**Report—Summons to Confirm.]**—At the trial of an action it was ordered that certain accounts be taken by the official referee, and that the rest of the trial do stand over until the official referee shall have made his report. The report having been made and filed:—Held, that no "summons to confirm" the report was required before the action was restored to the paper for hearing. *Deacon v. Dolby*, 51 L. J., Ch. 248; 30 W. R. 317.

**Report—Motion for Judgment.]**—In an action for an account an order was made under Ord. XXXIII. to take an account, without prejudice to the proceedings in the action generally being carried on. By a subsequent order it was directed that the accounts should be taken by the official referee. The referee made a report finding a sum due from the plaintiff. The plaintiff moved that the report might be set aside and the accounts remitted to the referee, and that he might be directed to state his reasons. The defendant at the same time moved that the report might be confirmed and the plaintiff ordered to pay the sum found due. Kay, J., refused both motions, holding that a motion to confirm the report was unnecessary, that the action ought to be set down for trial, and that the plaintiff could object to the report at the hearing. The defend-

ant appealed:—Held, by the Court of Appeal, that the proper course was not to set down the action for trial, but for the defendant to move for judgment on the report, and for the plaintiff to move to set the report aside. Both the orders of Kay, J., were discharged, and the two motions remitted to him to be disposed of on the merits. *Walker v. Bunkell*, 22 Ch. D. 722; 52 L. J., Ch. 596; 48 L. T. 618; 31 W. R. 661—C. A. Reversing, 31 W. R. 138.

Held, also, that the proviso as to the order to take the accounts being without prejudice to the proceedings in the action generally being carried on ought not to have been inserted. *Id.*

**Application to set aside—Where made—Within what Time made.]**—Application to set aside the findings of a referee appointed under s. 57 of the Judicature Act, 1873, to try the issues of fact in an action and report to the judge making the order of reference, must be made to a divisional court and not to the judge, as such findings are by s. 58 equivalent to the verdict of a jury, and can only be set aside by the court:—*Quære*, whether the time for making the application runs from the time when the report is made to the judge. *Cooke v. Newcastle and Gateshead Water Company*, 10 Q. B. D. 332; 52 L. J., Q. B. 337.

Where on a reference under s. 57 of the Judicature Act the unsuccessful party desires to question the findings of the referee, the proper course is to move the court on notice under Ord. LIII. to the other party, and such a motion need not be made within the time limited by Ord. XXXIX. r. 1A, for moving for a new trial in an action tried by a jury. *Dyke v. Cunnell*, 11 Q. B. D. 180; 47 L. T. 174; 31 W. R. 747.

**Power of Court to alter or vary Decision.]**—When a judge has referred the amount of damages in an action to a special referee, he may accept the decision wholly or partially, or, if dissatisfied with it, he may wholly disregard it, or remit to the referee for amendment, but he has no power to alter or vary it. The Master of the Rolls referred the amount of damages to a special referee, and on the report being made, being dissatisfied with the principle on which the referee had proceeded, assessed the damages himself, using for the purpose the shorthand notes of the evidence heard before the referee. The Court of Appeal reversed his decision, and remitted the case to the referee to rehear the matter, with liberty to report specially on any facts. *Dunkirk Colliery Company v. Lezer*, 9 Ch. D. 20; 39 L. T. 239; 26 W. R. 841—C. A.

**Court may send back Report.]**—The court on the trial of any action may require an explanation from the official referee or remit, or otherwise deal with his report. *Walker v. Bunkell*, 31 W. R. 138.

**Remitting Report—Within what time Application made.]**—Where an official referee has made his report, any application under Ord. XXXVI. r. 34, must be made within the time limited for moving against the verdict of a jury. *Sullivan v. Rivington*, 28 W. R. 372.

There is no time limited by the Judicature Acts, nor will any time be laid down by the court, within which a motion must be made to remit for further consideration the report of an

official referee on an account referred to him. *Walker v. Bunkell*, 31 W. R. 138.

**Length of Notice of Application to vary Report.**—Though no time is fixed for giving notice of an application to vary a referee's report, on the analogy of the rule with regard to motions, two clear days' notice should be given. *Brook, In re, Sykes v. Brook*, 50 L. J., Ch. 744; 45 L. T. 172; 29 W. R. 821.

**Application, how made.**—Where a referee under the Judicature Act, 1873, has made his report, an application to send the case back to him should be made on notice of motion and not *ex parte* in the first instance. *Graves v. Taylor*, 27 W. R. 412.

Where, in an action which has by the judgment been referred to the official referee and in which further consideration has been adjourned, either party desires to vary the referee's report, he should serve the opposite party with a notice of motion to vary, such notice to be given for the usual motion day. The motion will then be adjourned, as a matter of course, to come on with the further consideration. Where further consideration has not been adjourned, the proceedings to vary may be either by motion or summons. *Burrard v. Callisher* (No. 2), 19 Ch. D. 644; 51 L. J., Ch. 510; 46 L. T. 341; 30 W. R. 540.

Seemingly, the findings of a referee in his report to the court cannot be questioned upon motion for judgment upon the report, but are matter for appeal in the ordinary course. *Mansfield Union v. Wright*, 46 J. P. 200.

At the trial of an administration action, certain inquiries were by consent ordered to be made before an official referee, and further consideration was adjourned. When the action came on for further consideration, the plaintiff applied to have the referee's report varied, though he had given no notice to the defendant of the application:—Held, that the application must be heard; but that, if the defendant desired, the further consideration must be adjourned for him to have time to meet the application. *Brook, In re, Sykes v. Brook*, 50 L. J., Ch. 744; 45 L. T. 172; 29 W. R. 821.

**Affidavits.**—Upon a motion to set aside or vary the judgment in a case tried before an official referee, an affidavit, or some evidence of what took place at the trial, must be furnished to the court. *Stubbs v. Boyle*, 2 Q. B. D. 124; 46 L. J., C. P. 136; 35 L. T. 906; 25 W. R. 184.

At the trial of an action certain inquiries were by consent ordered to be made before an official referee. When the action came on for further consideration, an application was made to have the referee's report varied:—Held, that no evidence of what took place before the referee need be produced. *Brook, In re, Sykes v. Brook*, 50 L. J., Ch. 744; 45 L. T. 172; 29 W. R. 821.

**Order is Interlocutory.**—An order to alter a special referee's report is interlocutory. *Dunkirk Hall Colliery Company v. Lever*, 9 Ch. D. 20; 39 L. T. 239; 26 W. R. 841—C. A.

**Setting aside—Grounds.**—The words of Ord. XXXVI., r. 30, requiring a referee to sit *de die in diem*, are directory only, and though a neglect

to comply with such requirement would be misconduct in the referee, a party who has at the time acquiesced in such non-compliance cannot move to set aside the award on that ground merely. *Robinson v. Robinson*, 35 L. T. 337; 24 W. R. 675.

**Costs.**—An action was brought against the executor and trustee of a will by the beneficiaries, in which they alleged he had committed certain breaches of trust, and claimed the administration of the estate, the appointment of a new trustee, and of a receiver. At the trial an order was made by consent, by which certain inquiries, consisting of the common administration inquiries, and others with reference to the alleged breaches of trust, were referred to an official referee. The referee reported altogether in favour of the defendant, and the cause came on for further consideration:—Held, that the plaintiffs must pay all the costs of the action up to and including the hearing on further consideration, except such costs as would have been incurred in obtaining a simple administration judgment. *Brook, In re, Sykes v. Brook*, 50 L. J., Ch. 744; 45 L. T. 172; 29 W. R. 821.

A referee in his report on a claim comprising many items, some of which were decided for and the rest against the claimant, made no mention of the costs of the reference. The judge made an order adopting the report, and leaving the costs of the reference to be dealt with by the master:—Held, that the judge was not bound to give any direction to the master as to the principle on which he should deal with the costs. *Leigh, In re, Rowcliffe v. Leigh*, 26 W. R. 729—C. A.

The costs of referring a question arising in an action to a special referee, are usually costs in the cause. *Badische Anilin und Soda Fabrik v. Levinstein*, 52 L. J., Ch. 704; 48 L. T. 822; 31 W. R. 913.

## ARCHDEACON.

See ECCLESIASTICAL LAW.

## ARCHES, COURT OF.

See ECCLESIASTICAL LAW.

## ARCHITECT.

**Action to recover Fees in respect of Plans.**—The owner of a house desiring to make alterations, employed an architect to prepare plans. The architect having done so, employed the plaintiff, a surveyor, to take out the quantities, which were lithographed, and sent to various

builders—including the defendant and his son, who were in partnership—to invite tenders, the circular informing them that the builder whose contract was accepted should pay the plaintiff's fees. The defendant and his son had themselves, previously to the employment of an architect, prepared a plan for the owner, but one with which he was not satisfied. The tender of the defendant and his son was the lowest; but, it being greatly in excess of the expenditure contemplated by the owner, the plaintiff prepared a bill of reduction, but this reduced plan the owner also considered too expensive, and then employed the defendant (whose son had since died) to execute a modification of the original plan prepared in his office. The works were eventually executed by the defendant under a contract, in which it was agreed between the owner and the defendant that the defendant should not be liable for the plaintiff's fees. The plaintiff brought an action for his fees against the defendant, relying on a custom of the building trade, by which the builder whose tender is accepted, or who is employed to carry out the plans, or any modification of them, is directly liable for the surveyor's fees, the owner being liable, if the work is abandoned altogether, or he adopts an entirely independent plan. Evidence to support this custom was given, but one of the plaintiff's witnesses stated that, in his opinion, the liability depended on the agreement between the owner and the builder. The defendant's foreman stated that the works were carried out according to the defendant's own original plan, and that the plaintiff's calculations were not used at all for them. The plaintiff's witnesses stated that there was the strongest similarity between the work as carried out and the plaintiff's reduced plan:—Held, that the plaintiff was not entitled to recover. *Taylor v. Hall*, 4 Ir. R., C. L. 467.

**Mistake of Contractor.**—A builder made a tender undertaking to sign a contract to execute for a sum works described in the rough sketches and verbal explanations of an architect. The architect subsequently sent by special messenger to the builder a contract to perform for the sum named the works delineated and described in the plans and specifications thereto annexed. These differed materially from the works described in the rough sketches and verbal explanations on which the builder had made his tender. The builder, however, signed the contract without any examination, and completed the works according to the plans annexed to it. He afterwards filed a bill in equity claiming to have an account taken of the works executed by him on the basis on which he had made his tender:—Held, that as the mistake under which he had signed the contract was due to his own negligence, and he had not taken proceedings for rectifying the contract as soon as he had discovered it, he was not entitled to any relief in this respect. *Kimberley v. Dick*, 13 L. R., Eq. 1; 41 L. J., Ch. 38; 25 L. T. 476; 20 W. R. 49.

**Non-disclosure of Contract or that price limited.**—A building contract contained a clause, appointing the architect arbitrator in respect of extra works; the architect had guaranteed to his employer that the total cost should not exceed a specific sum, but that fact had not been

disclosed to the builder at the time when he signed the contract:—Held, that the guarantee was a material fact tending to influence the architect's decision, and as it was not disclosed to the builder, he was not bound by the submission to the architect's arbitration, and the court would perform the part of arbitrator in the matter. *Id.*

**Plans and Specifications no Warranty.**—A person asking for tenders for the execution of a certain work prepares plans and a specification for the information of intending contractors; he does not thereby enter into any implied warranty that the work can be successfully executed according to such plans and specification. *Thorn v. London (Mayor, &c.)*, 1 App. Cas. 120; 45 L. J., Ex. 487; 34 L. T. 545; 24 W. R. 932—H. L.

Semble, that the remedy (if any) of the contractor, in the event of his not being able to execute the work according to the plans and specifications, will be for compensation as upon a quantum meruit. *Id.*

The mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the bill of quantities by such architect to the builder. *Scrivenor v. Pask*, 18 C. B., N. S. 785.

**Action against, for Collusion.**—An action will lie by a builder against an architect who, fraudulently and in collusion with the builder's employer, refuses to certify that he is satisfied with the work done, whereby the builder is unable to obtain payment, if the architect has an interest in the contract between the builder and his employer. *Ludbrook v. Barrett*, 46 L. J., C. P. 798; 36 L. T. 616; 25 W. R. 649.

Semble, that such an action would lie without proof of special damage. *Id.*

**Certificate when Conclusive.**—An English company, who owned a railway in Russia, entered into a contract for the manufacture and delivery to them of rails for their railway. The contract provided that a sample should be sent to the company's engineer for approval before the commencement of the work. It was, however, "to be expressly understood that such approval is not in any way to relieve the contractor from any of the conditions or stipulations contained in this specification." During the progress of the work tests were to be applied by the engineer at his discretion, and the entire contract was to be executed in every respect to the satisfaction of the engineer, "who shall have the power of rejecting any rails or fishing plates he may disapprove on any ground whatever, and whose decision on any points of doubt or dispute that may arise in reference to this contract shall be final and binding on all parties. . . . The engineer will inspect, either personally or by deputy, every stage of the process of the manufacture at the works. . . . This examination at the works is not in any way to commit the company to the approval and acceptance of any rails or fishing plates, which, when delivered, shall not be strictly in accordance with the drawings and specifications." After the rails had been delivered to the company and paid for by them, and more than half of them laid down in Russia, it was discovered that they were defective. An action being brought by the company for breach

of contract :—Held, that it could not be maintained, as the contract shewed that the parties intended the final expression of the engineer's satisfaction with the entire contract to be conclusive. *Dunaberg and Witepsk Railway Company v. Hopkins, Gilkes and Company*, 36 L. T. 733.

In an action on a builder's contract, which provided that all the works should be left complete and clear, to the satisfaction of the architect, and did not contain any provision for payment by instalments :—Held, 1st. That the completion of the works to the satisfaction of the architect was a condition precedent to the builder's right to recover on foot of the contract. 2ndly. That he was not entitled to recover for the value of work done, as to which while incomplete, the architect had expressed approval so far as then partially executed, but which was not subsequently completed to the architect's satisfaction. *Richardson v. Mahon*, 4 L. R. Ir. C. P. 486. See other cases, sub tit. WORK AND LABOUR.

**Certificate of, when Condition Precedent.]—**See WORK AND LABOUR.

**Recovery of Claim.]—**See WORK AND LABOUR.

## ARMORIAL BEARINGS.

**Grant of.]—**A. obtained from the Heralds' College a grant of arms, to be borne by him and the descendants of his brother. His brother had two sons, the elder of whom was heir-at-law of A., and the younger his executor with another person. A. bequeathed all his household goods and effects to his wife, and she took possession of the grant of arms :—Held, that the two nephews of A. had not such an exclusive interest in the grant of arms as to enable them to maintain it against the wife of A. *Stubbs v. Stubbs*, 1 H. & C. 257; 31 L. J., Ex. 510.

Seemingly, that even if the executors were entitled to the grant of arms, the court could not amend the writ of summons so as to give judgment for the one plaintiff who was executor, since the other executor ought to have been joined. *Ib.*

**Effect in Evidence.]—**See EVIDENCE.

## ARMY AND NAVY.

1. *Regular Officers.*
  - a. Rights and Duties, 424.
  - b. Actions against, 427.
  - c. Pay, Commission, &c., 429.
2. *Privates*, 435.
3. *Militia*, 437.
4. *Volunteers*, 438.
5. *Billeting*, 439.
6. *Courts-Martial*, 439.
7. *Army and Navy Agents*, 441.
8. *Other matters.*—See WAR.

### 1. REGULAR OFFICERS.

#### a. Rights and Duties.

**Navy—Carrying Treasure.]—**The flag officers of a fleet have no right to any share in the gratuity of one-half per cent. which is given to the captains of ships of war for carrying public treasure on board their ships. *Montague v. Janczerin*, 3 Taunt. 442.

It is illegal for the commander of one of his Majesty's ships of war to carry on board her, on freight, the bullion of private merchants, without an order from an authority competent to command him to perform that service. *Brisbane v. Daeres*, 5 Taunt. 143.

A flag officer commanding on a foreign station is not entitled to any share of the freight paid by private merchants to the captain of a ship of war for the conveyance of private treasure on board the ship to this country, in pursuance of orders issued to the captain by the flag officer, under the authority of the Admiralty. *Warren v. Shirreff*, 5 M. & S. 32.

The captain of a ship in the king's service received at Gibraltar bullion to be brought to this country for freight, giving a bill of lading for it; the ship arrived, but the bullion was lost :—Held, that whether it was illegal or not under 22 Geo. 2, c. 33, s. 24, for the captain to receive the bullion on board, at all events he was answerable for the loss of it. *Hatchwell v. Cooke*, 2 Marsh. 293; 6 Taunt. 577.

An action lies against the commander of a ship of war who takes the bullion of a private merchant on board, for not safely keeping and delivering it. *Hodgson v. Fullarton*, 4 Taunt. 787.

**Officer's Right to Vote.]—**An officer was in the habit of always living with his mother when on leave from his regiment, and had actually resided three months previously to the 31st July with her :—Held, that as he could not return at his own option, but only with the permission of his commanding officer, he was not entitled to vote. *Ford v. Hart*, 9 L. R., C. P. 273; 43 L. J., C. P. 24; 29 L. T. 685; 22 W. R. 159; 2 Hopw. & C. 167.

**Indian Officers.]—**An officer in her Majesty's Indian army, permanently residing and in active service in India, will not be compelled to find security for costs. *Whittall v. Campbell*, 5 H. & N. 601; 29 L. J. Ex. 326; 6 Jur., N. S. 485; 2 L. T. 251.

Before the transfer of the government of the Indian possessions to the crown, military officers in the service of the East India Company were objects of their military laws so long as they remained on pay and in service. *Vertue v. Clive (Lord)*, 4 Burr. 2472. See *Douglas, In re*, 3 G. & D. 509; 3 Q. B. 825.

And they had not a right to resign whenever they pleased. *Parker v. Clive (Lord)*, 4 Burr. 2419.

An officer, commanding forces of her Majesty and of the East India Company in India, has no such legal right, by statute or otherwise, to his pay as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the company to discharge arrears, though he has always received his pay from the company, and their practice has been to discharge

it monthly. *Napier, Ex parte*, 18 Q. B. 692; 21 L. J., Q. B. 332.

**On Disbandment of Regiment.]**—A colonel of a regiment, on full pay, was appointed civil superintendent of a colony, and "to command such of his majesty's subjects as are now armed, or may hereafter arm, for the defence of the settlers." After acting both as military commander and civil superintendent some years, his regiment was disbanded, and he was reduced to half-pay; but still was recognized in both capacities by the authorities at home and in the colony:—Held, that his appointment to command all persons armed for the defence of the colony gave him a right to command all the king's troops there, and that he did not lose that right by the disbandment of his regiment, and his reduction to half-pay; and, therefore, he was justified in putting under arrest, for disobedience to orders, a commissioned officer on full-pay, holding equal regimental rank with himself. *Bradley v. Arthur*, 6 D. & R. 413; 4 B. & C. 292.

**Dismissal of Officers.]**—Every officer in the army holds his office subject to the will of the crown, and is liable to be dismissed at any moment without cause assigned; and there is no such thing as a military appointment permanent in the sense of being tenable for life, or until the holder is disqualified by misconduct or incapacity from fulfilling the duties attached to it. *Tufnell, In re*, 3 Ch. D. 164; 45 L. J., Ch. 731; 34 L. T. 838; 24 W. R. 915.

Therefore, when a medical officer in the army was, at his request, and on condition of waiving his right to promotion, appointed to the permanent medical charge of the military prison at Dublin:—Held, first, that as a military officer he was subject to the rules and regulations of the service, and the court had no jurisdiction on a petition of right or any other proceeding to inquire into the circumstances under which he ceased to hold the office. *Id.*

Held, secondly, that the office, like all others in the army, was only tenable durante bene placito. *Id.*

The East India Company, before 21 & 22 Vict. c. 106, when the government of India was transferred to the crown, had the absolute power to dismiss or compel the retirement of an officer in the Indian army at the will and pleasure of the company, and such power being in the nature of a crown prerogative could not be waived by contract between the company and its officers. *Grant v. Secretary of State for India*, 2 C. P. D. 445; 46 L. J., C. P. 681; 37 L. T. 188; 25 W. R. 848.

An action for removing an officer does not lie against the secretary of state for India, as the act of removal was not within the cognizance of a court of law, the East India Company and afterwards the crown having an absolute power to remove the officer at will and pleasure. *Id.*

Held, also, that the defendant was not liable for libel by reason of the publication of the order of removal in the Gazette, at all events when not alleged to have been published by him maliciously and without reasonable and probable cause. *Id.*

An action against a secretary of state for war, a lord lieutenant (commandant of the militia of the district), and a colonel of a regiment of

militia, for causing, by means of false charges, the removal of the plaintiff from the office of lieutenant-colonel of the regiment, cannot be maintained unless they acted dishonestly, or without any belief in the truth of the charges, and from bad and improper motives. *Dickson v. Combermere (Viscount)*, 3 F. & F. 527. And see *Freer v. Marshall*, 4 F. & F. 485.

**Grant of Booty by Royal Warrant to Secretary of State "in Trust" to distribute.]**—Her Majesty by royal warrant "granted" booty of war to the secretary of state for India in council "in trust" to distribute amongst the persons found entitled to share it by the decree of the judge of the Court of Admiralty, to whom the matter had been referred by the sovereign for that purpose, with a direction that doubts should be finally determined by the secretary of state unless her Majesty should otherwise order. An action having been brought against the secretary of state for India in council by K., on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue:—Held (reversing the decision of Hall, V.-C.), that the warrant did not operate as a transfer of property or create a trust; and that the defendant, being merely the agent of the sovereign to distribute the fund, was not liable to account to any of the parties found entitled. *Kinlock v. Secretary of State for India in Council*, 15 Ch. D. 1; 49 L. J., Ch. 571; 42 L. T. 667; 28 W. R. 619—C. A.

**Carriage—Exemption from Toll.]**—By s. 86 of the Mutiny Act, 39 Vict. c. 8, a toll collector is made liable to a penalty if he shall demand and receive toll "for any carriages or horses belonging to her Majesty, or employed in her service, under the provisions of this act." By s. 68, for the regular provision of carriages for her Majesty's forces and their baggage in their marches, power is given to constables, upon warrants issued by justices within their several jurisdictions, to provide carriages and horses, for employment in her Majesty's service; and the section proceeds to enact how and under what circumstances this can be done. An officer in her Majesty's service, in pursuance of an order to proceed from his official residence at one place to another in the Isle of Wight, made a part of the journey in uniform in his own dogcart, drawn by his own horse, and upon arrival at a toll bar he was charged a toll in respect of his carriage, which he paid under protest. It was necessary that he should have a carriage to take several official books and things he was directed by order to take to his destination, and if he had hired a carriage the cost of hiring would have been allowed to him. Having been convicted by justices under s. 86 for taking this toll:—Held, that s. 86 only exempted carriages employed under and by virtue of s. 68, and that the carriage in question was therefore not employed in her Majesty's service under the provisions of the act, and that the conviction was accordingly wrong. *Hinds v. Thring*, 36 L. T. 216.

Sect. 72 of the Mutiny Act of 1864, 27 & 28 Vict. c. 3, which exempted from liability to toll her Majesty's officers and soldiers on duty, and on their march, from the payment of any duties and tolls while passing along or over any road or bridge, did not apply to a floating bridge kept in



its proper place by parallel chains laid across the bed of the river and propelled from one side of the river to the other side by means of steam power. *Ward v. Gray*, 34 L. J., M. C. 146; 11 Jur., N. S. 738; 12 L. T. 305; 13 W. R. 653.

And see VOLUNTEERS, *infra*.

#### b. Actions against.

**Superior Officer.**—An inferior officer cannot maintain an action against his superior officer in respect of any matter done by such superior officer in the discharge of his duty, but he must pursue the mode of redress prescribed by the articles of war. *Dawkins v. Paulet (Lord)*, 5 L. R., Q. B. 94; 39 L. J., Q. B. 53; 21 L. T. 584; 18 W. R. 336.

A military person cannot maintain an action against his officer for acts done by or under orders from his superiors, which they would have a right to give, and which he would be bound by military law to obey, unless, at all events, he has himself caused and procured such orders by means of reports or representations maliciously, or for some sinister and improper motive, and also without any reasonable or probable ground. And it is not enough, in order to shew malice, that the report is in some respects untrue in point of fact, unless it also appears to have been wilfully untrue, and without any reasonable ground. *Keighly v. Bell*, 4 F. & F. 763.

The circumstances that a person, having been arrested under such orders with a view to his trial, was detained in custody by the defendant for a considerable period without being brought to trial (orders to bring him to trial not having been received), and that during his confinement the nature of his custody was changed from open to close arrest, on representations from the superior civil authorities, and that his release was so arranged with them as to facilitate his arrest on civil process for a large debt due to the crown, are not sufficient evidence of any bad or sinister motive, such as would sustain an action, either by way of false imprisonment or malicious prosecution. *Id.*

An action lies by an inferior military officer against his superior officer (both being under martial law), who imprisons him for disobedience to an order made under colour, but not within the scope of military authority; although the imprisonment is followed by a trial by a court-martial. *Warden v. Bailey*, 4 Taunt. 67; and see *S. C. (in error)*, nom. *Bailey v. Warden*, 4 M. & S. 400; and *Dawkins v. Rokeby (Lord)*, *infra*.

A, being a captain in the navy, is accused by his commander-in-chief of neglect of duty, disobedience to orders, &c.; and being tried by a court-martial is honourably acquitted. A. then brings an action against his commander for a malicious prosecution:—Quere, will such an action lie? *Sutton v. Johnstone, (in error)*, 1 Bro. P. C. 76; 1 T. R. 493, 784. See *Warden v. Bailey*, 4 Taunt. 88, 89.

In an action against a commanding officer of the guards, for maliciously procuring the discharge of the plaintiff, a private soldier, it appearing that the commanding officer had absolute power to discharge private soldiers, and had so discharged the plaintiff, an amendment was directed, so stating the fact; and held that, there being reasonable ground for suspecting the plaintiff of felony, which had been committed, and the defendant having acted bonâ fide, he was

entitled to the verdict. *Freer v. Marshall*, 4 F. & F. 485; and see *Dickson v. Combermere*, 3 F. & F. 527.

**Reducing.**—An action will not lie for reducing a sergeant of the guards to a common soldier in Germany, the event having taken place out of the king's dominions. *Barwis v. Keppel*, 2 Wils. 314.

#### Evidence before Military Court is privileged.]

—An action will not lie against a witness for what he says when giving evidence before a court of justice. The same principle applies where a military man is bound to appear and give evidence before a military court of inquiry. *Dawkins v. Rokeby (Lord)*, 7 L. R., H. L. 744; 45 L. J., Q. B. 8; 33 L. T. 196; 23 W. R. 931.

A military court of inquiry may not be strictly a judicial tribunal; but where such court has been assembled under the orders of the general commanding in chief in conformity with the Queen's regulations for the government of the army, a witness who gives evidence thereat stands in the same position as a witness giving evidence before a judicial tribunal. *Id.*

Where the commander-in-chief directed a military inquiry to be held, to investigate the conduct of a commissioned officer in the army, who afterwards sued the president of such court of inquiry for a libel stated to be contained in his report, and transmitted by him to the commander-in-chief:—Held, that such a report was a privileged communication, and properly rejected as evidence at the trial, and that an office copy thereof was also inadmissible. *Home v. Bentinck (Lord)*, 4 Moore, 563; 2 B. & B. 130—Ex. Ch.

**Kidnapping Act—Seizure of Vessel.**—By the Kidnapping Act, 1872, s. 3, vessels carrying native labourers of the South Sea Islands, not being part of the crew, must have a licence; by s. 6, vessels carrying native labourers without a licence are subject to the provisions of s. 16; by s. 9, to detain or confine a native for the purpose of removing him from one place to another is declared to be felony; by s. 16, any vessel suspected upon reasonable grounds of committing an offence against the 9th section may be detained; by s. 20, no damages shall be payable and no officer shall be responsible for the detention or seizure of a vessel in pursuance of the act. Before the passing of the Kidnapping Act, 1872, the plaintiff's vessel sailed on a voyage to the South Sea Islands for the purpose of fishing; her master hired native labourers, and after the fishing was over the vessel was engaged in carrying the natives home when she was seized by a man-of-war, of which the defendant was commander. At the time of the seizure the defendant bonâ fide believed that there was reasonable ground for suspecting that an offence had been committed against the act:—Held, no action would lie against the defendant. *Burns v. Nowell*, 5 Q. B. D. 444; 49 L. J., Q. B. 468; 43 L. T. 342; 29 W. R. 39; 44 J. P. 828—C. A.

**Subsistence of Troop.**—A captain of a troop during the time of his absence, and while another officer is in the actual command of it, and by whom the orders for subsistence are issued, and the subsistence money is received from government, is not liable to pay for subsistence fur-

nished to the men, though he was entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. *Myrtle v. Beaver*, 1 East, 135.

Nor is the captain of a troop for which forage is furnished by the orders of a clerk appointed by such captain, liable for such forage, though present with the troop at the time, if it does not appear that he had received money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum, regulated by the returns of the preceding month. *Rice v. Chute*, 1 East, 579.

Otherwise, if at the time he had received the money from the paymaster. *Rice v. Eeritt*, 1 East, 583, n. And see *Davis v. Edgar*, 4 Taunt. 63.

**Knapsacks.**—The liability of the colonel of a regiment for knapsacks furnished to the regiment by his order, depends upon the question whether they were supplied upon his personal credit. Where the tradesman who furnishes necessaries to a regiment, looks to the regimental fund as the medium through which he is to obtain payment, though by the assistance of the colonel, the latter is not personally responsible. *Prosser v. Allen*, Gow, 117. And a new trial was granted after a verdict on a contrary supposition.

**Share of Mess.**—The officers of a regimental mess are only separately liable, each for his own share. *Brown v. Doyle*, 3 Camp. 51, n.

**Regimental School.**—The colonel of a regiment has no authority to order his sergeant to pay money towards lighting and warming a regimental school, and schoolmaster's salary. *Warden v. Bailey*, 4 Taunt. 67; and see *S. C. (in error)*, nom. *Bailey v. Warden*, 4 M. & S. 400.

**User of Rifle Ranges.**—Action against a lieutenant-general in command of troops to restrain an alleged nuisance to a neighbouring proprietor by the noise and vibration caused by the rifle practice of the troops under his command. The land on which the practice took place was vested in the secretary of state for war, and by various acts of parliament authority was given to use the land for military purposes. There was no allegation in the statement of claim that the defendant threatened to continue the nuisance, or that the military use of the land was unreasonable. It appeared also by the statement of claim that the defendant was not the owner of the land:—Held, that a threat to continue the nuisance was necessary in order to obtain an injunction; that the secretary of state for war was a necessary party; and that, as the land was vested in the secretary of state for war for military purposes by act of parliament, the court had no authority to interfere with his discretion, unless it could be proved that the use to which the land was put was, even for military purposes, unreasonable. *Hawley v. Steele*, 6 Ch. D. 521; 46 L. J., Ch. 782; 37 L. T. 625.

#### c. Pay, Commission, &c.

**Pay, Stopping.**—The king may at any time stop the half-pay of an officer in the army, by

signifying his pleasure that it shall no longer be paid. *Macdonald v. Steele*, Peake, 175.

— **Assignment.**—The future half-pay of an officer is not assignable. *Lidderdale v. Montrose (Duke)*, 4 T. R. 248; and see *Flarty v. Odium*, 3 T. R. 681.

Neither is the full pay of a military officer. *Barwick v. Reade*, 1 H. Bl. 627.

An assignment of the half-pay of an officer in the army is bad in law and in equity. *Stone v. Lidderdale*, 2 Anst. 533.

Though an officer's half-pay is not assignable at law, yet the use of it may be assigned in equity; and, when so assigned, the assignor cannot maintain an action, as money had and received to his use. *Stuart v. Tucker*, 2 W. Bl. 1137.

**Acknowledging Receipt.**—A plaintiff being representative of a deceased officer of artillery, of which corps the defendants were paymasters, they delivered to him an account current, in which they acknowledged themselves to have received, from 1806 to 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28th, 1806:—Held, that they could not, in 1821, be permitted to say that this admission was by mistake, as, in 1816, the Board of Ordnance had announced, that, by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it, this announcement of the board never having been communicated to the deceased by the defendants till 1821. *Skyring v. Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 C. & P. 517.

**Mortgaging Commission.**—An officer in the army cannot pledge or mortgage his commission. *Collyer v. Fallon*, 1 Turn. & Russ. 459.

The proceeds of the future sale of a commission can be assigned. *Suffolk (Earl) v. Cox*, 36 L. J., Ch. 591; 16 L. T. 374; 15 W. R. 732.

A lieutenant applied for permission to sell his commission. The purchase-money was paid by the intending purchasers to the regimental agent:—Held, that notice to the agent of an assignment of the purchase-money before it was received was of no avail. *Ib.*

A commission cannot itself be charged, but only its proceeds when realized; therefore incumbrances take priority according to the order of their notices to the army agent given after the proceeds are in the agent's hands. *Boss v. Hopkinson*, 18 W. R. 725.

— **Priorities.**—Several incumbrancers, giving notice to the agents on the morning when the proceeds were first payable, at the opening of their office, take according to the order of the dates of their incumbrances being effected. *Ib.*

An officer covenanted to assign to trustees for his creditors the proceeds of the future sale of his commission. Before the sale the trustees gave notice of this assignment to the army agents of the officer. Afterwards the officer was adjudicated a bankrupt, and subsequently to his bankruptcy his commission was sold, and the proceeds received by his agents, and handed over by them to his assignee in bankruptcy. Upon a bill filed by the trustees of the deed of assignment against the assignee:—Held, that since they had done all they could do to perfect the

assignment to them, they were entitled to the proceeds of the commission in priority to the assignee. *Glover v. Moore*, 39 L. J., Ch. 98; 21 L. T. 815.

— **Notices, when Given.**—When an officer retires from her Majesty's service, the amount in respect of his commission to which he is entitled under 34 & 35 Vict. c. 86, s. 3, "upon his retirement," though it has been previously lodged by the Army Purchase Commissioners with the army agents, and by them entered in their books under the officer's name, is not the money of the officer so as to be capable of being affected by notice from an incumbrancer to the army agents until the retirement is gazetted. So, where a first incumbrancer gave notice after the money was transferred by the Army Purchase Commissioners to the agents, and again gave notice five days after the Gazette. Second and third incumbrancers gave simultaneous notices on the day after the Gazette:—Held, that the order of priorities was: 1. Second incumbrancer; 2. Third incumbrancer; 3. First incumbrancer. *Johnstone v. Cox*, 19 Ch. D. 17; 45 L. T. 657; 30 W. R. 114—C. A. Affirming 16 Ch. D. 571; 50 L. J., Ch. 216; 43 L. T. 690; 29 W. R. 351.

The costs of all parties were ordered to be paid out of the fund. *Id.*

A lieutenant in 1870 assigned to the plaintiff the money to arise from the sale of his commission, and made other incumbrances upon it. The full purchase-money was 700*l.*, 250*l.* of which was paid by the succeeding lieutenant, and 450*l.* by the crown, who absorbed the ensigncy. The sum of 250*l.* was paid to the army agents before the 9th May, 1871. On the 9th May, 1871, notice of the retirement was given in the Gazette to date from the 10th. The plaintiff and D., another incumbrancer, gave notice to the army agents of their claims on the 10th. On the 13th May the army agents received an order from the Horse Guards directing them to transfer from the reserve fund 450*l.* to the retiring officer's account as the price of the ensigncy absorbed by the crown. D. then gave a second notice of his charge:—Held, that, previously to the 13th May, the army agents were not in a position to receive notice affecting the 450*l.*, and that as to this sum D.'s claims had priority to that of the plaintiff. *Addison v. Cox*, 8 L. R., Ch. 76; 42 L. J., Ch. 291; 23 L. T. 45; 21 W. R. 180.

An officer in the army, who had created several charges on the proceeds of the sale of his commission, was gazetted on the 7th December as having retired from his regiment by sale of his commission. The proceeds of the sale were lodged with the army agents on the same day, but the amount, after deducting regimental debts, did not become payable to the officer till the following morning. At half-past five p.m. on the 7th of December, after business hours, one of the incumbrancers left at the office of the army agents a written notice of his charge. On the opening of the office at nine o'clock on the following morning, several other incumbrancers served the army agents with notices of their charges:—Held, that the notice left on the evening of the 7th December must be taken to have been served simultaneously with the other notices, as it was not really received by the army agents until the following morning. *Calisher v. Forbes*, 7 L. R., Ch. 109; 41 L. J., Ch. 56; 25 L. T. 772; 20 W. R. 853.

Held, also, that, as all the notices must be taken to have been served simultaneously, the incumbrancers were entitled to rank according to the dates of their charges. *Id.*

One of the charges extended to further advances:—Held, that the incumbrancer holding that charge was entitled to tack on to it all further advances made by him without notice of any prior charges, but that he was not entitled to tack on a charge bought up from another incumbrancer. *Id.*

An officer in the army covenanted to assign to the trustees of a settlement any moneys which he might receive from the sale of his commission, and subsequently executed a second covenant to assign the proceeds to another person who had no notice of the settlement. The second assignee gave the first notice to the army agent of the regiment, but the trustees also gave notice before the fund reached the army agent's hands:—Held, that the trustees had priority. *Buller v. Plunkett*, 1 Johns. & H. 441; 30 L. J., Ch. 641; 4 L. T. 737.

— **Over Marriage Settlement.**—An officer, by his marriage settlement, covenanted that any moneys to be received from the sale of his commission should be paid over to the trustees. Afterwards, and before he obtained leave to sell out, he charged the proceeds of the sale with the payment of moneys due to the agents of his regiment, who had no notice of the settlement. Notice of the settlement was subsequently given to the agents. The officer afterwards sold out, and the agents received the regulation price of the commission from the purchasing officer:—Held, that their charge upon the proceeds of the commission had priority over that of the trustees. *Somers v. Cox*, 33 Beav. 634; 33 L. J., Ch. 490; 10 Jur., N. S. 351; 10 L. T. 181; 12 W. R. 590.

**Advance by Army Agents—Power to set off Balance due from Amount received as Value of Commission.**—K., an officer in the army, mortgaged to R., to secure 5,000*l.*, all moneys which should be realized by sale of his commission. In December, 1877, K. obtained leave to retire from the army, and his commission was valued at 3,000*l.*, which on the 6th of December, 1877, was paid by the Paymaster-General to C. & Co., the army agents of the regiment, and was carried to the deposit account kept by C. & Co. with the Army Purchase Commissioners, there to remain till K.'s retirement was gazetted. K. kept an account current with C. & Co. as his bankers, which was overdrawn to the amount of 647*l.* K.'s retirement was gazetted on the evening of the 18th of December, and as soon as C. & Co.'s office opened on the 19th, R. gave them notice of his security. R. having claimed payment of the 3,000*l.*, C. & Co. claimed to retain out of it the 647*l.*:—Held, by Bacon, V.-C., that C. & Co. received the 3,000*l.* as K.'s bankers, and had a banker's lien upon it for the balance due to them, and were, therefore, entitled to retain the 647*l.*:—Held, on appeal, that as soon as K.'s retirement was gazetted the 3,000*l.* became money had and received by C. & Co. for his use, and for which he could have brought an action at law; that they had a right to set off the balance due to them against this demand; that this set-off was equally available against R., of whose security C. & Co. had no notice until after their right to set-off had arisen; and that, therefore, inde-

pendently of any question of banker's lien, *C. & Co. v. Co.* were entitled to retain the 647*l.* *Roxburghe v. Co.*, 17 Ch. D. 520; 50 L. J., Ch. 772; 45 L. T. 225; 30 W. R. 74—C.A.

— **To Infant—Lien.**—An infant obtained an advancement out of a fund in settlement for purchase of a commission in the army, which was accordingly actually bought; the infant was gazetted, and reported himself at headquarters, but never entered on his duties. Having procured leave of absence, he sold his commission, being very much embarrassed and threatened with arrest. Previously to the sale he had obtained from the army agent of the regiment advances for an outfit, which he never bought, and also for regimental dues and stoppages. The infant had never intended to join, but had merely taken up his commission for the sake of the advancement:—Held, first, that army agents had a lien on the proceeds of the sale of the commission remaining in their hands, for such advances. *Lawrie v. Banks*, 4 Kay & J. 142; 27 L. J., Ch. 265; 4 Jur., N. S. 299.

Held, secondly, that in the absence of fraud, the money, having been once actually advanced for the benefit of the infant, became his money and could not be restored to the trust fund. *Ib.*

— **Regulation Price.**—Where a plaintiff, who was not an authorised army agent, negotiated the sale and purchase of a commission between G. and the defendant, at a price above that allowed by the regulations, and the defendant, who was the purchaser of the commission, after having paid a sum exceeding the regulation price to G., retained 38*l.*, the remainder of the price agreed upon, with directions from G. to pay it over to the army agent for his agency, which he promised the plaintiff to do:—Held, that he could not recover against the defendant the 38*l.* as money had and received to his use, for he could not be in a better situation than G.; and by 48 Geo. 3, c. 15, s. 100, G. could not have recovered beyond the regulation price. *Davis v. Edgar*, 4 Taunt. 63.

**Purchase of Commission—Settlement of Fund for Purchase of Promotion.**—By a settlement a fund was directed to be held upon trust to pay the income to an officer in the army until an opportunity should occur for applying it for or towards his promotion in the army, and then to sell out the same and apply the proceeds for or towards such promotion; but if the officer should happen to die before such promotion, leaving his wife him surviving, then to hold the fund in trust for her, but if she should be then dead, then in trust for her father. The wife having died, and promotion by purchase having been abolished:—Held, that the officer was not entitled to the fund, except for his life. *Cator v. Drew*, 22 W. R. 248.

— **Bequest for—Performance Impossible.**—A testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favour of his nieces, their husbands, and children. He then declared that for making a further provision for the maintenance of his nephew, it should be lawful for his trustees, during the life of his sister-in-law upon her

request in writing, to expend any sums not exceeding 6,500*l.* in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army. After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid 600*l.* for the exchange and 550*l.* for horses and outfit; after which, in May, 1868, his mother signed and sent a formal request to the trustees, desiring that the whole of the 6,500*l.* with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son. From the 1st of November, 1871, purchase of commissions in the army was by royal warrant abolished:—Held, that the nephew was entitled to the full sum of 6,500*l.*, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty. *Palmer v. Flower*, 13 L. R., Eq. 250; 41 L. J., Ch. 193; 25 L. T. 816; 20 W. R. 174. *Distinguished next case.*

But when by a separation deed a sum of money was directed to be held by trustees for the wife for life, and after her death, as to four sixth parts, for W., one of the children of the marriage, who was then an officer in the army, during his life, and after his death for his children, and it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding 2,000*l.*, in or towards effecting the promotion of W. in the army, and the trustees applied 850*l.* in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army, no further sum could be applied for the same purpose:—Held, that the purpose for which the power was given to the trustees having failed, the residue of the 2,000*l.* could not be raised and applied in any manner for the benefit of W. *Ward, In re*, 7 L. R., Ch. 727; 20 W. R. 1024.

— **Advance for.**—A sum of money was paid by A. to B. for purchasing C.'s promotion in the army, and it remained unapplied in the hands of B. at the death of A. C. having been compelled, from the bad state of his health, to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche v. Kilmory (Lord)*, 1 Turn. & Russ. 207.

A sum paid for the purchase of a commission for a son is an advance within the meaning of the Statute of Distributions. *Boyd v. Boyd*, 4 L. R., Eq. 305; 36 L. J., Ch. 877.

**Trafficking in Commissions.**—A resignation for a pecuniary consideration, of the position of major in a regiment in the East India Company's service is illegal, by 49 Geo. 3, c. 126, s. 4, and security for payment of the money is void. *Greene v. Wroughton*, 11 Ex. 146; 24 L. J., Ex. 265; *S. P.*, *Eyre v. Forbes*, 12 C. B., N. S. 191.

To an action for the price of a volunteer's uniform, the defendant pleaded that the contract was corruptly entered into in violation of 49 Geo. 3, c. 126, with intent that he might have a military commission:—Held, that the plea disclosed no illegality. *Eticke v. Jones*, 11 C. B., N. S. 631; 8 Jur., N. S. 843.

**Proof of Commission.**—At the trial of an officer on an information for defrauding government by false returns of musters, it was held

sufficient to prove that he acted in the character mentioned in the information without proving his commission from the king. *Rez v. Gardner*, 2 Camp. 513.

**Assigning Pensions.**—By sect. 4 of 47 Geo. 3, sess. 2, c. 25, an assignment of a pension granted by the crown to a military officer, on his retirement from service, is void. *Lloyd v. Cheetham*, 3 Giff. 171; 30 L. J., Ch. 640; 7 Jur., N. S. 1272; 4 L. T. 576; 9 W. R. 924.

But this statute does not apply to a pension granted by the East India Company. *Heald v. Hay*, 3 Giff. 467; 31 L. J., Ch. 311; 8 Jur., N. S. 379; 5 L. T. 740; 10 W. R. 264; *S. P., Carew v. Cooper*, 4 Giff. 619; 33 L. J., Ch. 289; 10 Jur., N. S. 11; 9 L. T. 641; 12 W. R. 198, 767; but on appeal the case was compromised; see 10 Jur., N. S. 429; 13 W. R. 586.

## 2. PRIVATES.

**Authority over.**—A member of the Army Works Corps, who served as such in the Crimean war, under an agreement with the Government, although subject to the Mutiny Act, 19 & 20 Vict. c. 10, was not a soldier so as to enable him to claim a discharge according to the articles of war. *Cook v. Paxton*, 4 H. & N. 368; 5 Jur., N. S. 390.

The Mutiny Act and the articles of war apply only to her Majesty's forces. *Wolton v. Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73; 15 Jur. 329.

An enlistment on a Sunday is not void under 29 Car. 2, c. 7. *Ib.*

A person, receiving enlisting money, knowing it to be such, from a soldier who had been enlisted three weeks before, and had been employed in the recruiting service by a non-commissioned officer, and had belonged to a recruiting party for three weeks, the time within which he ought to have been attested, in pursuance of 10 & 11 Vict. c. 12, s. 55, being four days:—Held, that such soldier must be presumed to have been attested, and that the fact that he intended to have taken the recruit to be attested before a borough justice, instead of a county justice, the former not having authority to attest the recruit, afforded no counter presumption. *Ib.*

The receiving pay as a soldier subjects the receiver to military jurisdiction. *Grant v. Gould*, 2 H. Bl. 69.

**Duty as Citizens.**—A soldier is gifted with all the rights of other citizens, and is bound to all their duties, and he is therefore as much bound to prevent a breach of the peace or a felony as any other person. If it is necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. *Burdett v. Abbott*, 4 Taunt. 449. And see *S. C.*, 5 Dow, 165; 14 East, 1, 154.

**Enlistment.**—A volunteer in a militia regiment was brought before a deputy-lieutenant to be attested. A form of questions supplied from the War Office for the attestation of militia volunteers was used, and answered by the volunteer. One of the questions was, "Have you ever served in the army?" To which he answered "No."

He was then sworn, and received the bounty money. But it was afterwards discovered that he had previously been enrolled in and discharged from another militia regiment. The questions in the schedule to the Mutiny Act which are to be put to recruits for the line by justices of the peace on attestation differ from those in the form used in the case of a volunteer; but the question, "Have you ever served in the army?" occurs in both:—Held, that he could not be convicted, upon an indictment framed under 18 & 19 Vict. c. 11, s. 57, of making a false representation of a particular contained in the oaths and certificates in the schedule to the act annexed before the justice at the time of his attestation, and of obtaining enlisting money or bounty for entering into her Majesty's service. *Reg. v. Jessup*, Dears. C. 619; 25 L. J., M. C. 54; 2 Jur., N. S. 215.

Where A. applied to two soldiers, a drummer and a private, to enlist him, which they at first refused, but afterwards the drummer gave him a shilling for that purpose, and on A.'s wanting to go away they detained him:—Held, that the drummer had no authority to enlist A., and therefore no right to detain him. *Rez v. Longden*, R. & R. C. C. 228; 1 Russ. C. & M. 439.

**Deserters—Rule for Discharge.**—Where, in a return to a habeas corpus, it is alleged that the prisoner is detained as a deserter by virtue of 5 & 6 Vict. c. 12, s. 22, it must also be alleged that "he is a soldier, and ought to be with his corps." *Douglas, In re*, 3 G. & D. 509; 3 Q. B. 825; 12 L. J., Q. B. 49; 7 Jur. 39.

It is necessary to serve a rule nisi for the discharge of a prisoner, who is in custody under a warrant for assisting to conceal a deserter, contrary to the Mutiny Act, on the secretary at war. *Gale, Ex parte*, 3 D. & L. 114; 14 L. J., Q. B. 316; 10 Jur. 334.

**Detention of.**—By the 20th Article of War, no officer commanding a guard shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer, who shall at the same time deliver an account in writing, signed by himself, of the crime with which the prisoner is charged:—Held, that a commanding officer receiving a soldier charged with desertion by a non-commissioned officer, who at the same time delivered a written charge of the crime, signed by himself, was justified under that article in detaining the prisoner, although he had not been taken before a magistrate, and a warrant had not been obtained for his detention. *Wolton v. Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73; 15 Jur. 329.

**Expenses of Commitment.**—A justice, before whom a deserter is brought, and by whom committed to the county gaol, may, if the deserter is unable to bear the charges himself, direct the expenses of conveying him thither to be paid by the treasurer of the county to the constable of the parish who found and apprehended him in the parish and conveyed him to the gaol. *Rez v. Pierce*, 3 M. & S. 62.

**Carriage of Baggage by Railway Companies.**—Public baggage, stores, arms, &c., sent by railway, in charge of any of her Majesty's forces specified in 7 & 8 Vict. c. 85, s. 12, is their baggage, no matter what may be the disproportion

between the amount of baggage and the number of the force in charge of it, and must be carried by a railway company at the rates imposed by that section. *Att.-Gen. v. Great Southern and Western Railway Company*, 14 Ir. C. L. R. 447.

**Bastard Children.**—A soldier was indictable for disobeying an order of justices requiring him to support his bastard child; *Reg. v. Ferrall*, 2 Den. C. C. 51; T. & M. 390; 20 L. J., M. C. 39; 15 Jur. 42: but since the decision the Annual Mutiny Act has expressly absolved him from this liability, and a similar exemption exists with respect to the marines, see 44 & 45 Vict. c. 58, s. 145.

A soldier having been committed under a magistrate's warrant for deserting his children, and leaving them chargeable to the parish, the court, on the application of the crown, ordered his discharge. *Reilly, In re*, 4 Ir. C. L. R. 250.

### 3. MILITIA.

**Ballot.**—Under the Militia Acts, 42 Geo. 3, c. 20, and 47 Geo. 3, c. 71, if a person balloted was found at the time of enrolment to be unqualified for the service, and another was balloted in his place out of the same list, this was a continuance of the same ballot, and was a legal ballot. *Astley v. Ray*, 2 Taunt. 214.

**Privilege.**—An attorney is not privileged from serving in the militia, or paying for a substitute in his stead. *Gerrard's case*, 2 W. Bl. 1123.

**Insurance against Drawing.**—If A., in consideration of a premium, undertakes to insure B. against being drawn for the militia under a particular statute, until a certain day; and represents that, on that day, all balloting under the statute will be completely secured by the insurance against the operations of the statute, A. is not thereby bound to indemnify B. in consequence of his being drawn for the militia under the statute, after the above-mentioned day; but, on account of the misrepresentation, the contract is void, and B. may recover back the premium. *Duffell v. Wilson*, 1 Camp. 401.

**Qualification of Officer.**—A captain in the militia, receiving his pay and contingent allowances before his qualification was properly authenticated, was not executing any power directed by 42 Geo. 3, c. 90, to be executed by captains, so as to bring him within the penalty of the fourteenth clause; the receipt of such pay and allowances not being provided for by that statute, even if any other than acts of military discipline were intended to be so prohibited. *Robinson v. Garthwaite*, 9 East, 296.

In an action for a penalty, under 2 Geo. 3, c. 20, s. 16, for acting as a major of militia without being duly qualified, it was sufficient to aver that the defendant acted as such major, "not being in any manner qualified by the laws and statutes of the realm." *Roberts v. Irvine*, 3 Dougl. 194.

**Substitutes.**—A substitute must be considered as a militiaman. *Rea v. Aston*, 2 Burr. 1149.

The parish to which the principal militiaman

belongs is liable to reimburse the parish of the substitute the expenses of maintaining the substitute's family; though the substitute had more than one child when he was approved by the deputy-lieutenants, and inrolled. *Rea v. Willis*, 6 T. R. 179.

A substitute in the militia fraudulently and falsely declaring at the time of his enrolment, that he had no wife or family, when in fact he had a wife and one child, was not entitled to any parochial allowance for their relief under 43 Geo. 3, c. 47, ss. 2, 5. *Rea v. Preston*, 13 East. 313.

Under 43 Geo. 3, c. 47, it was the duty of the county treasurer who reimbursed payments made by overseers to the families of militiamen, to transmit an account of such reimbursements to the treasurer of the county for which such militiamen were serving. But it was not his duty to demand the amount or to take legal proceedings for obtaining payment, or to notify to the justices of the sessions the transmission of such account, and neglect of payment, or to transmit to the justices of the sessions an account of similar payments made by himself to the treasurer of another county, that they might make orders for repayment upon the overseers of the parishes for which such militiamen were serving. *Farr v. Hollis*, 4 M. & R. 230; 9 B. & C. 315.

**Liability of Officers to Poor Rates.**—See RATES.

### 4. VOLUNTEERS.

**Power of Commanding Officer to dismiss Member.**—Under the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21, subss. 1, 2, the ordinary commanding officer of a volunteer corps which forms part of an administrative battalion is authorized to dismiss a member from the corps for breach of discipline, although the corps is at the time assembled in camp with the rest of the administrative battalion under the general command of the battalion commander. *Tombs v. Magrath*, 5 Q. B. D. 548; 49 L. J., M. C. 75; 41 L. T. 533; 28 W. R. 814; 44 J. P. 552.

**Resignation.**—Members of volunteer corps inrolled under the regulations of 42 Geo. 3, c. 66, are entitled to resign on due notification of such their intention; not being restrained from such liberty of resignation by the rules of the corps, or its conditions of service; and this liberty was not taken away by 43 Geo. 3, c. 95, which distinguished between volunteer corps and volunteers under that act; that is, such as offered themselves voluntarily to serve in lieu of the compulsory levy. And 43 Geo. 3, c. 121, attached only on corps of volunteers at the time of an actual invasion. *Rea v. Dowley*, 4 East, 512; 1 Smith, 153.

**Liability of Rifle Corps for Uniforms.**—A promoter of a volunteer rifle corps may be liable to a tailor for uniforms supplied to the corps on the orders of the committee, although in the tailor's books the corps is debited, the question of liability being for the jury on the whole of the evidence, supposing there is any evidence of the defendant's concurrence in the orders given. *Cross v. Williams*, 7 H. & N. 675; 31 L. J., Ex. 145; 6 L. T. 675; 10 W. R. 302.

**Inrolment.**—It was not necessary, in order to make a man inrolled as a volunteer an effective member of his corps, that he should have taken the oath of allegiance required by 44 Geo. 3, c. 54, s. 20. *Rea v. Witnesham*, 4 N. & M. 447; 2 A. & E. 648; 1 H. & W. 43.

**Position.**—A commission of captain of volunteers, signed by the lord-lieutenant of a county, does not confer the degree of an esquire. *Talbot v. Eagle*, 1 Taunt. 510.

**Exemption from Turnpike Tolls.**—Volunteers in uniform, going to attend a mere voluntary rifle match, at a duly appointed place of rifle practice, but open to all the world, are not entitled to exemption from toll under 24 & 25 Vict. c. 126. *Teather v. Turner*, 7 L. T. 785; 11 W. R. 425.

A yeomanry non-commissioned officer is not a volunteer, within 26 & 27 Vict. c. 65. *Humphrey v. Bethell*, 1 L. R., C. P. 215; 12 Jur., N. S. 212; 13 L. T. 797; 14 W. R. 457; 1 H. & R. 221.

He is not, therefore, entitled to the exemption from toll granted to volunteers driving to their place of exercise. *Ib.*

**Nature of Carriage.**—*See* REGULAR OFFICERS, *supra*.

**Toll at Floating Bridge.**—*Ib.*

#### 5. BILLETING.

**In what Cases.**—A deputy high constable, appointed by parol only, may billet soldiers, under the Annual Mutiny Act. *Midhurst v. Waite*, 3 Burr. 1259; 1 W. Bl. 350.

The foot guards may be billeted all over the kingdom, as well as the other troops. *Rea v. Calcart*, 7 T. R. 724.

Horses employed in drawing artillery are billeteable, whether they belong to the ordnance or are furnished for the service by contract. *Read v. Willan*, 2 Doug. 422.

#### 6. COURTS-MARTIAL.

**Who may Act.**—It is not incident to the duty of the office of a commander-in-chief of a squadron to hold a court-martial on an inferior officer. *Johnstone v. Sutton (in error)*, 1 T. R. 493. Affirmed in Dom. Proc. 1 T. R. 784; 1 Bro. P. C. 76.

**Prohibition to.**—The court will not direct a writ of prohibition to a court-martial merely because the facts which establish the military offence disclose at the same time a greater offence (ex gratia, high treason) cognizable by the civil courts, provided a military offence is clear upon the evidence. *Reg. v. M'Carthy*, 14 W. R. 918.

Courts-martial in this country have jurisdiction over all persons receiving pay as soldiers, but are liable to the controlling authority which the courts of Westminster shall from time to time exercise for the purpose of preventing them from exceeding their jurisdiction. *Grant v. Gould*, 2 H. Bl. 69.

The court will not grant a prohibition to prevent the execution of the sentence of a court-martial passed against A., who has received pay as a soldier (but assumed the military character

merely for the purpose of recruiting in the usual course of that service), though the proceedings of the court-martial appeared to be in some instances erroneous. *Ib.*

A writ of prohibition cannot issue to a court-martial after sentence pronounced by the court and ratified by his Majesty, and execution by dismissal from the army, in pursuance of such sentence. *Poe, In re*, 2 N. & M. 636; 5 B. & Ad. 681.

**Certiorari.**—An officer was tried by court-martial, and sentenced to be dismissed from the army. He applied for a certiorari, to bring up the record of the conviction, alleging that the proceedings of the court which tried him were without jurisdiction:—Held, that as none of his civil rights were affected by the proceedings of the court-martial, but only his military status, the court could not interfere. *Mansergh, Ex parte*, 1 B. & S. 400; 30 L. J., Q. B. 296; 7 Jur., N. S. 825; 4 L. T. 469; 9 W. R. 703.

The court has no jurisdiction to quash the proceedings of a court-martial holden in India, although the documents are in the custody of the judge-advocate of England. *Ib.*

**Time for Trial—Habeas Corpus.**—The court granted a rule nisi for a habeas corpus, on behalf of an officer under military arrest for charges of misconduct, on an affidavit complaining that he had not been brought to trial, pursuant to the 23rd article of war, as soon as a court-martial could be conveniently assembled; but, it being stated upon the affidavit of the judge-advocate general in answer, that proceedings were instituted as soon as could conveniently be, and according to the course of office, and that the trial had been postponed partly on account of the absence of the prisoner's witnesses, the court discharged the rule. *Blake's case*, 2 M. & S. 428.

**Punishment Abroad—Legality.**—By the Mutiny Act, the king may make articles of war, and constitute courts-martial, with power to try and punish, as well in Great Britain as in Gibraltar. By a subsequent clause, no soldier shall, by such articles of war, be subject to the punishment of death, or loss of limb, within Great Britain (omitting Gibraltar) for any crime not expressed to be so punishable by the act. Then, by the articles of war, persons found guilty by a court-martial at Gibraltar, of theft, robbery, or of having used violence, or committed any offence against the persons or property of others, "shall suffer death, or such punishment, according to the nature and degree of the offence, as by the sentence of such court-martial shall be awarded:—Held, that a court-martial had a discretionary power by such words, and was not restricted to pass such sentence on a delinquent as would be warranted by the law of England. *Rea v. Suddis*, 1 East, 306.

**Place of Imprisonment.**—By the Mutiny Act, 20 & 21 Vict. c. 13, s. 38, the place of imprisonment of persons under sentence of general courts-martial shall be appointed by the officer commanding the district:—Held, that a person imprisoned under sentence of a general court-martial in any place other than the place appointed by the officer commanding the district was entitled to be discharged summarily by habeas corpus, unless the officer commanding

the district shall have changed the place by his order in writing under the provisions of sect. 41. *Allen, Ex parte*, 30 L. J., Q. B. 38; 7 Jur., N. S. 234; 3 L. T. 468; 9 W. R. 99.

**Perjury at.]**—Semble, that taking a false oath before a court-martial is perjury at common law. *Reg. v. Heane*. 4 B. & S. 947.

**Evidence.]**—Courts-martial are bound by the same principles and rules of evidence as the courts of law; and their proceedings, where not otherwise regulated by statute, must be in accordance therewith. *Ship Bounty*, 1 East, 312, n.; *Stratford's Case*, 1 East, 313.

**Proceedings at, Privileged.]**—See *Dawkins v. Rokeby (Lord)*, 7 L. R., H. L. 744; 45 L. J., Q. B. 8; 33 L. T. 196; 23 W. R. 931. *S. P., Home v. Bentinck (Lord)*, 4 Moore, 563; 2 B. & B. 130—*Ex. Ch., supra*.

#### 7. ARMY AND NAVY AGENTS.

**Charges.]**—By 59 Geo. 3, c. 111, army agents were entitled to make the usual charge for passing accounts before that act; and were also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. *Drury v. Atkins*, Tamlyn, 75.

**Liability—Commission.]**—An army agent is responsible for the price of commissions sold by him for an officer on foreign service. *Sturdy v. Ross*, 1 Esp. 450.

And as to **Rights to Commission Moneys**, see **PAY AND COMMISSION, supra**.

**Discovery at suit of Crown.]**—Information, under 4 Geo. 3, c. 58, by the crown, against an army agent for a discovery and production of documents with a view to an account. *Pleas*, that the accounts had been settled and closed at the war-office, by the issuing of the clearing warrants, and that the moneys imprested in the agent's hands for the pay or arrears of pay of officers, were held by him as the banker or private agent of the officers by whom he was appointed; and that for such moneys he was not accountable to the crown:—Held, that both the pleas were bad, for that the clearing warrants did not purport on the face of them to be a final settlement of accounts, and that an army agent was a public officer, and was accountable to the crown for moneys received by him for the pay and arrears of pay of officers. *Deare v. Att.-Gen.*, 2 Dow & C. 377.

**Partners.]**—A person, coming in as a partner in the business of navy agents, in general takes the joint liability of debts owing to a customer by the old firm, although the customer may be wholly unaware of his having joined the concern. *Scott v. Beale*, 6 Jur. N. S. 559.

## ARRAIGNMENT.

See CRIMINAL LAW.

## ARREST.

### I. ON MESNE PROCESS.

1. *Debtor quitting England*.
2. *Of Bankrupts*, 443.
3. *For what Debt or Damages*, 445.
4. *Affidavit of Cause of Action*, 447.
  - a. Form of, 447.
  - b. Must be Positive, 448.
  - c. Defendant's Benefit, 449.
  - d. Defendant's Request 450.
  - e. Agreements, 451.
  - f. Awards, 452.
  - g. Bills and Notes, 453.
  - h. Bonds, 455.
  - i. Other Causes of Action, 455.
  - j. Defects in, 458.
5. *Application for Order*, 458.
6. *Writ of Capias*, 459.
7. *Rescinding Order*, 460.
  - a. Jurisdiction, 460.
  - b. Grounds, 462.
8. *Maliciously obtaining Order*, 463.

### II. MANNER OF ARREST.

1. *By whom, where, and when.*—See **SHERIFF**.
2. *What amounts to an Arrest.*—See **SHERIFF**.
3. *Deposit of Money with Sheriff.*—See **BAIL**.

### III. ARREST IN OTHER CASES.

1. *In Criminal Cases.*—See **CRIMINAL LAW**.
2. *On Crown Process.*—See **REVENUE**.
3. *On final Process.*—See **SHERIFF**.
4. *Of Clergymen.*—See **ECCLESIASTICAL LAW**.

### IV. PRIVILEGE FROM ARREST.—See EXECUTION.

### I. ON MESNE PROCESS.

#### 1. DEBTOR QUITTING ENGLAND.

**Grounds for believing that Debtor is about to quit, Sufficiency of.]**—It must be shewn that there is reasonable ground to believe that the defendant is about to quit England to avoid the plaintiff's action. *Harvey v. O'Meara*, 7 D. P. C. 725; 3 Jur. 629.

Suspicion merely that he is about to leave England is not sufficient. *Id.*

It is not a sufficient excuse to prevent the granting of a capias, that the defendant is an officer in the army, and is going abroad to join his regiment. *Larohin v. Willan*, 4 M. & W. 361; 1 H. & H. 332; 7 D. P. L. 11; 2 Jur. 970.

An affidavit, that the defendant was a lieutenant in the 78th regiment of foot, which regiment is under orders to embark for India; and deponent believes, and has no doubt, that it is his intention to embark with his regiment, and quit England, on military service, for India, is sufficient. *Askenheim v. Colegrave*, 2 D. & L. 642; 13 M. & W. 620; 14 L. J., Ex. 113; 9 Jur. 117.

A person domiciled in Ireland, and about to return to that country, after a temporary sojourn in England, is liable to be held to bail as a person about to quit England. *Lamond v. Elffe*, 3 G.



& D. 256; 3 Q. B. 910; 12 L. J., Q. B. 12; 6 Jur. 1038.

But a captain of a steamer trading between an English port and Hamburg, and about to depart on one of his regular voyages, is not. *Atkinson v. Blake*, 1 D., N. S. 849; 6 Jur. 1113.

An attorney about to quit England may be arrested notwithstanding his being an officer of the court. *Thomson v. Moore*, 1 D., N. S. 283; 5 Jur. 1009; *S. P.; Flight v. Cooke*, 1 D. & L. 714; 8 Jur. 125.

It is not necessary for a deponent to swear to his own belief that the defendant is about to leave the country. *Willis v. Snook*, 8 M. & W. 147; 5 Jur. 579.

An affidavit that the deponent has been informed and believes that the defendant is about to leave England, without stating from whom he obtained the information, is not sufficient. *Graham v. Sandrinelli*, 16 M. & W. 191; 4 D. & L. 317; 16 L. J., Ex. 67.

But an order may be made on an affidavit of the plaintiff, that he has been informed and believes that the defendant is about to leave England, provided the name and description of the person from whom he has received such information are stated. *Gibbons v. Spalding*, 11 M. & W. 173; 2 D., N. S. 811; 7 Jur. 21.

A party was held to bail on an affidavit, that he had obtained money at the Cape of Good Hope by means of a forged letter, and having been charged with such forgery before a magistrate here, had been discharged, on the ground that the offence was not shewn to have been committed in this country; that it was believed that evidence would be obtained of offences committed in this country; and that the parties therefore believed that it was his intention immediately to quit this country. He applied to the court to be discharged. He did not deny the charges, but swore that he did not intend to quit England. The court refused to discharge him. *Ross v. Montefiore*, 1 H. & N. 722.

**Duration of Absence.]**—The principle by which the judges are guided in granting a *capias* is, to consider whether the defendant's contemplated absence is likely to last for such a time that when the plaintiff, in the usual course of law proceedings, shall be entitled to take the defendant's body in execution, he is not, in consequence of such absence, likely to be forthcoming. *Larchin v. Willan*, 4 M. & W. 351; 1 H. & H. 322; 7 D. P. C. 11; 2 Jur. 970.

**Intention to leave at once must be shewn.]**—A defendant arrested gave bail to the sheriff, and shewed that he had no intention of leaving England at the time when the arrest took place, although he intended to do so in about two months afterwards:—Held, that the arrest was premature, and that the bail-bond must be cancelled; although the plaintiff's affidavits stated that in consequence of a commission to examine witnesses abroad no final judgment could be obtained before the expiration of that period. *Pegler v. Hislop*, 1 Ex. 437; 5 D. & L. 223; 17 L. J., Ex. 53; 11 Jur. 996.

## 2. OF BANKRUPTS.

**English—Who may Arrest.]**—If commissioners of bankruptcy issue a warrant to apprehend a bankrupt, and direct the warrant "To J. A. & W. S.

our messengers and their assistants," this warrant does not justify the apprehension of the bankrupt by any one who is not in the presence, actual or constructive, of J. A. or W. S.; and therefore B., who was the assistant of W. S. in his business of a sheriff's officer, is not justified in apprehending the bankrupt in the absence of W. S. & J. A., although B. has the warrant in his possession. *Rez v. Whalley*, 7 C. & P. 245.

**—Validity of Warrant of Commitment.]**—The concluding words of a warrant of commitment must be so limited as to have direct reference to the offence imputed in the preceding part; and therefore, where a commitment, after reciting that the bankrupt had surrendered, and that the commissioners examined him touching his trade, and caused such examination to be reduced into writing and read over to him, to which examination the bankrupt did refuse to sign his name (not having a reasonable objection to the wording thereof or otherwise), required the gaoler to detain the bankrupt in custody until such time as he should submit himself, and full answer make to the satisfaction of the commissioners, to all such questions as should be put to him, and sign and subscribe to such examination as aforesaid:—Held, void. *Leake, Ex parte*, 9 B. & C. 234; 3 Y. & J. 46.

A warrant directed to the messenger of the court, and to his assistants, and to the governor, or keeper of Her Majesty's gaol of the castle of York, is sufficient, without naming the messenger. *Lord, Ex parte*, 16 M. & W. 462; 16 L. J., Ex. 118; 11 Jur. 186.

A bankrupt applied for a habeas corpus, on affidavit, which set out the conclusion only of the warrant as follows: "which answers so given on the same several examinations as aforesaid, by" &c., "and the schedule by him referred to, and hereto annexed as part of this our warrant, not being satisfactory to us the commissioners, these are therefore to will," &c. It appeared from the affidavit that the bankrupt had been several times examined, but no part of any examination was there set out:—Held, that no defect appeared: it not being necessary that the warrant should further particularize the objections, and the examinations themselves not being brought before the court. *Davneey, Ex parte*, 4 Q. B. 668; 3 G. & D. 640; 12 L. J., Q. B. 239; 7 Jur. 555.

Since 8 & 9 Vict. c. 48, for the substitution of a declaration for an oath in bankruptcy, it is illegal for a commissioner to examine a bankrupt upon oath; and a warrant of commitment, stating that the bankrupt was duly sworn, is void. *Ramsden, In re*, 1 B. C. Rep. 133; 3 D. & L. 748; 15 L. J., Q. B. 234; 10 Jur. 879.

In a warrant for the committal of a bankrupt for not answering satisfactorily, it is sufficient to state, that the answers of the bankrupt, set out in the examination, are not satisfactory; it is not necessary to state which of them are not so. *Davneey, Ex parte*, 1 D. & L. 608; 12 M. & W. 271; 13 L. J., Ex. 165; 8 Jur. 829.

It is not necessary in a warrant of a commissioner in a district where there are two commissioners, for the committal of a bankrupt for not giving satisfactory answers to questions propounded to him touching matters relating to his trade, dealings and estate, to allege that the prosecution of the fiat was allotted to him the committing commissioner, or that his brother commissioner was absent at the time. *Ward, In re*, 1 B. C.

Rep. 127; 3 D. & L. 756; 15 L. J., Q. B. 233; 10 Jur. 433; *S. P. Ramsden, In re*, 1 B. C. Rep. 133; 15 L. J., Q. B. 234; 10 Jur. 879.

When a party complaining obtained a warrant for the apprehension of the party ordered to be committed, and delivered it to the officer by whom it was executed, and afterwards the party committed was discharged on his own application, and various orders were made founded on the commitment, and it afterwards appeared that the warrant was by an oversight not sealed:—Held, that the commitment was invalid, that the consequential orders ought to be discharged, and that the party committed was entitled to recover damages from the party obtaining the process. *Van Sandau, Ex parte*, 1 De Gex, 303.

**Scotch Fugitive.**—The 2 & 3 Vict. c. 41, s. 18 (similar to 19 & 20 Vict. c. 79, s. 47), empowered the Lord Ordinary to grant to the debtor a warrant of protection or liberation; and the warrant granting protection or liberation, or a copy thereof, certified by one of the bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in *meditatione fugæ*:—Held, that a departure from England, for the purpose of returning to Scotland, was not a *meditatione fugæ* within this exception, and that the debtor, having been arrested after such order of protection was granted, was entitled to his discharge. *McGregor v. Fischen*, 5 D. & L. 722; 17 L. J., Q. B. 186.

Where a Scotch bankrupt obtains a warrant of protection, and is afterwards arrested in England for a prior debt, the court is bound to discharge him, although it is alleged that the bankruptcy is fraudulent and collusive, and that there was no trading. *O'Brien v. Don*, 26 L. J., C. P. 96; 3 Jur., N. S. 318.

By 19 & 20 Vict. c. 79, s. 47, a warrant granting protection shall protect the debtor from arrest in Great Britain and Ireland, and her Majesty's other dominions, for civil debt contracted previous to the sequestration; but such warrant shall not be of any effect against the execution of a warrant of apprehension in *meditatione fugæ*:—Held, that the exception was not confined to the warrant in *meditatione fugæ* peculiar to Scotland, but extended to analogous process in other parts of the Queen's dominions. *Dutton v. Hally*, 2 B. & S. 748; 31 L. J., Q. B. 297; 7 Jur., N. S. 99; 7 L. T. 527.

Therefore, a Scotch debtor, who has obtained a warrant of protection, and comes to England, is liable to be arrested on a *capias* under 1 & 2 Vict. c. 110, s. 3, when he is about to leave this country for New Zealand. *Id.*

### 3. FOR WHAT DEBT OR DAMAGES.

**Under 1 & 2 Vict. c. 110, s. 3.**—A judge, by consent of the parties in a cause, ordered, that, on payment of the debt and costs, the costs down and the debt in six months, all further proceedings should be stayed. The defendant paid the costs in pursuance of the order:—Held, that the plaintiff could not, within the six months, obtain an order to arrest the defendant. *Ball v. Stanley*, 6 M. & W. 396; 8 D. P. C. 344; 4 Jur. 561.

Although it distinctly appears that he is about

to leave the kingdom, unless a stipulation reserving to the plaintiff the power of applying for a *capias* in that event is inserted in the first judge's order. *Id.*

Semble, where an affidavit discloses a cause of action for unliquidated damages only, it should specify the amount of damage sustained. *Bullock v. Jenkins*, 1 L. M. & P. 645; 20 L. J., Q. B. 90.

Where, however, a judge had granted an order upon an affidavit which did not contain such a statement, the court refused to rescind the order, or to discharge the defendant out of custody; as the judge might have been satisfied upon the facts, that the plaintiff had sustained damage to the amount for which he had ordered the defendant to be held to bail. *Id.*

A *capias* is not grantable in an action by indorsee of a bill of lading against the master of the vessel, for a deceit in the representation in the bill of lading signed by him, that the goods were shipped in good order and well-conditioned. *Gadsden v. M'Lean*, 9 C. B. 283, *sed quære*. See 18 & 19 Vict. c. 111, s. 3.

A *capias* is an improper proceeding in an action on a *scire facias*. *Agassiz v. Palmer*, 1 D. & L. 18; 6 Scott, N. R. 603; 5 M. & G. 697; 12 L. J., C. P. 245; 7 Jur. 972.

A garnishee against whom a judgment creditor has obtained leave to proceed by writ calling upon him to shew cause why there should not be execution against him under the 17 & 18 Vict. c. 125, s. 64, cannot be held to bail or arrested under 1 & 2 Vict. c. 110, s. 2. *Horner v. Luff*, 3 B. & S. 818.

A party cannot be held to bail for arrears of a fee farm rent issuing out of premises situate in Scotland. *McKenzie v. Johnson*, 1 Scott, 694.

**Second Arrest for same Cause.**—A defendant was arrested for 70*l.*, but it appearing that to part of that amount the defendant had a defence under the Statute of Limitations, it was agreed that he should be discharged out of custody on giving a bill of exchange for 30*l.* drawn by a third person, and accepted by himself. The defendant having been arrested on the bill:—Held, that the defendant was not entitled to be discharged out of custody, as having been a second time arrested for the same debt. *Hamber v. Cooper*, 2 C., M. & R. 148; 3 D. P. C. 671; 1 Gale, 103; 5 Tyr. 718.

A foreigner resident abroad having been arrested during a visit to this country on an affidavit for money lent abroad, and having been discharged on the ground of a composition made abroad, and denied by the plaintiff, and having been again arrested on an affidavit on a promise in the agreement of composition, to pay the residue of the debt when he should be of ability, and the affidavits leaving the cause of action doubtful:—Held, that there was no sufficient ground for again discharging the defendant from custody, although there might be an equitable ground for reducing the amount of bail. *Barker v. Lindholt*, 11 W. R. 68.

**After Proceedings in Foreign and Colonial Courts.**—After an arrest in a foreign country, upon a judgment obtained there, the defendant, having escaped, may be arrested here in an action on that judgment. *Aliven v. Furnival*, 1 D. P. C. 614; *S. P., Maule v. Murray*, 7 T. R. 470.

There is no objection to an arrest here, after an arrest in a foreign country, where it does not

distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here. *Imlay v. Ellefsen*, 2 East, 453.

So one foreigner may arrest another in England for a debt which accrued in Portugal while both resided there, though the Portuguese law does not allow of arrest for debt. *De la Vega v. Vianna*, 1 B. & Ad. 284.

A defendant may be held to bail in this country notwithstanding proceedings had for the same cause of action in Scotland, such proceedings not enuring to deprive the party of his liberty there, and the debt being unsatisfied. *Sharp v. Johnson*, 2 Scott, 407.

#### 4. AFFIDAVIT OF CAUSE OF ACTION.

##### a. Form of.

**Intitling.**—An affidavit of debt sworn before a commissioner need not be intitled in any court. *Urquhart v. Dick*, 2 D. P. C. 17.

An affidavit, not intitled in any court, the jurat of which stated it to be sworn before a commissioner of Queen's Bench, Common Pleas and Exchequer, is sufficient. *Ferguson v. Mahon*, W., W. & D. 605.

An affidavit need not be intitled in the cause, if made before the writ of summons is sued out. *Schelleter v. Cohen*, 9 D. P. C. 277; 7 M. & W. 389; 5 Jur. 74.

It is no objection to an affidavit that it is sworn before the writ of summons is issued, and is headed with the name of the court, and also described in the heading as "between" the parties, designated in such heading as "plaintiff" and "defendant." *Hargreaves v. Hayes*, 5 El. & Bl. 272; 24 L. J., Q. B. 281; 1 Jur., N. S. 521.

Where a defendant was arrested by a wrong name, the affidavit to ground a motion that the bail-bond be delivered up to be cancelled must be intitled in the defendant's right name, "sued by the name of." *Finch v. Cucken*, 2 C. & M. 412; 2 D. P. C. 383; 4 Tyr. 285.

**Who may make.**—It is not necessary that the creditor should himself swear to the debt; it suffices for another person to swear positively that the defendant is indebted to the plaintiff, without shewing that the deponent is the agent of, or connected with, the plaintiff. *King v. Turner (Lord)*, 1 Chit. 58; *S. P., Pieters v. Luytjes*, 1 B. & P. 1; *Short v. Campbell*, 3 D. P. C. 487.

And without shewing the deponent's means of knowledge of the existence of the debt. *Holliday v. Laues*, 4 Scott, 354; 3 Bing. N. C. 541; 5 D. P. C. 485; 1 Jur. 151.

Consequently, it is no objection that it states that the plaintiff resides in a foreign country, and that it does not appear how the deponent could know that fact. *Andriani v. Morgan*, 4 Taunt. 231.

An affidavit made by a person, who described himself as agent and collector to the plaintiff, an hotel keeper, is sufficient. *Short v. Campbell*, 3 D. P. C. 487; 1 Gale, 60.

In an action by the assignees of a bankrupt, a positive affidavit, made by the clerk to the plaintiff's attorney, is sufficient. *Anon.*, 1 Chit. 58, n.

So an affidavit by a bankrupt, for his assignees. *Tucker v. Francis*, 4 Bing. 142; 12 Moore, 347.

##### b. Must be positive.

**Generally.**—An affidavit to hold to bail must shew on what account the debt became due. *Polleri v. De Souza*, 4 Taunt. 154; *S. P., Cooke v. Dobree*, 1 H. Bl. 10.

And the statement of the cause of action must be positive. *Van Maset v. Julian*, 1 Wils. 231; *S. P., Pomp v. Ludrigson*, 2 Burr. 655; *Champion v. Gilbert*, 4 Burr. 2126.

An affidavit, that the defendant is indebted "for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," is sufficient, without expressly stating that the debt is due from the defendant. *Symons v. Andrews*, 1 Marsh. 317; 5 Taunt. 752.

An affidavit for the price of goods guaranteed by the defendant, without shewing on what terms, or that the time for payment had expired, is bad. *Angus v. Robilliard*, 2 D. P. C. 90.

An affidavit to hold to bail, stating simply that the defendant is "well and truly indebted to the plaintiff for money lent and goods sold and delivered," is bad, as not stating the cause of action with sufficient precision. *Handley v. Franchi*, 2 L. R., Ex. 34; 36 L. J., Ex. 32; 15 L. T. 252; 15 W. R. 158.

**Reference to Documents.**—An affidavit by a third person, that the defendant is indebted to the plaintiff in certain sums, and that the deponent is more strongly and better assured that the said sums of money are due, by means of the deponent's having transmitted to him, and in his custody, certain documents, is sufficient. *Brown v. Phepoe*, 3 Dougl. 370.

So, a statement that the defendant "is indebted, as appeared by an account stated and under the defendant's own hand." *Anon.*, 1 Wils. 121.

So, "that the defendant is indebted in 20*l.* according to the bill delivered by the plaintiff to the defendant." *Williams v. Jackson*, 3 T. R. 575.

So, that the defendant is indebted on a bill of exchange, as "appears by such bill." *Rollin v. Mills*, 1 Wils. 279; *S. P., Bright v. Purrier*, 3 Burr. 1687; Bull. N. P. 269.

So that the defendant was indebted in such a sum, as the deponent computes it, is sufficient. *Moulthby v. Richardson*, 2 Burr. 1032.

**Executors.**—An affidavit by an executor stating the debt to be due, "as appears by the testator's books," is not sufficient, without the words "and which the deponent believes to be true." *Graham v. Hammond*, 2 B. & P. 298; *S. P., Sheldon v. Baker*, 1 T. R. 8.

**Partners.**—An affidavit for money lent by the plaintiff and his late copartners, C. and D., is insufficient, inasmuch as it does not shew that C. and D. were dead. *Morrall v. Parker*, 3 M. & W. 65; M. & H. 361; 6 D. P. C. 123; *S. P., Edgar v. Watt*, 1 H. & W. 108.

An affidavit for a debt, stated therein to be due to A. and B., is good, though the plaintiffs are partners, and are not stated to be so in the affidavit. *Bodfield v. Padmore*, 5 B. & Ad. 1095.

**Husband and Wife.**—An affidavit, for goods sold and delivered to, and for money paid and

laid out for the wife of the defendant, before his intermarriage with her, no request being stated, is insufficient. *Gray v. Shepherd*, 3 D. P. C. 442.

In an action by husband and wife against husband and wife, an affidavit to hold to bail stated the defendant to be indebted "for goods delivered and sold by the plaintiff's wife to the defendant's wife," not stating the transaction to have taken place before their respective marriages. The defendant, having failed in an attempt to justify bail, moved to set aside the bail-bond, on the ground of the above irregularity. The court discharged the rule on terms. *Morgan v. Davies*, 1 Scott, 93.

In an action by husband and wife, administratrix, on a bond given to the intestate, it is no objection to the affidavit that the defendant is alleged to be indebted to the husband and wife, administratrix; or that the affidavit omits to state that the deceased died intestate, or to whom the sum mentioned in the condition is made payable; the same degree of precision not being required in an affidavit as in a declaration. *Coppin v. Potter*, 4 M. & Scott, 272; 10 Bing. 441; 2 D. P. C. 785.

**Bankrupt's Assignees.**—An affidavit, by the assignee of a bankrupt for a sum of money "for interest agreed to be paid by the defendant, as appears to this deponent by the books of account of the bankrupt, and as this deponent verily believes to be true," is sufficient. *Harrison v. Turner*, 4 D. P. C. 72; 1 H. & W. 346.

**Foreign Money and Claims.**—An affidavit, made before a British consul in a foreign country, stated that the defendant was indebted to the plaintiff in a certain number of pounds sterling:—Held, that the affidavit was insufficient, inasmuch as it did not appear with certainty whether the defendant was indebted in British or Irish sterling money. It ought to have said "pounds sterling, English." *Pickardo v. Machado*, 7 D. & R. 478; 4 B. & C. 886.

An affidavit that the defendant was indebted to the plaintiff, "as liquidator of an estate duly appointed by the law of France," is defective for not shewing that the plaintiff, as liquidator, is by the law of France entitled to sue. *Tenor v. Mars*, 3 M. & R. 38; 8 B. & C. 638. See *Alison v. Furnival*, 1 C. M. & R. 277.

But an affidavit that A. was indebted to B. for goods sold and delivered in Holland, and that the debt was assigned to C. according to the laws of that country, and that the assignee of a debt may sue the debtor according to the laws of Holland, "as deponent is informed and believes," is sufficient to hold the defendant to bail in this country. *Sceurhop v. Schamanuel*, 4 D. & R. 180.

#### c. Defendant's Benefit.

**Must be for.**—An affidavit for goods sold and delivered, and materials found and work done by the deponent for the defendant, is bad for not stating that the goods were sold and delivered to, and the work done for, the defendant. *Young v. Gatten*, 2 M. & S. 603; *S. P., Bell v. Thrupp*, 2 B. & A. 596.

**When Sufficiently Stated.**—But an affidavit that the defendant was indebted "for the hire of

carriages of the plaintiff to and for the use of the defendant," is sufficient, without stating that they were hired of the plaintiff, or by whom they were hired. *Brown v. Garnier*, 2 Marsh, 83; 6 Taunt. 389.

An affidavit that the defendant was indebted to the plaintiff for the hire of a berth on board a vessel of the plaintiff, let by the plaintiff to the defendant at his request, held sufficient, and that it was not necessary to shew actual enjoyment. *Shepherd v. O'Brien*, 1 M. & W. 601; 2 Gale, 120; 5 D. P. C. 173.

An affidavit for money paid, laid out and expended "to and for the use and on account of the defendant" is sufficient. *Harrison v. Turner*, 4 D. P. C. 72; 1 H. & W. 346.

An affidavit that the defendant was indebted to the plaintiff in 20l. for money lent on a bill of exchange, drawn by S., accepted by the defendant, and overdue and unpaid, was held sufficient, without saying "lent to the defendant." *Bennett v. Dawson*, 4 Bing. 609; 1 M. & P. 594.

An affidavit, "for money paid, lent and advanced by the plaintiff to the defendant, and at his request," is bad, for not distinctly shewing that the money paid was paid to the use of the defendant, and at his request. *Fricks v. Poole*, 4 M. & R. 48; 9 B. & C. 543.

An affidavit that the defendant was indebted to the deponent "for materials found and provided, goods sold and delivered and work and labour done and performed by the deponent to and for the use and benefit of the defendant, and at his request" is sufficient. *Lucas v. Goodwin*, 4 Scott, 300; 3 Hodges, 32; *S. P., Hughes v. Sutton*, 3 M. & S. 78.

An affidavit, for work done by the plaintiff for the defendant, as his servant, is sufficient. *Bliss v. Atkins*, 5 Taunt. 756; 1 Marsh, 317, n.

It is a sufficient statement of the cause of action, that it is for the use and occupation of premises of the creditor; and if the statement proceeds to say, as tenant thereof, it is no objection that there was not added, to the creditor. *Lee v. Sellwood*, 9 Price, 322.

#### d. Defendant's Request.

**Must Allege.**—In an affidavit for the agistment of cattle, it must be alleged that they were agisted at the request of the defendant. *Smith v. Heap*, 5 D. P. C. 11; 2 H. & W. 89.

An affidavit for money paid to and for the use of the defendant, which did not state that the money was paid at the request of the defendant, was held bad. *Marshall v. Davison*, 2 Tyr. 315.

So, in another case, in K. B., an affidavit for money lent, and for goods sold and delivered, and for work and labour done, is irregular if it omits to state that it was "at the instance and request of the defendant," although it stated that it was "to and for his use, and on his behalf." *Durnford v. Messiter*, 5 M. & S. 446.

But in one case an affidavit for work done for the defendant, without adding "at his request," was held sufficient. *Anon*, 1 Chit. 331.

An affidavit for money paid for the use and benefit of the defendant, without adding "at his request," was held insufficient. *Pitt v. New*, 3 M. & R. 129; 8 B. & C. 654.

But in C. P., it was held, that an affidavit for money paid for a defendant and advanced to him need not state a request, as it was said that such

request must be generally inferred. *Berry v. Fernandes*, 8 Moore, 332; 1 Bing. 338.

An affidavit, stating that defendant was indebted to plaintiffs in 130*l.* and upwards, for work and labour done, and for paper found by plaintiffs and their servants, in and about the printing of a certain book of defendant's, and at his request, was held to be sufficient to shew that the work was done, and the materials found for the defendant at his instance. *Gale v. Lockie*, 6 M. & S. 228.

An affidavit that the defendant "before and at the time of the commencement of this suit, was, and still is, justly and truly indebted to the deponent in 100*l.* for work done, and materials for the same provided, and goods manufactured and made by the deponent for the defendant, and at his request," is bad. *Pontifex v. De Maltzoff*, 1 Ex. 436; 17 L. J., Ex. 55.

An affidavit that the defendant was indebted to the deponent in 337*l.*, that is to say, 267*l.* 16*s.*, being the amount of debt, and 69*l.* 4*s.*, the amount of costs, respectively paid by the deponent to C. in an action on a bill of exchange drawn by B. and accepted by the deponent on the request of the defendant, conveyed through B., or his clerk, and for the accommodation of the defendant:—Held, that the affidavit was not vitiated by the statement of the medium of the request, and that it disclosed a good cause of action for the costs. *Stratton v. Mathews*, 3 Ex. 48; 6 D. & L. 229; 18 L. J., Ex. 5; 12 Jur. 924. See also cases ante.

#### e. Agreements.

**Generally.**—An allegation "that the defendant was indebted in a certain sum upon and by virtue of a charter-party of affreightment, bearing date, &c., for and on account of the hire of a ship called the S., let to hire by the plaintiff to the defendant, and by him taken for a voyage from the port of L. to P.:"—was held sufficiently certain. *Skeen v. McGregor*, 8 Moore, 107; 1 Bing. 242.

Stating that the defendant was indebted to the plaintiff by virtue of articles of agreement, by which the latter agreed to sell and the former agreed to purchase certain lands, and that the defendant had been let into possession in pursuance of the agreement, is insufficient, without stating that a conveyance had been tendered to the defendant. *Young v. Dowdman*, 2 Y. & J. 31.

Where a plaintiff seeks to hold a defendant to bail for a sum of money to which he alleges he has rendered himself liable for the defendant, he must shew clearly that the liability has been incurred. *Townsend v. Barns*, 1 D. P. C. 562; 2 C. & J. 468.

It is not sufficient to state "that the defendant was indebted for money lent by the plaintiff to the defendant for the use of another, and for which the defendant promised to be accountable and to repay, or caused to be secured to the plaintiff," it not appearing in the affidavit, but that the money had been secured according to the agreement. *Jacks v. Pemberton*, 5 T. R. 552.

An affidavit that the defendant was indebted in 1,000*l.* "under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, which balance is due and unpaid," without stating that the

balance was 1,000*l.*, was held to be defective. *Hatfield v. Linguard*, 6 T. R. 217.

**Consideration for.**—An affidavit on articles of agreement should state the consideration. *Walker v. Gregory*, 1 D. P. C. 24.

An affidavit "that the defendant was indebted in 1,000*l.* upon and by virtue of a memorandum in writing, signed by the defendant, whereby he promised the plaintiff, that, when he returned in the month of March or April then next, he would marry her, or pay her 1,000*l.*," without shewing any mutual consideration on the part of the plaintiff to sustain the defendant's promise, is insufficient, as a court can take nothing by intendment in an affidavit. *Macpherson v. Lovie*, 2 D. & R. 69; 1 B. & C. 108.

An affidavit that defendant was indebted to plaintiff in a certain sum, under a deed by which defendant had covenanted to pay certain sums, "at certain times, and on certain events past and happened," is sufficient. *Barnard v. Neville*, 3 Bing. 126; 10 Moore, 475.

But, an affidavit stating that the defendant was indebted to the plaintiff so much "for interest money, under and by virtue of an agreement," is not sufficient. *Brook v. Trist*, 10 East, 358.

Stating that the plaintiff had furnished goods to the amount of 2,000*l.* to N., for whom the defendant undertook to be answerable; that N. had since failed, and paid 4*s.* in the pound only; and that 1,000*l.* remained due to the plaintiff:—Held, sufficient. *Collins v. Wallis*, 11 Moore, 248.

**Where there is a Penalty.**—A party cannot be held to bail for a penalty, but only for the sum secured by the penalty. *Hatfield v. Linguard*, 6 T. R. 217; *S. P.*, *Edwards v. Williams*, 5 Taunt. 247.

Therefore, in an action upon a bond conditioned for an indemnification, the defendant ought not to be held to bail for the penalty, but only for the amount of the damage incurred. *Kirk v. Strickland*, 2 Dougl. 449.

A defendant may be arrested for sums paid by plaintiff as obligor of an indemnity bond, as for liquidated damages, if the sum the plaintiff has been called on to pay can be ascertained. *Anderson v. Bell*, 2 Tyr. 732; 2 C. & J. 630.

Upon a bond conditioned for paying a less sum by instalments and interest, though a part only of the instalments is due, the obligee may arrest for the aggregate amount of all the instalments, and the interest accrued due before the action brought. *Talbot v. Hodson*, 5 Marsh. 527; 7 Taunt. 251.

#### f. Awards.

**Submission to Arbitration.**—An affidavit on an award ought to state the fact of the submission to, and the making of, the award; and that the money was due at a day past. *Anon.*, 1 D. P. C. 5.

**Directing Money to be Paid on Demand.**—An affidavit on an award, directing money to be paid upon demand, not alleging a demand, is insufficient. *Driver v. Hood*, 1 M. & R. 324; 7 B. & C. 494.

**For Damages.**—But an affidavit "for damages

awarded, and for costs and expenses taxed and allowed," is sufficiently certain; for, it will be inferred that the award and taxation are such as will support an action. *Jenkins v. Law*, 1 B. & P. 365.

#### **g. Bills and Notes.**

**Name of Drawer not Stated.**—An affidavit for principal and interest on a bill of exchange drawn and accepted by the defendant, and payable to the deponent at a day past, is sufficient, although it does not state who is the drawer. *Harrison v. Rigby*, 3 M. & W. 66; 6 D. P. C. 93; M. & H. 362; 1 Jur. 897.

**Certainty required.**—An affidavit of debt on a bill of exchange at three days' sight, stating that more than three days had elapsed since the defendant had received sight thereof, but not saying the day when he had had sight, is good. *Maynard v. Reynolds*, W. W. & D. 394.

An affidavit that the defendant is indebted to the plaintiff in 500*l.*, for principal moneys due upon a bill of exchange, without stating the sum for which the bill was drawn, is bad. *Fouell v. Petre*, 1 N. & P. 227; 5 D. P. C. 276; 5 A. & E. 818; 2 H. & W. 379; *S. P.*, *Robins v. Grant*, W. W. & D. 373.

An affidavit that the defendant is indebted to the plaintiff in a certain sum upon the balance of a bill of exchange, drawn by the plaintiff upon and accepted by the defendant, and due at a day past, is sufficient. *Walmesley v. Dibdin*, 4 M. & P. 10.

An affidavit stating that R. S., H. A., R. R., and B. S. were jointly indebted to the plaintiff on a bill of exchange "accepted (in the name and firm of A. and Co.) by the said R. S., H. A., R. R., and B. S., or one of them :"—Held, insufficient. *Harmer v. Ashby*, 10 Moore, 323.

In an affidavit a plaintiff stated that the defendant was indebted to him as indorsee of a bill of exchange. The declaration was, on a foreign bill, held no variance. *Phillips v. Don or Dan*, 6 D. & L. 527; 18 L. J., Q. B. 104; 13 Jur. 455.

**Must shew that they are due.**—It is necessary to state when the bill or note is payable, or that it is overdue. *Kirk v. Almond*, 1 D. P. C. 318; 2 C. & J. 354; 2 Tyr. 316; *S. P.*, *Bill v. Rogers*, 12 Price, 194; *Jackson v. Yate*, 2 M. & S. 148.

An affidavit, which states that the defendant is indebted on a bill, which was payable at a day past, is sufficient, without stating that the bill was not paid when due, or that it is still unpaid. *Phillips v. Turner*, 3 D. P. C. 163; 1 C., M. & R. 597; 5 Tyr. 196.

The date of bills or notes need not be stated, if it appears in the affidavit that the day of payment of the bills or notes is past. *Shirley v. Jacobs*, 3 D. P. C. 101; 1 Scott, 67; *S. P.*, *Irving v. Heaton*, 4 D. P. C. 638; 2 Scott, 798; *Weedon v. Medley*, 2 D. P. C. 689.

"That the defendant was indebted in a certain sum, as indorsee of a bill drawn by E. F. upon and accepted by the defendant, payable to the order of E. F. at a day past," is equally sufficient and certain. *Lamb v. Edwards*, 5 Moore, 14; 2 B. & B. 343.

An affidavit that the defendant was indebted as indorsee of a bill of exchange, without alleging the bill to have become due, was held sufficient. *Daivson v. March*, 1 N. R. 157.

**Must shew Title to sue.**—An affidavit on bills or notes must shew how the plaintiff became entitled to recover upon them. *Balbi v. Batley*, 1 Marsh. 424; 6 Taunt. 25.

In an affidavit by an indorsee of a bill, it must be stated by whom the bill was indorsed; it is insufficient to state that the bill was duly indorsed. *Lewis v. Gompertz*, 1 D. P. C. 819; 2 C. & J. 352; *S. P.*, *Woolley v. Escudier*, 2 M. & Scott, 392.

Thus, an affidavit that the defendant was indebted to the plaintiff upon a note for 10,000*l.*, drawn in favour of Inglis, Ellice & Co., and duly indorsed to the plaintiff, is insufficient, because it did not state any indorsement from the payee (the defendant) to the plaintiff. *M'Taggart v. Ellice*, 4 Bing. 114; 12 Moore, 826.

It is not necessary that the deponent should describe himself as the indorsee, if he traces title to himself; nor is it necessary to allege the default of the maker. *James v. Trevanion*, 5 D. P. C. 275; 2 H. & W. 332.

Stating that the defendant is indebted, as indorsee of a bill of exchange, drawn by one T. W. at a day now past, is not sufficient without stating in what character the defendant became liable. *Humphries v. Williams*, 2 Marsh. 231; *S. C.*, nom. *Humphries v. Winslow*, 6 Taunt. 531.

Nor is a statement that the defendant is indebted "on a bill of exchange, drawn by the defendant upon, and accepted by A. B.; and on another drawn by the plaintiff upon, and accepted by the defendant;" without stating the dates of the bills, or that they were due and unpaid. Semble, that it is not necessary, in such case, to state the character in which the plaintiff is entitled to sue upon them. *Machu v. Fraser*, 2 Marsh. 483; 7 Taunt. 171.

So, a statement that the defendant was "justly indebted to the plaintiff in 100*l.* upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," was held sufficient, without stating in what character the bill was due to the plaintiff, whether as payee or indorsee. *Bradshaw v. Saddington*, 7 East, 94; 3 Smith, 117.

**Necessary Averments.**—An affidavit on a bill (by indorsee against acceptor) needs not aver a presentment for payment. *Osborne v. Pennell*, 4 M. & Scott, 431.

An affidavit to hold the drawer of a bill, or indorser of a note, to bail, should state that the acceptor or maker had not paid the amount. *Crosby v. Clarke*, 1 M. & W. 296; 5 D. P. C. 62; 2 Gale, 77.

A statement, that the amount "is now due and unpaid," will not supply the omission of an allegation of default by the acceptor. *Jones v. Collins*, 6 D. P. C. 526; 1 W., W. & H. 187.

So where an affidavit alleged that the defendant was indebted to the plaintiff on the bill which was overdue, and that the money was still due and owing, but it omitted to aver either presentment or notice. Held bad. *Simpson v. Dick*, 3 D. P. C. 731.

But in another case it was held sufficient to allege a default by the acceptor, without averring a presentment or notice. *Witham v. Gompertz*, 4 D. P. C. 382; 2 C., M. & R. 736; 1 Gale, 301; 1 Tyr. & G. 6.

An affidavit by indorsee against drawer of a bill which does not aver presentment and default

by acceptor is insufficient. *Hopkinson v. Salem-bier*, 7 D. P. C. 493; 3 Jur. 538.

#### **h. Bonds.**

**Generally.**—An affidavit on a bond must shew that the bond is due and payable at the time of the arrest. *Smith v. Kendall*, 7 D. & R. 232.

An affidavit, stating the defendant to be indebted to the plaintiff generally, on a bond conditioned for the performance of an award, which award directed F. to pay a sum of money on demand, was held defective, as it did not appear how the defendant was indebted; and that no demand was expressed to have been made on F. for payment. *Armstrong v. Stratton*, 1 Moore, 110; 7 Taunt. 405.

**Condition of, must be set forth.**—A statement "that the defendant is indebted to the plaintiff in 6,000*l.* upon a bond, made and entered into by the defendant to the plaintiff in the penal sum of 25,000*l.*," without shewing the condition of the bond, is insufficient. *Boranguet v. Fillis*, 4 M. & S. 330.

But a statement that the defendant was indebted, "for principal and interest due on a bond," was held sufficient to express that such bond was conditioned for the payment of money, without setting forth the condition. *Byland v. King*, 1 Moore, 24; 7 Taunt. 275.

**Amount of Default.**—The affidavit must shew that the number of defaults in payments amounts to 20*l.* *Chambers v. Ward*, 1 D. P. C. 139.

#### **i. Other Causes of Action.**

**Amount due under Deed.**—An affidavit that the defendant was indebted upon and by virtue of a mortgage deed in 500*l.*, by which he covenanted to pay that sum at a certain day then past, is sufficient, without averring that the money was not paid at the appointed day. *Masters v. Billing*, 3 D. P. C. 751.

An affidavit grounded on a covenant by deed to pay a certain sum at a day named, is good, if it states the defendant to be indebted to the plaintiff, upon and by virtue of the indenture, in the said sum, "at a day now passed," without alleging it to be due and unpaid. *Lambert v. Wray*, 1 C., M. & R. 576; 3 D. P. C. 169; 5 Tyr. 195.

Where an affidavit states the defendant to be indebted in 304*l.* 4*s.* 7*d.*, "principal and interest," by virtue of an indenture covenanting to pay 300*l.*; the amount of principal and interest is sufficiently distinguished. *Jones v. Collins*, 6 D. P. C. 526; 1 W. W. & H. 187; 2 Jur. 374.

An affidavit set forth an indenture of mortgage with a proviso for re-conveyance on payment of the moneys therein mentioned; and also a covenant on the part of the defendant, and that "there was, and is still due to the deponent the sum of 9,000*l.* and upwards, for moneys, after the date of the indenture, paid and advanced by the deponent for the use and on the account of W. W.; and for work done by the deponent after the date of the indenture, as the agent of and for W. W., and on his retainer; and for interest upon the said moneys so as aforesaid paid and advanced, being computed from the respective times of such moneys being advanced

and paid by the said deponent as aforesaid." (The covenant contained an obligation to pay interest.) "And so this deponent says, that the said W. W. now is justly and truly indebted to this deponent upon the said covenant in the said sum of 9,000*l.* of lawful British money." It was objected, that this affidavit was bad; for omitting the words "at the request" of the defendant; for being argumentative, and not positive; for not alleging that the debt was due from the defendant, and for improperly including interest:—Held, that the covenant between the parties dispensed with the necessity of inserting "at the request;" that the omission to allege that the debt was due from the defendant, was, under the terms of the covenant, allowable; and that, under the contract to pay interest, it was enough, in alleging interest to be due, to conform with the covenant. *Boddington v. Woodley*, W. W. & D. 581; 1 Jur. 960.

**Goods Sold and Delivered.**—Before the 1 & 2 Vict. c. 110, s. 3, an affidavit for goods sold must have stated that they were delivered as well as sold. *Loisada v. Moryoseph*, 8 Moore, 366; *S. C.*, nom. *Lascar v. Morioseph*, 1 Bing. 357.

Therefore a defendant could not be held to bail on an affidavit stating that he was indebted for goods bargained and sold, without saying also delivered. *Hopkins v. Vaughan*, 12 East, 398; *S. P.*, *Bell v. Thrupp*, 2 B. & A. 596.

But in an affidavit, that the defendant was indebted to the plaintiff in 25*l.* 6*s.* 6*d.*, being the balance of account for railway shares sold by him to the defendant:—Held, that s. 3 of the 1 & 2 Vict. c. 110, applied to actions for damages, and therefore the affidavit need not state that the shares were delivered as well as sold. *Hargreaves v. Hayes*, 5 El. & Bl. 272; 24 L. J., Q. B. 281; 1 Jur., N. S. 521.

It must also state that they were sold by the plaintiff. *Perkes v. Severn*, 7 East, 194; *S. P.*, *Taylor v. Forbes*, 11 East, 315.

It is not sufficient to state a debt to be for goods sold and appraised to the defendant, without saying "by the plaintiff." *Fenton v. Ellis*, 1 Marsh. 535; 6 Taunt. 192.

**Money Lent.**—In an affidavit for a certain sum of money had and received, and money lent, it is not necessary to distinguish how much is due on each account. *Hague v. Levi*, 1 D. P. C. 720; 9 Bing. 595; 2 M. & Scott, 729.

An affidavit that the defendant is indebted "on balance of account for money paid, laid out, and expended by the plaintiff to and for the defendant, and at his request; and for money had and received by the defendant for the plaintiff; and for interest of moneys due by the defendant to the plaintiff," is not sufficiently certain. *Visger v. Delegal*, 2 B. & Ad. 571; 1 D. P. C. 333.

An affidavit for "money lent and advanced and interest thereon," is bad. *Callum v. Leeson*, 2 C. & M. 406; 2 D. P. C. 381; 4 Tyr. 266.

So, for money lent, without stating by whom the money was lent. *Smith v. Stevens*, 3 Tyr. 219.

An affidavit that the defendant is indebted to the plaintiff for money had and received by the defendant, for and on account of the plaintiff and at his request, but not adding that it was received to the plaintiff's use, is insufficient. *Kelly v. Curzon*, 4 A. & E. 622; 1 H. & W. 678.

An affidavit by a manager of a bank in the following form: "J. H., manager of the Ripon branch of the Yorkshire bank, maketh oath and saith, that A. is indebted unto J. S., as one of the registered public officers of the Yorkshire bank, in 50*l.* for money lent by this deponent, as such manager as aforesaid," is irregular under 7 Geo. 4, c. 46, s. 9, in not shewing that the manager was authorized to lend the money; but it is not altogether bad. *Spencer v. Newton*, 1 N. & P. 823; W. W. & D. 232; 6 A. & E. 630, n.

**Account Stated.**—An affidavit for money due from the defendant to the plaintiff, "on an account stated between them," is sufficient. *Balmanno v. May*, 6 D. P. C. 306; 2 Jur. 109; *S. P., Debenham v. Chambers*, 6 D. P. C. 101.

So, for money due "on the balance of an account stated," without the words "and settled," *Tyler v. Campbell*, 5 D. P. C. 632; 4 Scott, 384; 3 Bing. N. C. 675; 3 Hodges, 79; 1 Jur. 310.

An allegation of debt "for the balance of account," or "for the balance of principal money on a bill of exchange," is defective; it should be stated that the balance was on an account "stated." *Jones v. Collins*, 6 D. P. C. 526; 1 W. W. & H. 187; 2 Jur. 374.

An affidavit, that the defendant was indebted "on the balance of an account for goods sold and delivered by the plaintiff to the defendant," is sufficient, without stating that it was an account stated between the parties. *Kerrick v. Davies*, 9 M. & W. 22; 1 D., N. S. 347; 7 Jur. 1013.

**Interest.**—An affidavit claiming part of an integral sum for interest should shew that it arose from some contract for the payment of interest. *Neale v. Snoultten*, 3 D. & L. 422; 2 C. B. 320; 15 L. J., C. P. 48; 9 Jur. 1058.

An affidavit that the defendant was indebted to the plaintiff in 300*l.* for money paid, to and for his use, and at his request, and for interest due and owing from and agreed to be paid by the defendant to the plaintiff for and in respect thereof, is sufficient. *Hutchinson v. Hargrave*, 1 Scott, 269; 1 Bing. N. C. 369.

In an affidavit to hold to bail, it was stated that a sum was due for money lent and advanced, and for money due and payable for interest upon, and for the forbearance of divers sums of money due and payable and by the plaintiff forborne at the request of the defendant:—Held, that a special contract to pay interest was not sufficiently stated. *Drake v. Harding*, 4 D. P. C. 34; 1 H. & W. 364.

An affidavit, that a sum is due for principal and interest on a promissory note for a certain amount bearing interest, is sufficient without distinguishing how much is due for principal, and how much for interest. *Id.*

**Torts.**—An affidavit to hold to bail in an action for criminal conversation with the plaintiff's wife, stated that she had been taken away from the plaintiff about two years ago, and that the plaintiff had only recently discovered that she had been living ever since with the defendant in adultery, but omitted any positive averment that she was the plaintiff's wife when she was taken away, or that the

defendant had committed adultery with her:—Held, sufficient. *Bullock v. Jenkins*, 1 L., M. & P. 645; 20 L. J., Q. B. 90.

#### J. Defects in.

**Effect of being bad in part.**—When distinct sums are alleged to be due, each for an independent cause of action, and some of the causes of action are defectively, and others properly stated, the affidavit though bad in part is not bad altogether. *Jones v. Collins*, 6 D. P. C. 526; 2 Jur. 374. See *Baker v. Wills*, 2 C. & M. 415; 3 Tyr. 182.

If an affidavit is good as to one distinct sum stated in it, and this be an arrestable amount, it is no objection that it is bad as to another sum stated in it, unless it appears that process was issued for the whole amount, and not for the former sum only. *Cauvce v. Rigby*, 3 M. & W. 67; M. & H. 363.

If an affidavit discloses a good cause of action as to part only of the amount for which a defendant is arrested, and the valid portion is separable from the defective part, a judge has power to make a second order upon the same affidavit, reducing the sum for which the defendant is to give bail to the amount of the debt properly sworn to. *Cunliffe v. Maltass*, 6 D. & L. 723; 7 C. B. 695; 18 L. J., C. P. 233; 13 Jur. 751.

**Time of taking advantage of.**—A defendant having been arrested on an affidavit which was irregular and not a nullity, obtained a rule to be discharged out of custody upon another ground, which rule having been discharged, the court refused, on an application in a subsequent term, to discharge the defendant out of custody for such defect in the affidavit, he not swearing that his attention had not been drawn to the irregularity at or before the time of the previous application. *Spencer v. Newton*, 6 A. & E. 630, n.; 1 N. & P. 823.

Two months' delay in taking an objection to an affidavit, that it is not sworn before a proper commissioner, is not a waiver of it. *Sharpa v. Johnson*, 4 D. P. C. 324; 2 Scott, 407; 1 Hodges, 298; 2 Bing. N. C. 246.

A defendant does not waive a defect in the affidavit by applying for particulars, or demanding a declaration. *Hodgson v. Dowell*, 3 M. & W. 284.

Where a defendant is held to bail, or detained by virtue of a judge's order, he is not bound to apply either to the same or to another judge at chambers to rescind the order, or to discharge him from custody, on the ground of defects in the affidavit of debt: the application is properly delayed till the court is sitting. *Johnson v. Kennedy*, 4 D. P. C. 345; 2 Scott, 419.

#### 5. APPLICATION FOR ORDER.

**To whom made.**—The power to arrest is specially given to a single judge, and not to the court. *Harvey v. O'Meara*, 7 D. P. C. 725; 3 Jur. 629.

An application for an order for a *capias* cannot be made to the courts at Westminster, but it may be made to a single judge sitting there. *Bentley v. Berrey*, 7 M. & W. 146; 4 Jur. 1018; *S. P., Barnett v. Craw*, 1 D., N. S. 774; 6 Jur. 421.

A judge has a discretion as to granting an



order. *Stein v. Valkenhuisen*, El. Bl. & El. 65; 27 L. J., Q. B. 236; 4 Jur., N. S. 411.

**Affidavits used on.]**—A warrant to arrest a debtor having been issued under 14 & 15 Vict. c. 52, an order to hold to bail may be made upon examined copies of the affidavits filed in the Court of Bankruptcy. *Pearce v. Martin*, 16 Jur. 270.

An affidavit may be sworn before a writ of summons has been issued. *King v. Reg. (in error)*, 14 Q. B. 31; 18 L. J., Q. B. 253; 13 Jur. 742—Ex. Ch.

Where an order has been made to hold to bail, it is not necessary that the affidavit upon which it was made should shew that a writ of summons has been first issued; as the court will intend that the fact was proved to the satisfaction of the judge. *Bullock v. Jenkins*, 1 L. M. & P. 645; 20 L. J., Q. B. 90.

On the application a plaintiff may use affidavits made in another court, in an action against the same defendant, at the suit of a different plaintiff. *Langston v. Wetherall*, 2 D. & L. 858; 14 M. & W. 104; 14 L. J., Ex. 229.

#### G. WRIT OF CAPIAS.

**Form of.]**—A capias may be issued into a county palatine, although indorsed for a less sum than 50*l*. *Brown v. McMillan*, 7 M. & W. 196; 8 D. P. C. 852; 4 Jur. 1090.

A capias was regular in form, but the copy served omitted the form of action:—Held such an irregularity as to render the service void, although the bail bond given by the defendant, upon his arrest, properly recited the form of action. *Copley v. Medeiros*, 7 M. & G. 426; 2 D. & L. 74; 8 Scott, N. R. 172; 13 L. J., C. P. 148.

In a capias, and in the copy served, it was directed to the sheriffs instead of the sheriff of Middlesex:—Held, an irregularity; that, though the court or a judge might amend the writ, they had no power over the copy; and that the defendant was entitled to his discharge, though the writ was amended, on the ground of variance from it and the copy. *Moore v. Magan* or *McGhan*, 16 M. & W. 95; 4 D. & L. 267; 16 L. J., Ex. 57.

In a capias the direction was left in blank, without stating sheriff or county or place, and there was no day or year in the teste:—Held, not to be amendable, and the court discharged the defendant out of custody. *Rennie v. Bruce*, 2 D. & L. 946; 14 L. J., Q. B. 207; 9 Jur. 597.

A capias was indorsed, "This writ was issued by H. W. N. of the Fleet Prison, in the parish of St. Bride, in the city of London, the plaintiff in person:—Held, sufficient. *Needham v. Bristowe*, 4 Scott, N. R. 773; 4 M. & G. 262; 1 D., N. S. 700.

After the lapse of twenty days, the court will not discharge a defendant out of custody, on the ground that his addition was not indorsed on the capias, unless he shews circumstances to excuse the delay. *Davis v. Watkins*, 12 L. J., Q. B. 293.

**Misdescription of Name.]**—A capias will not be set aside for mere error in the christian name of the judge and surplussage in the statement of his title. *Folkard v. Fitzatubba*, 1 F. & F. 376.

A defendant was arrested under a capias, in

which he was described as William Mortlock, but in the copy served was called William Mortlake: the court refused to discharge him out of custody on the ground of irregularity. *Macdonald v. Mortlock*, 2 D. & L. 963; 14 L. J., Q. B. 244; 10 Jur. 432.

Where a writ was to take Christopher Hooper, and the English notice was directed to Christopher Wood, the court set aside the service for irregularity with costs. *Wright v. Hooper*, 2 C. & J. 236.

**Irregularly obtained.]**—An affidavit having been sworn by a party, and marked with the initials of the judge's clerk, was not signed by the judge until after the capias was issued and executed:—Held, that the order, capias and subsequent proceedings ought to be set aside. *Bell* or *Bell v. Bament*, 8 M. & W. 317; 9 D. P. C. 810; 5 Jur. 510.

**Amount Endorsed on.]**—A judge made an order for the arrest of a defendant for 422*l*.; the capias was endorsed for 422*l*. 13*s*. 4*d*. (the real amount of the debt). The court refused to discharge the defendant out of custody, and directed the writ to be amended on payment by the plaintiff of the costs of the application for the discharge. *Plock v. Pacheco*, 9 M. & W. 342; 1 D., N. S. 380.

An order for a capias was drawn up by mistake for a less sum than that sworn to, the capias was indorsed for the less sum, and a bail bond was executed in a penal sum for the amount of such lesser sum:—Held, that on payment of the lesser sum and costs, though making a sum less than the penal sum in the bond, the bail were entitled to have the bond delivered up, and to be discharged. *Jonas v. Pepper*, 1 El. & El. 327.

A capias may be issued into a county palatine although indorsed for a less sum than 50*l*. *Brown v. McMillan*, 7 M. & W. 196; 8 D. P. C. 852; 4 Jur. 1090.

**Who can obtain.]**—A capias can only be obtained by a person who is plaintiff in the action and after the commencement of it. *Williams v. Griffith*, 6 D. & L. 449; 3 Ex. 584.

**Effect of.]**—A capias, together with the arrest and proceedings under it, either by putting in and perfecting special bail, or depositing and paying money into court, is altogether collateral to the process in the suit, and does not cure any irregularity in it. *Vizetelly v. Wickof*, 9 Jur. 453; *S. P.*, *Ireland v. Berry*, D. & M. 505; 5 Q. B. 561.

The court has no power to compel the keeper of a gaol to accept a capias, in order that it may operate as a detainer against a party already in custody. *Edwards v. Robertson*, 3 Jur. 1106.

#### 7. RESCINDING ORDER.

##### a. Jurisdiction.

**By the Court.]**—The court has power to order a party arrested on a capias to be discharged, either under the authority given by 1 & 2 Vict. c. 110, s. 6, or in virtue of the general jurisdiction which the court previously possessed over a single judge acting in matters pending in the court. *Graham v. Sandrinelli*, 16 M. & W. 191; 4 D. & L. 317; 16 L. J., Ex. 67; 10 Jur. 1061.

**By a Judge.**—Where a judge is of opinion that an order to hold to bail ought not to have been made, the proper course is not to set aside the order, but simply to discharge the defendant out of custody. *Burness or Burnets v. Guirnorich*, 7 D. & L. 235; 4 Ex. 520; 19 L. J., Ex. 110.

**Application to the Court.**—An application to the court to set aside an order is an original motion, not an application to revise the discretion exercised by the judge. *Lamond v. Eiffe*, 3 G. & D. 256; 3 Q. B. 910; 12 L. J., Q. B. 12; 6 Jur. 1038.

A defendant, who has obtained a rule to be discharged out of custody, on the ground of the affidavits not shewing sufficiently that he was about to leave England, will not be permitted to advert to the circumstances that it did not appear by the affidavits that any process had been issued in the cause. *Willis v. Snook*, 8 M. & W. 147; 5 Jur. 579.

It is competent to a defendant to apply to the court to be discharged out of custody, although he has already applied for that purpose, but in vain, to the judge who made the order for his arrest. *Bullock v. Jenkins*, 1 L., M. & P. 645; 20 L. J., Q. B. 90.

**Affidavits used on.**—In showing cause against a rule to rescind an order, for the arrest of a party, or for refusing his discharge, either party may read other affidavits than those used before the judge. *Gibbons v. Spalding*, 11 M. & W. 173; 2 D., N. S. 746; 12 L. J., Ex. 185; 7 Jur. 377.

But those used before the judge ought to be before the court. *Heath v. Nesbitt*, 11 M. & W. 669; 2 D., N. S. 1041; 12 L. J., Ex. 408; 7 Jur. 586; *S. P.*, *Needham v. Brintow*, 4 M. & G. 262; 4 Scott, N. R. 773; 1 D., N. S. 700.

Where a judge has made an order, and, on a second application, has refused to rescind it, an affidavit on which a rule to rescind that order is obtained need not mention the second application, except to account for the delay in applying to the court for the rule. *Thomas v. Evans*, 12 L. J., Ex. 41.

A defendant appealing to the court may use affidavits to dispute the cause of action; and the plaintiff may answer by counter affidavits; but the court will not discharge the defendant under such circumstances, unless it appears most clearly that the plaintiff has no cause of action. *Pegler v. Hislop*, 5 D. & L. 223; 1 Ex. 437; 17 L. J., Ex. 53; 11 Jur. 996.

On application to the court to be discharged the party may use affidavits to contradict or explain those on which the order was granted, and those affidavits may be answered by the plaintiff on shewing cause. *Graham v. Sandrini*, 16 M. & W. 191; 4 D. & L. 317; 16 L. J., Ex. 67.

**When to be made.**—An application to set aside an arrest must be made promptly. *Sugars v. Concannon*, 5 M. & W. 30; 7 D. P. C. 391.

In order to excuse delay on the ground of a previous application at chambers, the rule must be drawn up on reading the summons, or it must be shewn by affidavit. *Ib.*

Where a defendant seeks to obtain his discharge on the ground of a substantial objection

to his arrest, he is not bound to apply before the expiration of the time for putting in bail. *Walker v. Lumb*, 9 D. P. C. 131; 1 W. P. C. 8; 4 Jur. 1014.

**Form of.**—Where a defendant has been arrested by an order made upon insufficient affidavits, an application for his discharge should be by motion to set aside the order, not the capias. *Hopkinson v. Salembier*, 7 D. P. C. 493; 5 M. & W. 423; 3 Jur. 538.

To support a rule by a defendant to rescind a judge's order, he must swear positively that "he is not about to leave England." *Robinson v. Gardner*, 7 D. P. C. 716.

Where sufficient has been shewn to indicate that he has an intention of quitting England, the court will not discharge him, even though he swears he never contemplated leaving England, and most positively not for the place alleged in the affidavit on which he was held to bail. *Dunoon v. Jacobs*, 3 Jur. 1149.

## b. Grounds.

**Absence of Cause of Action.**—The court will entertain an application for the discharge of a party arrested, or for the restoration of money deposited on the arrest, where it plainly appears that the plaintiff has no cause of action. *Sammers v. Hughes*, 18 C. B. 527; 25 L. J., C. P. 247; 2 Jur., N. S. 572; *S. P.*, *Pegler v. Hislop*, 1 Ex. 437; 17 L. J., Ex. 53; 11 Jur. 996; *Copeland v. Child*, 22 L. J., Q. B. 279; 17 Jur. 506; *Burns v. Chapman*, 5 C. B., N. S. 481; 28 L. J., C. P. 6; 5 Jur., N. S. 19; 7 W. R. 89.

It is no ground for rescinding an order for a capias, that the plaintiff, when he comes to declare, may have to rely upon a cause of action different from that stated in the affidavit upon which the order was obtained. *Burns v. Chapman*, 5 C. B., N. S. 481; 28 L. J., C. P. 6.

The court will only interfere where it clearly appears that the obtaining the order is an abuse of its process. *Ib.*

**Writ of Summons.**—Though a writ of summons must be sued out before a capias can be applied for, it is not necessary that the defendant should be served with a copy previously to his arrest; but where there has been no service of the writ, the court will grant a rule to discharge the defendant out of custody, unless served within a limited time. *Brooke v. Snell*, 8 D. P. C. 370; 4 Jur. 340.

**Where Arrest Preconcerted or Fraudulent.**—A creditor, by a concerted fraud, induced his debtor, who resided abroad, to come to England, and immediately had him arrested. The court set the proceedings aside, as an abuse of the process of the court. *Stein v. Valkenhuyzen*, El. Bl. & El. 65; 27 L. J., Q. B. 236; 4 Jur., N. S. 411.

**For not Declaring.**—A defendant is not entitled to be discharged, by reason of the plaintiff not having declared against him within a year; but the proper course is to proceed by judgment of non pros. *Turner v. Parker*, 2 D. & L. 444.

**Against Good Faith.**—The court refused to interfere summarily to discharge a defendant out

of custody, on the ground that the arrest was against good faith, in being made for the whole debt, after an engagement to receive the amount by instalments. *Udall v. Nelson*, 4 N. & M. 637; 2 A. & E. 215; 1 H. & W. 177.

**Where Debt has been Paid.]**—If the debt and costs in an action have been paid to the plaintiff, no matter by whom, the defendant is entitled to be discharged. *Rimmer v. Turner*, 3 D. P. C. 601.

**Where Debtor has been adjudicated a Bankrupt.]**—A party was adjudicated bankrupt in April, 1857; he did not surrender, but went abroad for some years, coming back to England from time to time under a feigned name, and communicating with some of his assignees. In March, 1863, while in England, he was arrested on a claim of debt for 50,000*l.* on a *capias* to hold to bail, on the ground that he was about to leave the country. He surrendered to the bankruptcy in July, 1863. The plaintiff had, in 1858, applied to the commissioner of bankruptcy to admit the debt as a claim, but the commissioner had refused on the ground that the debt was for money lent by a banking company, which was not a legal company because it had not paid up a sufficient portion of the subscribed capital. The defendant swore that he did not intend to leave the country at the time of his arrest, nor since, but purposed to remain in England to assist his assignees; he also stated that his health was suffering seriously from the confinement. He had not passed his last examination:—Held, that he was not entitled to be discharged from custody. *Steward v. Waugh*, 33 L. J., Q. B. 86; 9 L. T. 729.

#### 8. MALICIOUSLY OBTAINING ORDER.

**When an Action will lie for.]**—An action for maliciously arresting on a *capias* lies only where the party obtaining the order has imposed on the judge by some false statement or suggestio falsi, and thereby satisfied him of the existence of the debt to the requisite amount, and that there was reasonable ground for supposing that the debtor was about to quit the country. *Daniels v. Fielding*, 16 M. & W. 200; 4 D. & L. 329; 16 L. J., Ex. 153; 10 Jur. 1061.

A creditor receiving information from one person that his debtor is going abroad, and obtaining an order to arrest him on an affidavit, which is afterwards held to be insufficient and to some extent untrue, is not therefore liable to an action for maliciously obtaining the arrest without reasonable cause, there being enough to justify the belief that the debtor was going abroad, and the payment into court of a sum over 20*l.* is a sufficient admission of a debt to justify the application. *Neveill v. Loadman*, 2 F. & F. 313.

In an action for maliciously, and without reasonable or probable cause, causing the plaintiff to be arrested on a *capias*, the order for which had been obtained upon an affidavit not fairly disclosing the nature of the contract for the alleged breach of which the defendant was suing, the judge having stated that, in his opinion, the plaintiff had failed to make out a want of reasonable and probable cause, told the jury, that, to entitle the plaintiff to a verdict, the jury must be satisfied that there was a total want of

reasonable and probable cause, and that the defendant had acted with malice:—Held, a misdirection. *Gibbons v. Allison*, 3 C. B. 181.

## ARTICLES.

I. OF PEACE.—See CRIMINAL LAW.

II. OF CLERKSHIP.—See SOLICITOR.

## ARTIZANS.

**Artisans' and Labourers' Dwellings Improvement Act, 1875—Improvement Scheme—Compensation for Ancient Lights.]**—The provisions of the Artizans' and Labourers' Dwellings Improvement Act, 1875, with regard to the extinction of rights and easements in or relating to lands purchased by the local authority, apply to ancient lights in respect of premises adjoining the lands purchased, and the loss of such ancient lights is matter for compensation by the local authority according to the act. *Badham v. Marrie*, 52 L. J., Ch. 237 n.; 45 L. T. 579.

**—Extinguishment of Easement affecting Land purchased by Local Authority—Right to Compensation.]**—The effect of s. 20 of the Artizans' and Labourers' Dwellings Improvement Act, 1875, is that upon the purchase of land by a local authority for the purpose of carrying into effect a scheme under the act, all easements whatsoever affecting the land become thenceforth extinguished, subject only to this, that compensation is to be paid by the local authority to persons injured in manner provided by the section. *Swainston v. Metropolitan Board of Works*, 52 L. J., Ch. 235; 48 L. T. 634; 31 W. R. 498.

A local authority, under the powers of the above act, purchased and took a certain house for the purposes of an improvement scheme. The plaintiffs, the owners of adjoining land, claimed to be entitled to a right to support to a building thereon from the house so purchased, and brought an action to restrain the local authority from removing the house in such a way as to interfere with the plaintiffs' right to support. The local authority had taken no proceedings to purchase the alleged easement of the plaintiffs:—Held, that the only right the plaintiffs could have was to receive compensation under the above section, and that their action must therefore fail. *Id.*

**Provisional Award—Final Award—Time when Ownership of Property passes.]**—On the 23rd December, 1878, the Metropolitan Board of Works served a notice on B., the owner of certain houses, stating that they would be taken compulsorily under the Artizans' and Labourers' Dwellings Improvement Act, 1875, and an arbitrator was appointed. The arbitrator made his provisional award on the 18th March, and his final award on the 22nd July, 1880. On the 18th February, 1880, the Metropolitan Board of Works served a notice on B. that the houses were

in a dangerous state, and requiring him to take down a portion and repair them, and on the 18th March a magistrate made an order that B. should take down a part and repair the buildings. This order not having been complied with, the Metropolitan Board of Works gave notice to B., on the 16th July, 1880, to hoard and take down the structure; and on the 19th July, the notice not having been complied with, the Metropolitan Board of Works incurred expenses to the amount of 26*l.* 9*s.* 4*d.* in hoarding, and afterwards other expenses amounting in all to 78*l.* 9*s.* 4*d.* It was contended, on the part of B., that at the time the expenses were incurred the provisional award had been made, and therefore he was not the "owner."—Held, that the ownership in the property was not transferred until the final award was made on the 22nd July, 1880, and therefore the Metropolitan Board of Works could recover the expenses from B. as being the owner when they were incurred. *Barnet v. Metropolitan Board of Works*, 46 L. T. 384; 46 J. P. 469.

**Provisional Award altered by Arbitrator on Account of omission of Interest—Validity of Final Award.**—The Metropolitan Board of Works, the "local authority" under the Artizans' and Labourers' Dwellings Improvement Act, 1875 (38 & 39 Vict. c. 36), served on the plaintiff, the lessee of property required for an improvement scheme, a notice for him to send in a statement as to the nature of his claim. This was done, but the arbitrator appointed under the act, through some omission, did not include the plaintiff's interest in his provisional award, framed pursuant to subs. 8 of the schedule to the act. The plaintiff subsequently received a two-days' notice to attend before the arbitrator that his claim might be considered. He attended accordingly, though under protest, and stated his claim, which was considered by the arbitrator, who altered his provisional award by inserting the amount of compensation awarded by him to the plaintiff in respect of his interest. This was confirmed by the final award under subs. 12. In an action to set aside the award:—Held, that, notwithstanding the omission of the plaintiff's interest from the provisional award, he was a "person interested" therein within the meaning of subs. 11, that the proceedings of the arbitrator in considering his claim under that subsection, and in altering the provisional award in respect of his interest under subs. 12, were regular, and that the final award was good. *Carr v. Metropolitan Board of Works*, 14 Ch. D. 807; 49 L. J., Ch. 272; 42 L. T. 354.

Held, also, that if there had been an irregularity, it would have been formal only, and would have been cured by the latter part of subs. 12. *Ib.*

**Compensation—Duty of Arbitrator—Principle of Assessment.**—When an arbitrator has been appointed under the Artizans' and Labourers' Dwellings Improvement Act, 1875, to assess compensation for lands proposed to be taken compulsorily under that act, it is his duty to assess the compensation for such lands upon the footing that the interest in respect of which a claim is made is an existing interest, and it is not his duty to decide whether the interest does or does not exist. *Wilkins v. Birmingham (Mayor)*, 25 Ch. D. 78; 49 L. T. 468; 32 W. R. 118.

From the date when the local authority shall

have published once in three successive weeks the particulars mentioned in s. 6 of the schedule to the Artizans' Dwellings Act, the relation of vendor and purchaser is created for the purpose of fixing the subject-matter of compensation, and the effect of the publication of such particulars is analogous to the effect of a notice to treat under the Lands Clauses Consolidation Act, 1845. Section 121 of the Lands Clauses Consolidation Act, 1845, is incorporated in the Artizans' Dwellings Act. *Ib.*

## ASSAULT AND BATTERY.

I. ACTION FOR.—*See* TRESPASS.

II. IN OTHER CASES.—*See* CRIMINAL LAW —JUSTICE OF PEACE.

## ASSESSED TAXES.

*See* REVENUE.

## ASSETS.

*See* EXECUTOR AND ADMINISTRATOR.

## ASSIGNMENT.

I. EQUITABLE ASSIGNMENT, 467.

II. OF BREACHES.—*See* BOND.

III. OF DEBTS.—*See* CHOSE IN ACTION.

IV. OF PERSONAL PROPERTY.—*See* BILL OF SALE—DEED.

V. OF LEASES.—*See* LANDLORD AND TENANT.

VI. OF MORTGAGES.—*See* MORTGAGE.

VII. FOR BENEFIT OF CREDITORS.—*See* BANKRUPTCY.

VIII. FRAUDULENT.—*See* BANKRUPTCY —FRAUDULENT CONVEYANCES.

IX. OF PERJURY.—*See* CRIMINAL LAW.

X. OF POLICIES.—*See* INSURANCE.

## I. EQUITABLE ASSIGNMENT.

See JUDICATURE ACT, 1873, s. 25, sub-s. 6.

**By Letter—Validity of.]**—Where a cestui que trust by letter directed an executor to pay the share to which "I am entitled" or "due to me" to three persons equally, and such letter was adopted and acted on by all parties, the writer having died:—Held, that it was not necessary that an assignment, to be valid in equity, should be by deed, and therefore that such letter operated as an assignment of the whole share of the cestui que trust in the testator's estate, whether immediately payable or in reversion. *Lambe v. Orton*, 1 Drew. & Sm. 125; 29 L. J., Ch. 319.

A., having assured his life, wrote to the assurance company, "please to take notice that I wish to transfer my interest in the policies" to B. The letter was delivered to the company, and noted in their books:—Held, that this was a good equitable assignment as against a subsequent assignee of the policies, who had, in addition, obtained possession of them. *Chowne v. Baylis*, 31 Beav. 351; 31 L. J., Ch. 757.

**By Parol.]**—G., a few hours before his death, said to a creditor, "there is the wool which has gone to Doncaster; go and sell that wool; pay B. the balance due to him on such wool, and keep the remainder yourself:—Held, that these words created a valid equitable lien. *Gurnell v. Gardiner*, 4 Giff. 626; 9 Jur., N. S. 1220; 9 L. T. 367; 12 W. R. 67.

**—Shares deposited as Security—Rights of Parties.]**—A. deposited with B. share certificates in a company as security for a loan, and afterwards, by deed, assigned all his personal estate to C. and D., in trust for the benefit of his creditors. The assignees gave notice of the assignment to the company; but B. omitted to give notice of his equitable lien:—Held, that notwithstanding the omission of such notice, C. and D. could not maintain trover against B. for the certificates. *Broadbent v. Varley*, 12 C. B., N. S. 214.

**By Agreement—When enforceable.]**—An agreement for an advance in order to enable a contractor for railway works to execute them, on terms entitling the lender to a charge on the contract moneys, and to receive profits in lieu of interest, does not entitle the lender to any part of the benefit of the agreement for security, unless the advance was made to the stipulated extent and at the stipulated times, nor to any lien or charge for a small portion only of the stipulated advance. *Twynnam v. Hudson*, 4 De G., F. & J. 462.

**By an Order for Payment on a third person—Lien.]**—A. being indebted to B., gave him an authority addressed to C., from whom certain sums of money were accruing due to A., authorizing C. to pay those sums to B. Notice of this instrument was given to C.:—Held, first, that the authority was not such an order for the payment of money as would require a stamp; and secondly, that it was an equitable assignment of the moneys in C.'s hands to B., creating a lien or charge upon them which might be successfully set up by C. when served with a garnishee order by a

subsequent judgment-creditor of A. *Sawnderson v. Perrin*, 22 L. T. 419.

**—Liability to Assignee—Defence of.]**—To an action for money due on an award, a plea, that the plaintiff assigned the debts to D. & Co., who gave notice thereof to the defendant, and that the assignment remained in force, and that the defendant still remained liable to pay D. & Co., that the action was not brought for the benefit of D. & Co., nor with their consent, and if the plaintiff recovered, the defendant would nevertheless be obliged to pay D. and Co., is good, as a court of equity would grant an unconditional injunction to restrain the plaintiff from suing for his own benefit. *Jefferies v. Day*, 1 L. R., Q. B. 372; 35 L. J., Q. B. 99.

**Conditional promise not an Assignment.]**—A promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person. *Field v. Megaw*, 4 L. R., C. P. 600.

A., having a cargo of wheat, brought by a vessel called the *Maraquita*, in the hands of a factor for sale, obtained from B. a loan of 500/.. for which he gave B. his acceptance at two months, describing the consideration to be "value received in wheat ex *Maraquita*," and they verbally agreed that the bill was to be renewed from time to time until A. should receive from the factor the proceeds of the wheat:—Held, that this did not charge the fund in the hands of the factor, so as to amount to an equitable assignment of, or an equitable charge upon, the fund. *Id.*

**When attached—Effect on Garnishment.]**—An equitable assignment of property which is subsequently attached, bars the garnishment, though notice of the assignment has not been given to the garnishee before the attachment. *Robinson v. Nesbitt*, 3 L. R., C. P. 264; 37 L. J., C. P. 124; 17 L. T. 653; 16 W. R. 543.

## ASSIZES.

**Circuit.]**—A circuit is continuous from its commencement to its termination. *Oxfordshire (Sheriff), In re*, 2 C. & K. 200; *S. P., Anon.*, Salk. 8.

**Time during which Assizes Continue.]**—Although, by contemplation of law, the whole time during which assizes continue at one place is considered for some purposes as one legal day, yet the particular day on which a conviction actually took place may be proved when necessary. *Whitaker v. Wisbey*, 12 C. B. 44; 21 L. J., C. P. 116; 16 Jur. 411.

Therefore, where a convicted felon made a bona fide assignment of goods after the commission day of the assizes, but before the day on which he was actually convicted:—Held, that the assignee could prove the actual day of the conviction, although the record mentioned only the commission day, and that the assignment was valid. *Id.*

**Jurisdiction of Judges.]**—A judge of assize has authority to order the court, or any part of it, to be cleared if quiet is not preserved in it, and the sheriff is bound to execute his orders and to preserve quiet; and if, instead of that, he incites his officers to disobey such orders, he is guilty of a high contempt of court. A placard issued by him, and posted on the outside of the wall of the court while the judge was sitting:—Held such a contempt. *Surrey (Sheriff), In re*, 2 F. & F. 236.

**Quarter Sessions—How they are affected by.]**—The authority of courts of quarter sessions, whether for a county or a borough, is not in law either determined or suspended by the coming of the judges into the county under their commission of assize, oyer and terminer, and general gaol delivery; although, generally speaking, it would be inconvenient and improper that courts of quarter sessions for counties should be held concurrently with the assizes for the same counties. *Smith v. Reg. (in error)*, 13 Q. B. 738; 18 L. J., M. C. 212.

**Warrant of Commitment for Contempt by.]**—A court of assize being a superior court, a warrant of commitment for contempt need not set out the particulars of the contempt. *Fernandez, Ex parte*, 6 H. & N. 717; 7 Jur., N. S. 529; 4 L. T. 296; *S. P.*, 10 C. B., N. S. 3; 30 L. J., C. P. 321; 7 Jur., N. S. 571; 4 L. T. 324; 9 W. R. 832.

**Clerk of.]**—Though the clerk of assize and clerk of arraigns act as officers of, and are subject to, the control of the court, and their names are inserted in the commissions of oyer and terminer, the court stated that there never was an instance of their acting under the commission, and that they had no authority to decide on any question. *Milward v. Thatcher*, 2 T. R. 83.

**Fees of.]**—By 19 Geo. 3, c. 74, s. 30, the clerk of assize on each circuit was entitled to receive a certain fee for every person convicted of a transportable offence (except petty larceny), and sentenced to transportation, hard labour or confinement in the house of correction, and for persons capitally convicted, who afterwards received the king's pardon on condition of being transported or imprisoned. *Fleetwood v. Finch*, 2 H. Bl. 220.

**Liability of.]**—If a clerk of assize draws an indictment with unnecessary prolixity, he may be ordered to pay the extra expense. *Re v. Bury*, 1 Leach, C. C. 201; *S. P.*, *Re v. May*, 1 Doug. 193.

## ASSURANCE.

*See* INSURANCE.

## ATTACHMENT OF DEBTS.

1. *In what Cases.*
2. *What can be Attached*, 471.
3. *Effect and Operation of*, 477.
4. *Practice on*, 482.

### 1. IN WHAT CASES.

**On Order for Payment of Costs.]**—The order for costs on dismissing an action for want of prosecution is not enforceable by attachment of debts under Ord. XLV. r. 2. *Cremetti v. Crom*, 4 Q. B. D. 225; 48 L. J., Q. B. 337; 27 W. R. 411.

A person who has obtained an order for the costs of an interpleader issue and entered it of record, pursuant to 1 & 2 Will. 4, c. 58, s. 7, so as to have the force and effect of a judgment, is not a judgment creditor within the meaning of the garnishee clauses of the Common Law Procedure Act, 1854, ss. 60, 61. *Bent v. Pembroke*, 8 L. R., Q. B. 363; 42 L. J., Q. B. 212; 29 L. T. 327; 21 W. R. 919.

After a rule has been discharged with costs, the person in whose favour the rule has been discharged cannot obtain a garnishee order; the 1 & 2 Vict. c. 110, s. 18, giving to rules of the courts of common law the effect of judgments for the purposes of the act, but not actually making them judgments. *Sunderland Local Marine Board v. Frankland*, 8 L. R., Q. B. 18; 42 L. J., Q. B. 13; 28 L. T. 18.

Under sub-s. 8 of sect. 25 of the Judicature Act, 1873, the Court of Divorce has power to attach a debt due to a respondent in order to compel obedience to an order of that court for payment of costs. *Whittaker v. Whittaker*, 7 P. D. 15; 51 L. J., P. 80; 47 L. T. 131; 30 W. R. 431.

**By Judgment Creditors.]**—An executor of a judgment creditor is not entitled to attach a debt due to the judgment debtor before he has made himself a party to the judgment. *Baynard v. Simmons*, 5 El. & Bl. 59; 24 L. J., Q. B. 253; 1 Jur., N. S. 657.

But a party in an interpleader issue, who has obtained an order for his costs, which, by 1 & 2 Will. 4, c. 58, s. 7, has the force and effect of a judgment, is a judgment creditor. *Hartley v. Shemwell*, 1 B. & S. 1; 30 L. J., Q. B. 223; 7 Jur., N. S. 774; 9 W. R. 520.

A party having obtained judgment in a superior court for a debt, brought an action on that judgment in a county court, which made an order for payment by instalments:—Held, that the court ought not to assist him, by attaching a debt in the hands of a garnishee. *Jones v. Jenner*, 25 L. J., Ex. 319; 2 Jur., N. S. 574.

A. sued C. as executrix jointly with B. and others, and recovered judgment against them; and under the judgment attached a debt owing by B. to C.'s testator, which B. paid:—Held, that the attachment was void, and that payment of it by B. could not be set off in an action at the suit of C. as executrix against B. to recover it. *Chapman v. Callis*, 6 L. T. 282.

An attachment can be obtained only by judgment creditors at common law. *Commissioners of Donations v. Archbold*, 14 Ir. C. L. R. 67.

## 2. WHAT CAN BE ATTACHED.

**Debt Accruing Due.]**—Under the Common Law Procedure Act, 1854, s. 61, an order may be made not only attaching an accruing debt in the hands of the garnishee, but also an order for payment of the accruing debt when it shall become payable by the garnishee to the judgment creditor. It is not necessary to wait till the debt has become actually payable before making the order for payment. *Tapp v. Jones*, 10 L. R., Q. B. 591; 44 L. J., Q. B. 127; 33 L. T. 201; 23 W. R. 694.

There must be an existing debt due from the garnishee to the judgment debtor, though the time of payment may be postponed. *Jones v. Thompson*, 1 El. & Bl. & El. 63; 27 L. J., Q. B. 234; 4 Jur., N. S. 338.

Therefore, the amount for which a judgment debtor has obtained a verdict against a third person, in an action for unliquidated damages, no judgment having been signed, and the amount therefore not being a debt, is not attachable. *Ib. S. P. Dresser v. Johns*, 6 C. B., N. S. 429; 28 L. J., C. P. 281; 5 Jur., N. S. 1262.

Where the attorney of the judgment creditor had, after judgment, taken an assignment from the garnishee of a debt growing due, and which had been paid before the application, there being nothing to shew that the assignment and the payment under it were not bona fide, the court refused to make an order. *Wise v. Birkenhead*, 29 L. J., Ex. 240; 1 L. T. 223; 8 W. R. 420.

**Income from Trust Fund.]**—A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in February and August. Upon application by the judgment creditor in November for a garnishee order attaching the debtor's share of the income in the hands of the trustees, it appeared that the last half-yearly payment had been made, and that there was no money the proceeds of the trust property in the hands of the trustees:—Held, that there was no debt "owing or accruing" at the time when the order was applied for which could be attached under Ord. XLV. r. 2. *Webb v. Stenton*, 11 Q. B. D. 518; 52 L. J., Q. B. 584; 49 L. T. 432—C. A. Affirming, 48 L. T. 268.

Seemingly, that the proper course for the judgment creditor to pursue was to apply for the appointment of a receiver, under the practice of the Chancery Division. *Ib.*

**Debt Payable at Future Day.]**—A debt due by a third party, but not payable until a future day, may be attached. *Sparks v. Younge*, 8 Ir. C. L. R. 261—Ex.

The mere possibility that when the day of payment arrives there may be a defence against the recovery of the debt, is no ground for resisting an attachment order. *Ib.*

**Annuity.]**—A plaintiff had recovered judgment against the defendant in an action of debt, which judgment still remained unsatisfied. The defendant, under the will of her deceased husband, was entitled to an annuity for the maintenance of herself and her infant son:—Held, that the annuity was attachable in the hands of the trustees in whom it was vested, subject to an inquiry as to the proportion to be

allowed for the maintenance of the son. *Nash v. Pease*, 47 L. J., Q. B. 766.

Dividends due on a savings bank annuity in the hands of the Commissioners for reducing the National Debt, payable to the wife of a party against whom judgment has been obtained, are not in the hands of a garnishee capable of being attached. *Dingley v. Robinson*, 2 Jur., N. S. 1145.

**Bonds.]**—Commissioners, incorporated for the purpose of effecting improvements in Westminster, were empowered to borrow money on bonds, and to advance money to builders for building purposes. By the condition of these bonds, all the bondholders were to be paid *pari passu*. The commissioners advanced a sum to a builder. The plaintiff sued the commissioners on one of these bonds, and they suffered judgment to go by default:—Held, that the debt due from the builder to the commissioners was not such a debt as could be attached, for the plaintiff could not enforce immediate payment, and the effect of the garnishment would be to give him a priority over the other bondholders. *Kennett v. Westminster Improvement Commissioners*, 11 Ex. 349; 25 L. J., Ex. 97. See *Ames v. Birkenhead Dock Trustees*, 20 Beav. 332; 24 L. J., Ch. 540; 1 Jur., N. S. 529.

C., at the request of D., commenced an action, in which C. had no interest, against I.; upon D. giving to C. a bond, whereby D. bound himself to C. in a penal sum, subject to the condition that, if D. should pay I. such costs as C. should, in due course of law, be liable to pay in case he should discontinue, become nonsuit, or a verdict should pass against him, such costs to be first taxed, or in case of a judgment obtained by I. for his costs of defence; and also should permit C. during the pendency of the action, or of any liability to him arising therefrom, to retain and apply any of D.'s moneys that might come to C.'s hands towards the discharge of any costs or liabilities which C. might be put to, or incur, by reason of his permitting the action to be carried on in his name, or from any injury to him thereby from the default or omission of D. to pay the same, the bond should be void. C. was nonsuited in the action, and I. had judgment to recover his costs:—Held, that D.'s liability under the bond to pay such costs did not constitute a debt, and could not be attached as such by the judgment creditor. *Johnson v. Diamond*, 11 Ex. 73; 24 L. J., Ex. 217; 1 Jur., N. S. 938.

**Legacy.]**—A legacy in the hands of an executor cannot be attached, although he has promised to pay it over if ordered so to do. There must be such an account stated as would sustain an action in order to constitute the legacy a legal debt in the hands of a legal debtor. *McDowall v. Hollister*, 3 C. L. R. 933; 25 L. T., O. S. 185; 3 W. R. 522.

**Superannuation Allowance to Clerk.]**—The superannuation allowance to a retired clerk of the East India Company, granted by a resolution of the court of directors, is not attachable to answer a judgment debt due from such clerk. *Innes v. East India Company*, 17 C. B. 351; 25 L. J., C. P. 154; 2 Jur., N. S. 189.

**Pension—Quarterly Instalment due and to become due.]**—A quarterly instalment of a police

constable's pension which is actually due to him may be attached under Ord. XLV., being "a debt owing" to him. Otherwise as to further instalments to become due in the future. *Booth v. Trail, Hayson, In re*, 12 Q. B. D. 8; 49 L. T. 471; 32 W. R. 122.

**Married Woman—Restraint on Anticipation.]**

—Judgment having been signed in an action against the defendants, a man and his wife, it was sought to attach in execution moneys in the hands of trustees forming part of the income of trust funds payable to the wife to her separate use, which had accrued since the judgment. The will by which the trust was created contained a clause restraining anticipation by the wife. It appeared that the action was for the amount of a promissory note made by the husband and wife jointly during the coverture:—Held, that the moneys in question could not be attached in execution. *Chapman v. Biggs*, 11 Q. B. D. 27; 48 L. T. 704; 47 J. P. 485.

**On Bankruptcy.]**—An order having been made for the attachment of the surplus of a bankrupt's estate against the official assignee of the Court of Bankruptcy as garnishee, under the Common Law Procedure Act, 1854:—Held, that such order was invalid, there being no debt that could be attached within the meaning of the Act. *Hunter, In re*, 8 L. R., C. P. 24; 42 L. J., C. P. 55; 27 L. T. 827; 21 W. R. 263.

A deed under the Bankruptcy Act of 1861, s. 192, is a bar to an execution issued against a garnishee under an order to the same extent that it is a bar to an execution on a judgment. *Kent v. Tomkinson*, 2 L. R., C. P. 502; 36 L. J., C. P. 224; 17 L. T. 41.

A dividend payable by the assignees in bankruptcy to a creditor who has proved in the Court of Bankruptcy, cannot be attached by a judgment creditor of the person to whom such dividend is payable. *Boyse v. Simpson*, 8 Ir. C. L. R. 523; *S. P., Gilmour v. Simpson*, 8 Ir. C. L. R., App. xxxviii.

**—Creditor's Dividend.]**—A garnishee order will not be given to attach a dividend in the hands of the official liquidator of a company which is being wound up in bankruptcy. *Dawson v. Malley*, 1 Ir. R., C. L. 207; 15 W. R. 791.

**Cheque stopped.]**—A garnishee order was made under Ord. XLV. r. 2, attaching a debt. At the time the order was made, the garnishees had given the judgment debtor a cheque for the amount of the debt. Upon service of the order on the garnishees they stopped payment of the cheque at the bank, the cheque not having been presented:—Held, that upon the cheque being stopped it was as if it had never been given, and that there was therefore an existing debt capable of being attached, and the garnishee order was effectual. *Cohen v. Hale*, 3 Q. B. D. 371; 47 L. J., Q. B. 496; 39 L. T. 35; 26 W. R. 680.

**Money in Court.]**—A plaintiff has such an interest in money lodged in the name of the master of the court to the credit of the cause that the money so lodged may be made the subject of a charging order. *Adams v. Gillem*, 9 Ir. R., C. L. 148. *See next case.*

**Money paid into County Court.]**—The proceeds of a judgment paid into the county court are not attachable by means of a garnishee summons at the suit of a third person as "a debt," due from the registrar of the court to the judgment debtor. *Dolphin v. Layton*, 4 C. P. D. 130; 48 L. J., C. P. 426; 27 W. R. 786.

**Absolute Debt—Purchase-money under Lands Clauses Act.]**—A "debt due or accruing" to a judgment debtor and therefore capable of being attached by a garnishee order under Rules of Court, 1875, Ord. XLV. r. 3, must be an absolute and not merely a conditional debt. Thus, where,

after notice to treat by a railway company to a landowner, the purchase-money has been fixed by the verdict of a jury and judgment of the sheriff under sects. 49 and 50 of the Lands Clauses Act, the purchase-money cannot be attached by a garnishee order nisi served upon the company by a judgment creditor of the landowner after the verdict but before the execution or tender of a conveyance; for the proceedings under the above sections do not of themselves create an absolute debt due from the company to the landowner, his right to the purchase-money being conditional upon the execution or tender of a conveyance. Accordingly, in a case where the landowner had brought an action and obtained judgment against the company for specific performance of the statutory contract:—Held, that the purchase-money could not be attached by garnishee orders nisi served upon the company, some before and others after the commencement of the action, notwithstanding that a good title had been shewn; nor even by a garnishee order served after the execution of the conveyance when the money had been paid into court by the company under the judgment, the money not being "a debt in the hands" of the garnishee within rule 3 of Ord. XLV. *Howell v. Metropolitan District Railway Company*, 19 Ch. D. 508; 61 L. J., Ch. 158; 45 L. T. 707; 30 W. R. 100.

**Discharge of Garnishee.]**—The provisions of rule 8 of Ord. XLV., as to payment or execution being a valid discharge to the garnishee, are inapplicable to a debt due from the judgment debtor that is conditional only. *Id.*

**Wages Attachment Abolition Act, 1870—Salary of Secretary attachable.]**—The salary of a secretary to a company amounting to 200l. a year is not "wages" of a "servant" within the Wages Attachment Abolition Act (33 & 34 Vict. c. 30), and is therefore not exempted from attachment by that act. *Gordon v. Jennings*, 9 Q. B. D. 45; 51 L. J., Q. B. 417; 46 L. T. 534; 30 W. R. 704; 46 J. P. 519.

**Money in hands of Receiver.]**—A receiver who had been appointed in an administration action and ordered to pay to a legatee a sum quarterly out of moneys in or coming to his hands, was, on the application of creditors who had in an action in a Common Law Division obtained a judgment against the legatee, ordered, under Rules of Court, 1875, Ord. XLV., to pay them their debt and costs. *Crowans' Estate, In re, Ravier v. Wright*, 14 Ch. D. 638; 49 L. J., Ch. 402; 42 L. T. 866; 28 W. R. 827.

**Debt Due from Partnership Firm.]**—A gar-



nishee order cannot be made under Ord. XLV. r. 2, attaching a debt due from a partnership firm described by its partnership name. *Walker v. Roofs*, 6 Q. B. D. 631; 50 L. J., Q. B. 470.

**Funds in Hands of Executor.**—The court refused to attach, at the instance of a judgment creditor, on a judgment de bonis testatoris against an executrix, funds lodged by her in that capacity in the bank of the judgment creditor. *Hewat v. Davenport*, 21 W. R. 78.

A charging order will not be made against government stock, standing in the name of a judgment debtor, upon a judgment de bonis testatoris obtained against the debtor as administratrix. *Ib.*

A garnishee order made against executors will not affect money paid into court by them in an administration suit, and carried to a separate account to meet a debt due to the judgment debtor. *Sterens v. Phelps*, 10 L. R., Ch. 417; 44 L. J., Ch. 689; 23 W. R. 716.

A judgment creditor obtained a garnishee order nisi against the executors of P., a debtor of the judgment debtor. At that time P.'s estate was being administered in the Court of Chancery, and after the service of the garnishee order the executors paid the personal estate in their hands into court, and a sufficient sum to answer P.'s debt to the judgment debtor was carried to the separate account of the judgment debtor in the suit. The judgment debtor afterwards filed a petition for liquidation, and obtained an injunction restraining the judgment creditor from proceeding with his garnishee order. The trustee in the liquidation then applied in the suit for payment to him of the sum standing to the separate account of the judgment debtor:—Held, that there was no debt owing to the judgment debtor in the hands of the executors of P. at the time when they were served with the garnishee order, and consequently the judgment creditor had no charge on the fund in court. *Ib.*

**Surplus on Fl. Fa.**—Surplus money realized by a sale under a fl. fa. belongs to the judgment debtor, and may be attached in the hands of a sheriff. *O'Neill v. Cunningham*, 6 Ir. R., C. L. 503.

**Within the Jurisdiction.**—A debt cannot be attached under the garnishee clauses of the Irish Common Law Procedure Act, 1856, unless the garnishee is within the jurisdiction; and a registered company, whose head office is in London, are not within the jurisdiction within s. 63, although they have an agent residing in Ireland and transacting their business there. *Martyn v. Kelly*, 5 Ir. R. C. L. 404.

**Notice to Treat.**—A notice to treat, upon which nothing has been done, does not constitute "a debt owing or accruing," which can be attached under Order XLV. r. 2, of the Judicature Act, 1875. *Richardson v. Elmit*, 2 C. P. D. 9; 36 L. T. 58.

**Promissory Note.**—A promissory note not yet due does not constitute a debt which can be attached to answer a judgment debt. *Pine v. Ainner*, 11 Ir. R., C. L. 40.

**Rent.**—Rent due may be attached. *Mitchell v. Lee*, 2 L. R., Q. B. 259; 36 L. J., Q. B. 154; 15 L. T. 502; 15 W. R. 337; 8 B. & S. 92.

A mortgagee who has given notice to the tenant to pay rent to him has not a lien or a charge upon the rent within 23 & 24 Vict. c. 126, (Common Law Procedure Act, 1860), s. 29. *Ib.*

**Salary.**—The salary of a medical or other officer cannot, before it is actually payable, be attached by a garnishee order under the County Court Rules, 1875, for it is not "a debt due, owing, or accruing" to the judgment debtor. *Hall v. Pritchett*, 3 Q. B. D. 215; 47 L. J., Q. B. 15; 37 L. T. 671; 26 W. R. 95.

**Interest on Railway Stock guaranteed by Garnishee.**—The defendants raised money by the issue of capital stock to complete a portion of their line. By an arrangement between the defendants and the D. Railway Company, confirmed by an Act of Parliament, the line was worked by the latter company, who provided and paid to the defendants half-yearly a sum of money for the payment of interest on the stock. Judgment having been recovered by the plaintiff against the defendants and one of the half-yearly instalments being due:—Held, that it could be attached in the hands of the D. Railway Company as a debt under the Common Law Procedure Act, 1854, s. 61. *Bouch v. Sevenoaks, &c. Railway Company*, 4 Ex. D. 133; 48 L. J., Ex. 338; 40 L. T. 560; 27 W. R. 507.

**Verdict.**—A verdict in an action of trespass upon which no judgment has been entered, is not a debt which can be attached. *Shaw v. Shaw*, 18 L. T., 420.

**Order of Court for Payment.**—An order of the court of Chancery for payment of money, though a judgment debt within 1 & 2 Vict. c. 110, s. 11, cannot be attached, the provisions of the C. L. P. Act, 1854, ss. 60, 61, applying only to judgments in the superior courts of common law. *Price, In re*, 4 L. R., C. P. 155; 17 W. R. 319.

**Proceeds of Execution.**—The proceeds of an execution may be attached in the sheriff's hands for a debt due by the execution creditor. *Murray v. Simpson*, 8 Ir. C. L. R. App. xlv.

**In other Cases.**—Upon a joint judgment recovered against several, a debt due to one or more of the judgment debtors may be attached in the hands of the garnishee. *Miller v. Myan*, 1 El. & El. 1075; 28 L. J., Q. B. 324; 5 Jur., N. S. 1257; 33 L. T., O. S. 184; 7 W. R. 524; 2 F. & F. 379.

A judgment creditor cannot attach a debt due to the wife of a judgment debtor, under a specialty given to her dum sola. *Dingley v. Robinson*, 26 L. J., Ex. 55; 2 Jur., N. S. 1145.

Nor a judgment creditor, who has taken his debtor in execution under a ca. sa. *Jauralde v. Parker*, 6 H. & N. 431; 30 L. J., Ex. 237; 3 L. T. 751; 9 W. R. 346.

But a judgment creditor may attach a debt due to his debtor, although the garnishee has been taken in execution for the debt. *Marples v. Hartley*, 1 B. & S. 1; 30 L. J., Q. B. 223; 7 Jur., N. S. 774; 9 W. R. 620.

A judgment creditor having arrested his

debtor, the debtor filed a petition in bankruptcy, and obtained his discharge:—Held, that the creditor might attach the debt of his judgment debtor in the hands of a third party, notwithstanding his arrest. *Halahan v. Worman*, 7 L. T. 278; 11 W. R. 10.

Where judgment is recovered against an executor, a debt due from a third person to the testator's estate may be attached, and it is no answer that a decree has been made in a suit in Chancery for the administration of the testator's estate. *Burton v. Roberts*, 6 H. & N. 93; 29 L. J., Ex. 484.

And a court of equity will not interfere with or restrain such attachment. *Fowler v. Roberts*, 2 Giff. 226; 6 Jur., N. S. 1189; 8 W. R. 492.

A judgment creditor cannot (without leave of the Court of Chancery) attach moneys in the hands of its receiver which have been directed to be paid by him to the judgment debtor. *De Winton v. Brecon (Mayor, &c.)*, 28 Beav. 200; 6 Jur., N. S. 1046.

Where an official manager of a company in the course of being wound up has funds in his hands belonging to the company, he may be ordered to pay out of the funds in his hands a debt due to a creditor of the company's creditor. *Warwick and Worcester Railway Company, In re, Turner, Ex parte*, 2 De G., F. & J. 354; 30 L. J., Ch. 92; 6 Jur., N. S. 1172; 3 L. T. 380.

But money in a sheriff's hands, levied under an attachment for costs, awarded by a decree in equity, remains in custodia legis, and is not, without further order, the property of the party who has issued the attachment. *Williams v. Reeves*, 12 Ir. Ch. Rep. 173.

An order upon a garnishee has no operation upon debts of which a judgment debtor has already divested himself by bona fide assignment. *Hirsch v. Coates*, 18 C. B. 757; 25 L. J., C. P. 315.

### 3. EFFECT AND OPERATION OF.

**Priority between Garnishee Order and Solicitor's Charging Order.**—A judgment creditor of the defendant in a partnership action obtained a garnishee order nisi to attach all moneys in the hands of the receiver in the action appearing to be due to the defendant on taking the accounts. On the following day, and before service of the order nisi, the defendant's solicitors obtained, on a summons served on the receiver, a charging order intitled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the defendant under the action. On the next day the garnishee order nisi was served on the receiver, and was subsequently made absolute:—Held, that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order both under the act and independently of it. *Hamer v. Giles*, 11 Ch. D. 942; 48 L. J., Ch. 508; 27 W. R. 834.

By an award made pursuant to an order of nisi prius, the sum of 179l. was ordered to be paid by M. to P. This amount remained unsatisfied. The plaintiffs obtained judgment for 1,200l. against P. B., who acted as P.'s attorney in the action in which the order of nisi prius was made, and took out a summons for a charging order under 23 & 24 Vict. c. 127, s. 28, upon the 179l. Afterwards the plaintiffs ob-

tained a garnishee order under 17 & 18 Vict. c. 125, s. 61, against M. —Held, that the unpaid amount of 179l. was property within 23 & 24 Vict. c. 27, s. 28, and the summons for the charging order having been issued by B. before the plaintiffs obtained the garnishee order, B.'s lien as the attorney by whom the 179l. had been recovered must prevail, and he was entitled to receive that sum in priority to the plaintiffs. *Birchall v. Pugin*, 10 L. R., C. P. 397; 44 L. J., C. P. 278; 32 L. T. 495; 23 W. R. 923.

Solicitors who act for a plaintiff in an action in which he recovers damages are entitled to a charge or lien upon such damages for their costs in the action, as against a judgment creditor of the plaintiff who has obtained an ex parte garnishee order before such costs have been taxed. *Shipley (or Shippey) v. Grey*, 49 L. J., C. P. 524; 42 L. T. 673; 28 W. R. 877.

An attachment of a judgment debt overrides an attorney's lien on or control over the judgment, in respect of general costs due to him from the garnishee. *Hough v. Edwards*, 1 H. & N. 171; 26 L. J., Ex. 54; 2 Jur., N. S. 814.

But if a judgment creditor receives a debt which has been attached from the garnishee, with notice of the lien of the judgment debtor's attorney, he will be liable to repay it to the attorney. *Eisdell v. Covingham*, 28 L. J., Ex. 213.

So an order attaching a fund in the hands of a garnishee, to answer a judgment debt, will not displace the prior lien for costs of a solicitor who has given notice to the garnishee. *Sympton v. Prothero*, 26 L. J., Ch. 671; 3 Jur., N. S. 711; 5 W. R. 814.

**On Proctor's Lien.**—A proctor's lien on a fund in court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the holder of the garnishee order. *The Jeff Davis*, 2 L. R., Adm. 1; 17 L. T. 151.

A plaintiff having obtained a decree in the Admiralty Court for payment by the defendant of a sum of money for costs, the defendant, under the authority of two garnishee orders, paid part of the sum to judgment creditors of the plaintiff. No notice had been given to the plaintiff's proctor previously to the application for the garnishee orders, nor was the existence of the proctor's lien mentioned to the judge who made the orders:—Held, that the defendant was still liable to pay the costs decreed. *The Leader*, 2 L. R., Adm. 314; 37 L. J., Adm. 57; 18 L. T. 767; 17 W. R. 61.

**Secured Creditor, who is.**—An attachment under the Common Law Procedure Act, 1854, ss. 61—63, resembles an actual seizure by a sheriff, and therefore a garnishee order absolute is a security on the property of the judgment debtor within the Bankruptcy Act, 1869, s. 12, and if he afterwards becomes bankrupt the execution creditor is a creditor holding a charge on the bankrupt's estate, as a security for a debt due to him, within the Bankruptcy Act, 1869, s. 16, sub-s. 5. *Emanuel v. Bridger*, 9 L. R., Q. B. 286; 43 L. J., Q. B. 96; 30 L. T. 195; 22 W. R. 404.

A judgment creditor, who, before a liquidation petition filed by his debtor, has obtained a garnishee order nisi attaching debts due to the debtor, is a secured creditor within ss. 12 and 16

of the Bankruptcy Act, 1869, and is, therefore, entitled to the attached debts as against the trustee in the liquidation, even though they did not become actually payable until after the commencement of the liquidation. *Joselyne, Ex parte, Watt, In re*, 8 Ch. D. 327; 47 L. J., Bk. 91; 38 L. T. 661; 26 W. R. 645—C. A.

A judgment creditor, who has obtained and served on the garnishee a garnishee order nisi, before a petition for liquidation has been presented by the judgment debtor, is a creditor holding a security on the debtor's property within the meaning of the Bankruptcy Act, 1869, s. 12. *Lowe v. Blakemore*, 10 L. R., Q. B. 485; 44 L. J., Q. B. 155; 33 L. T. 473; 23 W. R. 856.

A judgment creditor who has obtained a garnishee order nisi to attach debts due to his debtor does not obtain any charge on the debts until service of the order nisi on the garnishees. *Stanhope Silkstone Collieries Company*, 11 Ch. D. 160; 48 L. J., Ch. 409; 40 L. T. 204; 27 W. R. 561—C. A.

A creditor of a liquidating debtor who before the presentation of the petition has obtained a garnishee order affecting money accruing due to his debtor, but who has not obtained any order for payment by the garnishee, is not a secured creditor within the meaning of the Bankruptcy Act, 1869, s. 40. *Greenway, Ex parte, Adams, In re*, 16 L. R., Eq. 619; 42 L. J., Ch. 110; 29 L. T. 75; 21 W. R. 866. *But see cases supra.*

A party who pays money under compulsion of a court of law is protected against all claims made to it by other parties. *Wood v. Dunn*, 2 L. R., Q. B. 73; 36 L. J., Q. B. 27; 15 L. T. 411; 15 W. R. 180; 7 B. & S. 94—Ex. Ch.

A. executed a deed, which was registered in accordance with the provisions of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 192, whereby he conveyed all his property to trustees for the benefit of his creditors. A creditor of his obtained a garnishee order against B., attaching a debt due by him to A. B., having no notice or knowledge of the deed, paid the debt:—Held, first, that this payment, being under the compulsion of the judge's order, was protected against the claim of the trustee. *Ib.*

Held, secondly, that the execution creditor was in the position of a creditor having security for his debt in respect of a lien within 12 & 13 Vict. c. 106, s. 184. *Ib.*

**Set-off between Garnishee and Judgment Creditor.**—When a debt due from the garnishee to the judgment debtor has been attached, the garnishee has no right to retain the amount of any debt due to him from the judgment creditor, and the judge must order execution to levy the whole amount due from the garnishee to the judgment debtor. *Sampson v. Seaton and Beer Railway Company*, or *Sampson, In re*, 10 L. R., Q. B. 28; 44 L. J., Q. B. 31; 31 L. T. 672; 23 W. R. 212.

**Mode of Paying.**—A garnishee, whose debt has been attached, and who has been summoned, has no right to substitute a different mode of discharging his debt to that already existing between the judgment creditor and the judgment debtor. *Turner v. Jones*, 1 H. & N. 878; 26 L. J., Ex. 262.

If before regular service of a garnishment summons the garnishee (an order for execution having been granted) bona fide pays the debt,

he is protected. *Cooper v. Brayne*, 27 L. J., Ex. 446.

— **By Process of Law.**—A plaintiff having recovered judgment against a defendant for 18l., and the defendant having recovered judgment against B. for 44l., the plaintiff obtained an order, attaching B.'s debt, together with a summons, calling on B. to shew cause why he should not pay to the plaintiff 18l. of the amount of the debt due to the defendant. Afterwards, and before the return of the summons, the defendant taxed his costs as against B., and on the same day issued a fi. fa. under which the sheriff took possession of the goods of B., who gave notice to the sheriff of the summons, and offered to pay the sheriff the debt due to the defendant, less the amount due to the plaintiff. This the sheriff refused to accept, and insisted on being paid the whole amount for which execution was levied. Whereupon B. paid the whole amount under protest:—Held, that B. having been compelled by process of law to pay the debt to the sheriff, could not be called upon to pay it a second time to the plaintiff. *Turnbull v. Robertson*, 47 L. J., C. P. 294; 38 L. T. 389; 26 W. R. 557.

— **"Devolution of Estate by Operation of Law."**—A garnishee order was made absolute in favour of judgment creditors of W. attaching a judgment debt recovered by W. against S.:—Held, that this was a devolution of estate by operation of law within Ord. L. r. 2, and that the judgment creditors of W. were entitled to be added as co-plaintiffs in the action of W. against S., but not to have the conduct of the action. *Wallis v. Smith*, 51 L. J., Ch. 577; 46 L. T. 473.

**In case of Bankruptcy of Judgment Debtor.**—P. sent goods to an auctioneer for sale for ready money, not to be removed until payment. The auctioneer sold them on those terms, stated in the conditions of sale, and received part of the price from some of the purchasers; but H. who had purchased part, took them away without payment, and without the consent of the auctioneer or of P. H. refused to pay, offering to set off a debt due to him from P. This was declined. H. having obtained judgment against P., obtained an order to attach the price of the goods remaining in the auctioneer's hands, which was served on the garnishee. On the same day, but after the service, P. became bankrupt. His assignees claimed the money from the garnishee, and also demanded payment from H. of the price of the goods taken away by him:—Held, that the service bound the debt so as to render the judgment creditor a creditor having security for his debt within 12 & 13 Vict. c. 106, s. 184, but did not give him a lien, so as to bring him within the exception in that section, and consequently that the judgment creditor could not prevail against the assignees. *Holmes v. Tutton*, 5 El. & Bl. 65; 24 L. J., Q. B. 346; 1 Jur., N. S. 975.

If a judgment creditor obtains an order attaching a debt due to the judgment debtor, and subsequently another order, directing the garnishees to pay the amount attached to the judgment creditor, or that execution may issue against them, and the judgment debtor becomes bankrupt before payment by the garnishees or execution levied on them, the judgment creditor cannot

avail himself any longer of the order, but must share equally with the other creditors, as he is only in the situation of a creditor having security under 12 & 13 Vict. c. 106, s. 184, and not within the exception to that section, as a creditor having a mortgage or lien. *Tilbury v. Brown*, 30 L. J., Q. B. 46; 6 Jur., N. S. 1151; 3 L. T. 380.

A judgment creditor obtained a garnishee order attaching a debt due to his debtor. After the order was made absolute, but before execution levied, the judgment debtor became bankrupt. The judgment creditor then issued execution against the garnishee. The garnishee applied to set the execution aside. The assignees in bankruptcy had notice of all the proceedings, and declined to make any claim. The court refused to set aside the execution. *European Bank v. Fox*, 15 W. R. 158; 15 L. T. 288.

**Garnishee Order not transferring Debt due with benefit of Securities.**—M. mortgaged a leasehold to W., and then to B. A judgment creditor of B. obtained a garnishee order against M. After this W. sold the property under a power of sale, and an action was brought to distribute the surplus proceeds:—Held, that the judgment creditor had no claim against the surplus proceeds of sale, for that a garnishee order has not the effect of transferring the debt due from the garnishee with the benefit of the securities for it, and that to treat the garnishee order as affecting the land before execution would conflict with the provisions of 27 & 28 Vict. c. 112. *Chatterton v. Watney*, 17 Ch. D. 259; 50 L. J., Ch. 535; 44 L. T. 391; 29 W. R. 573—C. A. Affirming, 16 Ch. D. 378; 50 L. J., Ch. 227; 44 L. T. 53; 29 W. R. 373.

**Common form of Garnishee Orders nisi.**—Mention is made in them of "the said garnishee" when the name of the garnishee has not been before stated. *Id.* Per V.-C. B., 16 Ch. D. 386.

**Trust Moneys—Right of Cestui que Trust to intervene on Summons.**—A garnishee summons having been issued to attach certain moneys due to the judgment debtor on a judgment, the judgment creditor received notice from a third person that she claimed the said moneys as trust moneys recovered for her benefit by the judgment debtor as her trustee. On the hearing of the summons no suggestion was made by the garnishee under Ord. XLV. r. 6, that the moneys sought to be attached belonged to some third person, and the master refused to hear a solicitor on behalf of the claimant, on the ground that no such suggestion, as aforesaid, having been made he had no power under Ord. XLV. rr. 6, 7, to hear him, and made the order absolute:—Held, that where in garnishee proceedings circumstances are brought to the knowledge of the master which afford reasonable ground for supposing that the money sought to be attached is trust money, the master should exercise an equitable jurisdiction and withhold the order absolute, and order the money to be paid into court to abide the event of an inquiry. *Roberts v. Death*, 8 Q. B. D. 319; 51 L. J., Q. B. 15; 46 L. T. 246; 30 W. R. 76—C. A.

The master had power under rule 7 to hear the claimant. *Id.*—Per Cotton and Lindley, L.JJ. (Brett, L. J., diss.)

VOL. I.

**Payment by Garnishee.**—Payment into court by a garnishee under a judge's order, is a payment within the meaning of the C. L. P. Act of 1854, s. 65, and discharges the garnishee; and the subsequent execution of a composition deed by the debtor will not prevent the creditor from being entitled to the money so paid into court. *Culverhouse v. Wickens*, 3 L. R., C. P. 295; 37 L. J., C. P. 107; 17 L. T. 478; 16 W. R. 402.

A. having signed judgment against B. (a solicitor), obtained a garnishee order against C. who owed B. a bill of costs; C. obtained further time for taxing the bill on payment into court of 25*l.* B. subsequently, and before the taxation was complete, executed a composition deed, and gave notice to C. not to pay the amount of the bill to A. The bill when taxed was found to exceed 25*l.* On an application by C. for the repayment to him out of court of the 25*l.*:—Held, that the payment into court was a discharge as against B., and that A. was entitled to the money. *Id.*

A garnishee order cannot be reviewed by the Admiralty Court, and therefore payment under a garnishee order of the costs pronounced due to a party by decree of that court is a satisfaction of the decree even as against that party's proctor claiming a lien. *The Olive*, Swabey, Adm. Rep. 423; 5 Jur., N. S. 445.

But where a garnishee order had been obtained against a receiver appointed by the Court of Chancery, he not objecting to the order being made, and he paid over to the person named in the order moneys in his hands as such receiver, he was ordered to refund. *De Winton v. Brecon (Mayor, &c.)*, 28 Beav. 200; 6 Jur., N. S. 1046.

Action for work done in New York. Plea, that an action had been brought by D. against the plaintiff in the supreme court of New York, for a sum exceeding 50*l.*; that by process issued out of that court, and executed on the defendant, that sum, due and owing from the defendant to the plaintiff, was attached in the defendant's hands according to the laws of that state, to satisfy the demand in the action; and that judgment was recovered by D. in that court, and a writ of execution issued by D. on such judgment to the sheriff, whereupon the defendant was liable and obliged, by the laws of the state, to pay over to the sheriff the 50*l.*, deducting the necessary expenses of the attachment. The plea alleged that the plaintiff and the defendant were citizens of New York, and the defendant was resident there, and subject to the jurisdiction and process of the court, and that by the laws of the state he was discharged and acquitted of the 50*l.*:—Held, that this plea was sufficient without setting out the American law as to foreign attachment, and a good defence pro tanto. *Gould v. Webb*, 4 El. & Bl. 933; 24 L. J., Q. B. 205; 1 Jur., N. S. 821.

#### 4. PRACTICE ON.

**Notice of Attachment out of Mayor's Court.**—Quære, whether a notice of attachment out of the Mayor's Court is any answer to an order attaching a debt. *Newman v. Rook*, 4 C. B., N. S. 434.

At all events, service of such a notice upon the vestry clerk of a parish without the limits of

B

the city can have no operation upon a debt due from the vestry to the judgment debtor. *Ib.*

To entitle a garnishee to a writ, he must satisfy the court or judge that he has a real ground for disputing his liability for payment of the debt. *Ib.*

**Proceeding against Garnishee by Writ.]**—It is discretionary with a judge to order, if a garnishee disputes his liability, that the judgment creditor shall be at liberty to proceed against the garnishee by writ. *Wise v. Birkenshaw*, 29 L. J., Ex. 240; 1 L. T. 223; 8 W. R. 420.

Where an order for an attachment of debts has been obtained ex parte, and a summons, calling on the garnishee to shew cause why he should not pay the money to the judgment creditor, has been issued, and the garnishee appears and disputes his liability; and the judgment creditor does not ask to be allowed to proceed against him by writ, the judge may not only dismiss the summons, but discharge the attachment order altogether. *Wintle v. Williams*, 3 H. & N. 288; 27 L. J., Exch. 311.

While an action is pending against a garnishee, the court will not, without evidence of collusion between him and the judgment debtor, grant a writ against the garnishee. *Richardson v. Greaves*, 10 W. R. 45.

Where the court cannot clearly, beyond all doubt, see that the garnishee is not liable to attachment, the court will not set aside the order without allowing the judgment creditor to proceed against him by writ. *Seymour v. Brecon Corporation*, 29 L. J., Ex. 243.

A garnishee, against whom a judgment creditor has obtained leave to proceed by writ, calling upon him to shew cause why there should not be execution against him, cannot be held to bail or arrested under 1 & 2 Vict. c. 110, s. 2. *Horner v. Luff*, 3 B. & S. 818.

**Examination of Judgment Debtor.]**—The court has no power to order the directors of a railway company against which judgment has been obtained to be orally examined as to debts owing to the company. *Dickson v. Neath and Brecon Railway Company*, 4 L. R., Ex. 87; 38 L. J., Ex. 57; 19 L. T., 702; 17 W. R. 501.

**Under Rules of Supreme Court, Ord. XLV.]**—In the oral examination of a judgment debtor "as to whether any and what debts are owing to him," the examination is not confined to the question whether any debts are owing and what they are, but any question fairly pertinent and properly asked with a view to ascertain full particulars of what debts there are and which of them may be attached, must be answered. Per James, L. J.: The examination may take the form of the severest cross-examination. *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8; 50 L. J., Ch. 7; 43 L. T. 399; 29 W. R. 179—C. A.

**Non-attendance—Effect of.]**—A judgment debtor was ordered to attend on the 7th December to be examined, under Ord. XLV. r. 1, as to the debts owing to him, with a view to attaching them. He did not attend on that day, and the examination was adjourned to the 21st December. Before the 21st December, upon a judgment debtor's summons, he was ordered to pay the judgment debt by instalments. He did

not attend upon the 21st December. Upon the application of the judgment creditor that an attachment might issue for contempt:—Held (Brett, L. J. diss.), that the having obtained an order that the debt should be paid by instalments was not inconsistent with examining the debtor as to debts owing to him, and that the attachment ought to issue unless the debtor attended to be examined within fourteen days. Per Brett, L. J.: To pursue the two proceedings concurrently was lawful, but oppressive; the allowing an attachment to issue was always matter of discretion; the Court of Appeal ought not to differ from the court below on a matter of discretion unless it was made absolutely clear that they had exercised their discretion wrongly; and that was not clear in the present case. *Hayter or Hayton v. Beall*, 44 L. T. 131—C. A. Reversing, 29 W. R. 333.

**Service of Rule for.]**—Service of a rule, for the oral examination of the judgment debtor upon his wife, without shewing that it came to his knowledge, is not sufficient. *Mason v. Mugeridge*, 18 C. B. 642.

**Applying to Inferior Courts.]**—Where, by an order in council, under 17 & 18 Vict. c. 125, s. 105, the act has been applied to an inferior court of record, the inferior court has the same powers with respect to the garnishee clauses as the superior courts. *Dauber or Dawler v. Barnes*, 31 L. J., Q. B. 302; 8 Jur., N. S. 512; 6 L. T., 333; 10 W. R. 605.

**Decision of Judge final.]**—When upon an attachment, under a garnishee order by a judgment creditor, of moneys due to the judgment debtor, a third party claims such moneys for a debt due to him from the judgment debtor, and consents to a judge at chambers deciding the issue summarily between him and the judgment creditor, instead of asking under Ord. XLV. r. 7, for an issue to be tried in the usual way, such decision of the judge is final, and cannot be appealed against by such third party. *Eade v. Winsor*, 47 L. J., Q. B. 584.

**Against Executors.]**—If a garnishee order is made against the executors of a debtor of the judgment debtor, it ought to appear on the face of it that they are sought to be charged as executors. *Stevens v. Phelps*, 10 L. R., Ch. 417; 44 L. J., Ch. 689; 23 W. R. 716.

**Costs.]**—Where a garnishee disputes his liability, and the court authorizes the judgment creditor to proceed by writ against the garnishee, omitting all mention of costs, the successful party is entitled to his costs in the ordinary way, and an order of the court is not necessary for that purpose. *Johnson v. Diamond*, 11 Ex. 431; 25 L. J., Ex. 40; 1 Jur., N. S. 1093.

## ATTACHMENT OF THE PERSON.

### I. WHEN GRANTED.

1. *Against whom.*
  - a. Generally.
  - b. Solicitors.—See SOLICITOR.
  - c. Sheriffs.—See SHERIFF.
  - d. Witnesses.—See EVIDENCE.
  - e. Trustees.—See TRUST AND TRUSTEE.
2. *For what.*
  - a. Contempt of Court.—See CONTEMPT OF COURT.
  - b. Under Debtors Act.—See DEBTORS ACT.
  - c. For Non-performance of Awards.—See ARBITRATION AND AWARD.

### II. PRACTICE ON.

1. *Writ*, 487.
2. *Affidavits*, 489.
3. *Service of Rule, Order or Motion*, 490.
4. *Demand*, 494.
5. *Examination of Defendant*, 495.
6. *Other Matters relating to*, 496.

### III. FOREIGN ATTACHMENT.—See MAYOR'S COURT.

### IV. BY DIVORCE COURT.—See HUSBAND AND WIFE.

### I. WHEN GRANTED.

#### 1. AGAINST WHOM.

##### a. Generally.

**Officers of the Court.]**—Where the process of the court has been abused, and undue means have been used in its execution, an attachment, and not an information, is the proper remedy. *Asen.*, 2 Ld. Ken. 372; *S. P.*; *Gregory v. Onslow*, Loft. 35.

An attachment was granted for arresting a plaintiff while attending arbitrators under a rule of court, on purpose to prejudice his cause. *Ree v. Hall*, 2 W. Bl. 1110.

Altering a sheriff's warrant is no ground for an attachment, unless an ill use is made of it. *Hale v. Castleman*, 1 W. Bl. 2.

Where a rule for an attachment against a clerk of assize for not returning a certiorari has been discharged, on the ground that it was not shewn by affidavits in support of the application that the clerk was a commissioner of oyer and terminer, the court will not grant another rule for an attachment in respect of the same default, or a rule requiring the clerk to return the certiorari. *Reg. v. Harland*, 8 D. P. C. 323.

Writs of certiorari to remove indictments were directed to the justices of oyer and terminer for a county, and served upon the clerk of assize. No return having been made, a side-bar rule issued, directed to the said justices, requiring them to return the indictments within six days after notice to them, or one of them, or the clerk of assize. The rule was served upon the clerk of assize, on the 30th of April, and on one of the justices of oyer and terminer, on the 10th of May. On the 22nd an attachment was moved for against the same justice:—Held, that the rule

for an attachment was not absolute in the first instance:—Held, also, that the service of the rule upon the justice was too late, and that the indictments being retained by the clerk of the assize, who was also a quorum commissioner of oyer and terminer, until payment of certain fees, he was the proper party to be served with the side-bar rule, and not one of the judges of the superior courts. *Newton v. Alderson*, 4 Jur. 190.

A sheriff having seized goods under process out of the common pleas, an officer of the palace court, during the temporary absence of the sheriff's officer (whose son remained on the premises with the warrant), took the goods under process of that court, the court refused to interfere, either by granting an attachment against the officer of the palace court, or by ordering him to refund a sum paid to him in order to obtain the release of the goods. *White v. Chapple*, 4 C. B. 628; 16 L. J., C. P. 233; 11 Jur. 543.

**Rescuers from Bailiff.]**—An attachment granted against rescuers, upon a return by the sheriff of rescue from his bailiff. *Cobby v. Dewes*, 10 Bing. 112.

**Member of late Parliament for Contempt—Privilege.]**—On a motion for attachment of a member of the parliament which was dissolved on the 24th of March, for contempt in not obeying an order of the court to pay certain moneys, &c., to the liquidator of the company:—Held, that the rule laid down in *Goudy v. Duncombe* (1 Ex. 430), that a member of parliament was entitled to privilege from arrest for forty days both after and before the meeting of parliament, and whether after a prorogation or a dissolution, applies to a person who was a member of the old, but is not a member of the new, parliament. *Anglo-French Co-operative Society, In re*, 14 Ch. D. 533; 49 L. J., Ch. 388; 28 W. R. 580.

**Infant for not executing Settlement.]**—Leave will not be given to issue a writ of attachment against a person who refuses to execute a settlement which he has been ordered to do under the Infants Marriage Act, ss. 19, 23, until the settlement has been tendered to him personally for execution after service of the decree, and he has refused to execute it. *Att.-Gen. v. Warring*, 28 W. R. 623.

**Peer.]**—An attachment may issue against a peer for refusing to obey the process of the court. *Ree v. St. Asaph (Bishop)*, 1 Wils. 332.

**Against Witness for Disobeying Subpoena.]**—A subpoena may be issued from the crown office, requiring a witness to attend at the assizes in the country, to give evidence in support of an intended prosecution for a felony; and the court will grant an attachment against him for not attending in obedience to the subpoena. *Reg. v. Ring*, 8 T. R. 585.

**Against Keeper of Asylum for obstructing Service of Writ.]**—A keeper of an asylum having refused to allow service of a writ on a lunatic under his charge, or to bring it to his notice, the court granted a rule nisi for an attachment against him for obstructing its proceedings. *Denison v. Harding*, 15 W. R. 346.

## II. PRACTICE ON.

## 1. WRIT.

**Requirements of.]**—An attachment must be directed to elisors, when against coroners for not attaching the sheriff. *Andrews v. Sharp*, 2 W. Bl. 911; *S. P.*, *Rex v. Peckham*, 2 W. Bl. 1218.

An attachment will be irregular if for more than the precise sum allowed, however small the difference. *Daniel v. Bishop*, M'Clel. 61; 13 Price, 129.

**Motion for.]**—In order to obtain an attachment, it is not sufficient that all the necessary steps be taken, partly at one time and partly at another. *Rogers v. Twissel*, 3 D. P. C. 572.

Upon a motion for an attachment for non-payment of money, the court refused to allow cause to be shewn at chambers, though it was at the end of the term. *Fall v. Fall*, 2 D. P. C. 88.

Where a reasonable time had not been given between the day of serving a rule for an attachment and the day of shewing cause, the court, on making the rule absolute, directed the attachment to lie in the office a few days, until notice of that step having been taken should be given to the defendant. *Rex v. Giles*, 4 D. P. C. 569.

The ten days after demand of costs under a recognizance, taken by virtue of 5 & 6 W. & M. c. 11, ss. 2 & 3, must elapse before an attachment can be granted against a party refusing to pay them. *Rex v. Ireland*, 3 T. R. 512.

**Extent of.]**—An application to make a judge's order a rule of court, and for an attachment for disobeying it, may be made on the same motion. *Hinchliffe v. Jones*, 4 D. P. C. 86; 1 H. & W. 337; *S. P.*, *Forster v. Kirkwall*, 4 D. P. C. 370.

**When made.]**—Whenever an attachment is absolute in the first instance, it may be moved for on the last day of term. *Anon.*, Loftt. 301.

But not where there is only a rule nisi. *Anon.*, 3 Smith, 118.

An attachment cannot be moved for on the last day of term, except for non-payment of costs, or against a sheriff for not returning a writ. *Anon.*, 1 Burr. 651; *S. P.*, *Rex v. York*, 5 Burr. 2686.

A motion for an attachment cannot be made upon the last day of term. *Sutton, Ex parte*, 25 L. T. 572.

**By whom made.]**—An attachment for misconduct cannot be moved for by a complainant in person, but must be made by a barrister. *Fenn, Ex parte*, 2 D. P. C. 527.

**On Notice.]**—The issuing of an attachment is one of the matters as to which the old practice may be followed in suits which were pending when the Judicature Acts came into operation (Nov. 2, 1875), down to the time when issues might be joined, or notice of motion for decree given in such suits. *Garling v. Royds*, 1 Ch. D. 81; 45 L. J., Ch. 56; 24 W. R. 23.

But the new practice by which writs of attachment are only to be issued after notice to the party sought to be attached applies to all orders made subsequently to the Judicature Act coming into force, and applies whether the suits in which

the orders have been made are being carried on under the old or the new practice. *Dallas v. Glyn*, 3 Ch. D. 190; 46 L. J., Ch. 51; 34 L. T. 897; 24 W. R. 880.

An application for leave to issue a writ of attachment, for the enforcement of an order perfected before the commencement of the Judicature Acts, cannot be made *ex parte*, but only upon notice. *Anon.*, 24 W. R. 103.

An attachment may be issued for disobeying an order to do an act within a specified time after notice of the order, although the person served has received actual notice of it by means of an informal service, and the specified time after receiving the actual notice has already elapsed before the order is regularly served. *Gregg, In re, and Prance, In re*, 9 L. R., Eq. 137; 39 L. J., Ch. 107; 23 L. T. 234; 18 W. R. 589.

Before making an application for an attachment on the ground of contempt, notice of the application must be given to the party to be affected by the attachment, although the proceeding may have been commenced before the Judicature Acts came into operation. *Baigent, In goods of*, 1 P. D. 421; 33 L. T. 462; 24 W. R. 43.

Literal execution of an attachment before proceeding to take a bill pro confesso may, under certain circumstances, be dispensed with. *Culley v. Buttifant*, 1 Ch. D. 84; 45 L. J., Ch. 200; 24 W. R. 55.

Under Ord. XLIV. r. 2, a motion for an attachment for removing goods out of the custody of the sheriff can only be made on notice. *Jupp v. Cooper* (5 C. P. D. 26) considered. *Eynde v. Gould*, 9 Q. B. D. 335; 51 L. J., Q. B. 425; 31 W. R. 49.

**Costs—Indorsement on Order.]**—On the 20th of May, 1881, an order was made for the defendants within seven days after service to file an affidavit as to documents. The copy served had no such indorsement as is required by Cons. Ord. XXIII. r. 10. The defendants filed successively three affidavits, which were successively held insufficient, and on the 10th of February, 1882, filed a fourth. A summons was taken out to consider its sufficiency, and on its being attended on the 24th of February, the defendants' solicitor stated that the draft of a further affidavit had been sent into the country, and that the affidavit would be filed as soon as possible, and requested an adjournment. The chief clerk refused to adjourn, held the affidavit of the 10th of February to be insufficient, and ordered the defendants to pay the costs. On the 25th, the plaintiffs served notice of motion for attachment for the 3rd of March. On the 28th of February, the defendants filed a further affidavit, and on the 1st of March asked the plaintiffs' solicitors whether they proposed to withdraw their notice of motion. The plaintiffs' solicitors replied that they did not, as their briefs had been delivered before the affidavit was filed, but that they would consider any proposal the defendants had to make. The defendants' solicitors wrote in answer making no offer to pay any costs, but saying that they should deliver their briefs. North, J., refused the motion with costs:—Held, on appeal, that the plaintiffs were right in giving their notice of motion, and that as the defendants had made no offer to pay any costs, the plaintiffs were entitled to bring on their motion, and must have the costs of it. Under

the practice established by the Judicature Acts, it is not necessary that the copy of an order which is served should have the indorsement required by Cons. Ord. XXIII. r. 10, stating the consequences of failing to obey the order. *Thomas v. Palin*, 21 Ch. D. 360; 47 L. T. 207; 30 W. R. 716.

**Motion to Commit after Notice.]**—A plaintiff who has served a notice of motion for leave to issue a writ of attachment against a defendant in contempt, and obtained an order accordingly, cannot afterwards move *ex parte* for an order of committal to issue instead of the writ of attachment which he has obtained. *Buist v. Bridge*, 43 L. T. 432; 29 W. R. 117.

**Attachment for not Returning a Writ of Fi. fa.]**—An application, on notice, under Ord. XLIV. r. 2, to attach the sheriff for not returning a writ of fi. fa., should be for an order nisi. *Fowler v. Ashford*, 45 L. T. 46.

**Enlarging Rule.]**—An application on the last day but one of term to enlarge a rule for an attachment without any affidavit of attempts to serve was refused. *Smith v. North*, 27 L. J., Ex. 421.

## 2. AFFIDAVITS.

**How intitled.]**—Affidavits for attachment in civil suits are proceedings on the civil side of the court until the attachments issue, and are to be intitled with the names of the parties; as soon as the attachments issue, the proceedings are on the crown side, and from that time the queen is to be named as the prosecutrix. *Wood v. Webb*, 3 T. R. 253.

Affidavits to set aside attachments which have been granted (though not issued) must be intitled in the name of the queen. *Rea v. Middlesex (Sheriff)*, 7 T. R. 439, 527.

Which title is sufficient, without naming the cause, although it is convenient to do so. *Rea v. Middlesex (Sheriff)*, 5 B. & C. 389; 8 D. & R. 149.

So, affidavits in answer to a rule nisi for an attachment must be entitiled in the cause out of which the motion arises; but after the rule is granted, the affidavits must be intitled on the crown side. *Whitehead v. Frith*, 12 East, 165.

Affidavits in answer to any application for an attachment in a criminal case should not be intitled in that case unless the record is in the Q. B., but should be intitled in the court only. *Rea v. Stretch*, 4 D. P. C. 30.

Where a submission to an award is made a rule of court, there being no action, the affidavits on which to apply for an attachment for disobeying the award need not be intitled in any cause, but the affidavits in answer must. *Beran v. Beran*, 3 T. R. 601.

Seemle, that the proper title of affidavits in support of a rule for an attachment against a sheriff's officer, for extortion in the execution of a fi. fa., is in the cause. *Masters v. Lowther*, 11 C. B. 848; 21 L. J., C. P. 130; 16 Jur. 374.

Where an attachment has issued in a cause, in moving to discharge the person arrested under it, the affidavits must be intitled the queen against the person arrested in the original cause, and not simply in the original cause. *Brown v. Edwards*, 2 D. & L. 520; 14 L. J., Q. B. 17.

A rule nisi for an attachment for non-payment of money pursuant to an award was intitled "in the matter of A. and B.," but the affidavit of service was intitled, "between A. B., plaintiff, and C. D., defendant :"—Held, irregular, as the affidavit should have been intitled the same as the rule. *Houghton, In re*, 2 M. & P. 452.

**Contents of Affidavit generally—Service.]**—An affidavit for a rule for an attachment for a contempt must state that the party was served personally with a copy of the rule, and that the original was shewn to him at the same time. *Rea v. Smithies*, 3 T. R. 351; S. P., 7 D. & R. 612.

**— Misdescription.]**—An attachment for non-payment of money will not be granted, if an affidavit, on which it is sought to bring the party into contempt, describes the rule of court as an order. *Turner, In re*, 6 D. P. C. 6; W., W. & D. 575.

**By whom made.]**—On a motion for an attachment for non-delivery of a bill of costs to a party pursuant to rule of court, the affidavit should be made by the party himself; that of a third person is insufficient. *Potter v. Back*, 8 D. P. C. 872.

**Party shewing cause—Necessity for.]**—The rule, that a party cannot shew cause unless he takes office copies of the affidavits on which the rule has been obtained, applies to a rule for an attachment. *Reg. v. Carttar*, 1 L., M. & P. 274.

**When allowed.]**—Upon shewing cause against a rule for an attachment, fresh affidavits by the party who has obtained the rule are inadmissible. *Butler, In re*, 13 Q. B. 341; 18 L. J., Q. B. 328; 13 Jur. 869.

## 3. SERVICE OF RULE, ORDER, OR MOTION.

**Notice of Motion.]**—A party must be personally served with notice of a motion for an attachment, and service on his solicitor in the cause will not be sufficient, although the order, in respect of a breach of which the attachment is asked for, has been personally served, unless it is shewn that personal service on the party cannot be effected. *Mann v. Perry*, 50 L. J., Ch. 251; 44 L. T. 248.

**Rule or Order—Personal—Sufficiency of.]**—The court will not make a rule nisi for an attachment absolute, unless there is a personal service, or it appears that it has been seen in the possession of the party sought to be served, even although an attorney of the court, and circumstances are sworn to that leave no doubt that he is keeping out of the way for the purpose of avoiding the service, and the applicant has no other remedy. *Payne, In re*, 1 D. & L. 703; 13 L. J., Q. B. 37; 7 Jur. 1109.

It is not, in every case, and under all circumstances, an inflexible rule, that the court will not make a rule for an attachment absolute, without personal service. *Whalley, In re*, 14 M. & W. 731; 3 D. & L. 291; 15 L. J., Ex. 4; 9 Jur. 995.

A rule absolute will be granted for an attachment without an affidavit of personal service of



the rule nisi if the affidavits disclose circumstances to satisfy the court that the rule nisi has reached the hands of the party, though they shew that he is keeping out of the way to avoid service. *Morris, In re*, 22 L. J. Q. B. 417.

The court will not break in upon the rule which requires personal service for the purpose of an attachment, although the party keeps himself secluded, in order to evade service, and there is reason to believe that the rule of court has been brought to his knowledge. *Thomas v. Rawlings*, 28 L. J., Ex. 347.

Where the court is satisfied that a rule nisi for an attachment has reached the hands of the person against whom it is directed, and that he is keeping out of the way to avoid service, the court will make the rule absolute, notwithstanding its not having been served personally. *Morris, In re*, 1 B. C. C. 190; 1 C. L. R. 522.

A rule nisi for an attachment must be personally served. *Denman v. Golding*, 2 Tidd's Prac. 981.

Even when against an attorney. *Wilkinson v. Pennington*, 5 Scott, 401; 6 D. P. C. 183; *S. P., Anon.*, 1 D. & R. 529.

The court refused to order that service at the dwelling-house should be deemed good service of a rule for an attachment, upon an affidavit that the defendant was "shy and difficult to be met with," and that the deponent had tried all the means in his power, for two months, before he could serve the defendant personally with the award, for the non-performance of which the attachment was sought to be enforced. *Garland v. Goulden*, 2 Y. & J. 89.

In order to ground an attachment for non-payment of costs, the rule for the payment of them, as well as the rule nisi for an attachment for non-payment, must be personally served. *Birket v. Holme*, 4 D. P. C. 556; 1 H. & W. 659.

In order to obtain an attachment for non-payment of costs, pursuant to a rule of court, or the master's allocatur, there must in all cases be a personal service, unless it appears that the rule or allocatur has been seen in the actual possession of the party. *Dicas v. Warne*; 1 Scott, 537.

The court will not grant an attachment without personal service, in any case where the party applying has another remedy. *Love, In re*, 4 B. & Ad. 412.

It is not sufficient to shew the party the original rule, without personal service of a copy. *Parker v. Burgess*, 3 N. & M. 36.

It is not necessary to place the original in the defendant's hands; if shewn to him, so that he can read the contents, it is sufficient. *Calvert v. Redfearn*, 2 D. P. C. 505.

In order to obtain an attachment for non-payment of costs, pursuant to the master's allocatur, it is not indispensably necessary that a copy of the rule and allocatur should be left in the hands of the defendant. *Rez v. Koops*, 3 D. P. C. 566; *S. C., nom. Rose v. Koops*, 1 H. & W. 213.

To bring a party into contempt for non-payment of costs, pursuant to the master's allocatur, a copy of the rule and allocatur must be left with the defendant. *Dalton v. Tucker*, 5 D. P. C. 550; *W., W. & D.* 199.

Personal service of the rule for payment of costs is necessary in order to obtain an attachment, although the defendant is an attorney. *Albin v. Toomer*, 3 D. P. C. 563; 1 H. & W. 215.

Where it is clear that the copy of the rule and allocatur have come to the hands of the defendant, an attorney, the court will grant a rule nisi for an attachment, although strict personal service has not been effected. *Phillips v. Hutchinson*, 3 D. P. C. 583; *S. P., Rez v. Dignam*, 4 D. P. C. 359.

Where there had not been personal service of the rule of court and master's allocatur, but copies had been left, and notice had been given of a call that would be made, the court made a rule for an attachment against an attorney absolute, where on shewing cause against the rule nisi, he did not deny having received the papers and notice. *Bottomley v. Belchamber*, 4 D. P. C. 26; 1 H. & W. 362.

A personal service of a rule of court must be made to ground an attachment for non-payment of money, pursuant to a judge's order, which is afterwards made a rule of court; and service of the order and allocatur is not sufficient, nor is service of the rule on the London agents of the attorney sufficient. *Woollison v. Hodgson*, 3 D. P. C. 178.

It is no answer to a rule for an attachment, that the judge's order, which has been made a rule of court, has not been personally served, if the rule itself has been regularly served. *Greenwood v. Dyer*, 5 D. P. C. 255.

Where, in moving for an attachment absolute in the first instance for non-payment of costs, pursuant to a rule of court, it appears that accidentally it has not been stated that the original rule was shewn at the time of service, the court will allow the attachment to lie in the office until the defect is supplied. *Davies v. Skerlock*, 7 D. P. C. 592.

The court will not dispense with personal service of a rule nisi for an attachment for disobedience of a rule of court. *Swinfen v. Swinfen*, 1 C. B. N. S. 364; 26 L. J., C. P. 97; 3 Jur. N. S. 85.

A compromise having been entered into by a plaintiff's counsel on her behalf at the trial, and embodied in an order of nisi prius, afterwards made a rule of court, upon a motion against her for an attachment for refusing to perform it, on the ground that it was done without her authority, and against her express instructions:—Held, that the dissent of one of its members was enough to justify the court in declining to attach the plaintiff. *Id.*

A rule nisi was obtained against a solicitor to shew cause why an attachment should not issue against him for disobedience to an order of the court. There was no personal service of such rule nisi upon him. He had at one time instructed counsel to shew cause against the making absolute of such rule, and such counsel had consented to an application for a postponement of the hearing being made to the court by the counsel for the applicant, but upon the application to make absolute the rule nisi, the counsel who had been instructed formerly did not appear, nor did anyone appear on behalf of the solicitor. The court held that personal service might, under the circumstances, be dispensed with, and made absolute the rule for an attachment. *Alcock, In re*, 1 C. P. D. 68; 33 L. T. 532; 24 W. R. 320; 45 L. J., C. P. 86, sub nom. *Anon.*

Service of a notice of motion for a writ of attachment upon the solicitor on the record of the party against whom the attachment is to be

issued, is sufficient notice to the party, without personal service. *Browning v. Sabia*, 5 Ch. D. 511; 46 L. J., Ch. 728; 25 W. R. 602. *S. P., Richards v. Kitchin*, 36 L. T. 730; 25 W. R. 602.

— **Endorsement.**—An attachment may be granted for disobedience of an order, though the copy of the order served on the party in default has not the endorsement required by the CIVth Gen. Ord. of March, 1843, or the XCIXth Gen. Ord. of October, 1867, as varied by the 1st Gen. Ord. of April, 1873. *Thomas v. Palin* (21 Ch. D. 360) followed. *Wallace v. Graham*, 11 L. R., Ir. 369.

**On Defendant's Wife.**—The court refused to make a rule absolute for an attachment, where the service of the rule nisi had been on the wife of the defendant at his dwelling-house, the person effecting the service exhibiting the original. *Guard, In re*, 6 Jur. 916.

**On Defendant's Son.**—Where a copy of a rule nisi for an attachment was delivered to the defendant's son, who refused to say where his father was, and an appointment was made for a subsequent day :—Held, not sufficient to dispense with personal service. *Ibbertson, In re*, 5 D. P. C. 160.

**Insufficiency of Demand.**—A judge's order was served upon C., an attorney, calling upon him to deliver his bill of costs to B. within ten days. This order, not having been obeyed, was made a rule of court, and the rule was served upon C. by B.'s clerk, who at the same time demanded the bill of costs, but had no power of attorney to make the demand :—Held, that this was insufficient to support an attachment against C. *Briggs, Ex parte, Catlin, In re*, 6 D. & L. 566; 7 C. B. 136; 18 L. J., C. P. 184; 13 Jur. 471.

**On Partners.**—An attachment for disobedience of a judge's order will not be issued against two partners unless each has been served with the order. *Welland, Ex parte*, 11 C. B. 544.

**On Sunday.**—A rule nisi for an attachment for non-payment of money pursuant to the master's allocatur cannot be served on a Sunday. *McIbham v. Smith*, 8 T. R. 86.

**Non-Service—How Objection Taken.**—The court will not open a rule for an attachment on the mere affidavit of the party that he has not been served; at least unless he shows some mistake in the service. *Hopley v. Granger*, 1 N. R. 256.

**Order Wrongly Entitled.**—An order that a father named Holt should deliver over his infant daughter to her mother was intituled in the matter of the infant (naming her), and in the matter of the act 36 & 37 Vict. c. 12. The copy served on the father was intituled only in the matter of the act, but was indorsed on the outside "*Re Holt*:"—Held, that the service was ineffectual, and that the order to attach must be discharged. *Holt, In re*, 11 Ch. D. 168; 40 L. T. 207; 27 W. R. 485.

**Waiver of.**—Where a rule nisi issues to shew cause why an attachment should not issue for not obeying a judge's order, which has been made a rule of court, and the rule nisi is not personally served, but the party appears upon it and objects to the want of personal service, such appearance waives the necessity of personal service. *Levi v. Duncombe*, 1 C., M. & R. 737; 3 D. P. C. 447; 5 Tyr. 490; 1 Gale, 60.

If a party is in contempt, it is not necessary that a rule calling upon him to answer it should be personally served. *Id.*

#### 4. DEMAND.

**When Necessary.**—In order to bring a party into contempt by not paying money according to an order, a demand of the money must be made after the order has been made a rule of court. *Chilton v. Ellis*, 2 D. P. C. 338; 2 C. & M. 459; 4 Tyr. 369.

Where a judge's order directed that certain deeds should be given up on a tender of, &c., to the plaintiffs or their agent :—Held, that, before an attachment for a refusal of the tender to him, the plaintiffs must have notice of that tender, and be personally required to give up the deeds. *Evans v. Millard*, 3 D. P. C. 661; 1 Gale, 138.

To sustain an attachment for disobedience of a rule requiring a party to execute a conveyance, it is not enough merely to serve him with a copy and to shew him the original rule; there must be an express demand upon him to do the act which the rule commands him to do. *Swinfen v. Swinfen*, 18 C. B. 485; 25 L. J., C. P. 303.

A common law court may issue an attachment for disobedience of a rule drawn up on an order of nisi prius made at the trial of an issue directed by the Court of Chancery. *Id.*

In order to obtain an attachment for non-payment of costs, a demand is not necessary, if the party sought to be served by his violence prevents the demand from being made. *Wentham v. Downes*, 3 D. P. C. 573; 1 H. & W. 216.

An attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found that he had been overpaid, and the attorney was ordered to refund the overpayment to the client; and also, by a subsequent order, to pay the costs of taxation, more than a sixth having been taken off. Upon an application of the attorney to be allowed to pay these sums to the holder of the bill of exchange (which had been dishonoured), instead of his client, he was ordered to do so within a week, or, in default, that an attachment should issue :—Held, that no demand of these two sums was necessary to ground an attachment, but that it was his duty to seek the holder of the bill, and pay the money to him. *Woollison v. Hodgson*, 3 D. P. C. 178.

**Sufficiency of.**—A personal demand is absolutely necessary before moving for an attachment for non-payment of costs. *Stannell v. Truer*, 1 C., M. & R. 88; 2 D. P. C. 673; 4 Tyr. 862.

In order to bring a party into contempt for non-delivery of a bond pursuant to a rule of court, the demand of it must be made by one of the parties mentioned in the rule as entitled

to receive it. *Fortescue, Ex parte*, 2 D. P. C. 448.

Or it must appear that the demand was made by a person duly authorized. *Doe d. Hickman v. Hickman*, 1 Scott, N. R. 398; 4 Jur. 746.

An attachment for non-payment of costs cannot be supported by a demand of the costs by a third person, authorized by the attorney to receive them. *Clark v. Dignum*, 3 M. & W. 319; 1 H. & H. 86.

**By Solicitor.**—A demand of costs on the master's allocatur by the attorney in the cause, they being costs in the cause, is sufficient whereon to ground an attachment. *Cox v. Salmon*, 2 M. & W. 127; 2 Gale, 226.

Where in a country cause costs are by a rule to be paid to the party, or his attorney, a demand by the attorney in the country is sufficient to found a motion for an attachment for non-payment, although the agent in London is strictly the attorney on the record. *Dennett v. Pass*, 1 Scott, 586; 1 Bing. N. C. 638; 3 D. P. C. 632; 1 Hodges, 157.

If a rule is made that a party do pay the costs of the day to another, without adding "or to his attorney," it is sufficient, in order to ground an attachment for disobedience, to show that the demand of them was made by the attorney of that party. *Inman v. Hill*, 4 M. & W. 7; 6 D. P. C. 666; 2 Jur. 470; *S. P.*, *Mason v. Whitehouse*, 6 D. P. C. 602; 1 Arn. 261; 6 Scott, 575; 4 Bing. N. C. 692; 2 Jur. 545.

**By Power of Attorney.**—If money is ordered to be paid to a certain person (not an attorney), or his agent, the demand must either be made by himself, or by some one authorized by power of attorney. *Brown v. Jenks*, 4 D. P. C. 581.

If the demand is made by the authority of a power of attorney, a copy of that power must be left at the time of the demand. *Doe d. Cope v. Johnson*, 7 D. P. C. 550; 3 Jur. 28; 1 W., W. & H. 549.

If not left, the court will not afterwards grant an attachment. *Rez v. Packwood*, 2 D. P. C. 570.

## 5. EXAMINATION OF DEFENDANT.

**Examination of Debtor as to his Means—Contents of Affidavit.**—A party applying for the attachment of a judgment debtor for non-compliance with an order for his oral examination, must make an affidavit that conduct money has been tendered to the debtor, and also there must be an affidavit shewing some good reason for not examining the debtor at his place of residence, and also that there were no other means of ascertaining what debts were owing to the debtor. *Protector Endowment Company v. Whitlam*, 36 L. T. 467.

**Liability of Defendant to answer Interrogatories.**—A defendant under attachment must answer interrogatories; he cannot come in and confess the contempt before he does so. *Rez v. Edwards*, 4 Burr. 2105; 1 W. Bl. 637.

But on an attachment for rescue, a defendant may submit to a fine without answering interrogatories. *Rez v. Elkins*, 1 W. Bl. 640; 2 Burr. 2129.

But where a defendant is brought up, it is the practice of the court to put interrogatories to him,

although he does not deny the charge, unless the prosecutor waives putting them. *Rez v. Horsley*, 5 T. R. 362.

**Report of Master.**—On attachment for a contempt, where a defendant has been examined on interrogatories, and the master of the crown office directed to report thereon to the court: if he reports that the defendant has cleared himself of the contempt, the court will not enter into a discussion of the correctness of such report, unless it appears, by the interrogatories and answers (semble, not by affidavit) that the master has been mistaken. It is not sufficient ground for a review that the master's report appears contradictory to the opinion of a judge who granted the attachment. *Rez v. Morley*, 4 A. & E. 849.

The report of the master of the crown office that a defendant and his attorney were in contempt for not obeying an award, and filing a bill, is to be taken as a conviction; and on his being brought up for judgment, the court will not receive affidavits in denial of the contempt, but only in mitigation of punishment. *Coulson v. Graham*, 2 Chit. 57.

The master's report upon interrogatories of contempt cannot be moved for on the last day of term, without the previous leave of the court, unless upon extraordinary cases, and personal service of notice. *Rez v. Wheeler*, 1 W. Bl. 311; 3 Burr. 1256.

**Interrogatories—Defendant not ruled to Answer.**—Where a defendant was in custody on an attachment for non-performance of an award, the prosecutor was ruled to exhibit interrogatories: he did so, and they were filed: but not ruling the defendant to appear before the examiners, the court discharged him on bail. *Doe d. Clarke v. Stillwell*, 2 D., N. S. 18; 7 Jur. 154.

**—Not Answering.**—Where an order of a judge had been obtained for a defendant to answer interrogatories, and he had obtained an extension of the time, but no answer had been given, the court granted a rule nisi for an attachment for contempt of court, although there had been no personal service. *Seafeld (Lord) v. Pratt*, 5 L. T., 580.

**—Effect of Answers to.**—Where a person, adjudged to be in contempt, fails to purge such contempt by his answers to personal interrogatories administered to him by the prosecutor, the court will proceed to pass sentence; but, before doing so, will give the party so in contempt an opportunity of filing affidavits in mitigation of punishment. *Matthews, In re*, 12 Ir. C. L. R. 273.

Where a person, in contempt, is ordered to answer personal interrogatories, upon the discussion of the sufficiency of the answers to such interrogatories, the prosecutor has the right to begin. *Ib.* 275.

## 6. OTHER MATTERS RELATING TO.

**Entry of Order made in Chambers.**—Attachment for contempt will not be granted for disobedience to an order made in chambers unless the order be duly entered in accordance with Consolidated Order XXXV. r. 32. *Ballard v. Tomlinson*, 48 L. T. 515; 31 W. R. 563.

**Bail.**—An action on 23 Hen. 6, c. 9, will not lie against a sheriff for refusing to take bail on an attachment out of Chancery; that statute referring only to process in courts of common law. *Studd v. Acton*, 1 H. Bl. 468; *S. P.*, *Phelps v. Barrett*, 4 Price, 23.

For although a sheriff may, if he chooses, take a bail-bond on an attachment out of Chancery, he is not compellable to take bail thereupon. *Morris v. Hayward*, 6 Taunt. 569; 2 Marsh. 280.

The sheriff may recover on a bail-bond so taken. *Ib.*

But such bail-bond is not assignable under 4 Ann. c. 16, s. 20. *Miller v. Palfreyman*, 4 B. & Ad. 146; 1 N. & M. 696.

It is the duty of a sheriff to execute a writ of attachment, issued for not appearing to a subpoena ad respondendum; and he must return the writ as having been executed (in whatever manner), or that the party is not found in his bailiwick. *Masters v. Cooper*, 1 Price's P. C. 8.

Two days' notice of bail on an attachment is not required, nor any justification of such bail. *Rex v. Hall*, 2 W. Bl. 1110.

A defendant may be admitted to bail, and sworn to answer interrogatories upon an attachment for contempt, although a defective notice of bail has been served on the prosecutor. *Anon.*, 4 D. & R. 393.

**Jurisdiction to Commit for Default in Payment of the Costs.**—Upon a motion for an attachment, no order was made, except that the respondent pay the costs of the motion. Upon default in payment:—Held, that the court had no jurisdiction to commit to prison for the default. *Micklethwaite v. Fletcher*, 27 W. R. 793.

**Discharge from Arrest.**—An attorney was arrested under an attachment issued by a court of law for contempt of court in not obeying a previous order that he should pay to a client a sum which he had received for him while acting in the capacity of attorney. Before the attachment issued the attorney had been adjudicated bankrupt, but when he was arrested the bankruptcy was not closed, nor had he obtained an order of discharge:—Held, that the Court of Bankruptcy ought not to order his release from custody, but ought to leave the court of law to decide whether the attachment was merely a process to compel payment of a debt, or whether it was issued in the exercise of the court's quasi criminal jurisdiction over its own officer. *Deere, Ex parte, Deere, In re*, 10 L. R., Ch. 658; 44 L. J., Bk. 120.

Where a party is arrested under an attachment for contempt of court in not paying money, he is not entitled to be discharged upon tendering the amount to the officer. *Pitt v. Coombs*, 3 N. & M. 212; 5 B. & Ad. 1078.

A party irregularly arrested upon an attachment on the 3rd of February, did not apply for his discharge until the 10th day of Easter Term, which was at the end of the month of April:—Held, that the application was too late. *Reg. v. Burgess*, 3 N. & P. 366; 8 A. & E. 275; 2 Jur. 856.

If there is a misnomer of the Christian name of the defendant in a writ of attachment, though amended by order of a judge after arrest, the court will discharge him out of custody. *Reg. v. Burgess*, 1 W., W. & H. 46; 2 Jur. 396.

A party cannot be detained, but may be retaken on an amended writ of attachment. *Ib.*

Where, in a copy of a rule for an attachment for nonpayment of costs pursuant to the master's allocatur, the defendant's name was spelt Calver instead of Calvert, and the master's name Day instead of Dax, the court set aside the attachment, and discharged the defendant out of custody, although in the rule the names were spelt correctly. *Rex v. Calvert*, 2 C. & M. 189; 4 Tyr. 77; 2 D. P. C. 276.

A party in contempt for filing a bill in chancery to set aside an award, after entering into a rule of court to abide by it, was discharged without any fine, rather than set a small one for so high an offence. *Rex v. Wheeler*, 3 Burr. 1256; 1 W. Bl. 311.

**Purging Contempt.**—A party arrested on an attachment for not obeying a judge's order cannot purge his contempt or be discharged, unless his compliance with the order is complete and bona fide. *Reg. v. Weston*, 8 Jur. 1122.

A party attached for contempt in not performing an award, and sentenced to imprisonment for a definite period, is not, by undergoing such imprisonment, exonerated from the performance of the award. *Reg. v. Hemsworth*, 3 C. B. 745.

Costs were granted upon an attachment for contempt to the person who had purged himself of the contempt upon examination. *Rex v. Plunket*, 3 Burr. 1329.

**Setting Aside.**—A rule for an attachment having been obtained on the part of a woman, who described herself in an affidavit as a widow, against her attorney for not paying her a sum of money, the court set aside the rule on its being shewn that she was a married woman (her second marriage having taken place subsequently to her employment of the attorney), since, although the concealment of her second marriage was not made with any fraudulent intention, she had deceived the court, made a false affidavit, and was no longer in a condition to give a legal discharge for the money. *Reg. v. Carttar*, 1 L. M. & P. 386; 19 L. J., Q. B. 422; 15 Jur. 176.

**Detention in Prison beyond proper Period.**—The plaintiff, having been guilty of a contempt in chancery, was arrested by the sheriff under a writ of attachment and delivered into the custody of the defendant, the governor of a county gaol, under a warrant commanding him to keep the plaintiff in custody so that the sheriff might bring her before the court of Chancery to answer her contempt. The defendant having detained the plaintiff in custody beyond the prescribed period, although the plaintiff in chancery had not brought her to the bar according to 11 Geo. 4 and 1 Will. 4, c. 36, s. 15:—Held, first, that in proceedings against the defendant for the undue detention, the proper form of action was trespass, and not case; and, secondly, that such an action was not within the limitation in 4 Geo. 4, c. 64, s. 75, which applied only to proceedings for acts done in a supposed exercise of the powers of the statute. *Moone v. Rose*, 4 L. R., Q. B. 486; 38 L. J., Q. B. 236; 20 L. T. 606; 17 W. R. 729.

**Priority of Motion to discharge a Prisoner from Custody.**—A motion to discharge a prisoner from custody has priority over all other motions. *Ash-ton v. Shorrocks*, 43 L. T. 530; 29 W. R. 117.

**Costs.**—The costs of an attachment are no longer fixed, but by Ord. L.V. r. 1, they are in the discretion of the court, and should be disposed of at the time of the application for the writ under Ord. XLIV. r. 2. *Abud v. Riches*, 2 Ch. D. 528; 45 L. J., Ch. 649; 34 L. T. 713; 24 W. R. 637.

When they were applied for subsequently, but no additional expense had been incurred, taxed costs were allowed to the plaintiff, in addition to the fixed sum payable on discharge. *Ib.*

## ATTAINDER.

1. *Of Peers.*—See PEERS AND PEERAGE.
2. *Of Other Persons.*

### 2. OF OTHER PERSONS.

**Effect of.**—By attainder, all personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and, therefore, attainder may well be pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder. *Bullock v. Dodds*, 2 B. & A. 258. And see *Lambert v. Taylor*, 6 D. & R. 188; 4 B. & C. 138.

Personal property not belonging to a felon, convicted of simple larceny and sentenced to transportation, at the time of conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown: *Roberts v. Walker*, 1 Russ. & Mylne, 752.

A., in January, 1815, was convicted of bigamy. In April, he conveyed away, by lease and release, lands in which he had an estate for life:—Held, that such conveyance was not void as against the crown, there having been no attainder. *Rez v. Bridger*, 1 M. & W. 145.

In an action for slander, imputing felony, the plaintiff had a verdict. Before judgment signed, the plaintiff was attainted of the felony; Quære, whether, before office found, the damages vested in the crown, and whether this would be sufficient matter suggested by the defendant, the crown refusing to interfere, on a writ of audita querela, to prevent judgment and execution following the verdict. *Symonds or Symons v. Blake*, 2 C., M. & R. 416; 4 D. P. C. 263; 1 Gale, 182; 5 Tyr. 840.

Where a party, convicted of felony, is entitled to a chose in action, the right of suing being in another in trust for him, that right of suit does not vest in the crown upon the conviction. *Bishop v. Curtis*, 18 Q. B. 878; 21 L. J., Q. B. 391; 17 Jur. 23.

An assignment of a felon's goods bona fide for a good consideration after the commission day of the assizes, but before the day upon which he was actually tried and convicted, will pass the property. *Whitaker v. Wisbey*, 12 C. B. 44; 21 L. J., C. P. 116; 14 Jur. 411.

A grant of a liberty in a manor of goods and chattels of tenants in such manor attainted of felony is confined to the goods and chattels of felons being locally situate within the manor, and does not pass goods or chattels lying out of it. *Rez v. Capper*, 5 Price, 217.

During the abeyance of a barony descendible to heirs of the body, one of the co-heirs was attainted for treason; an act of parliament afterwards passed to restore in blood the sons and daughters of the attainted co-heir:—Held, that it was competent to the crown to determine the abeyance in favour either of a party claiming through the co-heir, who was so attainted, or of one claiming through another co-heir. *Braye and Camoys Peccage, In re*, 8 Scott, 108; 5 Bing. N. C. 754.

**As regards Marriage.**—An attainted man, although civilly dead for some purposes, is nevertheless capable of contracting in a foreign country a marriage which will be deemed valid in England, if it was valid by the law of that country. *Kynnauld v. Leslie*, 1 L. R., C. P. 389; 35 L. J., C. P. 226; 12 Jur., N. S. 468; 14 L. T. 756; 14 W. R. 761; 1 H. & R. 521.

R. was attainted of high treason in 1715; he escaped from England, married at Brussels in 1724, and left issue, B. a son, and M. a daughter. B. left surviving him an only son, J., who died in 1814:—Held, first, that the descendants of M. could inherit from J., as they need not mention R., the common ancestor in the pedigree, and were, therefore, unaffected by the old doctrine as to corruption of blood which prevailed before 3 & 4 Will. 4, c. 106, s. 10. *Ib.*

Held, secondly, that the marriage of R. being contracted in a foreign country was valid in England, and the children legitimate. *Ib.*

**When Pardon Granted.**—A party sentenced to death for felony, which sentence was commuted to transportation for life, received a conditional free pardon in a penal colony:—Held, that such pardon did not alter the effect of the attainder in investing his property in the crown. *Church, In re*, 16 Jur. 517.

**Rights of Wife of Attainted Person.**—A. died intestate, the wife of a felon under sentence of transportation, and leaving property acquired after the conviction of her husband:—Held, that such property belonged to the crown as accrued to the felon, and not to the next of kin of the wife. *Coombes v. Queen's Proctor*, 2 Rob. Ecc. Rep. 547; 16 Jur. 820.

**Can be heard in Court on subject of Attainder only.**—A person attainted can be heard as a suitor in a court of justice only for the direct purpose of reversing the attainder, not in the prosecution of a civil right. *Bullock, Ex parte*, 14 Ves. 452; nom. *Rez v. Bullock*, 1 Taunt. 82; 2 Leach C. C. 966.

**Actions against Attainted Persons.**—Ejectment may be maintained for freehold lands, on the demise of a person attainted of felony, when there has been no office found on behalf of the king. *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 765; S. C., nom. *Doe d. Evans v. Pritchard*, 2 N. & M. 489.

An action will lie against one attainted of treason. *Ramsay v. McDonald*, 1 W. Bl. 30; S. C., nom. *Ramsden v. Macdonald*, 1 Wils. 217.

**ATTORNEY.**

See SOLICITOR.

**ATTORNEY (POWER OF).**

See POWER OF ATTORNEY.

**ATTORNEY  
(WARRANT OF).**

See WARRANT OF ATTORNEY.

**ATTORNEY AND  
SOLICITOR-GENERAL.**

**Precedence.**—After the 14th Dec. 1814, the attorney and solicitor-general took precedence before all the Queen's serjeants; whereas before they were accustomed to have place and audience in the courts next after the two most ancient of the Queen's serjeants, but before the others. 6 Taunt. 424; 2 Ves. & B. 422.

The attorney-general, in the Queen's business, has pre-audience in the Exchequer over the postman and tubman. *Reg. v. Exeter (Bishop)*, 7 M. & W. 189; 9 D. P. C. 276; 5 Jur. 102.

Although not a serjeant, he had a right of audience in the Common Pleas, in a cause in which the crown was interested, before the exclusive privileges of the serjeants were abolished by 9 & 10 Vict. c. 54. *Paddock v. Forester*, 8 D. P. C. 334; 1 Scott, N. R. 391; 1 M. & G. 583.

The attorney-general, by an order of the House of Lords, has pre-eminence over the lord advocate, and the solicitor-general over the Scotch solicitor-general. 2 C. & F. 482.

**Representations of Crown.**—The attorney-general is the only legal representative of the crown in the courts. *Rea v. Austen*, 8 Price, 142.

But during the vacancy of the office, the whole business and authority of the attorney-general devolve upon the solicitor-general. *Rea v. Wilkes*, 4 Burr. 2527, 2554, 2570.

The attorney-general is an officer of the crown, and in that sense only the officer of the public. *Att.-Gen. v. Brown*, 1 Swanst. 288.

**Privileges of Office.**—An information being laid in Middlesex, by the attorney-general for the Duchy of Cornwall, for the recovery of dues claimed in respect of goods imported into a port alleged to be parcel of the duchy, the defendant applied to change the venue to Devonshire, upon an ordinary affidavit that the cause of action arose and the witnesses resided there:—Held,

first, that although the attorney-general may not have a right in all cases to lay and retain the venue where he pleases, he has such a right in the case of such an information, it being a suit in the nature of a transitory action. *Att.-Gen. v. Crossman*, 4 H. & C. 568; 1 L. R., Ex. 381; 35 L. J., Ex. 215; 12 Jur., N. S. 712; 14 L. T. 856; 14 W. R. 996.

Held, secondly, that in the case of such an information relating to matters affecting the duchy of Cornwall, the attorney-general for the Prince of Wales would have the same right as the attorney-general for the crown. *Ib.*

But as documents relating to the duchy of Cornwall would have to be produced from their place of deposit in Middlesex, there was no such preponderance upon the balance of convenience in favour of a trial in Devonshire as to call on the court to interfere, or to render it necessary to decide the question of prerogative. *Ib.*

The attorney-general attends, in peerage cases, as assistant to the lords' committees for privileges, and, it is said, that he is entitled to sit (on a chair) inside the bar. *Saye and Sele (Barony)*, 1 H. L. Cas. 511, n.

The courts exercise over the attorney-general the same authority which they exercise over every other suitor; and the attorney-general would not, any more than any other suitor, be permitted to prosecute any proceeding which was merely vexatious or had no legal object. *Reg. v. Prosser*, 11 Beav. 306; 18 L. J., Ch. 35; 13 Jur. 71.

Where there has been an excess of the statutory powers granted to a public company, but no injury has been occasioned to any individual, and there is none which is imminent, or of irreparable consequence, the attorney-general alone can obtain an injunction to restrain the exorbitancy. *Ware v. Regent's Canal Company*, 3 De G. & J. 212; 28 L. J., Ch. 163; 5 Jur., N. S. 25.

**When entitled to take Proceedings on behalf of the Public.**—The attorney-general may properly take proceedings on behalf of the public, when acts tending to the injury of the public are being done without lawful authority, even though no evidence be produced of actual injury having been inflicted. After the expiration of the parliamentary powers of a bridge company the company continued to carry on their operations, on and off their own lands, intending to apply for a new act to revive and extend the powers conferred by their original act. An action having been commenced by the attorney-general, on the information of two of the shareholders, for the purpose of restraining the company from proceeding with their works without due authority, and from using the moneys of the company for such works, or for other unauthorized purposes, the company obtained their new act, and the plaintiffs thereupon obtained leave to discontinue so much of their claim as related to matters other than the claim to have the company restrained, before the passing of the new act, from executing works off their own lands. The action being brought to a hearing:—Held, that the action was justifiably commenced, and that the company must pay the costs of the action, other than those relating to the part of it which had been discontinued. *Attorney-General v. Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752; 51 L. J., Ch. 746; 46 L. T. 687; 30 W. R. 916.

**Action against Corporation by Freemen—Information unnecessary.]**—In an action by some (on behalf of all) of the freemen of a borough to establish the right of all the individual freemen to share for their private benefit the net proceeds of certain properties vested in the corporation:—Held, on demurrer, that the effect of the saving of rights in s. 2 of the Municipal Corporations Act of 1835 was to legalize the beneficial interests therein mentioned, without reference to the legality of their origin, and, in particular, to obviate any objection which might otherwise arise in respect of the tendency towards a perpetuity of any such beneficial interest. *Prestney v. Colchester (Mayor)*, 21 Ch. D. 111; 51 L. J., Ch. 805.

An action to establish such rights as aforesaid may be brought by parties claiming to be entitled, without an information by the attorney-general. *Ib.*

**Information by, to restrain Public Body.]**—Upon an information filed by the attorney-general to restrain a public body from transgressing powers conferred by an act of parliament, it is not necessary to prove that injury to the public will result from the acts complained of; and in this respect there is no difference between an ex-officio information and an information at the relation of a private individual. *Att.-Gen. v. Cockermouth Local Board*, 18 L. R., Eq. 172.

**Right to sue Railway Company for breach of its powers.]**—The right of the attorney-general to sue a railway company for breach of its powers is not taken away by the provisions of the 7 & 8 Vict. c. 85. *Att.-Gen. v. Great Northern Railway Company*, 29 L. J., Ch. 794; 6 Jur., N. S. 1006.

**Fiat for bringing Error.]**—The attorney-general having refused his fiat for a writ of error to a person convicted of a misdemeanour:—Held, that in a proper case the fiat was due ex debito justitiæ; but that the attorney-general was to determine, on his own responsibility, whether or not each case was proper, and that the court could not review his decision. *Newton, Ex parte*, 4 El. & Bl. 869; 24 L. J., Q. B. 246; 1 Jur., N. S. 591; *S. P. & S. C.*, 16 C. B. 97.

Where, in a colony, a person has been convicted of a criminal offence, and is undergoing his sentence, no writ of error will be granted to bring up the record of conviction unless the attorney-general has given his fiat for the writ. *Reg. v. Lees*, El., Bl. & El. 828; 27 L. J., Q. B. 403; 5 Jur., N. S. 333.

**Entry of Nolle Prosequi.]**—Where a defendant has been found guilty upon several counts of an information, the attorney-general may enter a nolle prosequi on one of the counts, after a rule nisi for a new trial. *Reg. v. Leatham*, 30 L. J., Q. B. 205; 7 Jur., N. S. 674.

The attorney-general has power to enter a nolle prosequi on an indictment without calling upon the prosecutor to shew cause why that should not be done; and where he has done so, the court will not interfere. *Reg. v. Allen*, 1 B. & S. 850; 9 Cox C. C. 120; 31 L. J., M. C. 129; 8 Jur., N. S. 230; 5 L. T. 636.

**Right of Reply.]**—Where a question affecting

the crown is discussed on motion, the attorney-general, having shewn cause against the rule, has no right to reply. *Reg. v. Lords Commissioners of the Treasury*, 16 Q. B. 357; 20 L. J., Q. B. 305; 15 Jur. 767.

## ATTORNMENT.

See LANDLORD AND TENANT—MORTGAGE.

## AUCTION.

See SALE.

## AUDITÀ QUERELÀ.

**Common Right.]**—A writ of audità querelà is of common right. *Giles v. Nathan*, 5 Taunt. 558; 1 Marsh. 226; *S. P.*, *Lister v. Mundell*, 1 B. & P. 427.

Where an audità querelà clearly affords relief to the defendant, the court will relieve him on motion, without putting him to the audità querelà. *Ib.*

**When allowed.]**—No writ of audità querelà shall be allowed unless by rule of court or order of a judge. *Reg. Gen.*, Q. B., C. P. and Ex., H. T. 16 Vict. r. 79; 1 El. & Bl. App. xv.

**By Motion only.]**—Before this rule, it could only be granted upon affidavit and motion in open court. *Dearie v. Ker*, 7 D. & L. 231; 4 Ex. 82; 18 L. J., Ex. 448.

**Where Relief questionable.]**—Where the relief is questionable, the court will not dispose of the case on motion, but leave the defendant so to proceed that the plaintiff may demur or bring error. *Ib.*; *S. P.*, *Symonds v. Blake*, 4 D. P. C. 263; 2 C., M. & R. 416; 1 Gale, 182.

**Where Fraud imputed.]**—Where fraud was imputed to a defendant, on affidavits stating that he had fraudulently caused a commission of bankruptcy to be issued against the plaintiff, and there were counter-affidavits, denying the existence of fraud, the court refused to go into the question on motion, but left the party to his remedy by action, or by audità querelà. *Baker v. Ridgway*, 2 Bing. 41; 9 Moore, 114.

**Not Ex parte.]**—A court of equity refused to order a writ of audità querelà to be issued upon an ex parte application. *Troop v. Ricardo*, 33 Beav. 122; 9 Jur., N. S. 887; 8 L. T. 757; 11 W. R. 1014.

A defendant may plead several matters by

leave. *Giles v. Hutt*, 5 D. & L. 387; 1 Ex. 701; 17 L. J., Ex. 121.

**Security for Costs.**—So a plaintiff will be compelled to give security for costs where such security would be required in an ordinary action. *Helmes v. Pemberton*, 1 El. & El. 369; 28 L. J., Q. B. 172; 5 Jur., N. S. 727; 7 W. R. 160. See *further*, sub tit. PRACTICE.

**Venire facias—Supersedeas.**—In an auditá querelá, the court granted a rule absolute for a supersedeas, together with a venire facias. *Giles v. Hutt*, 5 D. & L. 115; 1 Ex. 59; 16 L. J., Ex. 258.

**Personal Service.**—The venire facias and summons to appear must be personally served, it being original process. *Williams v. Roberts*, 1 L. M. & P. 381; 10 L. J., Ex. 269; 14 Jur. 399.

**Judgment—Deed of Settlement—Alternative Powers.**—Upon an auditá querelá to be relieved from a judgment, the writ set out a deed of settlement of a company, by which it was agreed between the defendant and the shareholders, of which the plaintiff was one, that upon the neglect of a shareholder to pay any call within a calendar month after notice, the directors might after the expiration of such month declare that such shares as to which the full amount should not have been paid should be forfeited; provided that it should be lawful for the directors, if they should think fit, to enforce the payment of any call, instead of declaring forfeited any share. It stated that the plaintiff having neglected to pay his calls, the defendant sued him, recovered judgment and levied part of the amount of the calls, and that they afterwards declared his shares forfeited:—Held, that the power in the deed was in the alternative, and that in case of non-payment of a call the directors might either sue or declare the shares forfeited, but that they could not do both; that the proceeding to judgment and execution was an election by them of their remedy, and that the declaration afterwards that the shares were forfeited was a nullity; and consequently, that the plaintiff was not entitled to be relieved from the judgment. *Giles v. Hutt*, 3 Ex. 18; 5 Railw. Cas. 505; 18 L. J., Ex. 53.

**Subsequent Release.**—Jurisdiction in equity to restrain execution upon a judgment against a defendant, on the ground of a subsequent release by the plaintiff of his claims under the judgment, for a valuable consideration paid by the defendant, notwithstanding that a rule obtained by the defendant, to set aside the judgment on the ground of such subsequent release, had been discharged, and a writ of auditá querelá on the same ground had been set aside by a court of law. *Williams v. Roberts*, 8 Hare, 315.

**Bill in Equity for Relief.**—Although an auditá querelá is said to be "in the nature of a bill in equity to be relieved against the oppression of the plaintiff" (3 Black. Com. 406), yet the defendant is not, either by the existence of that remedy, or by having unsuccessfully resorted to it, precluded from bringing an original bill in equity for relief against the plaintiff, in a case where a court of law has set aside the writ in a summary proceeding. *Id.*

## AUSTRALIA.

See COLONY.

## AUTHOR.

See COPYRIGHT.

## AUTREFOIS ACQUIT AND CONVICT.

See CRIMINAL LAW.

## AVERAGE.

See INSURANCE—SHIPPING.

## AVOWRY.

See REPLEVIN.

## AWARD.

See ARBITRATION.

## BAIL.

- I. FORM AND NATURE OF BAIL-BOND, 508.
- II. ASSIGNMENT OF BAIL-BOND, 510.
- III. ACTIONS ON BAIL-BONDS, 511.
  1. *Generally*, 511.
  2. *Pleadings*, 511.
  3. *Practice*, 512.
- IV. RIGHTS AND LIABILITY OF BAIL TO THE SHERIFF, 514.
- V. DEPOSIT OF MONEY IN LIEU OF BAIL, 514.
  1. *Generally*, 514.
  2. *When Defendant may take out of Court*, 515.



3. *When Plaintiff may take out of Court*, 516.
4. *By Third Parties*, 517.
5. *Practice*, 517.

#### VII. WHO MAY BE BAIL, 519.

#### VIII. QUALIFICATION OF SPECIAL BAIL, 520.

#### IX. PUTTING IN BAIL, 521.

#### IX. NOTICE AND JUSTIFICATION OF BAIL, 522.

1. *Description of Bail*, 522.
2. *Residence*, 523.
3. *By Prisoner*, 524.
4. *Irregular Notice*, 524.
5. *Affidavit of Justification accompanying Notice*, 524.
6. *Justification*, 525.
7. *In what Sum*, 526.
8. *Costs*, 527.

#### X. EXCEPTION, 529.

#### XI. ADDING BAIL AND GIVING TIME, 530.

#### XII. ALLOWANCE OF BAIL, 531.

#### XIII. LIABILITY OF BAIL, 531.

#### XIV. DISCHARGE OF BAIL, 532.

1. *By Render of Principal*, 532.
2. *By Bankruptcy of Principal*, 535.
3. *By Lunacy of Principal*, 537.
4. *By Principal becoming Privileged*, 537.
5. *By Death of Principal*, 537.
6. *By taking Cognovit*, 537.
7. *By Part Levy in Execution*, 538.
8. *By Arrangement with Principal*, 538.
9. *By other Means*, 539.
10. *Application for Discharge*, 539.

#### XV. PROCEEDINGS AGAINST BAIL, 540.

#### XVI. BAIL ON REMOVAL FROM INFERIOR COURTS, 543.

#### XVII. BAIL IN ERROR OR ON APPEAL, 543.

#### XVIII. CONTRACTS TO INDEMNIFY, 545.

#### XIX. BAIL IN PARTICULAR CASES.

1. *On Attachment*.—See ATTACHMENT.
2. *Criminal Matters*.—See CRIMINAL LAW.
3. *Outlawry*.—See OUTLAWRY.

#### XX. OTHER MATTERS.

1. *Affidavit to Hold to Bail*.—See ARREST.
2. *Contracts respecting putting in*.—See CONTRACT.
3. *Recovery of Expenses*.—See MONEY COUNTS.
4. *Contribution*.—See MONEY COUNTS.

#### I. FORM AND NATURE OF BAIL-BOND.

**General Requisites.**—The 23 Hen. 6, c. 9, is a public act. *Samuel v. Evans*, 2 T. R. 569.

The sheriffs of London, to whom, as such, a writ of special *capias* was directed, under which they arrested the plaintiff, cannot be sued for damages for not having taken bail for his appearance, according to the 23 Hen. 6, c. 9, the sufficiency of the bail tendered being only alleged to be within Middlesex and London taken together. *Lovell v. London (Sheriffs)*, 15 East, 320.

Although the sheriff takes a bail-bond on 23 Hen. 6, c. 9, yet that is at his peril, and the plaintiff shall not be concluded thereby. *Wolfe v. Collingwood*, 1 Wils. 262.

An undertaking by an attorney to give a bail-bond to the sheriff is contrary to 23 Hen. 6, c. 9, and therefore void. *Lewis v. Knight*, 1 D. P. C. 261; 1 M. & Scott, 353; 8 Bing. 271; *S. P.*, *Sedgeworth v. Spicer*, 4 East, 568; 2 Smith, 305.

If a sheriff's officer takes an undertaking for the appearance of the party, instead of a bail-bond, without the plaintiff's assent, and bail above be not duly put in, the sheriff is liable to an action for an escape. *Fuller v. Prost*, 7 T. R. 109.

Where a sheriff suffers a person, who has been arrested, to go at large without taking a bail-bond, the court will not suffer him to render the defendant after an action against him for an escape; though he should not have been ruled to return the writ, or bring in the body, before action commenced, and although the defendant was in custody in several other actions. *Birn v. Middlesex (Sheriff)*, 2 Marsh. 261; *S. C.*, nom. *Bird v. Bond*, 6 Taunt. 554. And see *Hamilton v. Wilson*, 1 East, 383.

A bond stated to have been taken on a certain day, conditioned for appearance on the day previously to the date of the bond, is void by the statute. *Samuel v. Evans*, 2 T. R. 569.

A bail-bond conditioned to appear in eight days after the date (the arrest having been on the same day) is sufficient. *Erans q. t. v. Muerley*, 2 D. P. C. 364; *S. C.*, nom. *Erans v. Shropshire (Sheriff)*, 4 Tyr. 169.

If a party executes a bail-bond before the condition is filled up, it is void. *Powell v. Duff*, 3 Camp. 181. See *Holding v. Raphael*, 5 N. & M. 655.

By a writ, a sheriff was commanded to take W. P. and one S. P., and him and the said S. P. safely keep until he and S. P. should have given him bail in an action at the suit of the plaintiff. The sheriff took a bail-bond conditioned for the appearance of W. P. alone:—Held to be no variance. *Grottick v. Phillips*, 3 M. & Scott, 132; 9 Bing. 721.

**To whom given.**—A bail-bond must be given to the sheriff, as such, for the appearance of the party, and for no other purpose. *Rogers v. Reeves*, 1 T. R. 418, 422; *S. P.*, *Jackson v. Hunter*, 6 T. R. 71.

**Penalty and Sureties.**—A bail-bond taken in more than double the sum sworn to is good. *Norden v. Horsley*, 2 Wils. 69.

An attorney ought not to prepare a bail-bond for a larger sum than is requisite according to the practice of the court. *Wingrave v. Godmond*, 7 C. & P. 66.

A sheriff is bound to let his prisoner arrested

on mesne process go at large, on having reasonable sureties. *Matson v. Booth*, 5 M. & S. 223.

A bond with five sureties, three of whom are respectively worth more than the penalty of the bond, is sufficient, though the other two are worth less than the penalty. *Ib.*

The addition of another obligor in a bond given to the sheriff after the bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligors, does not vacate the bond nor make a new stamp necessary. *Ib.*

Where a sheriff took a bail-bond executed by one surety only, the court refused to set aside an attachment against him for not bringing in the body, although he consented to pay the costs. *Rez v. London (Sheriff)*, 9 Moore, 422; 2 Bing. 227; *S. P., Reg. v. Lane*, 7 D. P. C. 313.

But when the application is made at the instance of the bail, the court will set aside such an attachment. *Rez v. Middlesex (Sheriff)*, 2 D. P. C. 140.

A sheriff took a bail-bond with one surety only; he afterwards made a day's default in returning the writ. The court set aside an attachment against him on payment of costs. *Rez v. Surrey (Sheriff)*, 2 C., M. & R. 698; 1 T. & G. 32.

**Cancelling or Setting Aside.**—A bail-bond given upon an arrest on a capias was set aside for a variance between the capias and the paper served as a copy of the writ. *Copley v. Medeiros*, 7 M. & G. 426; 8 Scott, N. R. 172.

The court has power to order a bail-bond to be given up to be cancelled. *Needham v. Bristow*, 1 D., N. S. 700; 4 Scott, N. R. 773; 4 M. & G. 262.

But the court will not order a bond given to be delivered up to be cancelled, on affidavit that the defendant has rendered himself to gaol according to the condition of the bond. *Ridler d. Bilton v. Chappelow*, 1 D., N. S. 637; 6 Jur. 375.

A defendant, having been arrested, gave bail to the sheriff, but before the expiration of the time for putting in bail to the action, he died. A rule having afterwards been obtained, calling upon the plaintiff or his attorney to shew cause why the bail-bond given to the sheriff should not be given up to be cancelled:—Held, that the rule should also have called upon the sheriff, and was bad for not so doing. *Cook v. Lynch*, 2 B. C. Rep. 291.

A defendant having been arrested, paid into court the sum indorsed on the writ, and 20*l.* as a security for costs, to abide the event of the suit, in pursuance of 7 & 8 Geo. 4, c. 71, instead of putting in and perfecting special bail:—Held, that he was entitled to have the bail-bond delivered up to him to be cancelled. *Smith v. Jordan*, 2 M. & P. 428.

**Forfeiture by not putting in Special Bail.**—If a party does not put in special bail within eight days after execution of the process upon him, including the day of such execution, the plaintiff, immediately on the expiration of that time, may put the bail-bond in suit. *Hillary v. Rowles*, 5 B. & Ad. 460; 2 D. P. C. 201; *S. P., Robinson v. Hawkins*, W., W. & D. 575; 1 Jur. 843.

If a defendant gives a bail-bond to the sheriff, he cannot afterwards, by surrendering

to the sheriff, vacate the bond; but, after such surrender, and after the expiration of eight days from the arrest, if special bail is not put in, proceedings may be had upon the bail-bond. *Hodgson v. Mee*, 3 A. & E. 765; 5 N. & M. 302; 1 H. & W. 398.

— **By giving Time to Principal.**—After a bail-bond has been forfeited, and an assignment thereof taken, time given to the principal is no discharge of the sureties. *Woonnam v. Frier*, 1 C. & M. 352; 3 Tyr. 375.

If one of the bail below consents to time being given to the defendant to perfect bail above, this act is binding on both. *Howard v. Bradberry*, 3 D. P. C. 92.

## II. ASSIGNMENT OF BAIL-BOND.

**Form of.**—The seal to the assignment of a bail-bond, being a seal of office, is sufficient to give it validity, whoever signed it, and, therefore, it is no objection that it was signed by one of the under sheriffs' clerks. *Hams v. Ashby*, 1 Selw. N. P. 586, n.

An assignment must be executed in the presence of two witnesses, but it is not necessary that they should both subscribe their names in the presence of the officer assigning. *Phillips v. Barlow*, or *Barber*, 1 Scott, 322; 1 Bing. N. C. 433; 3 D. P. C. 381; 6 C. & P. 781.

An assignment is invalid, if executed in the presence of and attested by the plaintiff in the action and another person. *White v. Barrack*, 1 M. & W. 425; 5 D. P. C. 64; 2 Gale, 57.

**Effect of Assignment.**—A plaintiff who takes an assignment of a bail-bond given for a defendant arrested on a capias, and on bail above not being put in in due time, commences an action upon it, ought not on that account to discontinue his original action against the defendant. *Ede v. Collingridge*, 11 M. & W. 61; 2 D., N. S. 764; 12 L. J., Ex. 247; 7 Jur. 203.

If a plaintiff accepts an assignment, he cannot call upon the sheriff to return the writ, nor shall he have a rule for that purpose before it is determined whether or not the bond is good. *Brooke (Lord) v. Stone*, 1 Wils. 223.

Although a rule to return the writ cannot be had after the plaintiff has taken a valid assignment of the bail-bond, it is otherwise if the bond from any cause is void. *Williams v. Jacques*, 1 Tidd's Prac. 307.

If a plaintiff sues the bail by action, and takes them in execution, he cannot afterward take the principal, though one of the bail becomes bankrupt and is discharged, and the other also is discharged on payment of 5*s.* in the pound, and upon an understanding that the plaintiff was at liberty to proceed against the principal. *Allen v. Snow*, 2 M. & S. 341.

In an action by assignees of a bail-bond, it is no objection to their recovering that the sheriff, before assigning the bond, returned non est inventus. *Taylor v. Clow*, 1 B. & Ad. 223.

**Waiver of Assignment by excepting to Bail.**—Where a defendant is guilty of a neglect in not putting in bail in time, whereby the bail-bond becomes forfeited, the plaintiff may except to bail put in to stay the proceedings on the bail-

bond, and it will not be a waiver of the assignment. *Boldero v. Gray*, Cowp. 769.

It is not a waiver of the assignment, that the plaintiff intends to oppose the justification of bail. *Edmond v. Ross*, 9 Price, 5.

— **By proceeding against Sheriff.**—A plaintiff may abandon an attachment, and take an assignment of the bail-bond, and proceed thereon. *Pople v. Wyatt*, 15 East, 215.

So, where an attachment has been set aside. *Brown v. Neave*, Wightw. 406.

But where the plaintiff had ruled the sheriff to bring in the body, he could not take an assignment pending such rule. *Blackford v. Hawkins*, 7 Moore, 600; 1 Bing. 181.

But must have waited till the rule expired. *Whittaker v. Oldaker*, 1 M. & R. 298; 7 B. & C. 478.

### III. ACTIONS ON BAIL-BONDS.

#### 1. GENERALLY.

**In what Court.**—An action by an assignee of a bail-bond must be brought in the court out of which the process issued. *Miller v. Pulfreyman*, 1 N. & M. 696; *S. P. Morris v. Rees*, 2 W. Bl. 838; 3 Wils. 348; *Walton v. Bent*, 3 Burr. 1923.

Although it was irregular to bring an action on a bail-bond in a different court from that in which the original action was commenced, yet a defendant could not take advantage of it under non est factum. *Wright v. Walmesley*, 2 Camp. 396.

**When.**—A plaintiff who has held a defendant to bail, and has taken an assignment of the bail-bond, does not preclude himself from proceeding thereon against the bail, by going on with the original action against the defendant. *Betts v. Smyth*, 1 G. & D. 284; 2 Q. B. 113; 6 Jur. 343.

**Parties.**—Where two of three parties to a bail-bond were sued jointly:—Held, to be no irregularity. *Knowles v. Johnson*, 2 D. P. C. 653.

#### 2. PLEADINGS.

**Declaration.**—In an action against an assignee of a bail-bond, a declaration stated that A. had been arrested under a *capias*, and that the defendant had entered into the bail-bond with a condition, reciting that A. had been arrested by virtue of a *capias* against him, in an action at the suit of the plaintiff, and that the bond had been assigned to the plaintiff by the sheriff:—Held, that the defendant was estopped by his execution of the bail-bond from objecting that A. was not arrested in an action at the suit of the plaintiff. *Barnes v. Keane*, 15 Q. B. 75; 19 L. J., Q. B. 309; 14 Jur. 786.

A plaintiff declared, as assignee of the sheriff, and set forth a bond to himself:—Held, no ground of demurrer. *Reynolds v. Walsh*, 1 C., M. & R. 580; 5 Tyr. 202; 3 D. P. C. 441.

In an action by an assignee of a bail-bond a declaration stated that the sheriff, "by an indorsement on the writing obligatory, duly made and sealed with the seal of the officer of the sheriff, assigned the writing obligatory to the plaintiff, according to the form of the statute:—Held, that the declaration was good, and that it

was not necessary to state that the assignment was under the hand of the sheriff, and executed in the presence of two witnesses. *Lewis v. Parkes*, 3 M. & W. 133; 6 D. P. C. 93; M. & H. 321.

**Pleas.**—It is no plea to an action on a bail-bond, that there was no affidavit of debt filed in the action against the principal. *Knowles v. Stevens*, 1 C., M. & R. 26; 4 Tyr. 1016; S. C. nom. *Snow v. Stevens*, 2 D. P. C. 664.

Or that there was no proper affidavit. *Hume v. Liversedge*, 1 C. & M. 332; 1 D. P. C. 660; 3 Jur. 257.

Bail sued on a bail-bond cannot traverse the arrest. *Taylor v. Clow*, 1 B. & Ad. 223.

#### 3. PRACTICE.

**Staying Proceedings.**—After the time for giving bail has elapsed and no bail has been given, notice of appeal against a judgment does not stay the proceedings or affect it in any way. *Burnaby v. Earle*, 9 L. R., Q. B. 490; 43 L. J., Q. B. 209; 30 L. T. 760; 22 W. R. 877.

A bond for the payment to plaintiff of the sum for which he had obtained a verdict "if the determination of the action should be in his favour" was given by the defendant and others. A rule was afterwards obtained to set aside the verdict for the plaintiff, which rule was afterwards discharged. Thereupon, on the 15th November, 1870, the defendant gave notice of appeal under the Common Law Procedure Act, 1854, s. 37, but bail was not put in as required by s. 38; and no further steps were taken to prosecute the appeal. On the 9th April, 1872, the plaintiff having brought an action on the bond, the defendant pleaded that the former action was undetermined in favour of the plaintiff:—Held, that as there was, at the commencement of the present action, a judgment in favour of the plaintiff, and no stay of execution thereon, such a state of things amounted to a determination of the former action in favour of the plaintiff within the meaning of the condition to the bond. *Id.*

Where a defendant, having had notice on the 16th May, of actions having been commenced on the bail-bond, applied on the 29th May (being the 4th day of the term), to set aside the proceedings:—Held, that the application was too late. *Smith v. Webb*, 2 M. & W. 879.

Where there has been delay in applying to have a bail-bond set aside, which has arisen from compliance with the request of the plaintiff:—Held, that it could not be objected that the application was not made in a reasonable time. *Gould v. Williams*, 1 H. & W. 344.

Where several actions are brought on the same bail-bond, it is too late, after verdict, to move to stay proceedings on payment of the costs of one action only. *Johnson v. Macdonald*, 2 D. P. C. 45.

In staying proceedings on a bail-bond, it is not necessary to shew that a rule for the allowance of bail has been obtained, if sworn that the bail have been put in and justified. *Crosby v. Innes*, 5 D. P. C. 566; W., W. & D. 192.

Proceedings may be stayed on a bail-bond, on payment of costs, though the bail surrender the principal without having justified. *Meysey v. Carnell*, 5 T. R. 634. And see *St. Hanlaire v. Byam*, 7 D. & R. 458; 4 B. & C. 970.

**Necessary Affidavit.**—It is not sufficient for a

defendant, on moving to set aside proceedings on a bail-bond, to swear that the defendant in the original action has a good defence, even though an infant; he must swear to merits. *Hullett v. Aubrey*, 1 D. P. C. 688.

An affidavit must state that the defendant had a good defence upon the merits: a good defence to the action is not sufficient. *Grottick v. Bailey*, 5 B. & A. 703.

An affidavit of merits, if made by an attorney, must describe him as the attorney to the defendant; and it is not sufficient to shew, by other affidavits, that there is an attorney of the same Christian and surname, residing at the same place as that of which the deponent describes himself. *Bonnefor v. Russell*, 5 D. P. C. 546.

Collusion with the defendant must be denied by both the bail. *Dowson v. Cull*, 2 C. & J. 761.

— **How Intituled.**—Affidavits to set aside or stay proceedings on a bail-bond may be intituled either in the original action, or in the action against the bail. *Lisle v. Chetwode*, 2 Tyr. 177; *S. C.*, nom. *Leyles v. Chetwood*, 2 C. & J. 332; 1 D. P. C. 321; *S. P.*, *Stride v. Hill*, 4 D. P. C. 709; 1 M. & W. 37; 1 Gale, 431.

They may be intituled in both actions. *Pocock v. Cockerton*, 7 D. P. C. 21.

**Bail-bond standing as Security.**—To have the bail-bond stand as a security, it must appear that a trial was lost at the time of moving for the rule. *Stride v. Hill*, 4 D. P. C. 709; 1 M. & W. 37.

Where a bail-bond stands as a security, the plaintiff may sign judgment upon it, notwithstanding he may have commenced an action thereon, such action being unnecessary. *Storey v. Stephens*, 2 Jur. 594; 1 W., W. & H. 298.

A bail-bond, executed by one only of the bail, may be ordered to stand as a security. *Re v. London (Sheriffs)*, 9 Moore, 422; 2 Bing. 227.

**On Payment of Costs.**—Where an attorney had become bail to the sheriff, and the bail-bond had been assigned, the court would stay proceedings upon the bail-bond upon payment of costs. *Mann v. Nottage*, 1 Y. & J. 367.

Where a defendant gave bail to the sheriff, and subsequently obtained an order to stay proceedings in the action on payment of debt and costs forthwith, "the plaintiff to be at liberty to sign final judgment and issue execution for the amount," if the debt and costs were not so paid; and default being made in payment, the plaintiff took an assignment of the bail-bond, and issued process against the bail, after which the defendant died:—Held, that the bail were entitled to stay proceedings on the bail-bond on payment of costs; that the order did not require them to put the plaintiff into a condition to sign judgment, by justifying bail above; and therefore he had not lost a judgment by their laches. *Isaac v. Richards*, 7 D. P. C. 94; 4 M. & W. 382; 1 H. & H. 333.

**As to Judgment.**—Final judgment may be entered up on a bail-bond without executing a writ of inquiry. *Moody v. Pheasant*, 2 B. & P. 446.

If it appears in a declaration by an assignee

of the sheriff on such bond, that the bond is void, the court will arrest the judgment after verdict against the defendant, upon a plea of non est factum. *Samuel v. Evans*, 2 T. R. 569.

#### IV. RIGHTS AND LIABILITY OF BAIL TO THE SHERIFF.

Bail to the sheriff have no right to take their principal into custody. *Re v. Hughes*, 3 C. & P. 373.

Bail to the sheriff are liable for the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail-bond. *Stevenson v. Cameron*, 8 T. R. 28; *S. P.*, *Mitchell v. Gibbons*, 1 H. Bl. 76; *Orton v. Vincent*, Cowp. 71.

#### V. DEPOSIT OF MONEY IN LIEU OF BAIL.

##### 1. GENERALLY.

Where money is paid into the hands of a sheriff in lieu of bail, the defendant has, under 7 & 8 Geo. 4, c. 71, till the day for perfecting special bail, for giving notice of his intention that the money shall remain in court to abide the event of the suit. *Rouse v. Softly*, 6 Bing. 634; 4 M. & P. 464.

Where a defendant has paid the debt, and 10*l.* for costs, to the sheriff in lieu of bail, under 43 Geo. 3, c. 46:—Held, that he has, under 7 & 8 Geo. 4, c. 71, till the day for perfecting special bail, to pay in the additional 10*l.* for costs. *Stafford v. Love*, 3 D. P. C. 593; *S. C.*, nom. *Stafford v. Love*, 1 H. & W. 195.

Before bail are perfected, or until the time for excepting to them has passed, a defendant is entitled as a matter of right to pay in the debt, with a sum for costs, under 7 & 8 Geo. 4, c. 71, s. 2; and therefore, though he does not pay in the money until after he has put in, though not justified, bail above, and the plaintiff has been put to expense by searching for them, and making inquiries, the defendant is not liable to pay those expenses, but they are properly costs in the cause. *Stanforth or Stanford v. McCann*, 4 D. P. C. 367; 2 C., M. & R. 631; 1 Gale, 344.

Upon a *capias*, indorsed for bail for 200*l.*, the defendant paid the amount into the hands of the sheriff, on the 28th of April, with 10*l.* for costs: on the 29th, he entered an appearance to the action, and requested the officers of the court to receive 10*l.* for costs, to abide the event under 7 & 8 Geo. 4, c. 71, s. 2, and which the officers refused, because nothing had been paid in by the sheriff. The time for putting in bail above expired on the 5th of May; the sheriff, though frequently requested, did not pay the money into court till the evening of that day. On the 6th, the plaintiff obtained a rule nisi to have the money paid over to him: and, on the evening of that day, the defendant paid in the further sum of 10*l.* for costs, to abide the event of the suit:—Held, that these several payments were not equivalent to putting in and perfecting bail to the action. *Hannah v. Willis*, 4 Bing. N. C. 310; 6 D. P. C. 417; 5 Scott, 731; 1 Arn. 117.

The 43 Geo. 3, c. 46, s. 2, enabled a person arrested upon *mesne* process under a mistake as to identity, as well as persons properly arrested, to deposit the debt and costs in lieu of bail.

*De Mesnil v. Dakin*, 3 L. R., Q. B. 18; 37 L. J., Q. B. 42; 16 W. R. 145; 8 B. & S. 650.

A sheriff, against whom an action had been brought, for falsely returning that money deposited with him in lieu of bail had been paid into court, was allowed to pay into court in the original action the money so deposited, though the plaintiff had been delayed two months by the sheriff's neglect. *Hall v. Jones*, 4 D. P. C. 712.

Money paid into court in lieu of bail cannot be transferred to the account of a payment into court. *Ball v. Stafford*, 2 Scott, 426; 4 D. P. C. 327; 1 Hodges, 316.

Nor appropriated to the purposes of a plea of tender. *Stultz v. Hencage*, 4 M. & Scott, 472; 2 D. P. C. 806.

Money deposited in court in one action cannot be paid out to the execution creditor in another action in satisfaction of his claim, notwithstanding 1 & 2 Vict. c. 110, s. 12, as that section does not give power to seize money in execution, while in the hands of a third person as trustee for the defendant. *France v. Campbell*, 9 D. P. C. 914.

## 2. WHEN DEFENDANT MAY TAKE OUT OF COURT.

If a defendant has deposited money in lieu of bail, which the sheriff pays into court, he is entitled to take it out on justifying bail in due time. *Young v. Maltby*, 3 D. P. C. 604; 1 H. & W. 214; *S. P., Geach v. Coppice*, 3 D. P. C. 74.

Notwithstanding it has been paid in without prejudice to an application for defects in the affidavit of debt. *Green v. Glasbrooke*, 1 Scott, 402; 1 Bing., N. C. 516; 1 Hodges, 27.

The court will not order the sum paid into court in lieu of special bail to be paid out to a defendant on perfecting special bail, unless that is done before issue joined. *Welshman v. Sturges*, 13 Q. B. 556; 18 L. J., Q. B. 168; 13 Jur. 388.

When a plaintiff replies by taking issue on and demurring to a plea, the defendant, on putting in bail before issue is joined on the demurrer, is in time to apply to take out of court money paid in in lieu of bail, which by the 7 & 8 Geo. 4, c. 71, s. 3, he may take out at any time during the progress of the cause before issue joined in law or fact. *Alcenius v. Mygren*, 23 L. J., Q. B. 287.

A defendant arrested deposited a sum of money in lieu of bail, and applied to the court for a return of the deposit. The court thought that, but for the matters disclosed in the affidavits on shewing cause, the defendant would have been entitled to a return; but the affidavits having raised a question whether the defendant had not since his arrest broken up his establishment and gone abroad, on which point the defendant had had no opportunity of being heard, the court referred that question to the master before deciding on the return of the deposit. *Talbot v. Bulkeley*, 4 D. & L. 317; 16 M. & W. 191; 16 L. J., Ex. 67; 10 Jur. 1061.

A defendant, having been arrested, deposited with the sheriff the amount claimed, and 10*l.* for costs, in lieu of bail, and the sheriff paid the amount into court. The defendant afterwards put in and perfected bail, but not in due time:—Held, that, having made an affidavit of merits, he was entitled to take the money out of court, and that the plaintiff was not entitled to elect whether he would take the security of the bail

or of the money. *Brooke v. Brooke*, 1 B. C. C. 120; 22 L. J., Q. B. 81; 17 Jur. 186.

Money having been deposited in lieu of bail, and an order for better particulars with a stay of proceedings having remained unobeyed for a year, the court refused to grant a rule for taking the money out of court. *Harden v. Harbourn*, 7 D. P. C. 546; 1 W., W. & H. 568.

A defendant, having been arrested under a capias under 1 & 2 Vict. c. 110, paid money into the hands of the sheriff, under 43 Geo. 3, c. 46, s. 2. He subsequently put in special bail, to whom an exception was made, and the defendant then rendered:—Held, that the putting in bail, and the render of the defendant, were equivalent to an appearance for the purpose of an application to pay the money out of court to the defendant. *Brooke v. Gunning*, 8 D. P. C. 11; 6 Bing., N. C. 157; 8 Scott, 343.

## 3. WHEN PLAINTIFF MAY TAKE OUT OF COURT.

A plaintiff is not entitled to receive out of court money paid in by a defendant in lieu of bail, under 7 & 8 Geo. 4, c. 71, s. 2, unless judgment has been obtained, or the suit otherwise legally determined. *Johnson v. Wall*, 4 D. P. C. 315.

Where a party arrested by capias deposits money with the sheriff, and subsequently neglects to put in bail to the action, the plaintiff is entitled to take the money out of court without waiting for the final determination of the suit. *Tuton v. Gale*, 1 D., N. S. 383; 5 Jur. 1137.

Under 1 & 2 Vict. c. 110, the court has the same power with respect to money deposited with the sheriff, or paid into court in lieu of bail, as under 43 Geo. 3, c. 46, s. 2, and 7 & 8 Geo. 4, c. 71, s. 2. *Scherwinski v. Peronnet*, 8 D. P. C. 229; 6 M. & W. 90.

Where a defendant is arrested and is released on depositing with the sheriff the amount indorsed upon the writ, with 10*l.* for costs, which sums are afterwards paid into court, the plaintiff is entitled to have the money paid out of court to him (subject to taxation), if the defendant neglects to pay an additional 10*l.* into court. *Nuyssen v. Iuyssens*, 5 Ex. 857; 20 L. J., Ex. 33.

Upon his arrest at the plaintiff's suit, in January, 1863, the defendant deposited with the sheriff, pursuant to 43 Geo. 3, c. 46, s. 2, the sum indorsed upon the writ, together with 10*l.* to answer costs, and was thereupon discharged, the sheriff paying the deposit into court. The defendant being subsequently, upon his own petition, adjudicated a bankrupt, was thereby prevented from perfecting special bail, or paying in the additional sum in lieu thereof, under 7 & 8 Geo. 4, c. 71, s. 2, and, upon motion for payment of the deposit out of court to the plaintiff:—Held, that, notwithstanding the intervening bankruptcy of the defendant, and the claim made to the money by his assignees, the plaintiff was entitled, under the express words of 43 Geo. 3, c. 46, s. 2, to have the deposit paid out of court to him, with such a sum for costs, out of the 10*l.*, as the master should allow. *Cooke v. Bell*, 8 L. T. 431; 11 W. R. 732.

Money having been paid into court by a defendant, in lieu of special bail, and to abide the event in the suit, and a verdict having been given for the plaintiff:—Held, no sufficient cause against a rule to pay the money out to him, that,

in a foreign country, the defendant had since been made a bankrupt. *Stead v. Speigelberg*, 10 W. R. 46.

Where money is paid into court in lieu of bail, not by the defendant himself, but by one of the bail, and the plaintiff obtains judgment, he is entitled to have the money paid out to him in discharge of the debt and costs. *Bull v. Turner*, 4 D. P. C. 734; 1 M. & W. 47.

A defendant having been arrested was discharged upon paying the amount indorsed on the writ, together with 10*l.* for costs, into the hands of the sheriff. The sum was afterwards paid into court, together with 10*l.* for costs, in lieu of special bail. The plaintiff obtained a verdict in the action for a sum less than the sum indorsed on the writ, and for which the defendant was held to bail; but which, together with the costs in the action, considerably exceeded the amount paid in for debt and costs:—Held, that the plaintiff was entitled to have the whole amount paid over to him, and not merely the sum for which he had recovered a verdict, together with 20*l.* for costs. *Welchman v. Sturgis*, 6 D. & L. 739.

If money is deposited in court, in lieu of bail above, and the plaintiff obtains a verdict, he must limit his execution to the surplus of his demand, beyond the sum deposited, which he is bound to take out of court. *Heus v. Pyke*, 1 D. P. C. 322; 2 C. & J. 359; 2 Tyr. 313.

#### 4. BY THIRD PARTIES.

The court permitted bail to take out of court money, which he had paid in for the defendant's use, on a motion for a commission to examine witnesses abroad, the defendant having died abroad, intestate and insolvent, before the trial, the rule nisi having been served on all persons in any way interested in the cause. *Palmer v. Reiffenstein*, 7 M. & G. 641; 8 Scott, N. R. 347.

When money has been paid in by a third party, on the bail being put in and perfected, the court will pay it out to him, if the attorney who gives instructions for the application swears that he is the attorney of the defendant and acts for him, though the defendant himself is abroad. *Alcenius v. Nygren*, 23 L. J., Q. B. 287.

Money deposited by a third person in lieu of special bail, cannot be got back by application, on the defendant's rendering; it must remain in court to abide the event. *Bull v. Turner*, 4 D. P. C. 734; 1 M. & W. 47.

But where a friend of a party arrested makes a deposit of his own money on the defendant's behalf, in lieu of bail, and the sum is afterwards paid into court to abide the event of the suit, and the defendant then renders, the owner of the money may have it restored to him, under 7 & 8 Geo. 4, c. 71, s. 5, if the defendant appears in court and assents. For this purpose the render is equivalent to putting in and perfecting special bail. *Douglass v. Stanbrough*, 3 A. & E. 316.

#### 5. PRACTICE.

**On the Defendant taking out Money.**—If money has been paid into court to abide the event of the suit under 7 & 8 Geo. 4, c. 71, s. 2, and a defendant wishes to take it out on perfecting special bail, he must make an application before issue is joined. *Ferrall v. Alexander*, 1 D. P. C. 132; *S. P., Hanwell v. Mure*, 2 D. P. C. 155.

But if the cause is in such a state that issue

may be joined before the rule is disposed of, the court will grant the application with a stay of proceedings. *Bloor v. Cox*, 6 D. P. C. 266; 1 W., W. & H. 84.

An application on the part of a defendant after issue joined, on rendering or putting in special bail, is clearly too late. *Morris v. Shepherd*, 2 Jur. 1069.

If a defendant pays money into court to abide the event of the cause, the court will not grant a rule absolute in the first instance for repayment to him, judgment being for him, but there must be a rule to shew cause. *Symes v. Rose*, 5 Bing. 269; 2 M. & P. 426.

A rule for taking money, deposited in lieu of bail, out of court, in consequence of the plaintiff becoming nonsuit, is nisi in the first instance. *Grant v. Willis*, 4 D. P. C. 581.

Or where a defendant succeeds, the rule for taking the money out of court is nisi in the first instance. *Lorer v. Tolmin*, 5 D. P. C. 388; W., W. & D. 75; 1 Jur. 104.

So after judgment of non-pros the rule is nisi only. *Wild v. Rickman*, 1 H. & W. 670.

Where a defendant had obtained judgment as in case of a nonsuit, a rule to pay out of court money paid into court in lieu of bail was a rule nisi in the first instance. *D'Ebro v. Schmidt*, 13 Q. B. 653; 6 D. & L. 743; 18 L. J., Q. B. 223; 16 Jur. 389.

**On the Plaintiff taking out Money.**—A plaintiff is entitled to have money paid into court in lieu of bail paid out to him, if special bail is not perfected in due time, although the defendant has rendered since the time for perfecting bail, unless an affidavit of merits is produced. *Newman v. Hodgson*, 1 D. P. C. 329; 1 B. & Ad. 422.

If a defendant has deposited money in lieu of bail and he afterwards leaves the country, the court will allow a rule nisi for taking money out of court to be served by sticking it up in the office. *Know v. Duncan*, 9 D. P. C. 179.

Where money has been paid into court in lieu of bail, the plaintiff, on moving to have it paid out to him, is entitled to the costs of the application. *Freeman v. Paganini*, 4 M. & Scott, 165; 2 D. P. C. 776.

Where a sum had been paid into court to abide the event of the suit, and the cause and all matters in difference were referred; a sum being awarded in favour of the plaintiff in the action and as to the matters in difference, the court made absolute a rule obtained by the plaintiff for obtaining payment out of court of a part of the deposit in respect of the action, but refused, on disposing of that rule, to direct the residue to be paid over to the defendant, but left him to make a separate application. *Fowle v. Steinkeller*, 9 D. P. C. 1037.

A defendant was arrested, and deposited the amount of debt and 10*l.* costs with the sheriff. A few days after he embarked for Australia, leaving no person to receive papers or act for him. The plaintiff obtained a rule calling upon defendant to shew cause why the money should not be paid to the plaintiff according to 43 Geo. 3, c. 46, s. 2. A copy of the rule was stuck up four days in the offices of the court:—Held, that there had been a sufficient service of a rule nisi, which was made absolute. *Shackell v. Johnson*, 7 C. B. 865; 18 L. J., C. P. 249; *S. P., Know v. Duncan*, 9 D. P. C. 179.

Where a defendant has gone abroad, after depositing money in lieu of bail, pursuant to 43 Geo. 3, c. 46, s. 2, without putting in and perfecting bail in due time, and it does not appear that the defendant has a residence in this country, or employed an attorney in the action, the plaintiff may take the money out of court after serving his rule on the sheriff, and putting it up in the Queen's Bench office, *Hunt v. M' Lachlan*, 7 D. P. C. 708; 3 Jur. 999.

## VI. WHO MAY BE BAIL.

### Attorneys, their Clerks, and Sheriffs' Officers.]

—By Reg. Gen. H. T. 16 Vict. r. 94, if any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, or a sheriff's officer, bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime.

Both before and since this rule, an attorney or an attorney's clerk, or indeed any person, might be bail, for the purpose of rendering the principal. *Bell v. Gate*, 1 Taunt. 162.

The rule applied to bail to the action only, and not to bail to the sheriff. *Mann v. Nattage*, 1 Y. & J. 367, n.

An attorney is liable to an action on his recognition of bail, though contrary to the rule of court that he should be a bail at all. *Harper v. Tuhourdin*, 1 Chit. 714, n.; 6 M. & S. 383.

**Persons Indemnified.]**—The court rejected bail, who had received a verbal promise of indemnity from the defendant's attorney, although they gave time to put in fresh bail. *Greensill v. Hopley*, 1 B. & P. 103; *S. P., Cupon v. Dillamore*, 8 Moore, 516; 1 Bing. 423.

But it is no objection to bail that they are indemnified by the sheriff's officer. *Chick's bail*, 1 Chit. 714, n.

It is no objection to bail that they became so at the request of the defendant's attorney, unless they are also indemnified by him. *Hunt v. Blaquiére*, 4 Bing. 588.

Bail are not bound to disclose the name of the party, or friend, at whose solicitation they became bail, provided it were not the defendant's attorney, or his clerk, and they were not indemnified. *Vestris's bail*, 4 Scott, 395; 1 Jur. 335.

A bail who expects the attorney for the defendant to indemnify him, though he has received no undertaking to that effect, cannot justify. *Anon.*, 1 D. P. C. 1.

**Peers and Members of Parliament.]**—Bail was rejected on the ground that one of them was a peer of the realm. *Burton v. Atherton*, 2 Marsh. 232.

Nor can a member of the House of Commons be allowed to justify, because he is not liable to the ordinary process of the courts. *Duncan v. Hill*, 1 D. & R. 126; *S. P., Graham v. Sturt*, 4 Taunt. 249.

**Persons under other Circumstances.]**—A servant in the king's household, who is liable to be called on to attend the person of his Majesty,

cannot be bail, for his person cannot be taken in execution. *Anon.*, 1 D. & R. 127, n.

A domestic servant of a foreign ambassador cannot become bail. *Lock's bail*, 1 D. P. C. 124.

Bail was rejected where he was to receive a commission on the amount for which he proposed to justify. *Foxall's bail*, 7 D. & R. 783.

It is no objection to bail, that he is one of the indorsers of the bill of exchange upon which the action is brought. *Mitchell's bail*, 1 Chit. 287; *S. P., Stevens's bail*, 1 Chit. 305; and *Harris v. Manley*, 2 B. & P. 526.

So, also a drawer of a bill may justify as bail in an action against the acceptor. *Prince v. Beasley*, 5 D. P. C. 477; 4 Scott, 37; 3 Bing. N. C. 391; 1 Jur. 8.

But an acceptor of a dishonoured bill is not competent to become bail in an action against the drawer. *Anon.*, 1 D. P. C. 183.

## VII. QUALIFICATION OF SPECIAL BAIL.

**Housekeepers or Freeholders.]**—A plaintiff may waive the qualification that the bail shall be housekeeper or freeholder. *Saggers v. Gordon*, 5 Taunt. 174.

If notice of bail does not describe them either as housekeepers or freeholders, they may be rejected. *Cripp's bail*, W., W. & D. 387.

Bail must swear themselves "housekeepers;" "householders" is not sufficient. *Anon.*, 1 D. P. C. 127.

**— Within Jurisdiction.]**—Bail must be housekeepers within the jurisdiction of the courts, so as to be amenable to their process. *Hughes v. Sterling*, 11 Price, 158.

A lodger in England, possessed of a house in Scotland, cannot justify as bail. *Anon.*, 1 D. P. C. 61.

**— What an Occupation.]**—Where the bail lived in lodgings, but paid part of the rent and taxes of a house occupied by his partner, as a trader:—Held, that he might be considered as a housekeeper. *Savage v. Hall*, 8 Moore, 525; 1 Bing. 430.

But rejected, where it appeared that he had rented a house, and underlet the same to another, who paid the taxes, and let the first floor to the bail, but whom the landlord would not accept as tenant, and therefore he paid the full rent to the bail, who paid it to the landlord. *Anon.*, 1 Chit. 502.

Where a person had taken a house occupied by lodgers, from one of whom he had received rent, he was held to be qualified, though he had never in fact occupied the house himself. *Cohen v. Waterhouse*, 8 Moore, 365.

But not where he occupied every room in the house except one, which was reserved for his landlord, who paid all the taxes. *Slade's bail*, 1 Chit. 502.

Nor in respect of a house which he had hired, but which he was prevented from occupying by illness in the family of the former tenant. *Bold's bail*, 1 Chit. 288.

Nor in respect of the occupation of a tap connected with a tavern, if the licence is taken out in the name of the tavern keeper. *Walker's bail*, 1 Chit. 316.

But an occupier of a house for a limited period,

though he pays neither rent nor taxes, is sufficient. *Williams v. Dethick*, 2 Price, 8.

If it appears from the affidavit to oppose the justification of bail, that the person offering himself for that purpose has ceased to be actually a housekeeper, although he occupied a house when he signed the bail-piece, and is about to occupy another, he is not admissible. *Weale, v. Wild*, 12 Price, 770.

It is no objection that a man has not been assessed to the poor's rate; such assessment being only evidence of his being a housekeeper. *Anon., Lofft*, 328.

— **Description of House.**—Keeping a gambling-house is no ground of opposition. *Anon.*, 1 D. P. C. 160.

So, keeping a brothel is not of itself a ground for rejecting bail. *Gouge's bail*, 3 D. P. C. 320.

**Estate.**—A leaseholder, not a housekeeper or freeholder, cannot justify as bail. *Smith's bail*, 1 D. P. C. 1.

A leaseholder for ninety-nine years was admitted as bail by consent. *Anon.*, 2 Chit. 96.

A copyhold estate in right of the wife is not sufficient property to constitute a qualification. *Anon.*, 2 Chit. 97.

Seemle, that a bail may justify as a tenant by the curtesy of lands in the Isle of Man, without affidavit, or other evidence, that the law of tenancy by curtesy prevails there. *Tomsay v. Napier*, 8 Taunt. 148.

**Property.**—Bail may justify in respect of shares in a railway company in actual operation. *Pierpoint v. Brewer*, 3 D. & L. 487; 13 M. & W. 201; 15 L. J., Ex. 81; 10 Jur. 79.

The possession of effects abroad to any amount is not sufficient on justification. *Anon.*, Lofft, 34, 147; *S. P.*, 1 Chit. 258; *Wightwick v. Pickering*, Forrest, 138.

But bail was allowed to justify in respect of property, consisting partly of cash and partly of a freehold house at Gibraltar. *Beardmore v. Phillips*, 4 M. & S. 173.

## VIII. PUTTING IN BAIL.

**When to be Put in.**—A sheriff may put in bail before the return of a writ. *Evans v. Sweet*, 2 Bing. 271; 9 Moore, 556.

The bail to the sheriff cannot put in bail to the action before the return of the process, without consent of the defendant. *Birt v. Roberts*, M. & M. 177.

Where special bail have been put in, but have omitted to justify, the sheriff may put in fresh bail to render the defendant, even after an attachment has issued against him for not obeying the rule to bring in the body. *Hamilton v. Jones*, 4 M. & P. 454; 6 Bing. 628.

Bail above may be put in on a dies non juridicus. *Baddeley v. Adams*, 5 T. R. 170.

A defendant arrested between the 10th of August and 24th of October, must put in and justify bail before a judge at chambers, in the same way as in any other part of the vacation. *Re v. Middlesex (Sheriff)*, 2 C. & M. 333; 2 D. P. C. 286; 4 Tyr. 60.

A defendant arrested on a *capias* has only eight days to put in special bail, whether in a town or a country cause. *Grant v. Gibbs*, 1 Scott, 390; 3 D. P. C. 409; 1 Hodges, 56.

And such bail is not deemed to be put in until notice thereof served on the plaintiff's attorney or agent. *Id.*

**How put in.**—Where a poor defendant was arrested for 700*l.*, the court granted a rule to justify three bail instead of two. *Eastar v. Edwards*, 1 D. P. C. 39.

If in the bail recognizance the cause is rightly named, it is sufficient, though in the affidavits of the sufficiency of the bail, and of the acknowledgment of the bail, the cause be misnamed. *Lowe v. Galloway*, 5 Taunt. 663. And see *Austen v. Fenton*, 1 Taunt. 23.

If in an action, at the suit of two, bail is put in as in an action at the suit of one only, such bail may be treated as a nullity. *Anon.*, 2 Chit. 77.

So, in a joint action against two, if the bail is put in as in an action against one only. *Holt v. Frank*, 1 M. & S. 199.

**Bail-piece.**—Where bail has been rejected for insufficiency, the bail-piece is a nullity, and a new one is necessary. *Lewis v. Gadderer*, 1 D. & R. 350; 5 B. & A. 704.

The bail-piece must be intitled of the court, and in the cause. *Hall's bail*, 1 Chit. 79.

**Recognizance.**—Where bail have become incompetent after the recognizance has been completed, a party cannot be called upon to find fresh bail, either in civil or criminal proceedings. *Reg. v. Shirley*, 12 L. J., Q. B. 346.

## IX. NOTICE AND JUSTIFICATION OF BAIL.

### 1. DESCRIPTION.

A notice of bail describing him as a housekeeper is insufficient, if he is only a lodger, although on examination it appears that he is a freeholder. *Wilson's bail*, 2 D. P. C. 431.

It must contain their addition, as well as place of abode. — *v. Costar*, 5 Taunt. 554.

And a false addition is a fatal objection. *Wood v. Chadwick*, 2 Taunt. 173.

A schoolmaster is well described as "gentleman." — *v. Pasman*, 5 Taunt. 759.

To describe bail as "jewellers," when they are merely clerks in a jeweller's shop, is a misdescription. *Hamlet's bail*, 1 D. P. C. 501.

Gentleman not an objectionable description of one who deals by commission. *Anon.*, Lofft, 281.

Nor of a clerk in the custom-house. *Anon.*, 1 Chit. 492, n.; 5 Taunt. 759.

But a clerk in a mercantile house, described in the notice of justification by the addition of "gentleman," was rejected. *Moss v. Heavyride*, 7 D. & R. 772.

So, "shopkeeper" is an insufficient addition, where the bail had been before described as a grocer, and there were other circumstances of suspicion. *Anon.*, 1 Chit. 494, n.

An agent for the sale of Scotch ale, who described himself as a gentleman, was held to be misdescribed. *Fleming's bail*, 1 D. P. C. 641; 1 C. & M. 111.

"Yeoman" is a good description. *Lanyon's bail*, 3 D. P. C. 85.

"Gentleman" is a good description of a clerk in the post-office. *Wood v. Ray*, 4 D. P. C. 692.

"Manufacturer" is a bad description. *Fearnley's bail*, 1 D. P. C. 40.



The misnomer of a christian name of one of the bail in a notice, is fatal. *Anon.*, 1 Moore, 126.

A notice, describing one of the bail by the initial only of his second christian name, is bad. *White's bail*, 2 H. & W. 134.

Notice of J. M. as bail, was held not good notice for J. M. the younger, and the plaintiff need not swear there are two of the name. *Smith v. Mellon*, 5 Taunt. 854; 1 Marsh. 386; *Anon.*, 1 Chit. 88.

The want of a description of bail is cured by the plaintiff's excepting to them. *Bigg v. Dick*, 1 Taunt. 17.

## 2. RESIDENCE.

**Omission in Description of Bail.**—An omission to describe the bail, as housekeepers or freeholders, can only be objected to when the bail come up to justify. *Bell v. Foster*, 1 M. & Scott, 518; 8 Bing. 334; 1 D. P. C. 271.

Where the bail omitted to state in the affidavit that they were housekeepers, the court permitted them to justify, as the plaintiff did not interpose. *Martin v. Gell*, 2 Tyr. 166.

**Sufficiency of Description.**—If a bail have two places of residence, it is only necessary to state one of them in the action. *Fortesque's bail*, 2 D. P. C. 541.

The residence of a bail is sufficiently described by stating it to be at a place well known as a village, without mentioning any street in it. *Smith's bail*, 1 D. P. C. 499.

A misdescription of the number of a house in which the bail resided was held to be a ground of rejection. *Anon.*, 1 Chit. 493.

The name of a township, without the name of a street, stated to be in a certain parish named in the notice of bail, is sufficient. *Lanyon's bail*, 3 D. P. C. 85.

An objection to a notice, that the number of the street is not stated, must be taken in the first instance; and it is waived by obtaining time to inquire, unless it is sworn that the residence cannot be found. *Foster's bail*, 2 D. P. C. 586.

Where a notice of bail omitted to mention the numbers of the houses where the bail resided, in a place where the houses are numbered, the plaintiff had the option of having further time to make further inquiries, or the costs of his affidavit and appearance. *Muir v. Smith*, 2 Tyr. 742.

A notice of bail did not state the numbers of the houses where the bail resided, upon which ground, the bail having been found and being sufficient, the plaintiff had the costs of his appearance to oppose. *Innis v. Smith*, 2 C. & J. 634.

**What Residence.**—The actual and not the constructive residence of the bail must be stated. *Thomson v. Smith*, 1 D. P. C. 340.

It is not necessary that a bail should sleep in the house described in the notice as his residence. *Thomson's bail*, 1 D. P. C. 497.

If a man carries on his business at a lodging in one place, and keeps a house at another, a notice describing him as of the former place is sufficient. *Weddall v. Berger*, 1 B. & P. 325.

So, a notice of bail as of his place of business is sufficient. *Tunner v. Nash*, 1 Price, 400.

A notice, describing the bail to have resided

within the last six months (instead of for the last six months) at a particular place, is bad; but if the affidavit of justification is correct, it may be connected with the notice, so as to make the notice sufficient. *Ward's bail*, 1 D. P. C. 596; 1 C. & M. 28; 3 Tyr. 208; *S. P., Johnson's bail*, 1 D. P. C. 438.

A notice, stating the residences for the last six months to be as follows, and describing one of the bail as of one place, and now residing at another, is sufficiently positive as to where that one has resided. *Park's bail*, 2 H. & W. 134.

Where a notice omitted to state the residences of the bail for six months, and whether they were housekeepers or freeholders:—Held, that this was not such a defect as entitled the plaintiff to treat it as a nullity, and an attachment against the sheriff was set aside. *Ree v. Middlesex (Sheriff)*, 2 D. P. C. 5; 1 C. & M. 482.

A notice omitting to state the residence of the bail "for the last six months," is an irregularity of which the court will take notice, though the bail be unopposed. *Sywood v. Doherty*, 1 Scott, 79.

## 3. BY PRISONER.

If the defendant is a prisoner, the notice of bail must state that fact. *Fuller's bail*, 5 Tyr. 491.

It is sufficient if the notice of bail by a prisoner is signed by him as being in custody, though it does not state in the usual way that he is a prisoner. *Frith's bail*, 2 D. P. C. 229.

A two days' notice of justification by a prisoner, accompanied by an affidavit, is bad, unless it expresses that he is a prisoner. *Bullen's bail*, 3 D. P. C. 422.

## 4. IRREGULAR NOTICE.

Where a sheriff, in order to avoid an attachment for not bringing in the body, gave the plaintiff notice of putting in bail, but omitted to state the names of the proposed bail in such notice:—Held, that the notice could not be treated as a nullity, so as to entitle the plaintiff to move for an attachment. *Pugh v. Emery*, 4 D. & R. 80.

A plaintiff cannot take proceedings on the bail-bond on the ground of an informality in the notice of bail. *Wigley v. Edwards*, 2 C. & M. 320; 2 D. P. C. 282; 4 Tyr. 235.

An informality in a notice does not render the proceedings null, so as to justify the plaintiff in issuing an attachment against the sheriff. *Ree v. Middlesex (Sheriff)*, 1 C. & M. 482; 3 Tyr. 440.

A defendant being arrested, employed on the sudden one attorney to put in bail for him, and another to carry on the subsequent proceedings at the return of the writ; each attorney gave notice of bail above, describing himself as the defendant's attorney: the plaintiff excepted to one set of bail; and that set not justifying, he attached the sheriff, without regarding the notice given by the second attorney:—Held, that he was bound to attend to both notices, and the attachment was set aside for irregularity. *Gilmore v. Brindley*, 7 D. & R. 259.

## 5. AFFIDAVIT OF JUSTIFICATION ACCOMPANYING NOTICE.

In an action against several, it is no objection

to the notice of justification that it states that the bail will justify for three, bail for two only having been put in. *Denton's bail*, 1 D. P. C. 2.

The notice of justification stated that the two persons seeking to justify were bail of the defendant to the sheriff; in fact there were three defendants, and they had been bail for two of them: they were allowed to justify. *Anon.*, 1 Tyr. 378.

If bail justify by affidavit, the notice must be accompanied either by the original affidavit, or by a copy purporting upon the face of it to be a copy. *West v. Williams*, 2 B. & Ad. 345; 1 D. P. C. 162.

"He's" is sufficient in an affidavit of justification instead of "he is." *Lanyon's bail*, 3 D. P. C. 85.

Though the form of the affidavit to be made by bail, according to the rule, is several, it may be made jointly. *Anon.*, 1 D. P. C. 115.

Where a bail swears, "that he is not bail for any," without adding other persons, it is sufficient. *Smith's bail*, 1 D. P. C. 514.

An affidavit of justification stated "that the bail were not bail for any other defendant except the above-named defendants," but did not allege that they were not bail in any other actions for the same defendant:—Held, insufficient. *De Burgh's bail*, 7 D. P. C. 96; 1 Arn. 371; 2 Jur. 922.

The court allowed them to amend their affidavit by stating that they were not bail for any defendant "except in this action," the costs of the opposition to be costs in the cause. *Id.*

#### 6. JUSTIFICATION.

**When necessary.**—Bail who surrender their principal need not justify. *Anon.*, 2 W. Bl. 758.

**Effect of ruling the Sheriff.**—By giving the sheriff a rule to bring in the body, the time for justifying bail is extended till the rule expires. *Whittle v. Oldaker*, 7 B. & C. 478; 1 M. & R. 298.

**Personal Attendance.**—Bail, who live within ten miles of the city of London or Westminster, must justify in person, and not by affidavit. *Anon.*, 1 C. & J. 516; 1 D. P. C. 293.

The rule extends to bail living within the bills of mortality. *Wilmot v. Eaton*, 1 Price's P. C. 91.

Where such an objection, and that of the description of Somer's Town as the residence of the bail, were taken and allowed, the court gave time, notice to be given forthwith. *Id.*

A defendant usually residing in the country, arrested in London, in a town cause, may justify bail by affidavit. *White v. Thomas*, 5 Price, 13.

Bail (at least town bail) may justify in person, where there has been an insufficient affidavit of justification. *Shave v. Spode*, 2 M. & W. 42; 2 Gale, 225.

Bail who have been rejected at chambers, for being unprepared to state positively what debts were owing to and from them, may justify afterwards in court, when prepared, by examination of their books, to speak positively. *Clarke v. Vectris*, 4 Scott, 391; 1 Jur. 335.

**Within what time.**—The days between Thursday next before, and Wednesday next after, Easter-day, are not to be reckoned in

notices of justification of bail. *Cumming v. Pullen*, 1 Scott, 638.

**Form.**—It seems that the defendant's attorney may give notice of justification of bail put in by the sheriff, provided the exception has been properly entered. *Rex v. Middlesex (Sheriff)*, 8 D. & R. 149; 5 B. & C. 389.

Where one bail only has been rejected on account of insufficiency, and notice was given of adding and justifying another in lieu of the one rejected:—Held, that the original notice was a nullity, and that there should have been a fresh notice of putting in and justifying de novo, and not of adding bail. *Lewis v. Gadderrier*, 1 D. & R. 350; 5 B. & A. 704.

#### 7. IN WHAT SUM.

If an affidavit states that the bail are "possessed" of a certain sum, instead of "worth," it is insufficient, and must be amended. *Rogers v. Jones*, 1 D. P. C. 704; 1 C. & M. 323; 3 Tyr. 256.

An affidavit which merely states that the bail is "possessed," instead of "worth," will not be allowed to be amended. *Worlison's bail*, 2 D. P. C. 53; *S. P. Naylor's bail*, 3 D. P. C. 452.

It is not a ground for rejection, but merely of depriving the defendant of costs of justifying. *Carter's bail*, 5 D. P. C. 577; W., W. & D. 187.

Bail opposed on the ground that the affidavit stated the deponent "was worth 4*l.* beyond his just debts," instead of "beyond what would pay his just debts":—Held, no objection to the bail justifying, although, if they justified, the defendant would not be entitled to the costs of justification. *Miller's bail*, 5 D. P. C. 602; 1 Jur. 264; nom. *Sterens v. Miller*, 2 M. & W. 368; M. & H. 70.

An affidavit of justification of bail sworn in the country, stated the bail to be possessed of property of a certain amount, without further stating that each of the bail was worth double the sum for which the defendant was held to bail above his own just debts, or every other sum for which he might be then bail:—Held bad, but time given to amend, on payment of the plaintiff's costs of the day occasioned by the affidavit. *Darling v. Hutchinson*, 2 Tyr. 491.

It is sufficient for a bail to swear to property over and above "what will pay his debts." *Lawson's bail*, 3 D. P. C. 85.

"Debts," without describing them as "book debts," is sufficient. *Id.*

An affidavit that the bail was worth property to the requisite amount "over and above his just debts," but omitting "what will pay," is also sufficient. *Hunt's bail*, 4 D. P. C. 272; 1 H. & W. 520; contra, *Keough's bail*, 1 Arn. 243.

Stating that he was not bail in any other action for any defendant is also sufficient. *Id.*

An affidavit that the deponent is possessed of a certain sum "over and above all his just debts," is sufficient. *Housley v. Boyd*, 1 Scott, 698.

An affidavit that the deponent's property consists of "a freehold house situate, &c.," without stating its value, is sufficient. *Id.*

It is not enough that the bail should describe himself as possessed of "money in the funds," without stating in what fund it is. *Anon.*, 1 D. P. C. 159.

Stock in trade cannot be considered as "effects." *Deluarte's bail*, W., W. & D. 390.

Where persons are shewn to be bail in other actions, they must swear that they are worth the sum required beyond what will satisfy their debts and their other engagements. *Henshaw v. Woolwich*, 1 C. & J. 150.

A rejection of one bail is a rejection of both. *Lewis v. Gadderrerr*, 1 D. & R. 350; 5 B. & A. 704.

#### 8. COSTS.

**Generally.**—Where there is a defect in a notice of bail, and further time is given to inquire as to them, and they ultimately justify, the defendant is not entitled to the costs of justification. *Anon.*, 1 D. P. C. 126.

Costs of bringing up bail to justify allowed, when they have given notice of putting in and justifying at the same time, accompanied by an affidavit of justification, and after exception attend to justify, and are not opposed. *Bowman v. Russell*, 2 Tyr. 744.

If a plaintiff alarm bail who have been put in, and thus prevent them from justifying, the court will compel him to pay the costs of putting them in. *Gwynne v. Fuller*, 1 D. P. C. 444.

The rule, as to the addition of the deponent, applies to affidavits of sufficiency made by bail, and therefore, if it is omitted, the affidavit must be amended, and the defendant will not be entitled to the costs of justification. *Brown's bail*, 5 D. P. C. 220; 2 H. & W. 291.

Where an affidavit of sufficiency omits to state the place where the property of the bail is situate, and only ascribes the value to several kinds of property collectively, it is a departure from the form given by the rule, and the bail having justified, the defendant is not entitled to the costs of justification. *Hodgson v. Cooper*, 2 C., M. & R. 43; 3 D. P. C. 692; 5 Tyr. 740.

If bail on examination justify for different property than that mentioned in the affidavit, the defendant must pay the costs of the justification. *Deluarte's bail*, W., W. & D. 390.

Upon justification of bail in a country cause, one of the bail was allowed time to explain respecting some property which it was alleged was mortgaged: this being afterwards done:—Held, that the defendant was entitled to the costs of justification. *Grant's bail*, 3 D. P. C. 165; 1 C., M. & R. 598; 5 Tyr. 227.

In order to obtain the costs of justifying bail, an application should be made at the time of justification. *Fream v. Best*, 2 D. P. C. 590.

**Costs of Opposition.**—The costs of opposing bail who have complied with the rule of court, but are rejected, are allowed as a matter of course to the plaintiff, unless some very strong ground is shewn on the part of the defendant for putting in bail, who could not justify. *Evan's bail*, 1 D. P. C. 334.

Where an affidavit of justification of bail did not comply with the rule, by not stating the value of the different descriptions of the bail's property, and the bail were allowed:—Held, that the plaintiff was not entitled to the costs of opposition. *Rout's bail*, 2 H. & W. 291.

Where bail justify for property which, though sufficient in amount, is not properly described in an affidavit of justification, the plaintiff is not entitled to the costs of opposition, but the bail

will be admitted without payment of costs, and the costs of the opposition will be costs in the cause. *Brown v. Ahrenfeldt*, 4 M. & W. 76; 7 D. P. C. 46.

Where bail were rejected on the ground of a defect in the affidavit of justification, in omitting to describe the bail as housekeepers or freeholders, the court refused to allow the plaintiff the costs of his opposition, or of the opposition to a former justification on the ground of a defective notice. *Kibble v. Thorburn*, 2 M. & Scott, 359.

Where property of which the bail describes himself possessed in his affidavit is insufficient, the court will not allow him to justify, without payment by the defendant of the costs of opposition, although possessed of sufficient other property. *Jackson's bail*, 1 D. P. C. 172.

Where bail cannot justify in respect of the property described in an affidavit, but are allowed to pass on justifying for other property, the plaintiff is entitled to the costs of the opposition. *Hemming v. Blake*, 1 D. P. C. 179.

Costs of opposition on technical grounds are not allowed. *Hanwell's bail*, 5 D. P. C. 425.

Where proceedings have been taken on a bail-bond, before the bail come up to justify, the payment of those costs cannot be insisted on as a preliminary objection. *Wilson's bail*, 1 D. P. C. 614.

**—When there are several Notices.**—Where six different notices of the same bail were given, the court compelled the defendant to pay all the costs incurred by the plaintiff in consequence thereof. *Aldiss v. Burgess*, 3 B. & A. 759.

A deposit must be made for costs before the second set of bail justify, in the case of country as well as town bail. *Goodricke v. Turley*, 2 C., M. & R. 636; 4 D. P. C. 498.

It is no objection that bail has been already rejected, unless it appears that he was rejected on the merits. *Id.*

On bail justifying, a plaintiff was allowed the costs of a former successful opposition, though he did not ask for them until after the bail had passed. *Lewis v. Glossop*, 2 C., M. & R. 655.

**What allowed.**—A plaintiff's costs of inquiries after sufficiency of bail, are costs in the cause. *Paine v. Muntton*, 2 Tyr. 162.

If time to justify bail is granted, a defendant must pay the plaintiff's costs of attending to oppose. *De Bode's bail*, 1 D. P. C. 368.

If a copy of an affidavit of sufficiency served on the plaintiff does not purport to be a copy, or does not state the names of the parties and the sums in the actions in which they are already bail, or the names of the occupants, and numbers of the houses, stated by the bail to be in their possession; these defects are not grounds for rejecting the bail, but for disallowing the defendant his costs of justification. *Id.*

**Liability of Solicitor.**—Where time is applied for, to send an affidavit of justification into the country to amend a mistake in the jurat, the court will make the attorney pay the costs of the application. *Shilletoe's bail*, 9 D. & R. 6.

Where an attorney, knowing that bail were insufficient, caused them to be put in, and gave notice of justification, the court compelled him to

pay the costs of the opposition. *Blundell v. Blundell*, 1 D. & R. 142; 5 B. & A. 533.

### X. EXCEPTION.

**When allowed.**—If the bail to the sheriff is put in above, and exception taken before an assignment of the bail-bond, they are bound to justify, notwithstanding such assignment. *Hill v. Jones*, 11 East, 321.

Where bail are put in in due time, an exception must first be entered before the sheriff can be ruled to bring in the body; and the adding bail afterwards does not supersede the necessity of such exception, before an attachment can issue against the sheriff on account of the added bail not having justified in time. *Rez v. Middlesex (Sheriff)*, 8 T. R. 258; *S. P.*, 7 D. & R. 264.

If a sheriff's officer, or any attorney, or his clerk, or other disqualified person, be put in as bail, the plaintiff may except to the bail, and cannot proceed as if the matter were a mere nullity. *Banter v. Levi*, 1 Chit. 714; *S. P.*, *Rez v. Surrey (Sheriff)*, 2 East, 182; *Fozall v. Bowerman*, 2 East, 182.

A defendant gave a notice of bail, accompanied by an affidavit of justification, but without four days' notice of justification:—Held, that the plaintiff had twenty days to except to the bail. *Goddard v. Jarvis*, 2 M. & Scott, 169; 9 Bing. 88; 1 D. P. C. 278.

After bail had justified, a plaintiff not having excepted to them, in consequence of each of them positively swearing to the requisite amount, he discovered that they were both insolvent:—The court refused to compel the defendant to put in other bail. *Lazarus v. Levaux*, 4 D. P. C. 353.

Where a sheriff, eight days after an arrest, is called upon by a judge's order forthwith to put in and perfect bail, he is bound to justify without notice of exception. *Reg. v. Middlesex (Sheriff)*, 4 M. & W. 529; 1 H. & H. 335.

In order to compel a justification of bail, it is sufficient to except to one of them. *Feltham v. King*, 5 D. P. C. 658; *W., W. & D.* 388; 1 Jur. 707.

**Must be entered.**—The exception must also be entered in the bail-book before the body rule can be served on the sheriff. *Rez v. Middlesex (Sheriff)*, 7 D. & R. 264; *S. P.*, *Rez v. Middlesex (Sheriff)*, 8 D. & R. 149; 5 B. & C. 389.

And the irregularity is not waived by the defendant's acting upon the notice. *Thwaites v. Gallington*, 4 D. & R. 365.

In another case the want of entry in the book of the notice of exception is waived by giving notice of justification. *Hanwell's bail*, 3 D. P. C. 425.

Where the plaintiff took an assignment of the bail-bond, and afterwards gave notice of exception to the bail without entering it:—Held, that the plaintiff's irregularity in not entering an exception was not waived by the defendant's having given two notices of justification, under one of which the bail justified; and therefore held that the proceedings should be stayed, but the bail-bond was not to be delivered up to be cancelled. *Hodson v. Garrett*, 1 Chit. 174.

**Notice must be given.**—It is no exception until the defendant has had notice. *Oldham v. Burrell*, 7 T. R. 26.

Parol notice of exception to bail is not sufficient; it must be written. *Rez v. Middlesex (Sheriff)*, 8 D. & R. 149; 5 B. & C. 389.

A notice of justification of bail is a waiver as between the parties of a neglect to give notice of exception, though it is not a waiver so as to support a rule to bring in the body. *Anon.*, 1 Chit. 174; *S. P.*, *Rogers v. Mapleback*, 1 H. Bl. 106.

So it is a waiver of an irregularity in giving an imperfect notice of exception. *Aldridge v. Schroder*, 1 Smith, 75.

**Form of Notice.**—Notice of exception to bail intitled in a wrong court is a nullity. *Anon.*, 1 Chit. 375.

### XI. ADDING BAIL AND GIVING TIME.

**Changing Bail.**—By Reg. Gen. H. T. 16 Vict. r. 92, the bail, of whom notice shall be given, shall not be changed without leave of the court or a judge.

Where bail has been rejected, others cannot be put in without an order of the court or a judge. *Ventris's bail*, 5 D. P. C. 622; 4 Scott, 394; 3 Bing. N. C. 677; 3 Hodges, 129; 1 Jur. 335.

The rule does not apply to the case of a prisoner. *Bird's bail*, 2 D. P. C. 583. But see contra, *Stroud v. Kenny*, 4 M. & Scott, 248.

But the rule applies to bail put in by the sheriff for the purpose of rendering the defendant. *Rez v. Ennez (Sheriff)*, 4 M. & Scott, 247; 2 D. P. C. 782.

The rule does not apply to added bail. *Key v. McIntyre*, 2 M. & W. 347; 5 D. P. C. 453; *M. & H.* 44; *S. P.*, *Perry's bail*, 2 C. & J. 475; 1 D. P. C. 564.

Costs of bail, changed by judge's order for that purpose, must be paid before the bail can justify. *Jourdain v. Gunn*, 2 Tyr. 491.

**When Bail become Disqualified.**—Where bail has been rejected on the ground of a technical objection, the court will not allow bail to be added. *Elliott v. Gutteridge*, 6 D. P. C. 255; 1 W., W. & H. 41.

Where one of the bail failed to appear to justify, and an affidavit was produced, stating that he was prevented from attending by an agreement which he had entered into with his partner never to become bail:—Held, that nothing but an unforeseen accident of a serious nature could be a sufficient excuse for non-attendance, and the court refused to allow time to substitute another person in his stead. *Well's bail*, 8 Moore, 378; 1 Bing. 359.

Where a notice of bail to add and justify at the same time, was regularly served, and the new bail were substituted by a judge's order on the morning of justification, the court refused the costs of the plaintiff's opposition on that ground, but offered time to inquire after them. *Bowman v. Russell*, 2 Tyr. 744.

Time is generally allowed, where the justification is prevented by subsequent insolvency or bankruptcy. *Anon.*, 1 Chit. 2.

Where bail cease to be housekeepers, time will be allowed. *Anon.*, 1 Chit. 6.

So, where the bail was not a housekeeper in point of law. *Hughes v. Stirling*, 11 Price, 158.

So, where the bail had taken a house, but from an unforeseen accident was unable to take pos-

session. *Bold's bail*, 1 Chit. 288. And see *Slade's bail*, 1 Chit. 502.

The court refused time to add and justify, where one was an attorney. *George v. Barnsley*, 1 Chit. 8.

If added bail are excepted to on the ground that the original bail were attorney's clerks, the court will give time to put in and justify fresh bail. *Hodges v. Meek*, 3 Moore, 240.

Time was given to enable bail to pay his taxes, where his property was sufficient, and he had acted without bad faith in not paying them. *Spradens v. Mahoney*, 1 Chit. 309.

The court granted time to add and justify, where one of the bail, of whom notice had been given, was taken suddenly ill. *Gillbank's bail*, 9 D. & R. 6.

But time to justify bail, on account of the illness of the bail, refused, because it did not appear that he was really ill. *Gablentz's bail*, 1 H. & W. 111.

**To amend Proceedings.**—In general, time is allowed to correct errors in the notice of justification, or notice of bail, or jurat of bail-piece. *Anon.*, 1 Chit. 2, 495, 351.

## XII. ALLOWANCE OF BAIL.

**Necessity of.**—Bail is not regularly put in till the rule for the allowance of it has been served, even though the plaintiff opposes the justification. *Rez v. Middlesex (Sheriff)*, 4 T. R. 493; 2 Chit. 99.

If such rule is not served upon the plaintiff, he may take an assignment of the bail-bond, though he knows of the justification. *Holland v. White*, 2 B. & P. 341.

The court refused, on behalf of bail to the action, to set aside a regular attachment against the sheriff, upon an affidavit of merits, and on payment of costs, where the rule for the allowance of bail had not been served on the plaintiff's attorney. *Rez v. Middlesex (Sheriff)*, 2 D. P. C. 116.

**Setting aside.**—Allowance of bail may be set aside under circumstances of gross imposition and fraud on the part of bail. *Gould v. Berry*, 1 Chit. 143.

The court will not set aside the allowance of bail on the ground that they have sworn to a false account of their property, without the privy of the defendant or his attorney. *Anon.*, 1 Chit. 116, 143.

Allowance of bail was discharged on affidavit of perjury by bail uncontradicted. *Barling v. Waters*, Bing. 423; 4 M. & P. 125.

The court would not discharge a rule for allowance of bail, on account of perjury in one of them, who had sworn on his justification that he was a housekeeper, and a few days before that he was not; the plaintiff's only remedy was by indictment. *Shee v. Abbott*, 5 Moore, 321; 2 B. & P. 619.

Where a bail has misdescribed his place of residence on justification, but has been allowed to pass, the court will not set aside the rule for the allowance of the bail, but he may be indicted for perjury. *Eaglefield v. Stephens*, 2 D. P. C. 438.

## XIII. LIABILITY OF BAIL.

**When Liable.**—If bail enter into a recog-

nizance, although excepted to and never justified, they are liable. *Bramwell v. Farmer*, 1 Taunt. 427.

They are only liable as a security for the original action; therefore, when judgment cannot be had, they are not liable. *Anon.*, Lofft, 545.

**To what Amount.**—By Reg. Gen. H. T. 16 Vict. r. 109, bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance.

This means the sum mentioned in the order to hold to bail, and indorsed on the capias and costs. *Jonas v. Tepper*, 28 L. J., Q. B. 85; 5 Jur., N. S. 545.

Bail, having made default and then rendered their principal, are liable, in an action on the bail-bond, for the debt and costs, unless proceedings are stayed, as they may be, by order of a judge, on payment of costs; but if such an order is not taken advantage of until judgment is signed, the bail can have no relief. *Jallicks v. Costar*, 28 L. J., Ex. 209.

The liability of bail upon a recognizance given in an action is neither destroyed nor extended by inserting in the declaration, under an order to amend, new causes of action not included in the writ, and increasing the claim of damages. *Taylor v. Wilkinson*, 5 N. & M. 189; 1 H. & W. 451.

The bail to the action are not liable to pay the costs of a writ of error. *Yates v. Doughan*, 6 T. R. 288; *S. P.*, *Anon.*, Lofft, 520.

A plaintiff held the defendant to bail on an original writ; after declaring, he amended the declaration, adding fresh counts. He recovered a verdict on all the counts, with damages assessed severally on each. He then taxed the costs generally, without separating those incident to the new counts from the others:—Held, that the bail (though liable to the damages recovered on the causes of action mentioned in the recognizance) were not liable for the costs incident to the new counts, and that the plaintiff, not having separated the two classes of costs, could not recover any from the bail. *Taylor v. Wilkinson*, 6 A. & E. 533; 1 N. & P. 629; 2 Jur. 261.

## XIV. DISCHARGE OF BAIL.

### 1. BY RENDER OF PRINCIPAL.

**Bail who have not justified.**—Bail who are excepted to, and do not justify on the day appointed, cannot afterwards render the principal, being thereby out of court. *Hardwick v. Bluck*, 7 T. R. 297; *S. P.*, *Rez v. Middlesex (Sheriff)*, 7 T. R. 527, 439.

**When Render may be made.**—A defendant who entered into the bond with two sureties, required by sect. 8 of 1 & 2 Vict. c. 110, is in the same situation as if he were at large on bail, and he may render even before judgment is recovered, according to the practice in the case of a defendant on bail. *Ovaston v. Coates*, 2 P. & D. 485; 10 A. & E. 193; 3 Jur. 434.

**Enlargement of Time.**—Time was enlarged for bail to surrender their principal, who had be-

come a bankrupt, for the purpose of his examination. *Maude v. Jowett*, 3 East, 145; *S. P., Offley v. Dickens*, 6 M. & S. 348; *Glendining v. Robinson*, 1 Taunt. 320.

Where a defendant became bankrupt after action, the court enlarged the time for him to surrender in discharge of his bail, until a fortnight after he had finished his last examination. *Stead v. Yates*, 3 M. & P. 272.

In the case of a London as well as a country commission, the court, on behalf of bail, will, to prevent inconvenience, allow the time for the render to be enlarged. *Ruston v. Green*, 2 D. P. C. 617; *S. P., Waugh v. Ashford*, 1 Scott, 167; 1 Bing., N. C. 294; 3 D. P. C. 123.

The time for rendering a bankrupt will be enlarged by the court, notwithstanding 11 Geo. 4 & 1 Will. 4, c. 70, s. 21, authorising the render of defendants in discharge of bail to the county prison. *Harris v. Alcock*, 1 D. P. C. 568; 2 C. & J. 486; 2 Tyr. 418.

Bail shall have time to render, after a writ of error brought by the principal. *Capron v. Archer*, 1 Burr. 334.

The time was refused to be enlarged for bail to render their principal, on an affidavit that he was a lunatic: it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or those about him. *Cock v. Bell*, 13 East, 355.

So, on an affidavit that he could not be removed without endangering his life. *Wynn v. Petty*, 4 East, 102; *S. P., Nightingale v. Lowry*, 4 East, 102, n.; *Warrington v. Sammell*, 10 Moore, 170.

The court will allow time to the bail to render their principal, where, the principal being in custody, under process of another court, it appears, on the return made to a habeas corpus, issued by the bail, in order to render him, that he cannot be removed out of such custody without danger to his life, and that such impossibility still continues. *Winstanley v. Gaitskell*, 6 East, 389.

**Defendant in Criminal Custody.**—Where a defendant is in the criminal custody of K. B., the court of C. P. will not interfere summarily to procure him to be rendered in discharge of his bail. *Currie v. Kinnear*, 1 B. & P. 23; *S. P., Bennett v. Same*, 3 Moore, 259.

But the Court of Exchequer allowed the time to be enlarged for bail to render their principal, for a week after the expiration of the term of his imprisonment in a county gaol, under a conviction and sentence for a misdemeanor. *Ashmore v. Fletcher*, McClell. 252; 13 Price, 523; *S. P., Rouch v. Boucher*, 10 Price, 104.

Where a defendant, subsequently to arrest, and before perfecting special bail, was committed to criminal custody, in which he remained awaiting the decision of the judges on a point of law arising out of his defence on the criminal charge, the court refused to enlarge, till the opinion of the judges should have been delivered, the time for perfecting special bail, or to permit the sheriff's bail to render him. *Joyce v. Pratt*, 6 Bing. 377; 4 M. & P. 55.

But granted an enlargement for four days. *Id.* The court, on the application of bail, granted a habeas corpus to the sheriff in whose custody the defendant was under a charge of felony, to bring him up, in order that he might be surrendered. *Sharp v. Sheriff*, 7 T. R. 226.

The court, on application by the bail of a defendant, who was in custody on a charge of obtaining money upon false pretences, will grant a habeas corpus to the gaoler, to bring him up, in order that he may be rendered in discharge of his bail. *Daniel v. Thompson*, 15 East, 78.

The court will enlarge the time for bail to render a defendant who is under imprisonment in a county gaol upon a conviction for libel, until a week after the imprisonment under the sentence has expired; not until a week after the term for which he was sentenced to be imprisoned. *Campbell v. Ackland*, 1 C. & M. 73; 1 D. P. C. 635; 3 Tyr. 230.

Where a man was convicted of setting fire to his house, and sentenced to be imprisoned, the court gave the bail time to render during the period of his imprisonment. *Rea v. Fearn*, 1 Marsh. 170, n.

One who was committed to Newgate, by commissioners of bankruptcy, for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by habeas corpus, issued on the crown side of the court, on which side also must be taken the subsequent rule for his surrender in the action, his commitment pro forma to the marshal, and his recommitment to Newgate, charged with the several matters. *Taylor's case*, 3 East, 232.

**Defendant in other Custody.**—Where a man was held to bail in a civil action, and was afterwards committed to the custody of the sheriff upon an extent: the court, on an application by the bail for relief, held, that although they could not allow an exoneretur to be entered without the consent of the crown, they would give the bail time for surrendering the defendant. *Hodgson v. Temple*, 1 Marsh. 166; 5 Taunt. 503.

It is no objection to a motion on the part of bail to enlarge the time for rendering the principal, on good grounds, (as that the defendant is in custody quasi criminal,) that the bail have not justified. *Tinson v. White*, 1 Price's P. C. 156.

A defendant being in custody of a messenger, under an order of the secretary of state, for the purpose of being sent out of the kingdom, by virtue of the Alien Act, 43 Geo. 3, c. 165, the court refused to issue a habeas corpus on the application of his bail to bring him up, that they might render him in their own discharge, on account of the public inconvenience, and of the probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port. *Folekin v. Critico*, 13 East, 457.

So, because of the unwarrantable arrest and detention of the principal as a prisoner of war by a foreign enemy. *Grant v. Fagan*, 4 East, 189; 1 Smith, 12.

**Mode of Render.**—Where a sheriff has put in bail above in order to render, and has obtained a judge's order for rendering at the instance of himself and his bail, that order will not be rescinded, though it might be amended by striking out all which shewed it to be granted at the sheriff's instance. *Green v. Jacobs*, 3 Tyr. 231.

A render may be made by the party himself, and without an attorney. *Nethersole's bail*, 2 Chit. 99.

**Notice of Render.**—The render is not com-

plete or effectual till notice served. *Rea v. London (Sheriffs)*, 1 Price, 338.

On notice of render being given to the plaintiff or his attorney all further proceedings against the bail are to cease. *Anon.*, 1 Chit. 128.

Where writs of summons were served on the bail, after notice of the render of their principal:—Held, that the service was irregular. *Lewis v. Grimstone*, 5 D. P. C. 711; W., W. & D. 357; 1 Jur. 514.

The render of the principal, and notice thereof, by bail, do not operate as a stay of proceedings, unless the costs of writ and service thereof, are paid. *Horn v. Whitcombe*, 5 D. P. C. 328.

Where, after due notice of render of the principal, the plaintiff still proceeded against the bail in an action upon the recognizance, because no offer was made by them to pay the costs in the suit against them, nor any rule obtained by them to stay proceedings in the action against them on payment of costs:—Held, that the subsequent proceedings were irregular, being contrary to the rule of court, T. T. 1 Anne, which says, that, on such notice of render, all further proceedings against the bail shall cease. *Byrne v. Aguilar*, 3 East, 306.

The court, upon payment of costs, entered an exoneration on the bail-piece after execution against the bail, where the defendant in the original action was rendered in due time, but no notice of the render had been given until the goods of the bail had been taken in execution. *Thorn v. Hutchinson*, 4 D. & R. 712; 3 B. & C. 112.

**Right of Bail to take Principal.**—Special bail in the superior courts have a right to take their principal into custody at any time, and render him in discharge of themselves. *Rea v. Hughes*, 3 C. & P. 373.

A person may assist bail in taking, and may lawfully detain, the principal, although the bail do not continue present. *Pycwell v. Stow*, 3 Taunt. 425.

Bail cannot take their principal on a Sunday in order to render him. *Brookes v. Warren*, 2 W. B. 1273.

A bankrupt may be taken by his bail for the purpose of rendering him, notwithstanding his privilege from arrest, and if they neglect to take him they may be fixed. *Payne v. Spencer*, 6 M. & S. 237.

Bail above may justify the breaking and entering the house of A. (the outer door being open), in which the principal resides, in order to seek for him, for the purpose of rendering him: such a justification is good without averring that the principal was in the house at the time. *Sheers v. Brooks*, 2 H. Bl. 120.

## 2. BY BANKRUPTCY OF PRINCIPAL.

**Generally.**—When a defendant obtained his certificate under a commission before the trial, but did not plead it puis darrein continuance, the court ordered an exoneration to be entered on the bail-piece. *Todd v. Maxfield*, 5 D. & R. 258; 3 B. & C. 222.

Where the principal and bail both became bankrupts, the court ordered them to be relieved on motion, without pleading, though the bail-bond had been ordered to stand as a security. *Streeter or Slater v. Scott*, 2 D. P. C. 362; 2 C.,

M. & R. 475; S. C., nom. *Slatter v. Stacey*, 4 Tyr. 372.

Where a defendant obtained his certificate as a bankrupt after issue joined, and before trial, but did not plead it puis darrein continuance, and the plaintiff proceeded to trial, and obtained judgment, the court refused to order an exoneration to be entered on the bail-piece, although the plaintiff's attorney knew before the trial that the defendant had got his certificate; because the bail were still in a condition to render the defendant. *Humphries v. Knight*, 4 M. & P. 370; 6 Bing. 569.

Where a defendant becomes bankrupt and obtains his certificate, but omits to plead it, and his bail become fixed, the court will not set aside the proceedings on motion. *Clarke v. Hoppe*, 1 Rose, 353; 3 Taunt. 36.

After the bankruptcy of a defendant, the plaintiff may sue out a ca. sa., and proceed under it to fix the bail. *Payne v. Spencer*, 6 M. & S. 231.

Where the principal debtor is entitled to be discharged, if rendered on the ground that the plaintiff has proved under a fiat which was subsequently issued against the debtor, and, therefore, had elected to relinquish the action, the sureties are equally entitled to summary relief on motion, in case they are sued on the bond by the plaintiff. *Geike v. Hewson*, 4 M. & G. 618; 5 Scott, N. R. 484.

To scire facias against bail upon their recognizance, it is competent to a defendant to plead in bar against issuing execution, that, before issuing the alias writ of sci. fa. the plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects assigned to the provisional assignee, who was entitled to sue the defendants. *Kinnear v. Tarrant*, 15 East, 622; 1 Rose, 350.

Bail being fixed with the debt, and having paid it, sue the principal and obtain the judgment, after a commission of bankruptcy has issued against him, but before he has obtained his certificate; after he obtains it, the bail in the second action apply to be exonerated, on the ground that the plaintiffs, the bail in the original action, might prove their debt under the commission, by virtue of 49 Geo. 3, c. 121, s. 8. The court refused to interfere summarily, but left the bail to an audita querela. *Hewes v. Mott*, 2 Marsh. 37, 192; 6 Taunt. 329; 2 Rose. 455.

But if a plaintiff, after judgment obtained, proved his debt under a commission of bankruptcy, sued out against the defendant, and also proceeded against the bail, the bail were thereby entitled to their discharge, under 49 Geo. 3, c. 121, s. 14; and the court will discharge them on motion. *Linging v. Comyn*, 2 Taunt. 246; 1 Rose, 116.

**At what time Certificate obtained.**—The bail are entitled to be discharged, upon their bankrupt principal's obtaining his certificate, before the time allowed to them by the indulgence of the court for rendering their principal is out. *Mannin v. Partridge*, 14 East, 599; S. P., *Thackrey v. Turner*, 1 Moore, 457; 8 Taunt. 28.

Bail may apply to enter an exoneration, if the principal has become bankrupt, at any time before they are actually fixed. *Moorby v. Gadge*, 2 Chit. 104.

Where the principal became bankrupt, and on

the same day that he obtained his certificate, but before the rising of the court, the bail were fixed on scire facias:—Held, that the bail had till the rising of the court on that day, before they could be actually fixed; and on payment of costs the court ordered an exoneretur to be entered on the bail-piece. *Johnson v. Linacy*, 2 D. & R. 385; 1 B. & C. 247.

If a defendant against whom judgment has been recovered afterwards become bankrupt, and obtain his certificate within fourteen days of the service of process upon his bail, the bail are entitled to have proceedings stayed, though no notice is given to the plaintiff or application made to stay such proceedings, till after the expiration of the fourteen days. *Jones v. Ellis*, 1 A. & E. 382.

### 3. BY LUNACY OF PRINCIPAL.

Bail are not discharged by a commission of lunacy having issued against the principal. *Anon.*, Lofft. 617.

The court refused to enter an exoneretur on the bail-piece, on the ground that the principal was a lunatic, and that the marshal had refused to receive him into his custody. *Anderson's bail*, 2 Chit. 104.

Even where a defendant became a lunatic, after the commencement of the action. *Ibbotson v. Galway (Lord)*, 6 T. R. 133.

### 4. BY PRINCIPAL BECOMING PRIVILEGED.

Bail are discharged by the defendant becoming a member of the House of Commons. *Langridge v. Flood*, 1 Tidd's Prac. 293.

So, by his succeeding to a peerage. *Trinder v. Shirley*, 1 Dougl. 45.

An unprivileged person in custody in execution, elected a member of parliament, is entitled to his discharge on motion; and, therefore, bail may have an exoneretur entered on the bail-piece, if the privileged person is elected between perfecting bail and final judgment. *Phillips v. Wellesley*, 1 D. P. C. 9.

### 5. BY DEATH OF PRINCIPAL.

If the principal die after the return of a ca. sa. and before the return be filed, the bail are fixed, and the court will not stay the filing of the return in favour of the bail. *Rawlinson v. Gunston*, 6 T. R. 284; *S. P.*, *Field v. Lodge*, 3 Dougl. 410.

If a principal die after the return of a ca. sa., although his death happen before suing forth the first sci. fa., the bail are fixed in point of law, the sci. fa. being only an indulgence of the court. *Filewood v. Popplewell*, 2 Wils. 61, 65.

### 6. BY TAKING A COGNOVIT.

A cognovit by the principal, without notice to the bail, does not of itself discharge the bail. *Hodgson v. Nugent*, 5 T. R. 277.

Unless time is thereby given. *Stevenson v. Roche*, 9 B. & C. 707; *S. C.*, nom. *Stevenson v. Crease*, 4 M. & R. 561.

But if a plaintiff accepts from the principal defendant a cognovit, whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the

arrangement. *Bowfield v. Tower*, 4 Taunt. 456.

And if a plaintiff takes a cognovit, payable by instalments, and postponing the payment of any instalment to a later date than the time when the plaintiff could, with diligence, have obtained judgment and execution, the bail are discharged. *Croft v. Johnson*, 5 Taunt. 319; 1 Marsh. 59.

Where a plaintiff, with the consent of the bail to the sheriff, took a cognovit with a stay of execution for a month:—Held, that although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the cognovit was unsatisfied. *Clift v. Gyr*, 9 B. & C. 422; *S. P.*, *Charleston v. Morris*, 6 Bing. 427; 4 M. & P. 114.

A defendant, with consent of bail, gave a cognovit with stay of execution. He omitted to pay when the time had elapsed. The plaintiff not having given the bail notice of this:—Held, that he could not proceed against them half a year afterwards, upon the defendant's death. *Surman v. Bruce*, 4 M. & Scott, 184; 2 D. P. C. 777; 10 Bing. 434.

The bail are discharged by the defendant's giving a cognovit for the payment of debt and costs. *Farmer v. Thorley*, 4 B. & A. 91.

A warrant of attorney to pay by instalments discharges the sheriff. *Brown v. Neave*, Wightw. 121.

So, also, a cognovit. *Rez v. Surrey (Sheriff)* 1 Taunt. 159.

### 7. BY PART LEVY IN EXECUTION.

A plaintiff may sue out a fi. fa. against the principal, and levy part of the debt, and afterwards sue out a ca. sa. as to the residue, and charge the bail. *Stevenson v. Roche*, 9 B. & C. 707; *S. C.*, nom. *Stevenson v. Crease*, 4 M. & R. 561.

It is no ground for setting aside an execution issued against bail, that the plaintiff has accepted a composition from the defendant, and suspended the execution of a ca. sa. which had been issued against him, though it were without the knowledge or consent of the bail. *Brickwood v. Annis*, 1 Marsh. 250; 5 Taunt. 614.

A plaintiff sued out a ca. sa. against a principal, who having put in bail, became bankrupt, and obtained his certificate; he afterwards agreed to accept a composition, provided all the creditors would accept the same, of which the bail had no notice:—Held, that the ca. sa. against the principal must be set aside, and that as the bail had not applied to enter an exoneretur on the bail-piece until after execution had been levied on them, they could only be relieved on payment of costs. *Thackrey v. Turner*, 1 Moore, 457; 8 Taunt. 28; *S. P.*, *Mannin v. Purtridge*, 14 East, 599.

### 8. BY ARRANGEMENT WITH PRINCIPAL.

Where a plaintiff receives bills of exchange from a defendant with an agreement that he shall not be precluded from proceeding while the bills are running, the bail are not thereby discharged. *Melvil v. Glendinning*, 7 Taunt. 126.

Bail are discharged by time being given to their principal without their consent, although



they may not have been damnified. *Hannington v. Beare*, 4 D. P. C. 256.

Bail knowing of an agreement to give time must apply for relief immediately on being served with process. *Vernon v. Turley*, 4 D. P. C. 660; 1 M. & W. 316.

A mere honorary obligation on the part of a plaintiff not to press a defendant for payment of debt and costs is not such an indulgence to him as will release his bail. *Ladbroke v. Hewett*, 1 D. P. C. 488.

If a plaintiff by an agreement with a defendant expedites his remedy against him, the bail are not thereby released. *Id.*

Time was given by a plaintiff to the defendant without the knowledge of the bail. Subsequently, a consent for "further time" was obtained from the bail:—Held, that this operated as a waiver of the original irregularity. *Spyer v. Carper*, 5 D. P. C. 448; M. & H. 47; 1 Jur. 137.

Bail are not discharged by time being given to a principal, within the limits in which regularly final judgment could be obtained against him, although the plaintiff might have signed final judgment by the order of a judge at an earlier period. *Whitfield v. Hodges*, 1 M. & W. 679; 2 Gale, 127.

Where, in the course of a cause, an order was made for taking the bill on which the action was brought, and which by mistake was drawn up as a stay of proceedings:—Held, that the bail could not avail themselves of that order, as a giving of time, so as to discharge them. *Woosman v. Wood*, 1 D. P. C. 681.

#### 9. BY OTHER MEANS.

A plaintiff, having obtained bail to his action, sued in equity for the same cause, and being put to his election by the court of equity, elected to proceed there, and a perpetual injunction went not to proceed at law:—Held, that this was no ground for discharging the bail. *Horsley v. Walstab*, 7 Taunt. 235; 2 Marsh. 548.

The court permitted an exoneretur to be entered on the bail-piece, the defendant being under sentence of transportation for a felony. *Wood v. Mitchell*, 6 T. R. 247.

#### 10. APPLICATION FOR DISCHARGE.

Bail excepted to, but not struck off the bail-piece, may apply for an exoneretur. *Humphry v. Leite*, 4 Burr. 2107.

In order to exonerate bail excepted to, his name must be struck out of the bail-piece. *Fulke v. Bourke*, 1 W. Bl. 462.

After bail put in and justified, and demand of plea with time allowed for pleading, it is too late to move to enter an exoneretur on the bail-piece, on the ground that the plaintiff has not declared on the cause of action which he swore to in his affidavit. *Knight v. Dorey*, 1 B. & B. 48. And see *Ward v. Forrest*, 2 D. & R. 250; 1 B. & C. 149.

Irregularities in the conduct of a ca. sa. against the principal may be objected to on motion, in proceedings under a sci. fa. against the bail, as well as by plea. *Goldney v. Laporte*, 2 B. N. C. 456; 4 D. P. C. 639; 2 Scott, 670.

Where bail would be fixed by an indulgence granted by the court, such terms will be imposed upon the plaintiff as will give the bail an oppor-

tunity of freeing himself from his liability. *Bradley v. Bailey*, 3 D. P. C. 111.

A. had arrested B., who put in bail. A summons was afterwards obtained by the defendant's attorney for entering an exoneretur on the bail-piece. The clerk to the agent of the plaintiff's attorney gave his consent, not knowing that the defendant was at that time a merchant residing abroad; the exoneretur was accordingly entered. The court, having granted a rule nisi calling on the defendant to shew cause why the judge's order should not be rescinded and the exoneretur entered upon the bail-piece be struck out, made that rule absolute on payment of costs. *Firth v. Harris*, 8 D. P. C. 437.

#### XV. PROCEEDINGS AGAINST BAIL.

**Ca. sa. against Principal.**—In order to charge the bail, a ca. sa. against the original defendant must be in the sheriff's office four days before the return-day, exclusive of the day when it is lodged, and of the return day; and an intervening Sunday is not to be reckoned one of the four days. *Furnell v. Smith*, 7 B. & C. 693; *S. P.*, *Howard v. Smith*, 1 B. & A. 528.

It is no objection to a ca. sa., to fix bail, that some of the days during which the ca. sa. lay in the sheriff's office were half holidays. *Rigbye, Ex parte*, 6 N. & M. 773; *S. P.*, nom. *Armitage v. Rigbye*, 5 A. & E. 76.

Scire facias on recognizance of bail. Plea, no ca. sa. duly issued, lodged and returned. Replication, ca. sa. issued and returned non est inventus. Rejoinder, that the ca. sa. did not lie in the sheriff's office four days exclusive of the day it was lodged, the return-day, and an intervening Sunday:—Held, that the rejoinder was bad. *Sandon v. Proctor*, 7 B. & C. 800; *S. P.*, *Elliot v. Lane*, 1 Wils. 334.

The want of a ca. sa. is not an irregularity, but matter of substance, of which the bail can only take advantage by plea. *Philpot v. Manuel*, 5 D. & R. 615.

A defendant having put in and perfected bail, a ca. sa. was lodged and returned non est inventus, and proceedings being had against the bail, they rendered the principal in time: the defendant was then bailed again and discharged:—Held, that proceedings could not be had against the last bail without taking out a fresh ca. sa. *Thackray v. Harris*, 1 B. & A. 212.

Where, before the granting of a rule nisi for a new trial, a ca. sa. has been returned non est inventus, the plaintiff may, after the discharge of that rule, proceed immediately against the bail. *Rigbye, Ex parte*, 6 N. & M. 773; *S. C.* nom. *Armitage v. Rigbye*, 5 A. & E. 76.

Where proceedings have been taken against the bail, affidavits in support of an application to set aside the ca. sa. are properly intitled, both in the original action, and in that against the bail. *Pocock v. Capperton*, 1 H. & H. 334.

The court would set aside proceedings against bail, if the ca. sa. were tested of a term prior to that in which judgment was signed against the principal. *Gawler v. Jolley*, 1 H. Bl. 74.

A return of non est inventus, procured by the plaintiff against the principal, in order to found proceedings against the bail, is irregular, if the principal was at the same time in custody of the same sheriff who made the return, though at the suit of another person; and the subsequent pro-

ceedings against the bail will be set aside. *Burke v. Maine*, 16 East, 2.

So, if a plaintiff procured a ca. sa. against the defendant to be returned non est inventus, knowing that he was in custody of the sheriff, although by a different name. *Briggs v. Richardson*, 2 D. P. C. 158.

So, where the principal was in custody of the sheriff upon a criminal charge, and the plaintiff knew that he was in such custody at the time of the return. *Ward v. Brumfit*, 2 M. & S. 238.

**By Action.]**—A declaration in an action on a recognizance against bail, must set out for whom the defendant was bail, and in what sum. *Park v. Yestary*, 1 Wils. 284.

A parol agreement to give the principal time cannot be pleaded in bar of a recognizance. *Woodman v. Ford*, 2 Jur. 11.

A plea to an action on a recognizance of bail, that the plaintiff entered into an agreement with the principal, without the privity of the bail, to take from the principal goods to secure payment of part of the money recovered, and that such goods were consigned to them accordingly:—Held, bad, because such agreement, by parol, with a person not a party to the cause, could not be pleaded in bar of such an action, arising on matter of record. *Bulteel v. Jarrold*, 8 Price, 467.

**By Seire Facias—Form.]**—A sci. fa. against bail might have been sued out after a ca. sa. was returned, though not regularly filed; and the shortness of notice to the bail was immaterial. *Hunt v. Cox*, 1 W. Bl. 393; 3 Burr. 1360.

A plaintiff might have sued out a sci. fa. against the bail, on the return-day of the ca. sa. against the principal. *Shivers v. Brooks*, 8 T. R. 628.

A sci. fa. against bail need not have been tested on the return-day of the ca. sa. *Sandland v. Claridge*, 2 D. P. C. 115; 1 C. & M. 673; 3 Tyr. 804.

It might have been tested afterwards. *Ib.*

It was irregular in a sci. fa. to state the bail to have been put in on a day previous to its issuing. *Peacock v. Day*, 3 D. P. C. 291.

In a sci. fa. upon a recognizance of bail taken before a commissioner in the country, it was necessary to aver that the recognizance was transmitted to, and inrolled in the court above, as a sci. fa. could only issue on a matter of record, and inrolment was essential to constitute a record. *Laverty v. Duffin*, 1 Alcock & Napier, 295.

Where a sci. fa. did not aver any record upon which it was founded, the proper course was to demur; a plea of nul tiel record was improper. *Ib.*

**—Pleadings—Declaration.]**—Where a plaintiff issued a joint sci. fa. against A. and B., bail of C. and D., upon which A. only was summoned, B. not being found, and A. entered an appearance for himself only:—Held, that a declaration against him alone was irregular. *Sainsbury v. Pringle*, 10 B. & C. 751.

Sci. fa. to have execution for damages and costs recovered against B. upon a recognizance of bail, conditioned in case B. and K. should be condemned, that B. and K. should pay, &c., or render themselves, the plaintiff alleged that B. and K. have not paid, or rendered themselves, according to the form and effect of the recognizance:—Held, that the breach was ill assigned,

for non constat but that B., who was condemned, has paid or rendered. *Williams v. Thorley*, 4 M. & S. 33.

**—Pleas.]**—The bail could take advantage of a mere irregularity in a sci. fa. by pleading. *Powell v. Taylor*, 2 Tidd's Prac. 1182.

A writ of error allowed, though not returned, was in itself a supersedeas; and might have been pleaded by the bail to have been issued and allowed after the issuing and before the return of the ca. sa. against the principal, so as to avoid proceedings against them upon the recognizance of bail, prosecuted after a return by the sheriff of non est inventus made pending such writ of error. *Sampson v. Brown*, 2 East, 439.

A plea of the bankruptcy and certificate of the principal was bad to a sci. fa. on a recognizance. *Beddome v. Holbrooke*, 1 B. & P. 450, n.; *S. P.*, *Donnelly v. Dunn*, 2 B. & P. 46.

To a sci. fa. against bail upon their recognizance, the defendants might have pleaded in bar against the execution, that the plaintiff became a bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects assigned to the provisional assignee, who, before plea pleaded, assigned to the assignee under the commission, who was entitled to sue the defendants. *Kinmear v. Tarrant*, 15 East, 622; 1 Rose, 350.

**Staying Proceedings.]**—A writ of error allowed is a supersedeas in law to all further proceedings in the court below. *Miller v. Neubald*, 1 East, 662; *S. P.*, *Sampson v. Brown*, 2 Esp. 439.

Where a ca. sa. is returnable against the principal on a particular day, before which a writ of error is allowed and served; that operates as a supersedeas to any proceedings against the bail, though the ca. sa. has lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*, 3 T. R. 390.

Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Sprang v. Monpiratt*, 11 East, 316.

If proceedings against bail be stayed, upon undertaking to pay debt and costs within four days after affirmance of judgment, it means the final affirmance of it. *Kershaw v. Cartwright*, 5 Burr. 819.

The court will not stay proceedings against the bail, pending a writ of error on the judgment against the principal, if the principal has confessed that the writ of error is brought purely for delay. *Pool v. Charnock*, 3 T. R. 79.

**Other Cases.]**—When a rule to set aside proceedings for irregularity, and to stay proceedings in the meantime, is obtained, the proceedings are suspended for all purposes till the rule is discharged. *Swayne v. Crammond*, 4 T. R. 176.

Where bail is put in above, an injunction to stay proceedings against the principal extends to proceedings against the bail. *Carte v. Carte*, Amb. 32.

## XVI. BAIL ON REMOVAL FROM INFERIOR COURTS.

A cause was removed by certiorari from the Lord Mayor's Court. The defendant paid a sum of money into court in lieu of bail, and shortly afterwards obtained a rule for security for costs, on the ground that the plaintiff resided out of England. The security for costs was never given, and a period of nearly two years elapsed without any proceeding in the cause. The court made absolute a rule calling on the plaintiff to give security for costs within a fortnight, otherwise the defendant to be at liberty to take the money paid in, in lieu of bail, out of court. *Tassie or Tassi v. Kennedy*, 5 D. & L. 587; 2 B. C. Rep. 278; 17 L. J., Q. B. 215; 12 Jur. 854.

Where a cause has been removed from the Lord Mayor's Court by certiorari on the part of a defendant, and the plaintiff serves him with a rule for a procedendo, the latter has a right to give notice of justifying his bail, which he has already put in, and of which he has given notice, without waiting until served by the plaintiff with a rule for better bail; and if the plaintiff objects to such a notification, he is bound to attend before the judge when the bail appears to justify, and if he does not, and the bail are allowed, he has no right to treat the rule for the allowance as a nullity, and issue a procedendo. *Scarnett v. Rice*, 1 D., N. S. 333.

When a cause had been removed from an inferior court by habeas corpus at the defendant's instance, and no further steps taken on either side for a year, the plaintiff might apply ex parte for a procedendo to issue, unless bail in the Queen's Bench were given within four days. And the bail below cannot move to set aside such procedendo when issued, until they or the defendant have put in bail in that court. *Blanchard v. De la Crouée*, 9 Q. B. 869; 16 L. J., Q. B. 181; 11 Jur. 283.

The customary process of foreign attachment in the city of London is not equivalent to an arrest on mesne process, though the attachment can only be dissolved by the defendant putting in bail or rendering himself to prison; and 1 & 2 Vict. c. 110, does not affect the custom. *Day v. Paupierre*, 7 D. & L. 12; 13 Q. B. 802; 18 L. J., Q. B. 270; 14 Jur. 40.

The general rule, that where an action against an executor is removed from an inferior court, the defendant is not bound to put in special bail, does not extend to the case of an inferior court where a custom of foreign attachment exists which can only be dissolved on putting in special bail. *Bastow v. Grant*, 13 Q. B. 807; 21 L. J., Q. B. 377; 17 Jur. 299.

Upon the removal of a cause by certiorari from the Lord Mayor's Court, the defendant is not at liberty, under 7 & 8 Geo. 4, c. 71, s. 2, to pay money into court in lieu of putting in and perfecting special bail. *Morgan v. Pebrer*, 2 Scott, 853.

## XVII. BAIL IN ERROR OR ON APPEAL.

**When necessary.**—It is not necessary for a plaintiff in error, who was the plaintiff below, to give bail in error. *James v. Cochran*, 9 Ex. 552; 2 C. L. R. 651; 23 L. J., Ex. 126.

Bail in error is not necessary when the writ is

of error coram nobis, as it is not a supersedeas of execution. *Knight v. Thynne*, 9 D. P. C. 984; 5 Jur. 1109.

**Dispensing with.**—A judge having in the exercise of his discretion dispensed with bail on appeal, on the ground that the question to be determined was a doubtful one, and had been decided by the court in deference to a single authority, the court refused to set aside his order. *Turquand v. Moss*, 17 C. B., N. S. 24.

The court or a judge has a discretion to dispense with bail on appeal, as well as with bail in error. *Brown v. Whitmore*, 15 C. B., N. S. 442.

An official assignee of a district court of bankruptcy having been sued by the trade assignee for contribution to the costs of an unsuccessful action to which the former was an assenting party, and judgment having gone against him:—Held, that it was a fit case for dispensing with bail on appeal. *Id.*

Bail in error by defendants not dispensed with, on the ground that they were overseers, who ought not to be personally liable for costs. *Reg. v. Ives*, 11 W. R. 67.

**Who may be.**—Members of a corporation holding office in the corporation, may be bail for the corporation in error brought by the corporation. *Reg. v. Saddlers' Company*, 2 F. & F. 249; *S. P., Henley v. Lyme Regis (Mayor, &c.)*, 3 M. & P. 450; 6 Bing. 195.

If hired bail is put in on a writ of error, the plaintiff may issue execution. *Browne v. Brown*, 12 Moore. 172; 4 Bing. 38; *S. P., Bradley v. Gompertz*, 1 M. & R. 567; *Sutcliffe v. Eldred*, 2 D. P. C. 184.

Where sham or hired bail, who are insolvent, and of whom notice has been given, and to whom no exception is entered, become bail in error, the plaintiff may treat the writ of error and the bail as nullities, and take out execution. *Ward v. Leri*, 2 D. & R. 421; 1 B. & C. 268.

And the court will discharge a rule for setting such execution aside with costs. *Crum v. Kitchen*, 1 B. & C. 269, n.

**Recognizance and Proceedings.**—A recognizance of bail in error for a less sum than double the sum recovered by the judgment does not stay the execution. *Reed v. Cooper*, 5 Taunt. 320.

A recognizance entered into by the bail in error without the principal is good. *Dixon v. Dixon*, 2 B. & P. 443.

Money cannot be paid into court in lieu of bail in error unless by consent. *Collins v. Gwynne*, 2 M. & Scott, 775.

It is uncertain whether bail in error can be taken before a commissioner in the country, but the court will not make an order for it to be so taken. *Williams v. Panton*, 8 D. P. C. 701; 4 Jur. 990.

Money deposited in lieu of bail in error cannot, upon the reversal of the judgment, be retained to satisfy interlocutory costs incurred in the court below. *Collins v. Gwynne*, or *Gwynne v. Collins*, 1 M. & G. 938; 2 Scott, N. R. 85; 9 D. P. C. 70.

A plaintiff had judgment, and the damages were referred, and a sum of money paid into court to cover the damages and costs, upon the terms that it should be in lieu of giving bail in error, and to abide the further order of the court, and that thereupon all further proceedings upon the

reference should be stayed until after the proceedings in error should be disposed of. The judgment was afterwards reversed in the Exchequer Chamber:—Held, that the defendant was entitled to have the money paid out to him without awaiting the result of an appeal to the House of Lords. *Castrique v. Imrie*, 10 C. B., N. S. 340; 30 L. J., C. P. 281; 7 Jur., N. S. 998.

As to the form of the recognizance, see *Hesse v. Wood*, 4 Taunt. 691; *Harelock v. Geddes*, 12 East, 622; *Matthews v. Gibson*, 8 East, 527; and *Graham v. Grill*, 1 M. & S. 409.

**Justification and Notice.**—Where bail in error were regularly put in, and properly described in the notice, and were described as the bail "already put in" in the notice of justification:—Held sufficient, although it was objected that these names and additions should have been inserted in the notice of justification, as well as in the notice of their being put in. *Richardson v. Mellish*, 9 Moore, 579.

Bail in error, who refuses to justify, may have his name struck out of the bail-piece at any time. *Jones v. Tubb*, 1 Wils. 337.

**Changing.**—Bail in error cannot be changed. *Anon.*, 2 Chit. 84.

**Liability of Bail.**—As bail in error cannot surrender the principal, they are not entitled to relief though the principal becomes a bankrupt pending error. *Southcote v. Braithwaite*, 1 T. R. 624.

If a defendant, (the plaintiff in the action,) upon judgment being affirmed, takes in execution the body of the plaintiff in error, for the debt, damages and costs in error, he does not thereby discharge the bail in error, but may sue them on their recognizance. *Perkins v. Pettitt*, 2 B. & P. 440.

**Amending Bail-piece.**—The court will not admit the bail-piece in error to be amended by enlarging the penalty in order to defeat the execution. *Reed v. Cooper*, 5 Taunt. 320.

## XVIII. CONTRACTS TO INDEMNIFY.

An indictment against a defendant for a misdemeanor having been removed into the Queen's Bench, the plaintiff became bail in 40*l.*, the condition of the recognizance being that the defendant should appear and plead, and at his own costs cause the issues to be tried. The defendant was convicted, but the costs of the prosecution not having been paid, the recognizance was escheated, and the plaintiff compelled to pay 40*l.*:—Held, that he was entitled to recover that sum from the defendant as money paid; for that, as it was not contrary to public policy for the defendant to indemnify his bail against the costs of the prosecution, the law would imply a promise to that extent. *Jones v. Orchard*, 16 C. B. 614; 24 L. J., C. P. 229; 1 Jur., N. S. 936.

At the request of a defendant the plaintiff became bound in a recognizance of bail for the appearance of the defendant's daughter at the Central Criminal Court, to which court she had been committed for trial; the defendant having verbally promised the plaintiff to indemnify him against all liability. The daughter did not appear, and the recognizance was estreated and the plaintiff was obliged to pay the amount and was

VOL. I.

put to other expenses:—Held, that this was not a promise to answer for the debt or default of another person within the Statute of Frauds (29 Car. 2, c. 2, s. 4), and need not be in writing. *Cripps v. Hartnoll*, 32 L. J., Q. B. 381; 10 Jur., N. S. 200; 8 L. T. 765; 11 W. R. 953.

A judgment having been recovered against A. in a county court, he was arrested by the bailiff for non-payment. The judgment was for 34*l.*, but the creditor authorized the bailiff to accept 17*l.*, whereupon K. came forward and told the bailiff that if he would release A. he would produce him on the following Saturday, or pay the 17*l.*:—Held, that this was not a promise by K. to answer for the debt or default of another, so as to bring it within the Statute of Frauds. *Reader v. Kingham*, 13 C. B., N. S. 344; 32 L. J., C. P. 108; 9 Jur., N. S. 797; 7 L. T. 789.

On a deposit of money by one person with another as security upon his becoming bail for the depositor, the money to be returned when the liability as bail has ceased: the question for the jury is, whether the proceedings have in effect terminated, and the rescission of an order for the institution of proceedings, with the fact that none have in fact been since instituted, coupled with lapse of time, is evidence that the proceedings have terminated. *Batson v. Trance*, 3 F. & F. 320.

## BAILIFF.

I. OF COUNTY COURT.—See COUNTY COURT.

II. OF SHERIFF.—See SHERIFF.

## BAILMENT.

1. *Contract.*
2. *Kinds of Bailment*, 551.
  - a. Bankers, 551.
  - b. Warehousemen and Wharfingers, 552.
    - i. Rights of, 552.
    - ii. Liabilities, 554.
  - c. Livery Stable Keepers, 558.
  - d. Hirers of Property, 559.
  - e. Other Bailees, 560.
3. *Liability of Lenders of Property*, 564.
4. *Remedies*, 564.

### 1. CONTRACT.

**Bailment or Sale.**—A bailment on trust implies that there is reserved to the bailor the right to claim a re-delivery of the property deposited in bailment. *South Australian Insurance Company v. Randell*, 3 L. R., P. C. C. 101; 22 L. T. 843.

Wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment. *Id.*

T

Where therefore, corn was deposited by farmers with a miller, to be stored and used as part of the current consumable stock or capital of his trade, and was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof, the market price of any equal quantity, on the day on which he made his demand, with a small charge for general purposes:—Held, that such a transaction amounted to a sale by the farmer to the miller, and was not a bailment of the corn, and entitled the miller to claim in respect thereof upon a policy of insurance against fire as for his own property, notwithstanding that such corn was not specifically insured, or described, as required by the conditions of the policy, as “goods held in trust and on commission,” upon which condition the claim was resisted by the insurers. *Ib.*

**Deposit by several Persons.]**—If personal property is made the subject of a bailment by all the owners of it, the bailee may refuse to deliver it up to only some of them, acting without the consent of the other owner or owners. *Harper v. Godsell*, 5 L. R., Q. B. 422; 39 L. J., Q. B. 185; 18 W. R. 954.

If a thing is deposited by one, with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. *May v. Harvey*, 13 East, 197.

Where goods had been bailed by several upon the terms that the bailee was not to part with the possession, except upon the joint order or request of the bailors, and the bailee afterwards delivered the goods to one of the bailors upon his sole request:—Held, that the bailors jointly could not maintain an action for the delivery up of the goods without the joint order or request of the bailors. *Brandon v. Scott*, 7 El. & Bl. 234; 26 L. J., Q. B. 163; 3 Jur., N. S. 362.

**Jus Tertii—Estoppel.]**—Although in certain cases a bailee may set up the jus tertii, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor. *Davies, Ex parte, Sadler, In re*, 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237—C. A.

After the filing of a liquidation petition the holder of a registered bill of sale executed by the debtor instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession, and advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, and the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee the auctioneer held possession for him, and ultimately by his directions advertised the goods for sale, the advertisements and the catalogues of the goods being headed “In liquidation. By order of the trustee.” The goods were sold, and the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee, and he declined to pay them over. The trustee applied to the Court of Bankruptcy for an order for payment to him, serving notice of

his motion on the auctioneer only. On the hearing of this motion an order was made by consent that the money should be paid into court, and the hearing adjourned, notice being meanwhile given to the bill of sale holder. Notice was served on him, but not a four-days' notice as required by rule 50 of the Bankruptcy Rules, 1870, and he did not appear on the adjourned hearing. He had meanwhile commenced an action against the auctioneer for the proceeds of sale:—Held, that the Court of Bankruptcy ought to exercise its jurisdiction under sect. 72 of the Bankruptcy Act, 1869, and that the money must be paid out to the trustee, on the ground that the auctioneer had with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, and was, therefore, estopped from denying his title. *Ib.*

*Biddle v. Bond* (6 B. & S. 225), *infra*, distinguished. *Ib.*

To trover for goods, a defendant pleaded that the goods were delivered by the plaintiff to him, to be by him warehoused and taken care of; that before the delivery the goods had been the property of A., deceased, and that there was not at the time of the delivery any legal representative of A., and that this fact was concealed from the defendant; that afterwards one who had obtained letters of administration to the effects of A., claimed the goods, and forbade the defendant to deliver them to the plaintiff:—Held, a good plea. *Thorne v. Tilbury*, 3 H. & N. 534; 27 L. J., Ex. 407.

Semble, that a warehouseman, being a bailee of goods, is not estopped from disputing the title of the bailor; but that if the goods are the property of another, he may refuse to redeliver them, if he does so relying upon the right and title and by the authority of that other. *Ib.*

The estoppel against a bailee from disputing the title of his bailor, and setting up a jus tertii, ceases when the bailment on which the estoppel is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person, or that an adverse claim is made upon him, so that he may be entitled to an interpleader. *Biddle v. Bond*, 6 B. & S. 225; 34 L. J., Q. B. 137; 12 L. T., 178; 13 W. R. 561.

A warehouseman receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another. *Ogle v. Atkinson*, 6 Taunt. 759; 1 Marsh. 323.

**Attornment.]**—A wharfinger, having acknowledged certain timber on his wharf to be the property of the plaintiff:—Held, that he could not dispute the plaintiff's title in an action of trover brought against him by the plaintiff. *Gosling v. Birnie*, 7 Bing. 339; 5 M. & P. 160.

A manufacturer deposited goods with a wharfinger at S., for the purpose of being shipped for the defendants' wharf in L., receiving from them receipts describing them. The manufacturer indorsed upon these receipts, orders upon the defendants to deliver the goods on their arrival to the plaintiffs, the latter having advanced money upon them. The plaintiffs sent the receipts and delivery orders to the defendants, and demanded the goods. The defendants stated that the goods had not arrived, but promised that when they did

arrive they should be forwarded to the plaintiffs:—Held, that the defendants, having thus assented to the plaintiffs' title to the goods, could not afterwards dispute it, and that the plaintiffs might maintain trover upon their refusal to deliver them. *Holl v. Griffen*, 3 M. & Scott, 732; 10 Bing. 246.

An attornment by a warehouseman or a wharfinger does not dispense with an appropriation of goods, so as to vest the property in the vendee. *Austin v. Adams*, 1 F. & F. 312.

Where on a contract of sale of a portion of a large quantity of goods in the warehouse of the vendor, the vendee has resold the goods to a third person, whose right to them the vendor has recognized, he cannot afterwards dispute the title of such third person, although the specific goods have never been appropriated to him. *Woodley v. Coventry*, 2 H. & C. 164; 32 L. J., Ex. 185; 9 Jur., N. S., 548; 8 L. T. 249; 11 W. R. 599.

Therefore, where the defendants sold 348 barrels of flour to C., who sold them to the plaintiffs, and gave them a delivery order, upon presenting which to the defendants they said it was all right, and transferred the flour in their books from the name of C. to that of the plaintiffs:—Held, that the defendants were estopped from saying that no property in the flour passed to the plaintiffs, although no specific portion of a larger quantity had been appropriated to them. *Id.*

A wharfinger had malt deposited with him on account of B., as a security for money lent by the plaintiff, made a sale of the goods to him with a condition annexed for repurchase by B. at such an advanced price as to make the transaction usurious. The wharfinger, on notice of the sale, transferred the malt in his books from B. to the plaintiff, and held it at the disposal of the plaintiff. B. afterwards became bankrupt. His assignees claimed the malt, on the ground that the transaction with the plaintiff was usurious, and that the property had never passed; but they eventually compromised with the plaintiff:—Held, afterwards, in an action against the wharfinger for the proceeds of the malt, that the wharfinger could not set up the *ius tertii* in the assignees, which they had themselves abandoned. *Betteley v. Reed*, 3 G. & D. 561; 4 Q. B. 511; 12 L. J., Q. B. 172; 7 Jur. 507.

A warehouseman, who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is measured, and that before the malt was remeasured the seller became a bankrupt. *Stonard v. Dunkin*, 2 Camp. 344.

Goods in bales were sent from the country to a wharf in London, consigned to B. & Co., who were factors, for sale, and made deliverable to them or their assigns. A. having bought of B. & Co. forty-eight bales of goods, so consigned, and lying at the wharf, B. & Co. ordered the wharfingers to weigh and deliver the same to A. They accordingly weighed the goods, and communicated the weight to B. & Co., who thereupon sent to A. an invoice, stating the weight, together with the price. Five of these bales were afterwards delivered by the wharfingers, on the order of A., to a party to whom A. had resold them; the residue remained at their wharf, and were afterwards stopped by

B. & Co. as unpaid vendors. No transfer of any of the bales was made in the books of the wharfingers from B. & Co. to A., nor was any warehouse rent paid by him. A. afterwards became bankrupt, and his assignees brought an action against the wharfingers for the non-delivery of the goods:—Held, that these facts did not make them wharfingers to the bankrupt, so as to entitle the assignees to sustain the action. *Tanner v. Scovell*, 14 M. & W. 28; 14 L. J., Ex. 321.

*See also SALE (STOPPAGE IN TRANSITU) and ESTOPPEL.*

**Liabilities arising from.]**—L. having bought cases of wine of the plaintiff to be forwarded by the plaintiff from France, deposited the bill of lading with the defendant, a wharfinger, directing him to take delivery and warehouse the goods on his, L.'s, account. The shipowner put a stop order on the goods for freight. On the arrival of the wine, L. gave notice to the plaintiff that he had rejected it as not corresponding to sample. The plaintiff ultimately agreed to take back the wine, but on demanding a delivery order, found that L. had on the same day indorsed the bill of lading to M., who took it to the defendant and had the wine transferred into his own name. The plaintiff then tendered to M. a sum claimed for expenses, which being refused, he demanded the wine from the defendant, offering to pay all charges, and to indemnify him against the claim of any other person, but he declined to deliver, on the ground that warrants had been given for the wine to M. The jury found that M. had not been a bona fide purchaser for value from L.:—Held, that the defendant was liable in an action of detinue, inasmuch as his title as bailee could be no better than that of L., his bailor. *Batuff or Batut v. Hartley*, 7 L. R., Q. B. 594; 41 L. J., Q. B. 273; 26 L. T. 968; 20 W. R. 899.

C., a merchant domiciled at Alexandria, being indebted to T., a merchant carrying on business at Leipsic, for the purpose of settling litigation between them, deposited with B. (an English merchant resident at Alexandria) bills drawn in his favour as security for T.'s debt; B., by the agreement between C. & T., constituting himself a voluntary depositor of them, and undertaking to be responsible for them to T., "until the effective encashment of them, which remains intrusted to C.":—Held, that B. was not guilty of a breach of duty under this agreement in allowing C. to take the bills when due, for encashment at his discretion, and was not bound to see that C. handed over the money to T. *Treffitz v. Canelli*, 4 L. R., P. C. 277; 27 L. T. 252; 20 W. R. 842.

**Pledge of Goods obtained by Fraud from Pledgee and re-pledged.]**—D. & Co. deposited certain goods with the plaintiffs as security for an advance; they afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold them to the defendants, and would hand over to the plaintiffs the money to be received in payment. D. & Co. obtained an advance from the defendants, and deposited the goods, with a power of sale, with them:—Held, affirming the judgment of the Queen's Bench Division, that as the plaintiffs had parted with their special property in the goods to D. & Co., they could not recover them

in an action from the defendants who had obtained them *bonâ fide* and for a good consideration. *Babcock v. Lawson*, 5 Q. B. D. 284; 49 L. J., Q. B. 408; 42 L. T. 289; 28 W. R. 591—C.A.

## 2. KINDS OF BAILMENT.

### a. Bankers.

**Liability of.]**—A box containing debentures and other securities was deposited at a bank, the depositor keeping the key. The bank received no payment for their care of the box, which was kept in a strong room with similar boxes of other customers, and with property belonging to the bank. The debentures were stolen by the cashier of the bank. In an action by the depositor against the bank :—Held, that the bank was not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary care which men of common prudence generally exercise about their own affairs. *Giblin v. McMullen*, 2 L. R., P. C. 317; 38 L. J., P. C. 25; 21 L. T. 214; 17 W. R. 445.

It is not, however, sufficient to exempt a gratuitous bailee from liability, that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. *Id.*

The term "gross negligence" is not intended as a definition, but is useful as expressing the practical difference between the degrees of negligence for which different classes of bailees are responsible. *Id.*

**For Loss or Theft of Securities.]**—A customer, who kept an account with a banker, made a special deposit of certain bonds for safe keeping, paying nothing for the privilege; the bonds were stolen by the teller of the bank, who had always borne a good character :—Held, that the bank was a gratuitous bailee, and as such not liable, except for gross negligence. *Scott v. National Bank of Chester Valley*, 10 Canada, L. J., N. S. 182.

An owner of railway shares in two companies deposited the certificates for safe custody with a banking company, who undertook to receive the dividends for a small commission. On receiving the certificates from the railway companies, he gave his address in one instance at the office of the bank, and in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, and forged the name of the owner to the transfer. The companies wrote to him informing him of the transfers, and receiving, in one instance, no answer, and in another an answer in his name forged by the manager, registered the transfer. He afterwards, on discovery of the fraud, brought suits against the two companies and the transferees of the shares, in which he recovered the shares, but the court gave him no costs. The banking company being wound up, he claimed to prove against the company for the amount of his costs in the suits which had been occasioned by their negligence :—Held, that the banking company was a bailee for reward of the certificates, and that they had been guilty of culpable negligence in keeping them, but that the loss of the costs was too

remote in consequence of the negligence of the company for them to be held liable for it. *United Service Company, In re, Johnston, Ex parte*, 6 L. R., Ch. 212; 40 L. J., Ch. 286; 24 L. T. 115; 19 W. R. 457. Affirming 9 L. R., Eq. 181; 39 L. J., Ch. 390.

And see **BANKER**.

### b. Warehousemen and Wharfingers.

#### i. Rights of.

**Rent.]**—A person has no right to keep the property of another, and charge for the standing of it, unless there was a previous bargain between him and the owner of the property, or between him and some agent authorised by the owner. *Buxton v. Baughan*, 6 C. & P. 674.

If the purchaser neglects after notice to remove the goods within a reasonable time, the seller may charge him with warehouse room, or bring an action for not removing them. *Greaves v. Ashlin*, 3 Camp. 426.

Wharfingers in London are not entitled to wharfrage for goods unladen into lighters out of barges fastened to their wharfs. *Stephen v. Coster*, 3 Burr. 1408; 1 W. Bl. 413, 423.

By an act of parliament, certain persons were incorporated as the Hull Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorised to make a dock, quays, wharfs, &c., which it was enacted should be vested in them for the purposes of the act. It was provided that all goods, &c., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that act should be liable to pay, and should be charged and chargeable with the like rates of wharfrage and payments as were usually taken or received for any goods, &c., loaded or discharged upon any quays or wharfs in the port of London :—Held, that as the premises were only vested in the company for the purposes of the act, they had no common-law right to a compensation for the use of them, and that the statute did not give them any right to claim wharfrage for goods shipped off from their quays. *Hull Dock Company v. La Marche*, 8 B. & C. 42; 2 M. & R. 107.

**Insurable Interest.]**—Warehousemen and wharfingers with whom goods are deposited have an insurable interest in such goods, although there has been no previous authority to insure given by the real owners, nor any notice given to them of such insurance. *Waters v. Monarch Life and Fire Insurance Company*, 5 El. & Bl. 870; 25 L. J., Q. B. 102; 2 Jur. N. S. 375. See *Bateman, Ex parte*, 8 De G., M. & G. 263; 25 L. J., Bk. 19; 2 Jur. N. S. 265.

The insurers are entitled in such a case to recover from the insurance office the full value of goods destroyed by fire, but are liable to account to the true owners for the excess of the money received beyond the amount of their own charges in respect of such goods. *Id.*

**Lien.]**—Wharfingers have a general lien for the balance of their accounts. *Naylor v. Mangles*, 1 Esp. 109; *S. P., Spears v. Hartley*, 3 Esp. 81. And see *Rushforth v. Hadfield*, 6 East, 519; 7 East, 224.

A wharfinger has not a general lien in respect

of labourage and warehouse room, except by agreement express or implied: general continued and undisputed usage may be evidence of such agreement; but where the right is disputed in the place where the wharfinger lives, he cannot set it up against a customer unless he has previously given him notice that he will deal only upon those terms. *Holderness v. Collinson*, 1 M. & R. 55; 7 B. & C. 212.

A wharfinger's general lien on the goods of his customer in his possession for his balance in respect of freight and wharfage, due before the teste of an immediate extent, issued against such customer, being the crown's debtor, will prevail against the extent. *Rex v. Humphrey*, M'Clel. & Y. 173.

In an action to restrain the infringement of a trade mark, a wharfinger, who had received goods bearing the pirated trade mark in the ordinary course of business without any knowledge of the fraud, was made a co-defendant, and in his statement of defence disclaimed all interest in the matter in dispute, and submitted to act as the court should direct, on having his charges for warehouse rent and his costs of the action paid or provided for. At the trial of the action he contended at the bar that the plaintiff ought not to touch the goods for the purpose of removing the trade mark without first paying his charges:—Held, that the wharfinger was entitled to be paid his costs of the action by the plaintiff, and had a lien on the goods in his possession for his warehouse charges in priority to the lien (if any) which the plaintiff might have thereon for his costs. *Moet v. Pickering*, 8 Ch. D. 172; 47 L. J., Ch. 527; 38 L. T. 799; 26 W. R. 637—C. A.

— **Where Goods mixed.**—Where, after a fire at a wharfinger's, the salvage of oil belonging to various owners, the identity of which was lost, was retained in the warehouses under an arrangement with the agent of the owners, to pay charges upon the whole, and there was a distinct quantity of oil belonging to another owner, the identity of which was not lost, and which was not treated as salvage:—Held, that the wharfingers had no lien on this oil for the charges on the whole of the salvage. *Grant v. Humphrey*, 3 F. & F. 162.

— **Method of Payment.**—Where wharfage and other charges due on goods imported were, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the meantime removed or not; and goods were sold to S., and after Christmas the importer became bankrupt:—Held, that there was no lien on the goods for the wharfage as against S. *Crawshaw v. Homfray*, 4 B. & A. 50. And see *Richardson v. Goss*, 3 B. & P. 119.

— **After Notice.**—Where goods deposited at a wharf are sold by the owner, and he gives notice thereof to the wharfinger, paying all charges up to that time, the wharfinger cannot claim a lien against him for subsequent charges in respect of such goods, on the ground that no delivery order was lodged, and the notice was merely oral. *Barry v. Longmore*, 12 A. & E. 639; 4 P. & D. 344.

**Acting as a Factor.**—A person who carries on

the business of a warehouseman, and in that character receives goods solely for the purpose of warehousing them, is not an agent within the Factors Act (5 & 6 Vict. c. 39), although he also carries on the business of a broker; and therefore a pledge of the goods by such person without the authority in fact of his principal either to pledge or sell them is not protected by s. 1. *Cole v. North Western Bank*, 10 L. R., C. P. 354; 44 L. J., C. P. 233; 32 L. T. 733—Ex. Ch.

**Where Goods wrongfully taken.**—Goods came to a wharfinger consigned to A.; B., believing them to be meant for himself, carried them from the wharf, and used them before he discovered the mistake:—Held, that the wharfinger, after paying A. the value of the goods, could not maintain an action against B. for money paid to recover the amount. *Sills v. Laing*, 4 Camp. 81.

## ii. Liability of.

**Wharfingers.**—The liability of a wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighters is similar to that of a carrier. *Maving v. Todd*, 1 Stark. 72; 4 Camp. 225.

Where goods are to be carried coastwise, and the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried: if they are delivered to the mate, the wharfinger's responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped. *Cobban v. Downe*, 5 Esp. 41.

His liability commences from the time the crane is applied to raise them into the warehouse; and it is no defence that they were injured by falling into the street, from the breaking of tackle, the carman who brought the goods having refused the offer of slings for further security. *Thomas v. Day*, 4 Esp. 262.

If goods are sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board of it. *Leigh v. Smith*, 1 C. & P. 638; R. & M. 224.

B., a carrier and wharfinger, received into his warehouse goods of A., on the terms that they should be conveyed by B.'s barges to London when A. should direct, at the usual freight, and that in the meantime they should be kept by B. without charge for warehousing:—Held, in an action for not keeping the goods safely, that B. was not a gratuitous bailee. *White v. Humphrey*, 11 Q. B. 43; 12 Jur. 417.

— **Evidence of Acceptance by.**—To charge a wharfinger, the goods must be proved to have been booked, or to have been delivered to the wharfinger himself, or to some person who can be proved to have been his agent for the purpose of receiving them. *Buckman v. Levi*, 3 Camp. 414.

Goods were sent by canal carriers, directed to a person in the Isle of Man, to the care of the defendant at Liverpool. On the arrival of the goods at Liverpool, they were landed on a public wharf, and notice sent to the defendant, who was the agent of a steam-vessel company. He signed the carriers' book, and afterwards entered them in the manifest and clearance of the steam-vessel



going to the Isle of Man. There was also evidence that on former occasions, the defendant had desired that goods sent to him should remain on the wharf:—Held, that there was evidence of a delivery to and acceptance by the defendant of the goods, so as to make him liable for a subsequent loss by negligence. *Quiggin v. Duff*, 1 M. & W. 174; 1 Gale, 420.

An order signed by O. for the delivery, by the defendants, wharfingers, of twenty sacks of flour to the plaintiff (the party named in the order), was lodged with and accepted by them in the usual course of business, they at the same time declaring they had but five sacks to spare, which the party might have, and he received them accordingly. On application for the rest, they declined to deliver it. On trover brought against them by the party named in the order, it did not appear that he knew that O. had any other flour in the defendants' possession, and the defendants did not produce any delivery orders by which any such flour had been previously appropriated by O. The jury found that the defendants had accepted the order generally, and gave a verdict for the plaintiff for the value of the fifteen sacks. The court refused to disturb the verdict, and held, that trover was maintainable, as the defendants had not limited their acceptance of the order to any minor quantity of O.'s flour then in their hands, or alleged that they must select the sacks to be delivered to the plaintiff. *Gillett v. Hill*, 2 C. & M. 531; 4 Tyr. 290.

Where goods consigned to A., in London, and deliverable in the river, were, by his direction, he being insolvent, landed on a wharf at which he had been in the habit of landing goods, A. having no premises adjoining the river, but having a warehouse in the city, and the goods were stopped in transitu in the hands of the wharfinger:—Held, in trover for the goods, by the assignees of A. (who became bankrupt a few days afterwards), against the wharfingers, that the proper question to be left to the jury was, whether the wharfingers received the goods as A.'s agents, to take possession of them for his own benefit as owner, or as agent only, to forward them to him, or to keep them for the seller. *James v. Griffin*, 1 M. & W. 20.

—**Sufferance.**—In an action against a wharfinger, to whom goods were sent to be shipped, for neglecting to take out a sufferance, for want of which the goods were seized, it is not necessary to aver or prove that the goods were condemned by a sentence in rem. *Baker v. Liscoe*, 7 T. R. 171.

—**Insurance Moneys.**—If A. deposits goods in the warehouse of B., a wharfinger, for the purpose of sale by B., who is paid 10*l.* per annum for warehouse rent, and receives a commission on the sale: B., having insured the goods, which are afterwards burnt in the warehouse, and having received the amount from the insurer, is liable to A. for so much money had and received to his use. *Sideways v. Todd*, 2 Stark. 400; *S. P. Waters v. Monarch Life and Fire Insurance Company*, 5 El. & Bl. 870; 25 L. J., Q. B. 102.

—**Authority of Agent.**—Where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which he had not received, the wharfinger held not responsible, because it is not within the scope of the agent's authority in the course of his employment to

give such a receipt. *Coleman v. Riches*, 16 C. B. 104; 3 C. L. R. 795; 24 L. J., C. P. 125; 1 Jur., N. S. 596.

—**Warehousemen.**—A warehouseman is only bound to take reasonable and common care of any commodity entrusted to his charge. *Catliiff v. Danvers, Peake*, 114.

—**Theft.**—A. hired a room in the house of B. at 2*s.* a week, for the purpose of depositing goods for safety, and kept the key of a padlock by which the room door was fastened, and the goods were stolen by one of B.'s family:—Held, that B. could not be sued as bailee for the value of the goods stolen. *Peers v. Sampson*, 4 D. & R. 636.

—**Carriers as.**—The plaintiff was consignee of some flax sent by railway to New Church Station. On its arrival at the station the railway company sent to the plaintiff an advice note of its arrival, requiring him to remove it, and stating that they, the company, would hold it, "not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges." Soon after the receipt of this notice, the plaintiff went to the station and removed two tons of the flax, but left the rest at the station for more than two months. There were no warehouses at the station, and the flax remained on open ground insufficiently covered, and became damaged by wet. In an action for the damage it was admitted that, if the company was bound to take reasonable care of the flax, they had not done so:—Held, that, treating the advice note acquiesced in by the plaintiff as a contract, the terms of it, taken altogether, did not exempt the company from liability for negligence to the extent that they would be liable as warehousemen or bailees for hire; and that they were therefore liable for the damage. *Mitchell v. Lancashire and Yorkshire Railway Company*, 10 L. R., Q. B. 256; 44 L. J., Q. B. 107; 33 L. T. 61; 23 W. R. 853.

A package of goods was delivered to the Great Western Railway Company, and another to the London and North Western Railway Company, for carriage to the station of the former company at W., both packages being addressed to the plaintiff, "to be left till called for." One of the packages arrived at W. on the 24th of March, the other on the 25th. On their arrival they were placed in the station warehouse to await their being called for. The defendants did not know the address of the plaintiff, who travelled about the country with drapery goods. The goods had not been called for when, on the morning of the 27th of March, a fire having accidentally broken out, the warehouse was burned down and the goods were consumed by fire. The plaintiff on the same day after the fire called for the goods, and, not receiving them, brought actions against the defendant companies as common carriers to recover their value:—Held, that after the interval of time which the plaintiff had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen of them, and consequently that the actions were not maintainable in the absence of any evidence of negligence on the part of the defendants. *Chapman v. Great Western Railway Company*,

5 Q. B. D. 278; 49 L. J., Q. B. 420; 42 L. T. 252; 28 W. R. 566; 44 J. P. 363.

Where a commercial traveller deposited a case of patterns in a waiting room of a railway company, and it was lost:—Held, that in an action against them as warehousemen for negligence, he could not recover damages beyond the actual value of the article lost. There is no undertaking on the part of warehousemen to be answerable beyond the actual value of the articles, except by special contract. *Anderson v. North Eastern Railway Company*, 4 L. T. 216; 9 W. R. 519.

**Special Contract as to Goods.**—The defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place where, without any negligence on his part, they were destroyed. In an action to recover as damages the value of the goods:—Held, that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods. *Lilley v. Doubleday*, 7 Q. B. D. 510; 51 L. J., Q. B. 310; 44 L. T. 814; 46 J. P. 708.

If the owner of property gives another person authority to deal with it in a particular way, and such person chooses to deal with it in another way, he must take the risk of the consequences, and is liable for its loss or injury, unless such loss or injury would have occurred in whichever way the property had been dealt with. *Id.*

Where an order is given previously to the delivery of goods to a bailee, carrier or other person, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly; a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given and assented to; and the law infers an implied promise by him to perform such duty. *Streeter v. Horlock*, 1 Bing. 34; 7 Moore, 283.

**Pledge by Consignee before Arrival—Bills of Lading—Delivery Order.**—When goods are shipped under a bill of lading drawn in parts, to be delivered to the consignee "or his assigns, the one of which bills being accomplished, the others to stand void," the master, or the warehouseman who has the custody of the goods under the Merchant Shipping Act, 1862, ss. 66–78, is justified in delivering to the consignee on production of one bill of lading, although there has been a prior indorsement for value to the holder of another part; provided the delivery be bona fide and without notice or knowledge of such prior indorsement.

Goods having been shipped for London consigned to C. & Co., the shipmaster signed a set of three bills of lading marked "First," "Second," and "Third," respectively, making the goods deliverable to C. & Co., or their assigns, freight payable in London, the one of the bills being accomplished, the others to stand void. During the voyage C. & Co. indorsed the bill of lading marked "First," to a bank in consideration of a loan. Upon the arrival of the ship at London, the goods were landed and placed in the custody of a dock company in their warehouses; the master lodging with them notice under the Merchant Shipping Act, 1862, s. 68, &c., to detain the cargo until the freight should be paid. C. &

Co. then produced to the dock company the bill of lading marked "Second," unindorsed, and the dock company entered C. & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the dock company bona fide and without notice or knowledge of the bank's claim, delivered the goods to other persons upon delivery orders signed by C. & Co.:—Held, that the dock company had not been guilty of a conversion, and that the bank could not maintain any action against them. *Glyn, Mills & Company v. East and West India Dock Company*, 7 App. Cas. 591; 52 L. J., Q. B. 146; 47 L. T. 309; 31 W. R. 201—H. L. Affirming, 6 Q. B. D. 475; 50 L. J., Q. B. 62; 43 L. T. 584; 29 W. R. 316—C. A.

*And see SHIPPING and CARRIERS.*

### c. Livery Stable Keepers.

**Bound to take Reasonable Care.**—When a livery stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, the case comes within the second class of the fifth sort of bailment mentioned by Holt, C. J., in *Coggs v. Bernard* (2 Ld. Raym. pp. 917, 918), viz., a delivery to carry or otherwise manage for reward, to a private person, not exercising a public employment; and he is bound to take reasonable care. *Searle v. Laverick*, 9 L. R., Q. B. 122; 43 L. J., Q. B. 43; 30 L. T. 89; 22 W. R. 367.

The obligation to take reasonable care of the thing entrusted to a bailee of this class, involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe. *Id.*

The fact that the building has been erected for the bailee on his own ground makes no difference in his liability. *Id.*

The plaintiff brought his horses and two carriages to the defendant, a livery stable keeper; the carriages were placed under a shed on his premises, a charge being made by him in respect of each. The shed had just been erected, the upper part being still in the hands of workmen. The defendant had employed a builder to erect the shed for him, as an independent contractor, not as his servant, and he was a competent and proper person to be so employed. The shed was blown down by a high wind, the defendant being ignorant of any defect in it, and the carriages were injured; upon which the plaintiff brought an action against him. At the trial, these facts having been admitted, the judge rejected evidence to prove that the fall of the shed was owing to it being unskillfully built through the negligence of the contractor and his men; and he nonsuited the plaintiff, ruling that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to take ordinary care in the keeping of the carriages, and that if he had exercised in the employment of the builders such care as an ordinary careful man would use, he was not liable for damage caused by the carelessness of the builder, of which he, the defendant, had no notice:—Held, that the nonsuit and ruling were right. *Id.*

**As to Liability of Carriers to Provide Sufficient Carriages.]—***See* CARRIER.

**As to Liability of Proprietors of Cabs.]—***See* HACKNEY CARRIAGE.

#### d. Hirers of Property.

**Musical Instruments.]—**The hirer of goods—as in the case of musical instruments hired to be used at the Opera House—is not answerable for a loss by fire. *Longman v. Culini*, Abb. Ship. 270, n.

**Carriage.]—**The hirer of a carriage by the year, under a written agreement, binding the carriage-maker “to keep the same in perfect repair without any further charges whatever,” is not liable for repairs made necessary by accident, and not by the wilful default of the hirer. *Reading v. Menham*, 1 M. & Rob. 234.

Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sells it within the time, he cannot recover his charge for the hire. *Wright v. Melville*, 3 C. & P. 542.

A railway company enters into an agreement with A. for the delivery to them, during a certain period, of a certain quantity of coals, to be carried by them for hire, to be paid by A., and in A.'s waggons; the company to have the right to detain any waggons of A. on certain defaults on his part. In order to complete this agreement, A. agrees with B. to supply a portion of the coals to be sent on to the line, in waggons which had been hired, for a term from A. by B., but re-let for hire by him to A. for this purpose. A. having made default, the company seize and detain the waggons then on the line as being A.'s, but they are, in fact, waggons sent on by B., under his agreement with A. The company cannot retain them against B. *North v. Great Northern Railway Company*, 6 Jur., N. S. 98.

**Horse.]—**A party who rides a horse at the request of the owner, for the purpose of exhibiting and offering him for sale, without any benefit to himself, is bound to use such skill as he possesses; and, if proved to be conversant with, and skilled in, horses, is equally liable with a borrower for an injury done to the horse. *Wilson v. Brett*, 11 M. & W. 113; 12 L. J., Ex. 264.

**Ship.]—**After bailment of a ship the bailor mortgages to a third person, who, having the right to do so, demands the ship from the bailee; he is entitled to refuse to restore it to the bailor, because he could not do so without exposing himself to an action. *European and Australian Royal Mail Company v. Royal Mail Steam Packet Company*, 30 L. J., C. P. 247; 8 Jur., N. S. 136.

**Amount of Care Necessary.]—**What is reasonable care, skill and diligence varies in the case of a gratuitous bailee, and a bailee for hire; but the failure on the part of a bailee to exercise reasonable care, skill and diligence is in law gross negligence. *Beale v. South Devon Railway Company*, 11 L. T. 184; 12 W. R. 1115—Ex. Ch.

#### e. Other Bailees.

**Carriers—Liability and Duty of.]—**A common carrier by sea from London to Aberdeen received a mare to be carried to Aberdeen for hire. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the carrier's servants:—Held, that the carrier was not liable for the death of the mare. *Nugent v. Smith*, 1 C. P. D. 423; 45 L. J., C. P. 697; 34 L. T. 827; 25 W. R. 117—C. A. Reversing the decision of the Common Pleas Division, 1 C. P. D. 19; 45 L. J., C. P. 19; 33 L. T. 731; 24 W. R. 237—C. A.

A carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can shew that either the act of nature or the defect of the thing itself, or both taken together, formed the sole direct and irresistible cause of the loss, he is discharged. *Ib.*

In order to shew that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented. *Ib.*

A shipowner, who is not a common carrier, is not subject to the liability of a common carrier—*i. e.* does not insure the goods bailed to him for carriage. *Ib.*

In order to come within the exception of loss by the act of God as applied to the liability of a common carrier, the loss need not have been caused directly and exclusively by such a direct and violent, and sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or (if he could foresee it) could not by any amount of care and skill resist so as to prevent its effect. *Ib.*

A loss is a loss by the act of God if it is occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and a common carrier is entitled to immunity in respect of loss so occasioned if he can shew that it could not have been prevented by any amount of foresight, pains and care reasonably to be required of him. *Ib.*

If the loss is occasioned partly by the act of God as above defined, and partly by some other cause, which, if it had been the sole cause of the loss, would have furnished a defence, the carrier will be entitled to immunity in respect of such loss if he can shew that it could not have been prevented by any amount of foresight, pains and care reasonably to be required of him; and per Cockburn, C. J., in such cases a common carrier has done all that is reasonably to be required of him, if he has used all the means to which prudent and experienced carriers ordinarily have recourse to ensure the safety of goods entrusted to them under similar circumstances. *Ib.*

*And see* CARRIER.

**Pawners of Goods—Rights of Owner of Goods pledged against his Will.]—**The indemnity given by s. 25 of the Pawnbrokers Act, 1872, to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only as be-

tween the pawnbroker and the pawnor or the owner who has authorized the pledge, and the act does not affect the common law rights of the owner of property which is pledged against his will. *Singer Manufacturing Company v. Clark*, 5 Ex. D. 37; 49 L. J., Ex. 224; 41 L. T. 591; 28 W. R. 170; 44 J. P. 59.

— **Sale by—Shares.**—The registered holder of shares in a company, whose articles of association did not require that a transfer of shares should be made by deed, deposited the certificates of his shares, accompanied by a transfer executed by himself, but with the name of the transferee and the date of execution left in blank, with a person who advanced him money, as security for the loan. No time was fixed for the repayment of the loan, and nothing was said as to the object of the transfer:—Held, that the deposit had no authority, without a previous demand for repayment of the loan, to sell or sub-mortgage the shares and fill in the name of the purchaser or sub-mortgagee as transferee. *Sargent, Ex parte* (17 L. R., Eq. 273) distinguished. *France v. Clark*, 22 Ch. D. 830; 52 L. J., Ch. 362; 48 L. T. 185; 31 W. R. 374. Affirmed, W. N. 1884, 43—C. A. The rules as to the power of sale possessed by the pledgee of a chattel apply also to the pledgee of a chose in action. *Ib.*

— **Chattels.**—The deposit of personal chattels with another as a pledge to secure the repayment of money on a given day, with power to sell in case of default, creates an interest and a right of property in such chattels in the pledgee, and the wrongful act of such pledgee does not annihilate the contract between the parties, or the interest of the pledgee in the chattels under such contract, so as to enable the pawnor to maintain detinue without tendering the amount due. *Donald v. Suckling*, 1 L. R., Q. B. 585; 35 L. J., Q. B. 232; 12 Jur., N. S. 795; 14 L. T. 772; 15 W. R. 13; 7 B. & S. 783; *S. P. Halliday v. Holgate*, 3 L. R., Ex. 299; 37 L. J., Ex. 174—Ex. Ch.

A creditor who loses or disposes of a pledge loses his lien, and the pledgor can recover its value without deducting the debt due. *Cooke v. Haddon*, 3 F. & F. 229.

— **Date of Sale.**—A deposited a dock-warrant for brandies with B. as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock-warrant, and C. took actual possession of the brandies on the 30th:—Held, that the sale on the 28th, and the delivery of the dock-warrant to the vendee on the 29th, A. having the whole of that day to redeem it, amounted to a conversion. *Johnson v. Seear*, 15 C. B., N. S. 330; 33 L. J., C. P. 130; 10 Jur., N. S. 99; 12 W. R. 347.

Held, by Erle, C. J., Byles, J., and Keating, J., that the proper measure of damages was the actual damage which A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal. *Ib.*

But by Williams, J., that the proper measure of damages was the value of the thing converted, the bailment having been terminated by the wrongful sale. *Ib.*, and see *Davis v. Artingstall*, *infra*.

Where goods are deposited as security for the

repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee shall have power to sell in default of payment on the day,—Semble that such a power of sale is implied by law from the nature of the transaction. *Pigot v. Cubley*, 15 C. B., N. S. 701; 33 L. J., C. P. 134; 10 Jur., N. S. 318; 12 W. R. 467.

But where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by a subsequent agreement between the parties, it is not competent to the pawnee to sell without a proper demand and notice. *Ib.*

A notice that he will sell unless an excessive sum be paid immediately, is not such a notice as will justify the sale. *Ib.*

— **When Property Passed.**—B., being indebted to A., entered into an agreement that certain goods should be held by A. as a security for the debt, and the agreement contained an acknowledgment that A. had received into his possession the goods which were the subject of the pledge. Part of the goods was, in fact, delivered to A.; but a cart and one set of harness were, by arrangement, left in the possession of B. Shortly afterwards, upon A. getting into difficulties, B. took back all the goods which were the subject of the pledge into his own possession; but, upon A.'s being declared bankrupt, his assignees seized the goods, and sold them for the benefit of his creditors:—Held, in trover by B., against the assignees, that there was a constructive delivery of all the goods into the possession of the pawnee. *Martin v. Reid*, 11 C. B., N. S. 730; 31 L. J., C. P. 126.

**Liability of Auctioneer on Sale of Goods after Notice from true Owner.**—Goods, the separate property of a married woman, were placed by her husband in a hired warehouse, and entrusted to auctioneers for the purpose of sale:—Held, that the auctioneers became possessed of the goods, so that on receipt of notice of the wife's claim before sale they were liable to the wife for the value of both the goods sold and goods not sold but afterwards removed by the husband. *Davis v. Artingstall*, 49 L. J., Ch. 609; 42 L. T. 507; 29 W. R. 137.

The plaintiff is entitled to the real value of the goods sold, and not merely to what they fetched at the auction, which sum could not be assumed to be the real value of the goods. *Ib.*

See also PAWNBROKER and SALE (BY AUCTION).

**Liability of Bailees for Hire—Theft.**—A bailee of goods to be kept for hire is bound to take the same care of them as he would of his own; but if they are stolen by his servants he is not liable without gross negligence on his part. *Finnane v. Small*, 1 Esp. 315. See *Peers v. Sampson*, 4 D. & R. 636.

A treasurer of a benefit building society, having covenanted with its trustees that he will faithfully discharge the duties of treasurer, obey the directions of the trustees in relation to such duties, and punctually account to the trustees for all and every sum and sums of money, bills, notes, securities, goods and chattels, which he, in his office of treasurer, shall receive on the society's account, and being bound by the rules of the society to pay over in a given time the

same moneys which he shall receive, does not violate such obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence, and without fault of his own; such obligation being that only of a bailee. *Walker v. British Guarantee Association*, 18 Q. B. 277; 21 L. J., Q. B. 257; 16 Jur. 885.

— **Workmen for hire.**—A watchmaker is bound so to secure property placed in his hands in the way of his trade, as to protect it against depredations that may be committed by the persons in his employ. Therefore, where A. entrusted B. (who was a chronometer maker) with a chronometer to be repaired, and B. suffered his servant to sleep in the shop in which the chronometer was deposited; B. was held liable to A. for its value, B.'s servant having stolen it, and B., at the same time when the theft was committed, having deposited his watches in a more secure place than that in which the chronometer was left. *Clarke v. Earnshaw*, Gow. 30.

A workman for hire is not only bound to guard the thing bailed to him against ordinary hazards, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed. *Leck v. Maestac*, 1 Camp. 138.

Where chattels are bailed to an artisan for the purpose of his executing certain work upon them, at an agreed price, the bailor may reclaim the chattels before such work is fully executed; and the bailee has only a lien upon them to the extent of what would be a fair price for so much of the work as has then been executed. *Lilly v. Barnsley*, 2 M. & Rob. 548.

**Gratuitous Bailees.**—Upon a bailment without reward, in order that an act may be done by the bailee for the sole benefit of the bailor, such bailee (or mandatory) is liable only for gross negligence. *Doorman v. Jenkins*, 4 N. & M. 170; 2 A. & E. 256.

— **Animals.**—If A. places a dog with B., and the dog is received by B. to be kept by him, for reward to be paid to him by A., B. is not answerable for the loss of the dog if he took reasonable care of it; but if the dog is lost, the onus lies on B. to acquit himself by showing that he was not in fault with respect to the loss. *Mackenzie v. Cor*, 9 C. & P. 632.

A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so:—Held, that A. was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself. *Camoyse (Lord) v. Scurr*, 9 C. & P. 383.

— **Picture.**—A. lent a picture to B., who wished to shew it to C.; B., without any previous communication, and unknown to C., sent the picture to his house, where it was accidentally injured:—Held, that C. was not responsible for not keeping the picture safely. *Lethbridge v. Phillips*, 2 Stark. 544.

**Merchant entering Goods at Custom-House.**—A., a general merchant, undertakes, voluntarily and without reward, to enter a parcel of goods, the property of B., together with a parcel of his own of the same sort, at the Custom-house, for

exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A., having taken the same care of the goods of B. as of his own, and not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, was not liable to an action for the loss occasioned to B. *Shiells v. Blackburne*, 1 H. Bl. 158.

**As to Innkeeper.**—See INNKEEPER.

### 3. LIABILITY OF LENDERS OF PROPERTY.

**Defects.**—A lender of a chattel is responsible for defects in it with reference to the use for which he knows that the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Blackmore v. Bristol and Exeter Railway Company*, 8 El. & Bl. 1035; 4 Jur., N. S. 657.

A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant, while using it, from its defective state, if the lender was not aware of it. *Mac Carthy v. Young*, 6 H. & N. 329; 9 W. R. 439; 3 L. T. 785.

**Loan of Shed.**—The gratuitous loan of a shed for a particular purpose bears no analogy to a bailment of personal chattels, but is a mere licence to use the shed, revocable at any time. *Williams v. Jones*, 3 H. & C. 256; 10 Jur., N. S. 852; 11 L. T. 108; 12 W. R. 1007; affirmed on appeal, 3 H. & C. 602.

A. lent his shed to B. to make therein a sign-board, and D., a carpenter employed by B., lighted his pipe from a match with a shaving, which he dropped, and thereby set fire to the shavings on the ground, by which the shed was burned:—Held, that B. was not liable either as bailee or by relation of master and servant. *Id.*

And see NEGLIGENCE.

### 4. REMEDIES.

**Who may Recover.**—In a case of simple bailment of a chattel, without reward, it may be recovered in trover either by the bailor or bailee, if taken wrongfully out of the bailee's possession. *Nichols v. Bastard*, 2 C., M. & R. 659; 1 Tyr. & G. 156; 1 Gale, 295.

In an action by a bailee of a jewel for sale, against a sub-bailee for sale, for some injury done to it during the sub-bailment:—Held, that assuming there was no positive direction by the bailee to the sub-bailee not to part with it out of his possession, it would be for the jury to say (either on express evidence, or on their own knowledge) whether it would be according to the usage of trade for the sub-bailee thus to part with it temporarily to an expected purchaser, or whether it would be improper and negligent to do so, in which case the sub-bailee would be liable for the diminution in value. *Von Minden v. Pyke*, 4 F. & F. 533.

A bailee for hire of goods, who sells them by private sale to a bona fide purchaser, thereby determines the bailment, and the bailor may maintain trover for their recovery against the purchaser. *Cooper v. Willomatt*, 1 C. B. 672; 14 L. J., C. P. 219; 9 Jur. 598.

The owner of goods, let out by him in the ordi-

nary course of trade, can recover in trover against a bona fide purchaser to whom the hirer has wrongfully sold them. *Merner v. Bankes*, 16 W. R. 62; 17 L. T. 147.

Where the bailee refuses to deliver on the ground of the title being in a third person. *Bateel v. Hartley*, 7 L. R., Q. B. 594; and cases *supra*, sub tit. "CONTRACT."

**Owner against Third Person—Negligence.]—**

An owner of a barge, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury to it. *Mears v. London and South-Western Railway Company*, 11 C. B., N. S. 850; 31 L. J., C. P. 220; 6 L. T. 190.

**Detinue—Demand before Action.]—**An action of detinue does not lie against a bailee of goods until demand made by the bailor, after the determination of the bailment and before action brought. *Cullen v. Barclay*, 10 L. R., Ir. 224—C. A.

**Operation of the Statute of Limitations.]—**

When a bailee of goods for safe custody converts them, and subsequently refuses to deliver them up on demand to the bailor, who then first learns the conversion, the bailor may elect to sue for the detention, and against such action the Statute of Limitations runs only from the time of the demand. *Wilkinson v. Verity*, 6 L. R., C. P. 206; 40 L. J., C. P. 141; 24 L. T. 32; 19 W. R. 604.

An incumbent sold the communion plate belonging to the parish church which was intrusted to his charge. More than six years afterwards the churchwardens demanded it of him, and then first heard of its having been sold. They brought an action of detinue, and he pleaded the Statute of Limitations:—Held, that the statute afforded no defence as it ran from the time of the demand and not of the conversion. *Ib.*

**Where Deposit on Illegal Consideration.]—**

The plaintiff deposited with the defendant the half of a 50l. bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note:—Held, that the maxim, in pari delicto potior est conditio possidentis, applied; and that as the plaintiff could not recover without shewing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. *Taylor v. Chester*, 4 L. R., Q. B. 309; 21 L. T., 359; 38 L. J., Q. B. 225.

**Larceny—Fraud by Bailee.]—See CRIMINAL LAW.**

**Pleading.]—**In all cases of bailment, the duty of a bailee may be alleged in a declaration to be safely and securely to keep the goods entrusted to him. *Ross v. Hill*, 2 C. B. 877; 3 D. & L. 788; 15 L. J., C. P. 182; 10 Jur. 435.

## BAKER.

*See HEALTH (PUBLIC).*

## BANKERS AND BANKING COMPANIES.

### I. BANK OF ENGLAND.

1. *Generally*, 567.
2. *Investing in Bank Stock*.—*See TRUST AND TRUSTEE.*
3. *Charging Stock*.—*See EXECUTION.*
4. *Forging*.—*See CRIMINAL LAW.*

### II. OTHER JOINT-STOCK BANKS AND BANKERS.

1. *Generally*, 568.
2. *Power and Authority of Directors*, 570.
3. *Liabilities*, 575.
4. *Manager and Clerks*, 581.
5. *Stamp Office Returns*, 583.
6. *Public Officer*, 585.
7. *Members of*, 589.
8. *Enforcing Judgments against Members*, 592.
9. *Liability of Property of Members*, 594.
10. *Shares*, 595.
  - a. *Generally*, 595.
  - b. *Sale and Transfer*.—*See COMPANY.*
  - c. *Charging*.—*See EXECUTION.*
  - d. *Forging*.—*See CRIMINAL LAW.*

### III. BANK NOTES AND BILLS, 596.

### IV. CUSTOMERS' ACCOUNTS, 600.

1. *Of what Persons*, 600.
2. *The Account—Generally*, 605.
3. *Appropriation of Payments*, 618.
4. *Advances*, 622.
5. *In Respect of Bills Payable at Bankers*, 625.
6. *Authority to accept against Bills of Lading*, 626.
7. *Acting as Agents*, 626.
8. *Securities, Deposit, Pledge and Mortgage*, 627.
9. *Lien*, 635.
10. *Receiving Dividends*, 646.
11. *Investing Moneys*, 647.
12. *Effect of Bank Stopping Payment*, 648.

### V. LETTERS OF CREDIT AND CIRCULAR NOTES, 650.

### VI. SAVINGS BANKS, 655.

### VII. CHEQUES.—*See BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES.*

### VIII. CRIMINAL MATTERS RELATING TO.—*See CRIMINAL LAW.*

## I. BANK OF ENGLAND.

## 1. GENERALLY.

**Exclusive Privileges of Banking—Infringing.]**

—A company, consisting of a number of persons subscribing small sums, was formed for buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot. In connexion with this company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the company: and as part of the same concern a bank in which the subscribers of the company might place their savings for purchasing their land from the company:—Held, that the scheme was illegal, as being contrary to the 7 & 8 Vict. c. 32. *O'Connor v. Bradshaw*, 5 Ex. 882; 20 L. J., Ex. 26.

**Statute Regulating Powers of Banks with regard to Bills of Exchange.]**—By 7 & 8 Vict. c. 32, s. 26, repealing 3 & 4 Will. 4, c. 98, s. 6, *banks, though the partners exceed six in number, carrying on business in London, or within sixty-five miles of London, are enabled to draw, accept or indorse bills of exchange, not being payable to bearer on demand.*

**—Bank of England, how affected thereby.]**

—The 4 Geo. 3, c. 25, giving protection to the Bank of England against competition, did not prevent merchants from issuing bills short of six months' date, though there were more than six partners in their firm, if really not bankers, and only done for the purpose of commerce. *Wigan v. Fowler*, 2 Chit. 228; 1 Stark. 459; *S. P.*, *Perring v. Dunston*, R. & M. 426.

A co-partnership consisting of more than six persons, carrying on the business of bankers, within sixty-five miles of London, could not legally, in the course of such business, accept a bill of exchange, payable at less than six months from the time of giving such acceptance. *Bank of England v. Anderson*, 4 Scott, 50; 3 Bing. N. C. 589; 2 Hodges, 294; 1 Jur. 9; 2 Keen, 328.

A London bank (being a partnership in London consisting of more than six persons) agreed with a bank in Canada, that the manager of the London bank, but not a partner therein, should accept bills drawn by the Canadian bank, payable at a date earlier than six months; and that the London bank would provide funds for the due payment of such bills:—Held, that the acceptance of such bills, in execution of such agreement, was unlawful, regard being had to the acts in force respecting the Bank of England; and, secondly, would not have been lawful, even if the London bank, at the time of such acceptances, had in their hands funds of the Canadian bank equal to the amount of the bills; nor, thirdly, if without such funds in the hands of the London bank, the bills had been accepted by the manager on the credit of a contract by the Canadian bank to remit such funds to meet the acceptances; and, fourthly, that the Bank of England might maintain an action against the London bank founded on such transactions, as being an infringement of their privileges. *Booth v. Bank of England*, 2 Scott, N. R. 701; 6 Bing. N. C. 415; 7 C. & F. 509; 4 Jur. 762; affirming *S. C.*, 2 Keen, 466; 2 Jur. 510.

A., being agent of, and also partner in the Leith Banking Company, opened an office at Carlisle, and circulated there promissory notes, drawn by the company's cashier in Scotland, and made payable to the bearer on demand at the company's office in Leith:—Held, that this was a violation of the statutes passed for the protection of the Bank of England, and that a debt formed of notes so issued could not be proved under a commission of bankruptcy. *Hurdleson, Ex parte*, 1 Mont. & Mac. 86.

**Branch of.]**—A notice of an act of bankruptcy given to the Bank of England, in London, in time for communication to be made to the branch banks, is sufficient to bind the bank, in respect of transactions with the bankrupt, at any of the branch banks of that establishment. *Willis v. Bank of England*, 4 A. & E. 21; 5 N. & M. 478; 1 H. & W. 620.

The assignees of A., a bankrupt, are entitled to recover in trover against the Bank of England the amount of bank post-bills, converted into money by A. at a Bank of England branch bank after notice given at the Bank of England in London, in sufficient time to have communicated with the branch bank, that A. had committed an act of bankruptcy. *Id.*

But they cannot recover the amount of a bank post-bill paid to B., a bonâ fide holder for value, who had received it of A. after the commission of an act of bankruptcy, but without notice thereof. *Id.*

## II. OTHER JOINT-STOCK BANKS AND BANKERS.

## 1. GENERALLY.

**Irish Banks.]**—The 33 Geo. 2, c. 14 (Ir.), does not relate exclusively to persons who carry on the business of banking in the way of banks of issue, but to all bankers whatever. *Copland v. Davick*, 5 L. R., H. L. 358; 21 W. R. 1.

That statute is unrepealed, except as to such specific matters contained in it as have been the subject of special legislation. *Id.*

A memorandum accompanying a deposit of deeds made as security for a debt, and made by a person carrying on the ordinary business of a banker, is within that statute, and ought to be registered in order to be valid as against creditors under a trust deed executed pursuant to the provisions of that act. *Id.*

A deposit of deeds as security for a debt, accompanied by a memorandum stating the purpose of such deposit, constitutes a conveyance under that statute, and might have been registered, and ought to have been registered, even though the stoppage of payment by the banker took place within one month after its date. *Id.*

A trust deed so executed will be valid for all purposes affecting the distribution of the estate among the creditors, though it should be followed by a general bankruptcy. *Id.*

The 10th section of that statute, which relates to the approval of a trust deed by the majority of the creditors, is merely directory. *Id.*

The 33 Geo. 2 c. 14 (Irish), is repealed so far as banking companies in Ireland are concerned, by the 6 Geo. 4, c. 42, though the former is not mentioned in the latter act, the provisions of the

two statutes being entirely incompatible with each other. *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142. But see *Davies v. Kennedy*, *infra*.

When judgment has been obtained in Ireland against a public officer, a warrant of attorney under 6 Geo. 4, c. 42, s. 12, to confess a judgment in England for a less sum than that for which judgment was obtained in Ireland, is a nullity. *Walker v. M'Dowell*, 3 Jur., N. S. 1078.

The 33 Geo. 2, c. 14 (Irish), is not repealed by 6 Geo. 4, c. 42, contrary to the opinion of Lord St. Leonards, expressed in *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 185, but still regulates all banking transactions in Ireland. Per Walshe, M. R., in *Davies v. Kennedy*, 17 W. R. 305; 3 Ir. Eq. R. 31; and O'Hagan, C., 3 Ir. Eq. R. 668.

**What are Banking Companies.**—A company called "The District Savings Bank" was registered in 1858 under the Joint-Stock Companies Act of 1856, with limited liability, but was never registered under the acts of 1857 and 1858 relating to banking companies, and its shares were of 1*l.* each. Its objects were to receive deposits, to grant loans on security, and to conduct the business of emigration agents. Money could not be drawn out by cheques payable on demand, but could only be withdrawn after notice, and the company kept banking accounts with two banks in London:—Held, that it was not a banking company within the meaning of the acts relating to such companies. *Coe, Ex parte*, 3 De G., F. & J. 335; 31 L. J., Bk. 8; 10 W. R. 138.

Where a banking co-partnership had once begun to carry on the trade and business of bankers, and issued notes accordingly, but subsequently stopped payment, and merely kept the establishment open for the purpose of paying their notes and winding up the affairs of the concern:—Held, that they still continued to be a banking co-partnership, so as to be entitled to sue by their public officer. *Davidson v. Cooper*, 11 M. & W. 778.

**Branches.**—A banking company was established in 1836 by a deed, which provided that the business of the company should be carried on at D., and such other places as might afterwards be chosen with the consent of all the directors. In 1839 a branch bank was established at C., which continued until 1843, when an action was brought against one of the shareholders, who executed the deed of 1836, to recover a sum of money deposited at it:—Held, that it might be presumed, either that the branch bank had been established in compliance with the provisions of the deed, or that the shareholder knew of, and was a consenting party to, carrying on business at it. *Crellin v. Culcort*, 14 M. & W. 11; 14 L. J., Ex. 375; 9 Jur. 810.

**Appropriation of Name.**—In an action against a banking corporation a declaration stated that the plaintiff had established a bank, called the Bank of London, and caused the name to be published and affixed to the offices of the bank, and prospectuses to be issued, and that the defendant afterwards fraudulently established another bank under the style of "The Bank of London," in imitation of the Bank of London of the plaintiff, by reason of which he was prevented from carrying on his business at his bank so fully as he otherwise would, and was deprived

of gains and profits:—Held, that the declaration was bad, for not shewing that the plaintiff carried on the business of a banker. *Lawson v. Bank of London*, 18 C. B. 84; 25 L. J., C. P. 188; 2 Jur., N. S. 18. See 25 & 26 Vict. c. 89, s. 20. See also TRADE-MARK.

**Injunction.**—A banking company established in 1878, having offices in Bloomsbury, and intended to deal chiefly with tradesmen in that district, was registered with a name similar to that of a banking company established in 1863, having offices in the city, and dealing principally with wholesale merchants:—Held, that since there was no mala fides on the part of the new company in adopting the name they had taken, the old company was not entitled to an injunction restraining them from using it, and that since the name of the new company had been duly registered, s. 20 of the Companies Act, 1862, had no application to the case. *Merchant Banking Company of London v. Merchants' Joint Stock Bank*, 9 Ch. D. 560; 47 L. J., Ch. 828; 26 W. R. 847. See also TRADE.

## 2. POWER AND AUTHORITY OF DIRECTORS.

**Amalgamation of Banking Companies.**—Two incorporated banking companies, the Bank of Hindustan and the Imperial Bank of China (under powers contained in their articles of association), agreed to amalgamate, the business of the latter company being transferred to the former, and the shareholders in the Imperial Bank of China having the option of taking newly-created shares in the Bank of Hindustan at a premium, part of which was to be paid out of the funds of the Imperial Bank. The directors of the Bank of Hindustan, without pursuing the course pointed out by the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 12, 50, 51, but by a simple resolution passed at one meeting, and confirmed at a subsequent meeting, resolved to create and issue 20,000 new shares of 100*l.* each, for the purpose of carrying out the proposed amalgamation; their power to increase their capital under the articles of association having already been exhausted. They afterwards issued circulars informing the shareholders in the Imperial Bank of the arrangement which had been made, and intimating to them that they had an option to take such new shares on the terms specified. A shareholder in the Imperial Bank, in consequence, in 1864, applied for and obtained an allotment of shares, paid a portion of the deposit and premium thereon, and by his letter of application engaged to pay the residue on a given day. Calls were afterwards made, of which he had notice; but he never repudiated his liability until an action was brought against him in 1867 for non-payment of those calls. In 1868, the supposed amalgamation of the two banks was, by a decree in Chancery, in a suit by dissident shareholders in the Imperial Bank, declared void:—Held, that the directors of the Bank of Hindustan had no power to issue the new shares, and that the shareholder was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in the Bank of Hindustan. *Bank of Hindustan, China, and Japan v. Alison*, 6 L. R., C. P. 54; 40 L. J., C. P. 1; 23 L. T. 616; affirmed on appeal, 6 L. R., C. P. 222; 40 L. J., C. P. 117; 23 L. T. 854; 19 W. R. 505—Ex. Ch.



**To Borrow Money.**—By a deed of settlement, a banking company, called The Bank of Australia, was established as a bank of issue and deposit in New South Wales. The deed contained clauses conferring powers upon the directors for the better management of the concerns of the company; whereby it was declared that they shall have and be expressly invested with full power and authority to superintend, order, conduct, regulate and manage all and singular the affairs and business of the company, to the best of their discretion and judgment, under and subject to the provisions thereafter contained. Such board of directors was empowered to devise and make such provisions, rules, orders and regulations, touching the government, carrying on, and management of the affairs of the company, the same not being repugnant to the general rules and regulations therein contained, as they should think expedient. In 1843, the Bank of Australia became involved in pecuniary difficulties, whereupon the directors applied to the Bank of Australasia for a loan, and borrowed from that bank at various times 154,000*l.*, for which the directors gave their promissory note. Upon the negotiation of this loan, the directors of the Bank of Australia entered into an agreement with the Bank of Australasia, whereby they stipulated that the Bank of Australia should cease to be a bank of issue, deposit and discount, and should become a loan company, and that no transfer of shares or stock should be made without the consent of the Bank of Australasia; they also agreed to wind-up and get in their capital as a loan company. Payment of the note was refused by the shareholders of the Bank of Australia, on the ground that the stipulations contained in the agreement were ultra vires the directors. In an action by the Bank of Australasia on the note, against the Bank of Australia:—Held, first, that the directors of the Bank of Australia had the power of managing partners in an ordinary banking partnership, and that amongst these was the power of borrowing money for the purpose of discharging the existing liabilities of the bank till the assets should be realised, and of discontinuing the bank if they thought such conduct essential to the interests of the shareholders. *Bank of Australasia v. Breillat*, 6 Moore, P. C. C. 152; 12 Jur. 189.

Held, secondly, that the circumstances of the engagements of the directors to repay the loan being accompanied by other stipulations, some of which were ultra vires, did not discharge the bank from liability to repay the loan, as the only effect of those stipulations was, that they could not be enforced. *Id.*

By a deed of settlement of a company, the directors were authorized to borrow, under the seal of the company, such sums as should from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed, not to exceed a certain sum. At a general meeting the directors were authorized to borrow such sums, and at such interest, and for such periods as they might deem expedient, in accordance with the provisions of the deed of settlement. The directors having borrowed 1,000*l.* on bond under the seal of the company:—Held, that the company was liable to repay the amount, whether the resolution was or was not a sufficient authority to the directors to borrow; for though parties dealing with a joint stock

company are bound to take notice of any limitation of the authority of the directors in the deed of settlement, yet where the directors have power to borrow, the lenders of the money have a right to presume that the company which put forward their directors as authorized to borrow, has taken every step requisite to empower them to do so. *Royal British Bank v. Turquand*, 6 El. & Bl. 327; 25 L. J., Q. B. 317; 2 Jur., N. S. 663. Judgment of Q. B. affirmed, 5 El. & Bl. 240—Ex. Ch.

An action was brought on promissory notes; they were at five years' date; attached to each were coupons for half-yearly interest at the rate of five per cent. till the principal would become due. They were issued through a broker employed by bank directors, and the plaintiff paid him the full value. In the advice notes from the broker to the plaintiff the transaction was called a sale of debentures. The money thus raised was employed as capital in starting branches of the bank abroad:—Held, that though the transaction was called a "sale of debentures," yet it appeared to be in substance a loan on the security of the notes; and that assuming that the directors had authority to borrow it for the company, the plaintiff might recover against the shareholders for money lent. *Maelac v. Sutherland*, 3 El. & Bl. 1; 2 C. L. R. 1320; 23 L. J., Q. B. 229; 18 Jur. 942.

Held, also, that the transaction appeared to be so much out of the ordinary course of banking transactions, that the plaintiff could not recover merely on the implied authority given to the managers of a company to do all that was in the ordinary course of the business for which the company was formed. *Id.*

The deed of the company authorized the establishment of branches in all places east of the Cape of Good Hope, and gave full powers to the directors to manage the whole concern; it provided that for the first four years there should be no general meetings. The money raised on the notes was employed in establishing branches; during the first four years dividends were paid by the directors, and afterwards, at three successive general annual meetings, dividends were voted on the supposition that they were derived from the profits of these branches and received by the shareholders:—Held, that the deed authorized the directors to issue notes and borrow money as they had done for the purpose of starting the branches. *Id.*

Held, also, that supposing it had not, the shareholders must be taken to have ratified the means by which the directors had raised the capital for establishing the branches from which the dividends were derived. *Id.*

**Deeds of Settlement of Companies—Loans and Advances.**—A banking company incorporated by charter, which contained a clause declaring that it should not be lawful for the company to advance money on the security of merchandise, advanced money on the faith of receiving as security a preferential lien on the wool of an ensuing clip to be shorn from the sheep of the party in whose favour the advances were made, but who was not in the actual possession of the sheep, though a part owner of the sheep and the agent of the other owners for whose benefit the advances had been made:—Held, in an action of trover by the company on such agreement giving them a preferable lien, that it was maintainable, and that the banking company was entitled to re-

cover for the value of the wool on such preferential lien. *Ayers v. South Australian Banking Company*, 3 L. R., P. C. 548; 40 L. J., P. C. 22; 19 W. R. 860; 7 Moore, P. C. C., N. S. 432.

**Authority to use Trustees' Names in Legal Proceedings.**—The deed of settlement of a banking company contained a proviso that, where property was vested in trustees, the court of directors should have power to direct any actions or suits to be commenced, prosecuted, or defended, on account of the property of the bank, and to direct the necessary parties to such actions or suits to carry them on or defend them, and that such parties should be indemnified out of the funds of the bank. Property was vested in a person, who as one of the trustees of the bank, and who had executed the deed, was made a co-defendant, with two other trustees, in a suit by persons claiming the property adversely to the bank. The solicitors of the bank entered an appearance for him without his knowledge:—Held, that the provision in the deed of settlement operated as an authority to the bank to use the names of their trustees in any action or suit, and that the solicitor of the bank was entitled to enter an appearance for him, and conduct the defence for him. *Heinrich v. Sutton*, 6 L. R., Ch. 220; 24 L. T. 530.

**To bind Shareholders.**—Directors of an unincorporated and unregistered banking company called the Royal Bank of Australia issued promissory notes in this form:—"The Royal Bank ——. We, the directors of the Royal Bank of Australia, for ourselves and the other shareholders of the company jointly and severally, promise to pay to A., or order, for value received on account of the company. (Signed) A. chairman, B. and C. directors, — of Australia:—"Held, assuming that the parties signing were authorized to sign promissory notes on account of the partnership, that this form of note showed sufficiently an intention to bind the company jointly, and that though the attempt to bind the shareholders severally was ultra vires and void, yet the shareholders were bound jointly. *MacLac v. Sutherland*, 3 El. & Bl. 1; 2 C. L. R. 1320; 23 L. J., Q. B. 229; 18 Jur. 942.

Directors of a bank issued instruments in the following form: "Union Bank Post Bill, Calcutta. At sixty days after sight of this our first bill of exchange (second and third of the same tenor and date not paid), we promise to pay, on account of the proprietors of the Union Bank of Calcutta, to the order of C. L. & Co., the sum of Company's rupees 10,000, value received. Signed J. R., W. G., directors." By the deed of settlement, the business of the company was to consist in issuing promissory notes, payable to bearer on demand for any sum not less than eight Company's rupees, and not exceeding 1,000, and bills of exchange payable at such time after date or sight as the directors should fix, to parties who should require the same and deposit the amount of such bills in the bank and in all other branches of business usually transacted by bankers at Calcutta. It was provided, that no promissory notes or bills of exchange should be issued otherwise than of the description and in the manner mentioned. In an action by an indorsee of one of these instruments against a shareholder in the bank:—Held, first, that the

directors had power to bind the shareholders by issuing instruments of that description. *Forbes v. Marshall*, 11 Ex. 166; 24 L. J., Ex. 305.

Held, secondly, that they were in a form which bound the shareholders. *Ib.*

Held, thirdly, that they were substantially made in the name of the partnership firm. *Ib.*

A banking company, established under 7 Geo. 4, c. 46, and 1 & 2 Vict. c. 96, is a quasi corporate body, so as not to be affected by what may be known to each individual shareholder. *Poules v. Page*, 3 C. B. 16; 15 L. J., C. P. 217; 10 Jur. 526.

When, therefore, D., one of the partners of a firm which was a customer of such banking company, was also one of the directors of the company, but his being director gave him no management of the banking accounts, which were conducted by the manager with the concurrence of three managing directors, of whom D. was not one, and the firm dissolved partnership: D.'s knowledge of such dissolution does not operate as a notice to the company. *Ib.*

Knowledge of a particular fact relating to the accounts, by one director of a banking company, is not notice to the company, where that director had no voice in the management of the accounts, and the money transactions of the company were conducted exclusively by a manager under three directors, of whom the director possessing the knowledge was not one. *Carew, In re*, 31 Beav. 39.

When a director is about to commit a fraud, it is to be presumed that he will not disclose the circumstances to his colleagues. *Ib.*

A. fraudulently obtained possession of acceptances from C., and he got them discounted and carried to his account by a banking company, to which he was largely indebted, and of which he was a director and local manager:—Held, under the circumstances, that the bank had notice, and could not be considered bonâ fide owners. *Ib.*

**Directors guaranteeing Debentures of another Company.**—The directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers, and to act in such manner as might appear to them best calculated to promote the interest of the bank, have, when the formation of another company is of importance to the bank, power to guarantee the payment of interest on debentures of that company issued for the purpose of forming it. *West of England Bank, In re, Booker, Ex parte*, 14 Ch. D. 317; 49 L. J., Ch. 400; 42 L. T. 619; 28 W. R. 809.

**In relation to the Salaries of Bank Servants.]**

—The deed of settlement of a banking company contained clauses empowering the directors to pay and allow to the servants of the company such remuneration, salaries and wages as the court of directors should think proper, and to confirm any contract and all acts done by persons acting as directors in relation to the formation and establishment of the company. The provisional directors entered into a contract with a manager to pay him a salary, and if the bank should discontinue business before the term agreed upon to pay him 1,000*l.* a year for three years, such contract to be confirmed by the proprietary, or a board duly authorized:—Held, that the directors alone had power to confirm

that contract by deed. *Wilkins v. Roebuck*, 4 Drew. 281.

**- Provision in Deed of Settlement to dissolve on Contingency—Happening of Contingency—Continuing Bank.]**—The deed of settlement of a banking company provided, that when one-fourth of the capital was lost, the directors should call a meeting, and the company should be dissolved. Considerably more than one-fourth of the capital was lost, and a meeting was called, at which the shareholders resolved to continue the bank. Further losses were made, but no such meeting was called again:—Held, that as the shareholders knew that the bank was going on after more than one-fourth of the capital was lost, the directors were not liable for continuing the bank. *Turquand v. Marshall*, 4 L. R., Ch. 376; 38 L. J., Ch. 639.

The directors of a banking company are not liable to the company for including in their accounts as good, debts which were, in fact, bad, unless they can be fixed with knowledge of the fact. *Ib.*

**To lend Money—Ultra vires.**—A banking company permitted its customers, a railway company, to draw cheques against a sum entered in the books of the bank under the title "Loan Account." The company being insolvent, the claim of the bank was disputed as being an unauthorized loan:—Held, that though the transactions between the banking company and the railway company were recorded in the bank books under the title of "Loan Account," yet they were not the less mere overdrawings in the regular course of a banking business, and that there was no borrowing or loan in the proper sense of the word, which could be questioned as ultra vires. *Waterlow v. Sharp*, 8 L. R., Eq. 501.

A banking company I., the articles of which in general terms gave the directors very ample powers of management, advanced money on the deposit of shares in Company A. The directors becoming alarmed by a judicial opinion that the shares remained within the order and disposition of the depositors, passed a resolution to have the shares transferred into the name of Company I. or its manager. They were accordingly transferred into the name of Company I., the transfers being executed on behalf of Company I. by an agent, not under the common seal. The company was registered as shareholder, sold some of the shares and received the purchase-money, and received the dividends on the rest. Company A. was afterwards ordered to be wound up:—Held, that although the acts of ownership exercised by Company I. over the shares would not have prevented its repudiating them if the transaction had been ultra vires, Company I. was rightly placed on the list of contributories; for that, although buying the shares of another company as a speculation would have been ultra vires, it was within the powers of the company, as bankers, to advance money on the deposit of shares, and to do all such acts as were reasonable and proper for making the security available. *Asiatic Banking Company, In re, Royal Bank of India, Ex parte*, 4 L. R., Ch. 252.

### 3. LIABILITIES.

**Under Companies Act.]**—The Court of Chancery has no jurisdiction under the Companies Act,

1862, s. 100, to order moneys of the company to be repaid by the bankers of the company, unless the moneys can be clearly proved to have been paid directly out of the funds of the company. *Imperial Land Company of Marseilles, In re, National Bank, In re*, 10 L. R., Eq. 298; 39 L. J., Ch. 331; 22 L. T. 598; 18 W. R. 661.

The bankers of a company are not officers of the company within s. 165, and the court has no jurisdiction therefore on a summary application to order them to repay moneys improperly retained. *Ib.*

**For Honouring Cheques of Company.]**—All persons dealing with a company are bound to take notice of its external position, as evidenced by its articles of association and partnership deed; but they are not bound to inquire into its internal management, provided that their transactions with it are such as might legally take place and be consummated under the articles of association. *Mahony v. East Holyford Mining Company*, 7 L. R., H. L. 869; 33 L. T. 383; 9 Ir. R., C. L. 306—H. L.

The articles of association of a company contained provisions as to the appointment of directors, and the drawing of cheques; they also contained a clause validating the acts of the directors notwithstanding any defect in their appointment. Certain persons assumed the office of directors without having been properly appointed, and communicated to the bankers of the company an alleged resolution, in accordance with the articles, as to the form in which cheques were to be drawn. The bank acted upon this communication, and honoured cheques drawn in the manner described. In an action by the official liquidator of the company to recover the amount paid upon these cheques:—Held, that, even without the validating clause, as the bank had dealt bona fide, in a manner authorized by the articles of association, with persons who were the de facto directors of the company, suffered by the shareholders to occupy that position, they were not liable to refund the money so paid. *Ib.*

**For Profits on sale of Shares.]**—Some of the directors of a banking company, whose duty it was, as directors, to watch over and regulate the completion of a contract entered into by S. to take up a large number of new shares in the bank, at his request, and before he had paid for and become the owner of the shares, entered into personal contracts with him to take some of the shares off his hands. They did so, and realized profits by the sale of the shares, and also by the sale of bonus shares issued in respect of the shares so taken by them from S.:—Held, that they must account for all such profits to the bank. *Parker v. McKenna*, 10 L. R., Ch. 96; 44 L. J., Ch. 425; 31 L. T. 739; 23 W. R. 271.

**For Fraud of Agent.]**—An action for deceit will lie against a banking corporation for a fraud committed by its agent, provided the fraudulent act was within the scope of the agent's authority, and the corporation has derived benefit from it. *Mackay v. Commercial Bank of New Brunswick*, 5 L. R., P. C. 394; 43 L. J., P. C. 31; 30 L. T. 180; 22 W. R. 473.

The cashier of a bank, who discharged the duties of manager, by sending a fraudulent answer to a telegram, induced a party to accept certain bills drawn upon them by L., and in-

dorsed to the bank :—Held, first, that it was within the scope of the cashier's authority to send such a telegram. *Ib.*

Held, secondly, that the bank, having obtained the benefit of the bills, was liable in an action for the false representations. *Ib.*

**Representation of Manager.**—The plaintiffs purchased from the New Orleans Bank a bill of exchange drawn on the Bank of Liverpool. The manager of the New Orleans Bank, at the time, told the plaintiffs that there was, or would be at the maturity of the bill, a balance at the Bank of Liverpool more than sufficient to meet the bill, and that there was no doubt it would be paid. The course of dealing between the New Orleans Bank and the Liverpool Bank was that the former drew bills on the latter, and employed them also to collect the moneys receivable on bills remitted to them, the agreement being that the Liverpool Bank was never to be under cash advances, and the funds remitted had always been sufficient to meet its acceptances. Soon after the purchase, the New Orleans Bank suspended payment, and the Liverpool Bank refused to accept the bill. The funds in the hands of the Liverpool Bank were abundantly sufficient to meet all their acceptances for the New Orleans Bank, and also to pay this bill :—Held, that the statements of the manager were merely a correct statement of the course of business between the two banks, and did not give the purchaser of the bill any lien on the funds in the hands of the Liverpool Bank. *Thomson v. Simpson*, 5 L. R., Ch. 659; 39 L. J., Ch. 857; 18 W. R. 1090.

The plaintiff supplied oats to D., a customer of a bank, for the purpose of enabling him to perform a contract with the government for the supply of oats, on the faith of a guarantee given by the manager that, on receipt of the money to be paid by the commissariat department to the bank for D. for the price of the oats supplied to the government by D., the bank would pay the plaintiff out of that money the sum due to him, subject only to the debt due to the bank from D. D. was, at the time, so largely indebted to the bank, that it was practically impossible that there should be any surplus to come to the plaintiff, after payment of the debt due to the bank; but the manager concealed this from the plaintiff. The bank having appropriated the whole of the money to the payment of their own debt :—Held, that on proof of these facts, there was evidence to go to the jury of a false representation on the part of the manager of the bank; that the bank was answerable for such false representation; and that the false representation was properly described in the declaration as that of the bank. *Barwick v. English Joint Stock Bank*, 2 L. R., Ex. 259; 36 L. J., Ex. 147; 16 L. T. 461; 15 W. R. 877.—Ex. Ch.

**For Statements as to Solvency of Customers or Others.**—In an action against the County of Gloucester Bank and K., the manager of one of their branches, for a false representation as to the solvency of an individual, the statement of claim alleged as follows :—That the plaintiffs, through their bankers, Stuckey's Banking Company, caused the following letter to be written and sent to the County of Gloucester Bank : "Private.—Somersetshire Bank, Bristol, Oct., 1875.—We shall feel obliged by your favouring

us with your confidential opinion as to the general character and responsibility in the way of business of J. F. to the extent of 1,000*l.* to 2,000*l.*" That in answer to the letter the County of Gloucester Bank, intending thereby to deceive the plaintiffs and induce them to give credit to J. F., caused a letter of reply to be sent to Stuckey's Banking Company, which was written and signed by K. upon paper belonging to the County of Gloucester Bank, and supplied by them to K. for the express purpose of answering such inquiries, and was in the words following : "County of Gloucester Bank, Stroud, 6th Oct., 1875.—Confidential.—For your private use and without responsibility on the part of this bank or the manager.—Stuckey's Banking Company, Bristol.—Gentlemen,—The person you inquire about is respectable and doing a good business, but we consider his means are not sufficient for his requirements in trade. The amount you state (2,000*l.*) seems rather large for a single transaction.—We are, &c., C. W. Kingdom, manager." The words, "County of Gloucester Bank, Stroud, 1875.—Confidential.—For your private use and without responsibility," &c., were printed upon the paper by the instructions of the County of Gloucester Bank before it was supplied to K. That at the time the reply was written and sent by the defendants, J. F., to their knowledge, was insolvent, and owed more than 1,000*l.* beyond his assets, and was largely indebted to the County of Gloucester Bank, and the defendants were interested in inducing corn merchants to give him credit. That, in consequence of the reply, the plaintiffs were induced to sell and deliver goods to the value of 818*l.* 10*s.* 6*d.* to J. F., on credit, in February, 1876, in which month he filed a petition for liquidation of his affairs, and the plaintiffs lost the whole of the 818*l.* 10*s.* 6*d.* :—Held, that judgment must be given for the defendants, first, on the ground that Bull, as the public officer of the County of Gloucester Bank, was not liable for the misrepresentation of his co-defendant K., the manager; and, secondly, on the ground that the letter in question was expressed on its face to be a confidential communication intended for the private information of the Somersetshire Bank only, and that it was not known to the defendants, at the time the letter was written, that the information was asked for on behalf of the plaintiffs, or that it would be communicated to them. *Hosegood v. Bull and Kingdom*, 36 L. T. 617.

At the request of a customer the manager of the Sheffield Bank wrote to the manager of the Cheltenham Branch of the Gloucestershire Banking Company, "I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing of R., and whether you consider him responsible to the extent of 50,000*l.*" Goddard, who was the manager of the Cheltenham branch, wrote in answer, "I am in receipt of your favour of the 8th instant, and beg to say in reply that R. is the lord of the manor of Charlton Kings, near this town, with a rent-roll, I am told, of over 7,000*l.* per annum, the receipt of which is in his own hands, and has large expectancies, and I do not believe he would incur the liability you name unless he was certain to meet the engagement." Signed, J. B. Goddard, Manager. The representation contained in the last-mentioned letter was false to the knowledge of Goddard, who, in writing it,

acted within the scope of his authority as manager to answer such inquiries, but without making any communication to the directors or other officers of the company:—Held, that the bank was not liable in respect of the misrepresentation, inasmuch as under 9 Geo. 4, c. 14, s. 6, it is necessary that the representation as to credit, &c., should "be made in writing signed by the party to be charged therewith;" and inasmuch as there was no signature by the bank, but that Goddard was personally liable. *Swift v. Jewsbury*, 9 L. R., Q. B. 301; 43 L. J., Q. B. 56; 30 L. T. 31; 22 W. R. 319—Ex. Ch. Overruling on this point the decision of the court below, 8 L. R., Q. B. 244; 42 L. J., Q. B. 111; 28 L. T. 338; 21 W. R. 562, sub nom. *Swift v. Winterbotham*.

**For acts of Manager.**—Two directors of a company wrote a letter to a bank, stating that they, as directors, had appointed C. to be legal manager, and had authorized him to draw cheques upon the account of the company. The directors were not empowered to give C. this authority. On the faith of the letter, advances were made by the bank on cheques drawn by C., purporting to bind the company. There was no imputation of fraud in the transaction. In an action by the bank against the directors to recover the amount so paid on C.'s cheques:—Held, that the law implied a warranty to the bank on the part of the directors, that C. had authority to bind the company, so as to make them responsible to the bank for the advances on the cheques. *Cherry v. Colonial Bank of Australasia*, 38 L. J., P. C. 49; 21 L. T. 356; 17 W. R. 1031.

An agent, but without the knowledge or authority of his principal, and the general manager of a bank without the knowledge or authority of the bank directors, concerted for their own purposes the following scheme, which the court held to be entirely void for fraud, and not binding on the principal. Two accounts were opened with the bank in the respective names of the agent and of the principal. The agent, on behalf of his principal, requested the bank to honour the agent's cheques, and guaranteed repayment, all moneys standing to the credit of the principal to be charged with such repayment. The agent paid to his principal's account 1,500*l.*, belonging to the principal, and drew on his own account for a like sum, which he spent in promoting the scheme. He drew other cheques on his own account, and paid the proceeds to his principal's account as moneys belonging to the principal. Thus in the bank books the agent's account stood with a large debit, and the principal's account stood with an equal credit charged with the guarantee. The principal having brought an action against the bank to recover the whole amount standing to his credit:—Held, that he could recover 1,500*l.*, his own money; but not the residue, which never had been his money. *British and American Telegraph Company v. Albion Bank*, 7 L. R., Ex. 119; 41 L. J., Ex. 67; 26 L. T. 257; 20 W. R. 413.

Guardians of the poor appointed the defendant, who was the manager of a bank, to be their treasurer. He received no remuneration from them nor profit from the sums deposited in his hands, those sums being dealt with by the bank as other funds deposited by customers. The clerk to the guardians allowed L., a clerk in his employ, to draw up orders on treasurer

for payment of money. These orders were paid across the bank counter, as cheques usually are. L. drew up orders in such a manner as to enable himself to increase the amount after they had been duly signed by the guardians and countersigned by the defendant, and he did increase them accordingly by various sums, in most instances by 10*l.*, the syllable "teen" being added after the written word four, six, eight or nine, and a 1 being inserted before the figure 4, 6, 7, 8 or 9, in spaces left by L. for the purpose. The orders thus fraudulently increased were presented at the bank and paid in the ordinary way, and the payment of the excess was due solely to the fact that the defendant's clerks were misled by want of proper caution on the part of the guardians and their clerk in signing the orders. In some cases L. forged the indorsement of payees; in others he both increased the amounts and forged the indorsements. The guardians sued their clerk for negligence in his duty, but settled the action on his consenting to a judge's order to stay proceedings on payment of a certain sum. They then brought a similar action against the defendant:—Held, that the clerk and the treasurer were not joint tortfeasors so as to make the compromise of the action against the one a bar to the action against the other, but, nevertheless, that the plaintiffs were disentitled, by the negligence of themselves and their clerk, to recover against the defendant. *Halifax Union (Guardians) v. Wheelwright*, 10 L. R., Ex. 183; 44 L. J., Ex. 121; 32 L. T. 802; 23 W. R. 704.

Held, also, that although the treasurer was not within the protection afforded to a banker by 16 & 17 Vict. c. 59, yet the account of the guardians must be deemed to have been kept with the bank itself, and the act operated to discharge the bank, and consequently the defendant, its servant, from liability in respect of the payment of the orders of which the indorsements were forged. *Ib.*

A. kept a deposit account at a banking company. The manager of the bank represented to him that the bank had an equitable mortgage on some houses of a third person, subject to a mortgage of 400*l.*, and advised him to purchase the houses for 595*l.*, 400*l.* to be paid in discharge of the mortgage, and 195*l.* to the bank. A. consented, and took his deposit receipts to the manager at the bank, who, on presenting them to a clerk, obtained from him 595*l.* The manager then gave A. a receipt in his own name, stating that 195*l.* was the balance of purchase-money of the houses, and that 400*l.* was deposited with him to pay off the mortgage. He afterwards absconded with the 595*l.* A. having brought an action against the bank to recover the money, the jury found that the manager intended to make A. believe, and A. did believe, that the manager was acting in the transaction as agent for the bank:—Held, that the bank was responsible for the money. *Thompson v. Bell*, 10 Ex. 10; 2 C. L. R. 1212; 23 L. J., Ex. 321.

A manager of a bank obtained the signature of A. to a cheque, purporting to be drawn upon the bank by A., under the pretence that it was a receipt (A. being unable to read it), and then paid him a private debt of his own with the bank's money. The transaction was entered in the books of the bank as a loan from the bank to A., upon his cheque:—Held, that the banker was not entitled to maintain an action against A. to recover back the money, the cheque having been

obtained by the fraud of his agent. *Forster v. Green*, 7 H. & N. 881 ; 6 L. T. 390.

C. entered into the service of bankers, as their clerk, at B., and gave a bond, with sureties, for the faithful discharge of his duties, and they covenanted to make good all losses which might accrue to the bankers through the negligence of C. D., a customer of the bank, lived twelve miles from B., and requested the bankers to send over a person to receive his rents. C. was accordingly sent over, received the cash from D., and lost it on his way home. In an action against the sureties for the amount of money lost by C., the jury found that it was not the custom for bankers at B. to send over and receive money from their customers in the country :—Held, that the money was received by C. in the course of his employment as bankers' clerk, and that the receipt of the money by C. was a receipt by the bankers. *Melville v. Doidge*, 6 C. B. 450 ; 18 L. J., C. P. 7 ; 12 Jur. 922.

#### 4. MANAGER AND CLERKS.

**Manager—Action against—Evidence—Questions as to Duties.**—Where, in an action against an acceptor of a bill of exchange, purporting to be accepted "per proc. the Tipperary joint-stock bank, W. K. manager," upon an issue raised upon a traverse of the acceptance, W. K., being called as a witness, was asked, on the part of the plaintiff, whether it was part of his business, as manager, to accept bills of exchange for the bank, which was objected to by the defendant :—Held, that the question was admissible. *Ere v. McDowell*, 14 Ir. C. L. R. 314.

An entry, contained in a book belonging to the bank, purporting to be a copy of a circular informing the customers of the bank that W. K. had been appointed manager, and had been empowered to sign all documents and indorse all bills on account of the bank, was admitted at the time as secondary evidence on the part of the plaintiff, of the issuing of the original circular :—Held, that in the absence of evidence of the sending of the original to the customers of the bank, the evidence was inadmissible. *Ib.*

The defendant's counsel proposed to ask the manager of another bank whether the bill of exchange sued on was one which, in the ordinary course of business, a bank, according to banking usages, would accept for an inland customer :—Held, that the question was proper. *Ib.*

He also proposed to ask the witness whether a bill, accepted in the same way as the above, would, according to the course of trade and bankers, put a party upon enquiry as to the authority of an acceptance :—Held, that the question was proper. *Ib.*

He also proposed to ask the witness whether authority to indorse was authority to accept :—Held, that the question was inadmissible. *Ib.*

The judge having told the jury that if they believed that W. K., as manager of the bank, signed the bill by direction of J. S., and that J. S. was a director at the time, the acceptance was binding on the bank :—Held, having regard to the fact that the bill was accepted per procuration, and that the deed of partnership required three directors to form a court, and empowered the court of directors to make regulations respecting the accepting of bills, that the direction was wrong. *Ib.*

**—Action against, by Bank.**—A declaration in an action against the manager of a banking company, after alleging the nature of his duties as manager, stated that he did not nor would take due and proper care not to advance the money of the company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills and notes ; and negligently and improperly advanced the money of the company to persons of doubtful, insufficient and bad means and credit, and on doubtful, insufficient and bad securities, and discounted and renewed bad and forged bills and notes, and wholly neglected to take due and proper care, or to use or employ proper skill and diligence in and about the management of the affairs of the bank, and the discharge of his duties of manager. Plea, that the deed of settlement of the company contained a clause, which provided that none of the directors, trustees or other officers should be answerable or accountable for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company might be placed out or invested, or for any loss, damage or misfortune which might happen to the moneys, funds, effects or property of the company, unless the same should happen in consequence of the wilful neglect or default respectively of such director, trustee or other officer of the company ; that he was manager and an officer of the company within the meaning of the deed of settlement, and was employed as such upon the terms of the clause ; and that the breaches to which the plea was pleaded did not happen by reason or in consequence of his wilful neglect or default as manager :—Held, that the plea was a good answer as to so much of the breach to which it was pleaded. *Ward v. Greenland*, 19 C. B., N. S. 527.

When in an action by a banking company against their late manager and cashier to recover moneys belonging to the bank, alleged to have been improperly applied in discounting bills for his own advantage, for the benefit of parties and companies with whom he was connected, and in which he was interested, it appeared that such transactions were all in the ordinary course of the business of the bank ; that he had not exceeded the power and authority with which he was entrusted ; and that no case of bad faith could be proved against him :—Held, that no such action could be sustained. *Bank of Upper Canada v. Bradshaw*, 4 Moore, P. C. C., N. S. 406 ; 1 L. R., P. C. 479.

**—Liability of Banker for acts of.]—See preceding sub-heading.**

**—Authority of, to Prosecute on behalf of Bank.]—**In an action for a malicious prosecution against an incorporated banking company the jury found that the same had been authorized on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution. A rule nisi to enter a nonsuit or for new trial was discharged :—Held, on appeal, that, assuming the prosecution to have been authorized by W., the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect. *Bank of New South Wales v. Owenston*,  
U 2

4 App. Cas. 270; 48 L. J., P. C. 25; 40 L. T. 500—P. C.

The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to shew that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorised to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to shew commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence must be given of a state of facts which shews that such exigency is present, or from which it might reasonably be supposed to be present. Rule made absolute for a new trial. *Ib.*

**Cashiers.**—A cashier has a general authority to part with his employer's money in payment of such cheques as he may think genuine. *Reg. v. Prince*, 11 Cox, C. C. 193; 1 L. R., C. C. 150; 38 L. J., M. C. 8; 19 L. T. 364; 17 W. R. 179.

Where, therefore, money has been obtained from a cashier at a bank on a forged cheque knowingly, it does not amount to larceny, but to obtaining the money by false pretences. *Ib.*

**Clerks.**—Any one employed in a bank under the principals to carry on the business of the bank, whether called secretary, manager, accountant, cashier, or by any other name, is a clerk, and if at the head of his department, is a chief clerk within 9 Geo. 4, c. 23, for verifying country bank issues of bills and notes. *Reg. v. Greenland*, 10 Cox, C. C. 377; 1 L. R., C. C. 65; 36 L. J., M. C. 37; 15 L. T. 589; 15 W. R. 460.

## 5. STAMP OFFICE RETURNS.

**As Evidence—When admissible.**—Under 7 Geo. 4, c. 46, s. 5, which requires that copies of the annual accounts of banking companies shall be verified by the oath of the public officer, taken before any justice of the peace, and in Schedule (A.) contains a form of such affidavit, ending, "Sworn before me, justice of the peace in and for the said county."—Held, that a return, which appeared on the face of it to be verified "before J. L." without adding that he was a justice of the peace, was receivable, it being shewn that J. L. was in fact a justice. *Bosanquet v. Woodford*, D. & M. 419; 5 Q. B. 310; 13 L. J., Q. B. 93; 8 Jur. 242.

The act requires that such return shall be delivered at the stamp office every year "between the 28th February and the 25th March."—Held, not necessary, in order to make the copy of such return admissible, that it should be shewn on the face of such copy or otherwise that the return had been delivered at the stamp-office within the specified time. *Ib.*

In a sci. fa. against proprietors, on a judgment against a public officer:—Held, the lists of the proprietors, filed at the stamp-office, but not within the time limited by the act, are not receivable in evidence, as against the plaintiff, to shew that at a given time the garnishees were not proprietors. *Prescott v. Buffery*, 1 C. B. 41.

On the trial of an indictment for forgery,

with intent to defraud "H. D., public officer of a district bank," he was called, and stated himself to be so; and an examined copy of the return forwarded to the stamp-office, in which he was stated to be so, was put in. This copy had neither the affidavit at the close of the return, nor the signature, and the date was left blank, but it was not objected that the return did not relate to the period of the uttering:—Held, sufficient proof that H. D. was the public officer. *Reg. v. Carter*, 1 C. & K. 741; 1 Den. C. C. R. 65.

The certified copy of the return delivered to the commissioners of stamps is evidence of the fact therein stated; and it is unnecessary to prove that the affidavit on which it is founded was made by the public registered officer of the company. *Steward v. Dunn*, 12 M. & W. 655; 1 D. & L. 642; 13 L. J., Ex. 324; 8 Jur. 218.

A certified copy of such a return describing the affidavit as having been made by "W. D., one of the directors of the company," and whose name also appeared in the return as one of the directors and public officers of the company, is sufficient. *Ib.*

A return made in March, 1841, on the affidavit of W. D., the public registered officer of the company, is presumptive evidence that W. D. was public registered officer of the company in November, 1842. *Ib.*

In order to prove that a defendant was a shareholder in the company at the time of issuing a writ of scire facias, a return made to the stamp-office some months previously, having been shewn:—Held, that a similar return, at the corresponding period of the following year, but subsequent to the issuing of the writ, was receivable. *Bosanquet v. Shortridge*, 4 Ex. 698; 19 L. J., Ex. 221; 14 Jur. 71.

## Not the only Evidence—as to Public Officer.]

—In an action by such officer on behalf of a banking company, the return to the stamp-office is not the only admissible evidence of his being one of the public officers, but it may be proved aliunde. *Edwards v. Buchanan*, 3 B. & Ad. 788; *S. P.*, *Reg. v. Brand*, 8 C. & P. 143; *Armitage v. Hamer*, 3 B. & Ad. 793.

—**As to Existence of Bank.**—So the returns are not the only evidence to prove the existence of a banking company. *Rez v. James*, 7 C. & P. 553.

## Delivery of Account not a condition precedent to suing.]

—To an action by a banking company, as indorsees of a note, against indorser, a plea was, that the company, between the 25th May and 25th July, 1847, did not deliver at the stamp-office an account or return pursuant to 7 Geo. 3, c. 67:—Held, that the plea was bad, as the delivery of the account to the stamp-office was not a condition precedent to the right of the company to recover on the note. *Bonar v. Mitchell*, 5 Ex. 415; 19 L. J., Ex. 302.

**Liability of Shareholders.**—A memorial of shareholders in a banking company, under 7 & 8 Vict. c. 113, is not vitiated by not being strictly conformable to the act; and a person whose name appears on the last delivered memorial is liable as a shareholder, notwithstanding the memorial is headed as a return made in pursuance of 7 Geo. 4, c. 46, instead of 7 & 8 Vict.

c. 113, and is not made within the period of the year directed by sect. 16 of 7 & 8 Vict. c. 113, and verified on oath, instead of by declaration under 5 & 6 Will. 4, c. 62. *Dossett v. Harding*, 1 C. B., N. S. 524; *S. P., Powis v. Harding*, 1 C. B., N. S. 533; 26 L. J., C. P. 107; 3 Jur. N. S. 139; *Daniel v. Royal British Bank*, 1 H. & N. 681; *Henderson v. Same*, 7 El. & Bl. 356; 1 H. & N. 685, n.; 26 L. J., Q. B. 112; 3 Jur., N. S. 111.

The fact of the name of a party appearing on the register of shareholders is *prima facie* evidence of his being a shareholder, although the register may be informal. *Id.*

A shareholder whose name is properly inserted in the last return or memorial, filed at the stamp-office, cannot get rid of his liability under 7 & 8 Vict. c. 113, s. 21, by a subsequent *bona fide* transfer of his shares. *Id.*

#### 6. PUBLIC OFFICER.

**Is proper Person to Sue for Bank.**—The 7 Geo. 4, c. 46, s. 9, which enacts that banking companies under that statute shall sue in the name of their public officers, is obligatory, not permissive. *Chapman v. Milcain*, 1 L. M. & P. 209; 5 Ex. 61; 19 L. J., Ex. 238; 14 Jur. 251.

The creditors of a company carrying on the business of bankers in England, for which a public officer resident in England has been appointed in the manner prescribed by the 7 Geo. 4, c. 46, must sue the company in the manner pointed out in the 9th section of it; it is not competent to waive that mode, and sue the individual members at common law. *Steward v. Greaves*, 2 D., N. S. 485; 10 M. & W. 711; 12 L. J., Ex. 109; 6 Jur. 1116.

**When not stating that he sues as such.**—A plaintiff sued as payee of a note payable on demand to "The Manager of the Provincial Bank of England," but did not sue as a public officer:—Held, that upon proof that he was in fact the manager, and that a demand had been duly made on behalf of the bank, he was entitled to recover; and that, in the absence of a plea that the bank was established under 7 Geo. 4, c. 46, and that the plaintiff was not the public officer, it was not necessary for the plaintiff to shew that he was, nor for the defendant to shew that he was not such public officer. *Robertson v. Steward*, 1 Scott. N. R. 419; 1 M. & G. 511.

A declaration commenced by stating, that "A., one of the public officers of certain persons united in co-partnership for the purpose of carrying on the trade or business of bankers in England, according to 7 Geo. 4, c. 46," and that the defendant was indebted to the plaintiff, for work and labour of the co-partnership as bankers of and for the defendant, at his request:—Held, that it sufficiently appeared from the whole record, that the co-partnership was carrying on the business of bankers according to the act, so as to enable them to sue by their public officer. *Davidson v. Bower*, 5 Scott. N. R. 538; 2 D., N. S. 115; 4 M. & G. 626; 12 L. J., C. P. 110; 6 Jur. 538.

**Continuation of Office.**—A public officer of a banking company is presumed to continue so until the contrary is shewn. *Steward v. Dunn*,

12 M. & W. 655; 1 D. & L. 642; 13 L. J., Ex. 324; 8 Jur. 218.

**Judgment Entered in Name of.**—Where a warrant of attorney is given to three trustees of a bank to secure a debt due to the co-partnership, the judgment thereon is properly entered up in the name of the public officer for the time being. *Bell v. Fisk*, 12 C. B. 493.

**Must Sue by Himself.**—An action can only be brought in the name of one of the public officers; but where it was brought by two, the court allowed an amendment by striking out the name of one. *Holmes v. Binney*, 6 Scott, 346; 4 Bing., N. C. 454.

**Change of Name of Bank.**—In 1833, a bank was established by the name of the Mirfield and Huddersfield District Banking Company. In 1836, H. and C., bankers, relinquished their business in favour of, and took shares in, this company; and it was subsequently agreed that the title of the bank should thenceforth be the West Riding Union Banking Company; that the capital should be increased by the creation of new shares, and that additional directors should be appointed:—Held, that the public officer of the West Riding Union Banking Company might, notwithstanding the change of name, and the accession of new proprietors, maintain an action on a guarantee given to the Mirfield and Huddersfield District Banking Company, before their junction with H. and Co., for advances made by them. *Wilson v. Craven*, 8 M. & W. 584.

**Removal of.**—A deed constituting a banking company, contained a stipulation that if any person chosen to act as public officer should become bankrupt, he should be disqualified, and his office become vacant:—Held, that this must be construed to mean that his office was to be void at the election of the company; but if, after the bankruptcy, the company treated and held him out to the world as its public registered officer, it might sue and be sued in his name. *Steward v. Dunn*, 12 M. & W. 655.

An action commenced in the name of P., a public officer of a banking company, was stayed under a judge's order, with leave to him to sign judgment and issue execution if the sum claimed was not paid by a certain day. P., before that day, was removed, and W. substituted in his stead. On an affidavit of these facts, a motion was made for leave to enter a suggestion of the removal of P., and of the substitution of W., and to sign judgment, and issue execution. The court was of opinion that the proper course was to move for a rule nisi to enter a suggestion, with a *nient dedire*. *Paterson v. Ironside*, 14 Jur. 722, n.

A cognovit having been given in an action by a public officer, by which it was provided that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution:—Held, to be sufficient to authorize signing judgment in the name of another public officer upon a suggestion being entered of the removal of the original officer. *Webb v. Taylor*, 1 D. & L. 676; 13 L. J., Q. B. 24; 8 Jur. 39.

In an action by such public officer, judgment having been entered up and execution issued in his name after he had ceased to be public



officer, the court permitted a suggestion of his removal and the name of another officer to be entered nunc pro tunc on the roll, and the judgment and ca. sa. to be amended by the insertion of his name without costs, though the defendant had been arrested, and had applied to set aside the proceedings for irregularity. *Id.*

**Death of.]**—T., who sued as a public officer, died, after issue joined. The nisi prius record was made up as though he were alive. The venire was awarded as between T. and the defendant. No entry was made on the plea roll of T.'s death, or of the appointment of B. as a new public officer; but a memorandum was afterwards entered upon the nisi prius record of these facts, but not by way of suggestion, nor followed by any confession by the defendant, or a nient dedire. The cause was entered for trial in the name of B., and was tried by the jury, returned to the venire between T. and the defendant. Notice was given to the defendant that such entry would be made, and the cause tried. The defendant appeared under protest, and the verdict was for B.:—Held, that the entry on the nisi prius record was irregular, and did not authorize the trial of the cause in the name of B. *Barnevall v. Sutherland*, 9 C. B. 380; 19 L. J., C. P. 298; 14 Jur. 720.

A public officer died after issuing a ca. sa., but before execution:—Held, that it was not necessary to bring a sci. fa., and that defendant was therefore not entitled to be discharged on the ground that the action had abated. *Todd v. Wright*, 16 L. J., Q. B. 311; 11 Jur. 471.

**Action by—Claim.]**—In an action by a public officer, it is sufficient to state in the declaration that he is the manager of a co-partnership established for the purpose of banking; and that he has been duly named and appointed as the nominal plaintiff on behalf of the co-partnership, without stating expressly that he has been named as manager, or that the co-partnership has been established under the act. *Christie v. Peart*, 7 M. & W. 491; 9 D. P. C. 201.

A declaration described a plaintiff as "one of the present public officers of persons united in co-partnership for the purpose of carrying on the trade and business of banking in England, according to the statute:—"Held, bad for not stating that the co-partnership was carrying on the trade and business of bankers, or had carried on such trade. *Fletcher v. Crosbie*, 9 M. & W. 252; 1 D., N. S. 149.

A declaration commenced by stating that M., the secretary for the time being of the company, complains of C. D., who has been summoned to answer the plaintiff, as such secretary, by virtue of a writ. The plaintiff having obtained a verdict, the defendant brought error, on the ground that it did not appear that he was secretary at the time the writ was issued:—Held, on motion to set aside the writ of error as frivolous, that it sufficiently appeared that the plaintiff was secretary at the commencement of the suit. *McIntyre v. Miller*, 2 D. & L. 708; 13 M. & W. 725; 14 L. J., Ex. 180; *S. P., Esdaile v. Maclean*, 15 M. & W. 277; 16 L. J., Ex. 71.

In an action in the name of a public officer, it is not necessary to allege in the declaration that the plaintiff is a member of the company, that

he is resident in England, or that he has been duly registered; it is sufficient to describe him as one of the public officers of the company, duly appointed. *Spiller v. Johnson*, 6 M. & W. 570; 9 D. P. C. 368; 4 Jur. 367.

Two plaintiffs on the part of a banking company having sued as public officers, where, according to 7 Geo. 4, c. 46, s. 1, the action should have been brought by one only, the court allowed them to set aside proceedings on payment of costs, even after issue delivered. *Holmes v. Binney*, 4 Bing., N. C. 454; 6 Scott, 346; 1 Arn. 203.

**Defence.]**—In an action by a public officer the court allowed a plea, denying that the co-partnership was, at the commencement of the action, carrying on the business of bankers, in addition to non assumpsit, and accord and satisfaction. *Roe v. Fuller*, 7 Ex. 220; 21 L. J., Ex. 104.

**Action against—Claim.]**—A declaration in scire facias that the plaintiff recovered against G., one of the public officers for the time being of certain persons united in co-partnership for the purpose of carrying on the business of bankers in England, of which co-partnership G. was a member, residing in England, and had been duly nominated, and before and at the commencement of the suit had been, and at the time of the judgment was, one of the public officers of the company, a certain debt and costs, whereof G., as such public officer, is convicted, as by inspecting the rolls appears:—Held, that the declaration was bad for omitting to state that the debt recovered against G. was due and owing from the company to the plaintiff. *Ness v. Fenwick*, 2 Ex. 598.

**Defence.]**—The court will not allow a defendant, sued as public officer, to traverse the allegation, that he was such officer at the commencement of the action, where the company are the real defendants, and there are pleas which go to the merits of the action. *Needham v. Law*, 11 M. & W. 400; 12 L. J., Ex. 316; 7 Jur. 404.

In an action against a banking co-partnership sued in the name of their officer, the court disallowed a plea of his bankruptcy, there being other pleas on the record, and the company undertaking not to sue out execution against him or his individual estate. *Steward v. Dunn*, 2 D., N. S. 742; 11 M. & W. 63; 12 L. J., Ex. 213; 7 Jur. 178.

**Interrogating.]**—In an action by a banking co-partnership, suing in the name of a public officer, interrogatories may be administered to him. *McKewan v. Rolt*, 4 H. & N. 738; 28 L. J., Ex. 380; 5 Jur., N. S. 714.

**Judgments against.]**—Where a plaintiff obtains judgment against a public officer, he may issue execution against him without suing out a scire facias. *Harwood v. Law*, 7 M. & W. 203; 8 D. P. C. 899; 4 Jur. 1137.

Judgment was obtained in a court of record at Dublin against an official manager of an Irish Banking Company for a large sum. The amount due was reduced by subsequent payments, in the name of the defendant. The plaintiff executed a warrant of attorney under 6 Geo. 4, c. 43, s. 12,

to confess judgment for the sum remaining due; and judgment was signed in the Queen's Bench in this country. Subsequently, the plaintiff executed a fresh warrant, to confess judgment for the sum for which judgment had been signed in the Irish court, and judgment was signed accordingly. On this latter judgment a *scire facias* issued against a shareholder. On his motion to set it aside:—Held, that the provisions in 6 Geo. 4, c. 42, s. 12, for enforcing judgments against the public officers of banking companies in Ireland, were, by 11 & 12 Vict. c. 45, made applicable to judgments against official managers, and that the judgment on which the *scire facias* proceeded was regular. *Walker v. Goodyere*, 7 El. & Bl. 960; 3 Jur., N. S. 1078.

**Attachment of Funds.]**—A banking corporation in the city of London cannot be made garnishees in the customary process of foreign attachment, nor can a writ of *fieri facias* issue against their goods. *London Joint Stock Bank v. London (Mayor, &c.)*, 1 C. P. D. 1; 45 L. J., C. P. 213; 33 L. T. 781.

**Operation and Service of Notices.]**—A notice left at a bank after business hours only operates as notice to the bank from the time when in the ordinary course of business it is opened and read. *Calisher v. Forbes*, 7 L. R., Ch. 109; 41 L. J., Ch. 56; 25 L. T. 772; 20 W. R. 853.

## 7. MEMBERS OF.

**Who are—Transferees or Transferors.]**—A deed of settlement of a banking company allowed shareholders to dispose of their shares upon obtaining the consent of the board of directors, which was to be testified by a certificate in writing, signed by three of the directors. During the time the company carried on business a managing director received applications for sales of shares, consented, and signed the certificate of consent, which was afterwards signed by two other directors, but was never signed by the three assembled as a board. S., a shareholder, had at various times, with such consents, sold his shares. The directors under 7 Geo. 4, c. 46, made a return to that effect. The company failed, and the directors passed a resolution declaring that there had been no valid transfer of the shares of S.:—Held, that as between him and the company the consents given by the directors, although informal and irregular, were valid, and that they could not afterwards treat S. as a member of the company. *Bargate v. Shortridge*, 3 Eq. R. 605; 5 H. L. Cas. 297; 24 L. J., Ch. 457.

By the constitution of a banking company, any proprietor wishing to transfer his shares to any person, was to give seven days' notice of his intention to the court of directors, and was to comply with certain other forms; subject thereto, he could, with the consent of the court of directors, transfer his shares by deed, and thereupon become freed of responsibility to the company in respect of his shares. It became the custom at once to prepare the deed of transfer, and then, upon the consent of the court of directors, the transfer was completed:—Held, that the consent of the court was not thereby waived; and that in the absence of such consent, or of any act by the court recognizing the transferee, the transferor remained liable to the

company. *Walton, Ex parte, and Hue, Ex parte*, 26 L. J., Ch. 545; 3 Jur., N. S. 853.

Under a supplemental charter, a banking company, being empowered to issue new shares, a fraudulent report of the company's affairs was made by the directors and adopted at a general meeting of the shareholders. In June, 1856, M., a customer of the bank, took twelve of these new shares, executed the deed, and received the share certificates. In the next return to the stamp-office his name was not inserted as a shareholder, and in the monthly balance-sheet the sum paid by him for the share was treated as a debt from the bank. In his pass-book he was credited with interest at four per cent. upon the sum he had paid on account of the shares. He also attended two meetings of shareholders. In September, 1856, the bank stopped payment, all the new shares not having been issued; and the affairs of the company were afterwards ordered to be wound up:—Held, that he was a contributory in respect of the twelve shares, and was not entitled to claim as a creditor in respect of the deposit paid for his shares. *Royal British Bank, In re, Mixer, Ex parte*, 4 De G. & J. 575; 28 L. J., Ch. 879.

**—Husband and Wife.]**—A wife dum sola became an original shareholder in a banking co-partnership established under 7 Geo. 4, c. 46; after her marriage, but without her husband's knowledge, she received dividends and paid calls in her maiden name, and in that name was returned to the stamp-office as a shareholder, but never executed any deed of settlement. The husband was aware that his wife was a shareholder, but never interfered in the matter, and when applied to for a call said he would have nothing to do with it. The deed of settlement provided that the husband of any female shareholder should not be a member in respect of such shares, but might either dispose of the shares so vested in him, or at his option become a member on complying with certain requisitions:—Held, that he was not a member of the company. *Dodgson v. Bell*, 5 Ex. 967; 1 L., M. & P. 812—Ex. Ch.

A woman, with the consent of her husband, purchased, with the proceeds of her separate estate, shares in a banking company, and was registered as owner. Her husband received some dividends and signed receipts as the agent of his wife; he also attended a meeting of the company, at which none but shareholders were entitled to be present. The deed of settlement provided, that the husband of any female shareholder should not be a member in respect of such shares, but should be at liberty to sell them, or at his option to become a member on complying with certain requisitions, as to giving notice of his desire to become a member, specifying the shares in respect of which he claimed to be a member, which the husband did not do:—Held, that he was not a member. *Ness v. Angus*, 3 Ex. 805; 6 D. & L. 645; 18 L. J., Ex. 470; 13 Jur. 874.

The 19 & 20 Vict. c. 47, did not take away the liability of the husband of a female shareholder to be placed on the list of contributories in her right in respect of shares in a banking company belonging to her, but in respect of which he had done no act to make himself a member of the company. *Northumberland and Durham District Banking Company, In re, Luard, Ex parte*,

1 De G., F. & J. 533; 29 L. J., Ch. 269; 6 Jur., N. S. 381; 8 W. R. 297.

Mrs. L. was, before her marriage, registered owner of shares in a banking company. Upon her marriage a settlement was executed, by which the shares were assigned to trustees upon trust, excluding the husband, but the trustees did not accept the trust, and the shares continued registered in the lady's former name. It was not proved that the company had notice of the marriage or of the settlement. The company was afterwards registered under the Banking Companies Act of 1857, 20 & 21 Vict. c. 49, and wound up under the acts of 1856 and 1857:—Held, that the name of the husband in right of his wife must be placed on the list of contributories as well as that of the wife. *Id.*

— **Personal Representatives.**—A deed of settlement of a banking co-partnership provided that the executor of a deceased shareholder should not be a member of the company in respect of such shares, but should be at liberty to sell the shares, or at his option to become a member, on complying with certain provisions, and that if he did not elect to become a member he was not to be entitled to any dividend accruing due after the testator's death:—Held, that an executor who received a dividend which accrued due after the death of his testator, but had not complied with the provisions of the deed of settlement, was not a member. *Ness v. Armstrong*, 4 Ex. 21; 7 D. & L. 73; 18 L. J., Ex. 473; 13 Jur. 874.

A person in 1844 bought shares in a banking company constituted under 7 Geo. 4, c. 46, and had them transferred to him. The company afterwards registered under 20 & 21 Vict. c. 49, so as to come within the Winding-up Act of 1856. He was never entered on the list of shareholders under that act, but had received dividends, and after his death, his executors received dividends, and then sold the shares:—Held, that as he would have been a contributory under the old acts, so his executors were contributories. *Northumberland and Durham District Banking Company, In re, Dixon, Ex parte*, 1 Drew. & Sm. 225; 8 W. R. 623.

A shareholder bequeathed her residuary estate, which included her shares in a banking company, to B, and appointed B. sole executrix. B. proved the will, and in passing her residuary account at the stamp-office, she claimed the shares for her own benefit. For four years she received the dividends on the shares "as executrix of C.;" for the two following years she gave a receipt in her own name, without adding those words. Her name, at the end of the four years, was entered in the dividend register, but without her privacy. No alteration was made in the register. The deed of settlement required certain formalities to be complied with before a legatee or an executrix could become a proprietor in the company, which formalities were not complied with:—Held, that B. was liable as a contributory in her representative character only. *Hertfordshire Banking Company, In re, Bulmer, Ex parte*, 33 Beav. 435; 33 L. J., Ch. 609; 10 Jur., N. S. 462; 10 L. T. 151; 12 W. R. 564.

— **Cestui que Trust or Trustee.**—Shares in a bank were purchased by a solicitor in the names of his brother and his clerk, who held the shares

as trustees for him, but there was no fraudulent object in thus concealing the name of the real purchaser. By the company's deed it was provided that no trust should be recognized, and no transfer of shares should be made without the consent of two directors. Upon the winding up of the company, the names of the two holders of the shares were only placed upon the list of contributories:—Held, that the beneficial owner was not liable to be placed upon the list. *East of England Banking Company, In re, Bugg, Ex parte*, 2 Drew. & Sm. 452; 35 L. J., Ch. 43; 11 Jur., N. S. 616; 12 L. T. 696; 13 W. R. 911.

— **Under the Companies Act of 1862.**—*See COMPANY.*

— **Bankruptcy of.**—A member of a banking company cannot be proceeded against in bankruptcy for a debt due from the company, no judgment for such debt having been recovered against the public officer, although the company may have ceased to carry on business, and an order have been obtained for winding it up, prior to such proceedings in bankruptcy. *Darison v. Farmer*, 6 Ex. 242; 20 L. J., Ex. 177.

#### • 8. ENFORCING JUDGMENTS AGAINST MEMBERS.

*Since the Companies Act of 1862, 25 & 26 Vict. c. 89, the mode and practice of enforcing judgments obtained against the public officers of banking companies unable to meet their engagements are either obsolete or superseded by creditors or individual shareholders being enabled to take proceedings to wind up these companies, and thereby obtain a fair and equal arrangement and liquidation of their debts and liabilities. The following cases relate to the former practice, and are retained, as they may be useful.*

**By Scire Facias.**—The 7 Geo. 4, c. 46, s. 13, in enacting that execution upon any judgment obtained against any public officer for the time being of a banking company may be issued against any member or members for the time being of such corporation or co-partnership, meant an execution against the persons who, at the time of issuing the scire facias, were members of the banking company. *Dodgson v. Scott*, 2 Ex. 457; 6 D. & L. 27; 5 Rail. Cas. 654; 17 L. J., Ex. 321; 12 Jur. 521.

In issuing execution against the members of a banking company, upon a judgment against the public officer, the proper course was to proceed first against those who were members at the time the scire facias issued; then, in the event of an execution against them being unsuccessful, against those who were members at the time of the contract being entered into; then, in the like event, against those who were so at the time of the contract becoming executed; and lastly, against those who were at the time of the judgment being obtained. *Id.*

In order to obtain leave to issue a scire facias against members of the second or subsequent class, all that was necessary to be shewn on the face of the affidavit was a reasonable certainty that any further proceedings against the first or previous class of members would prove ineffectual. *Id.*

It was no cause to shew against a rule for

leave to issue a scire facias against a member who was a member at the time of the contract entered into, on a judgment obtained against the public officer of the banking company, that the judgment was fraudulently confessed to the prejudice of the members. *Ib.*

Execution could not be had against persons who had become members after the contract was completed, but who had ceased to be so before judgment obtained. *Ib.*

Where a party had obtained judgment against a public officer of a banking co-partnership, the proper mode of proceeding to execution against members was by scire facias, and not by suggestion. *Ransford v. Bosanquet*, 2 Q. B. 972; 2 G. & D. 324; 12 L. J., Q. 489—Ex. Ch.

Where a creditor applied for leave to issue a scire facias against the members of the company at the time of the contract, he must have shewn that he made bona fide efforts to render effectual the execution required to be previously issued against the members for the time being. *Bank of England v. Johnson*, 3 Ex. 598; 6 D. & L. 458; 18 L. J., Ex. 238; *S. P.*, *Eardley v. Law*, 4 P. & D. 379; 12 A. & E. 802.

— **Against former Members.**—Where execution issued against one or more members of a banking co-partnership, and no satisfaction had been obtained, and the court saw grounds for believing that a creditor had used due diligence to obtain satisfaction from the existing members of the company, it would allow a scire facias to issue against former members; and it was not necessary that execution should have first issued against all the existing members. *Field v. McKenzie*, 5 D. & L. 172; 4 C. B. 705; 16 L. J., C. P. 203; 11 Jur. 714.

To obtain a scire facias against former members, it was enough to show that execution after scire facias had been issued against several of the present partners, and nulla bona returned; that reasonable inquiry had been made as to the solvency of all, and that there was, on such inquiry, ground for believing that execution would not be effectual against any. On this last point a prima facie case was sufficient. *Harvey v. Scott*, 11 Q. B. 92; 17 L. J., Q. B. 9; 12 Jur. 12.

**Pleas.**—It was no plea to a declaration in scire facias against a member, on a judgment obtained against a public officer, that another writ of scire facias on the same judgment had been sued out against another member of the company. *Nunn v. Lomer*, 3 Ex. 471; 18 L. J., Ex. 247; 13 Jur. 236; *S. P.*, *Burmester v. Cropton*, 6 D. & L. 430; 3 Ex. 397; 18 L. J., Ex. 142; 13 Jur. 237 n.; *Esdaile v. Lund*, 12 M. & W. 607; 2 D. & L. 565; 13 L. J., Ex. 117; 8 Jur. 109.

**Under 7 & 8 Vict. c. 113, s. 13, by Execution.**—A creditor of a banking company incorporated under 7 & 8 Vict. c. 113, could not maintain an action against a shareholder for his debt. His remedy was against the corporation, and execution in the mode prescribed by the statute. *Fell v. Burchett*, 7 El. & Bl. 537; 26 L. J., Q. B. 223; 3 Jur., N. S. 388.

A creditor who had ineffectually issued execution against the property of a banking company established under the 7 & 8 Vict. c. 113, on a judgment obtained against such company, and had complied with all the conditions imposed by

that act, was entitled as of right to have execution granted him against a shareholder, and the court had no discretion in the matter. *Morisse v. Royal British Bank*, 1 C. B., N. S. 67; 26 L. J., C. P. 62; 3 Jur., N. S. 137.

A shareholder whose name was properly inserted in the last delivered memorial remained liable to execution, under 7 & 8 Vict. c. 113, s. 13, although he had subsequently bona fide transferred his shares, and the transfer deed had been duly executed by the transferee, and registered. *Fry v. Russell*, 3 C. B., N. S. 665; 27 L. J., C. P. 153; 4 Jur. N. S. 193.

But if a shareholder died before a judgment was obtained against the company by a creditor, although his name appeared on the memorial of shareholders, which was the existing memorial under 7 & 8 Vict. c. 113, at the time of his death, his executors could not be proceeded against by the judgment creditor. *Powis v. Butler*, 27 L. J., C. P. 249; 4 Jur., N. S. 614; 4 C. B., N. S. 469—Ex. Ch.

A shareholder in a banking company, established under 7 & 8 Vict. c. 113, whose name appeared on the last delivered memorial, on application by a judgment creditor of the company for leave to issue execution against him, could not set up as an answer that he was induced to become a shareholder by the fraudulent misrepresentations of the directors as to the financial position of the company, and that he repudiated the shares as soon as he discovered the fraud. *Powis v. Harding*, 1 C. B., N. S. 533; 26 L. J., C. P. 107; 3 Jur., N. S. 139; *S. P.*, *Daniel v. Royal British Bank*, 1 H. & N. 681; *Henderson v. Same*, 7 El. & Bl. 356; 1 H. & N. 685, n.; 26 L. J., Q. B. 112; 3 Jur., N. S. 111.

A plaintiff who had obtained judgment against a banking company, established under 7 & 8 Vict. c. 113, might proceed by scire facias on the judgment against the shareholders of the company, and was not limited to the remedy given by the 13th section. *Cleeve or Cleeve v. Harwar*, 1 H. & N. 873; 3 Jur., N. S. 190.

**Notice of Proceeding.**—A notice under 7 & 8 Vict. c. 113, s. 13, to a shareholder of an intention to apply to the court or a judge for leave to issue execution against him was not bad for being in the alternative. *Powis v. Harding*, 1 C. B., N. S. 524, 551; 26 L. J., C. P. 107; 3 Jur., N. S. 139.

A joint notice to two shareholders was good on a motion against one. *Ib.*

Personal service of a notice of motion to the person to be charged was not necessary. It was sufficient if the notice was left with a servant at his dwelling-house. *Morisse v. Royal British Bank*, 1 C. B., N. S. 67; 26 L. J., C. P. 62; 3 Jur., N. S. 137.

In a notice a party was described as "John Marshall." In the memorial filed he was described as "John S. Marshall." There was an affidavit of identity:—Held, that the notice was sufficient. *Thomas v. Harding*, 1 C. B., N. S. 555.

## 9. LIABILITY OF PROPERTY OF MEMBERS.

**As regards real Estate.**—The senior master of the Common Pleas having declined to register a memorandum to charge real estate (belonging to a past member of a banking company) against

the public officer, of which a verdict had been obtained, pursuant to 1 & 2 Vict. c. 14, s. 19, and 3 & 4 Vict. c. 82, s. 2, the court refused to compel him to receive the memorandum. *Nees, Ex parte*, 5 D. & L. 339; 5 C. B. 155; 17 L. J., C. P. 15.

Semble, that a plaintiff, in an action against a public officer of a banking company, cannot charge the lands of a shareholder, under 1 & 2 Vict. c. 110, without leave of the court, under 7 & 8 Vict. c. 113, s. 13. *Harris v. Royal British Bank*, 2 H. & N. 535; 27 L. J., Ex. 1.

A creditor having obtained a judgment against an official manager of a banking company, registered the judgment against the real estate of a former shareholder in the company, without issuing a scire facias:—Held, that a court of equity ought to give relief against such registration, as being a cloud on the shareholder's title to his lands. *Hone v. O'Flahertie*, 9 Ir. Ch. R. 119, 497.

— **Former Membership—Left the Bank for Three Years.**—The remedies given by 7 Geo. 4, c. 46, s. 13, are not cumulative, but substitutional for the prior liabilities of partners, and therefore proceedings cannot be had against a party three years after he has ceased to be a member. *Barker v. Buttress*, 7 Beav. 134; 13 L. J., Ch. 58; 8 Jur. 89.

The 7 Geo. 4, c. 46, s. 13, limiting the liability of members to three years after ceasing to be members, has no effect in varying the liability to contribute between partners themselves. *Gouthwaite, Ex parte*, 3 Mac. & G. 187; 20 L. J., Ch. 188; 15 Jur. 137.

## 10. SHARES.

### a. Generally.

**Construction of Deed as to.**—Construction of a deed of association of a banking company, composed of shareholders whose shares had been created at different times, and upon some of which the amount of the shares had, and upon others had not, been required to be paid up, as governing the rights of such several classes of shareholders, with reference to a provision enabling the directors to declare a dividend out of the profits, "and to apply such dividend either as a bonus to be added to the respective shares, or as interest or dividend upon shares, or upon the amount paid up in respect of such shares, or as part bonus and part interest or dividend, or otherwise as they may deem most expedient, and to divide such dividend or bonus into as many equal parts as there shall be shares then held in the capital of the company." *Wilkinson v. Cummins*, 11 Hare, 337.

**Probate Stamp.**—Shares in a banking company purchased by executors with the assets of their testator in the name of a party who was entitled to the dividends for life, are included in the probate stamp, and do not require to be covered by the stamp upon the letters of administration granted to the estate and effects of the party in whose name the purchase was made. *Hennell v. Strong*, 25 L. J., Ch. 407.

If the bankers refuse to transfer the shares after an affidavit made by an executor of the testator in conformity with 48 Geo. 3, c. 149, they do so at the peril of costs. *Id.*

**Doctrine of Survivorship.**—Where A. purchased shares in a bank, and had them transferred into the books of the bank in her own name and that of B., and then died, the rule adopted by the Bank of England as to stock held applicable, and B. was declared entitled to them by survivorship. *Garrick v. Taylor*, 30 L. J., Ch. 211; 9 Jur., N. S. 116; 3 L. T. 460; 9 W. R. 181. Affirmed on appeal, 31 L. J., Ch. 68; 10 W. R. 49—L. J.

**Not within Mortmain Act.**—Shares in a banking company, established under 7 Geo. 4, c. 46, and having an interest in freehold and other lands vested in the trustees of the bank, are not within the Mortmain Act, 9 Geo. 2, c. 36. *Myers v. Perigal*, 11 C. B. 90; 21 L. J., C. P. 217; 16 Jur. 1118.

**Sale and Purchase of.**—Shares were purchased in a banking company, the rules of which provided that no benefit of survivorship should take place between the shareholders. The purchaser caused the transfer of them to be made to herself and another person who lived with her and was called her niece, but was not related to her:—Held, first, that the rules did not exclude the benefit of survivorship at law between the two. *Garrick v. Taylor*, 4 De G., F. & J. 159.

Held, secondly, that having regard to all the circumstances of the case, there was no resulting trust for the purchaser, but that on her decease the co-transferee took the whole interest both at law and in equity. *Id.*

## III. BANK NOTES AND BILLS.

### Right to Issue on Death of Partner in Bank.]

—Under 7 & 8 Vict. c. 32, s. 13, the right of a country bank to issue notes belongs beneficially on the death of a partner to the surviving partners. *Smith v. Everett*; 27 Beav. 446; 29 L. J., Ch. 286.

**Bank Post-bills.**—Bank post-bills, issued by the Bank of England in London, are not made payable at the branch banks by 7 Geo. 4, c. 46, s. 15. *Willis v. Bank of England*, 4 A. & E. 21; 5 N. & M. 478; 1 H. & W. 620.

They were considered by Pollock, C. B., Alderson, B., Platt, B., to be bills of exchange, and by Martin, B., to be promissory notes. *Forbes v. Marshall*, 11 Ex. 167; 24 L. J., Ex. 305.

**Duty on.**—The intention to impose a charge upon the subject must be shewn by clear and unambiguous language. Where by an act of the Cape Colony (No. 6, 1864), "for imposing a duty upon bank notes," which act was assumed to have been validly extended to the province of Griqualand West, it was provided that banks issuing within the colony notes of their own, purporting to be issued within the colony, and so (unless expressed to be payable elsewhere) to be payable by them within the colony, should make a return thereof with a view to the imposition of the duty chargeable by that act; it was held, that the appellant bank, which had a branch within the province, and there put in circulation notes issued by the bank in the colony payable in the colony, but did not issue

any notes payable in the province, was not liable, according to the true construction of the act, to make any return to the respondent, the treasurer of the province, or to pay duty on the notes put into circulation by its branch. *Oriental Bank Corporation v. Wright*, 5 App. Cas. 842; 50 L. J., P. C. 1; 43 L. T. 177—P. C.

Although by s. 10 of the act, banks of issue, liable to make the return prescribed by the act, must include within such return such notes also as they have put into circulation, yet banks which, not issuing any notes purporting to be locally issued, and therefore not liable to make a return, put into circulation within the province their own notes, issued elsewhere, are not in respect thereof liable to the duty imposed by the act. *Id.*

**Verification of Weekly Returns of Issues of Country Banks.]**—An affidavit verifying the return of the issue by a banker of unstamped bills and notes under 9 Geo. 4, c. 23, may be sworn, either before a justice of the peace under s. 7, or before a commissioner to administer oaths in chancery under 55 Geo. 3, c. 184, s. 52, the later enactment being cumulative only. *Reg. v. Greenland*, 10 Cox, C. C. 377; 2 L. R., C. C. 65; 36 L. J., M. C. 37; 15 L. T. 589; 15 W. R. 460.

The manager of a bank is a chief clerk within 9 Geo. 4, c. 24, s. 7, which requires such affidavit to be made by a cashier, accountant or chief clerk. *Id.*

**Notes and Drafts carrying Interest.]**—A banking company stopped payment, and was voluntarily wound up. The debts being paid in full:—Held, that interest at 5l. per cent. was payable on all promissory notes, drafts and other negotiable instruments current at the time of the stoppage, not from the time of the stoppage, but from the respective times of the claims in respect thereof being sent in to the liquidators; the stoppage of the bank not operating to dispense with the necessity of making a demand. *East of England Banking Company, In re, Provincial Banking Corporation, Ex parte*, 4 L. R., Ch. 14; 38 L. J. Ch. 121; 19 L. T. 299; 17 W. R. 18.

The stopping payment by a bank which issues notes payable on demand does not preclude the necessity of demanding payment in order that interest may be payable under 3 & 4 Will. 4, c. 42, s. 28. *Herefordshire Banking Company, In re*, 4 L. R., Eq. 250; 36 L. J., Ch. 806.

**Material Alteration—Erasure of Number.]**—In an action against the Bank of England for the non-payment of notes payable to bearer which had been regularly issued by the bank, it appeared that the notes had been bona fide purchased by the plaintiff for value, but that before the plaintiff took them the notes had been altered by erasing the numbers upon them, and substituting others, with the object of preventing the notes from being traced, as payment had been stopped and a notice issued specifying their numbers:—Held, that although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated, so that the plaintiff could not recover in his action on them against the bank. *Suffell v. Bank of England*, 9 Q. B. D. 555; 51 L. J., Q. B. 401;

47 L. T. 146; 30 W. R. 932; 46 J. P. 500—C. A. Reversing Coleridge, C. J.

**Bona fide Holder of for Value.]**—Bank notes cannot be followed by the legal owners into the hands of bona fide holders for a valuable consideration without notice. *Lowndes v. Anderson*, 13 East, 130; 1 Rose, 99.

For possession is prima facie evidence of property in negotiable instruments. *King v. Nelson*, 2 Camp. 5.

Therefore, in trover, for a bank note, it is not a prima facie case for the plaintiff to prove that the note belonged to him, and that the defendant afterwards converted it; and the defendant will not be called upon to shew his title to the note, without evidence from the other side that he got possession of it mala fide, or without consideration. *Id.*

One who takes a bank note or other negotiable security bona fide, that is, giving value for it, and having no notice at the time that the party from whom he takes it has no title, is entitled to recover upon it, even although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself. *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33.

**Of Stolen Note.]**—A bank note, though stolen, becomes the property of him who gives valuable consideration for it, having no notice or knowledge of the robbery, and in the ordinary course of business, is always treated as cash. *Miller v. Rice*, 1 Burr. 452; 2 Ld. Ken. 189.

The holder of a bank note is prima facie entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence is given to bring it home to his privity. *Solomons v. Bank of England*, 13 East, 135, n.

A money-changer at Paris, twelve months after he had received notice of robbery of bank notes at Liverpool, took one of the stolen notes (for 500l.), at Paris, giving cash for it, less the current rate of exchange, from a stranger, whom he merely required to produce his passport and write his name on the back of the note:—Held, that the circumstance of his forgetting or omitting to look for the notice was no evidence of mala fides. *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33.

A Bank of England note, which had been feloniously stolen in England in February, 1826, was remitted in May, 1827, by a foreign merchant to his correspondent in this country, to whom he was indebted in a sum exceeding the amount of the note. The latter demanded payment: the bank refused to pay, on the ground that the note had been stolen. At the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note:—Held, first, that, in trover for the note, the correspondent must be considered the agent of the foreign merchant, and that he could therefore recover upon his title only; secondly, that, in such action, it having been proved that the note had been stolen, it was incumbent on the plaintiff to shew that the foreign merchant had given full value for it. *De la Chaumette v. Bank of England*, 9 B. & C. 208.

**Bona fides—Question for Jury.]**—A bank note for 1,000l., dated 12th October, 1820, was lost

in London, in April, 1821, and in June, 1822, was presented for change to a money broker in Liverpool, by a person with whom the latter was well acquainted, but who was then in pecuniary difficulties, and he changed it by giving bills, which had some time to run, and cash, deducting a commission, without asking any questions how the holder became possessed of it:—Held, in an action of trover by the true owner against the money broker, that it was for the jury to say whether the defendant had received the note fairly and bona fide in the ordinary course of business, and had given full value for it; and the jury having found for the plaintiff, the court refused to disturb the verdict. *Egan v. Threlfall*, 5 D. & R. 326.

**Stoppage by Bank, Effect of.]**—A. paid a Bank of England note to B., who paid it to C., who presented it at the bank, where it was stopped on the ground that it had been fraudulently obtained from a fundholder:—Held, that although A. paid the amount of the note to C. in discharge of the debt due to him from B., A. could not maintain trover for the note against the Bank of England. *Benjamin v. Bank of England*, 3 Camp. 417.

**Lost Note—Rights of Finder.]**—In actions for money had and received, brought by the owners of lost bank notes, against those who may have got them into their hands without giving value, it is not absolutely necessary for the plaintiffs to give direct evidence of the loss; it is sufficient if such circumstances are shown as satisfy the jury of the fact of the loss. *Holiday v. Sigil*, 2 C. & P. 176.

A person entering a shop found on the floor a bundle of bank notes which had been accidentally dropped by a stranger. The person who lost them could not be found:—Held, that, as against every one but the true owner, the property in the notes belonged to the finder, and not to the owner of the shop, notwithstanding that the finder had immediately on picking up the bundle handed it over to the latter, with a view to its being restored to the true owner if he should return, and the owner of the shop had advertised the finding in the newspapers, the finder not having intended to waive his title, and having before he demanded the notes back, offered to repay the expense of the advertisements, and to indemnify the shopkeeper against any claim. *Bridges v. Hawkenorth*, 21 L. J., Q. B. 75; 15 Jur. 1079

**Halves of Notes.]**—The property in the halves of bank notes, sent in payment of a debt due to the receiver from a third person, with an intention on the part of both sender and receiver that the other halves are to follow, remains in the sender until he sends the second halves; the payment being until then inchoate and conditional. It is therefore open to the sender, at any time before sending the second halves, to disaffirm the transaction, and re-demand the first halves from the receiver, who is liable to an action for refusing to return them. *Smith v. Mundy*, 3 El. & El. 22; 29 L. J., Q. B. 172; 6 Jur., N. S. 977; 2 L. T. 373; 8 W. R. 561.

A bank is bound to pay on the production of the half of a bank note, either with or without an indemnity from the holder. *Redmayne v. Burton*, 2 L. T. 324.

**Indemnity against Loss.]**—A bank note is a negotiable instrument, and the bankers, upon an indemnity being given, will be restrained from setting up the loss as a defence to an action upon the note. *M'Donnell v. Murray*, 9 Ir. C. L. R. 495; 1 L. T. 498.

To an action against the Bank of England on a 10l. note, the bank pleaded that the note was lost. Upon the plaintiff giving an indemnity, the plea was set aside, and the bank thereupon paid the amount of the note into court. The parties being resident, and the cause of action arising, within the jurisdiction of the Sheriff's Court of London:—Held, that the plaintiff was not entitled to costs. *Noble v. Bank of England*, 2 H. & C. 355; 33 L. J., Ex. 81; 9 Jur., N. S. 718; 8 L. T. 733; 11 W. R. 716.

**Country Bank Notes.]**—Where a servant received on behalf of his master, in payment of goods sold, country bank notes, at one o'clock on Friday afternoon, and paid them to his master after banking hours on Saturday evening, and between three and four in the afternoon of Saturday the bank stopped payment:—Held, that there were no laches in not presenting the notes before the bank stopped on the Saturday. *James v. Houlditch*, 8 D. & R. 40.

On Saturday evening, the 19th of January, the plaintiff gave change for a 5l. bank note of P. & Co.'s bank to the defendant, at his request; on Monday morning the banking-house of P. & Co. was opened for two hours and then closed, and the partners afterwards became bankrupts; no payment was made; and the jury gave an opinion that if the note had been presented it would not have been paid; the note was not, in fact, presented, but on Monday the plaintiff sent it to the defendant, and requested to have his money returned; the defendant at first promised to return it, but afterwards refused:—Held, that the obligation on the holder of a note in such a case is to give prompt notice to the person from whom he received it of the stoppage at the bank, and to tender the note back to him; and that the plaintiff had done all that he was bound to do, and was entitled to recover the amount as money had and received to his use, although there had been no presentment of the note. *Turner v. Stones*, 1 D. & L. 122; 12 L. J., Q. B. 303; 7 Jur. 745.

#### IV. CUSTOMERS' ACCOUNTS.

##### 1. OF WHAT PERSONS.

**Partners.]**—There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name. *Alliance Bank v. Kearsley*, 6 L. R., C. P. 433; 40 L. J., C. P. 249; 24 L. T. 552; 19 W. R. 822.

Where accounts are kept at a bankers' by a firm, each partner having a right to draw cheques, and also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from and to the different accounts. *Backhouse v. Charlton*, 8 Ch. D. 444.

Upon the death of one partner in a firm having an account at a bankers', the surviving partner has a right to draw cheques upon the partnership account. *Id.*

**Husband and Wife.**—A wife being executrix of her father, paid money which she had received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this account, and the wife had drawn cheques upon the account for payment of debts due by the husband and for payment of household expenses. The husband died:—Held, that the wife was merely the agent of her husband, and that the money remaining in the bank belonged to his estate, and not to the wife's estate. *Lloyd v. Pugh*, 8 L. R., Ch. 88; 42 L. J., Ch. 282; 28 L. T. 250; 21 W. R. 346.

A wife having property settled to her separate use for life, with remainder as she should, notwithstanding coverture, by deed or will appoint, with remainder to her executors or administrators, opened two accounts with her bankers, a private and an administration account, and directed the bankers, by the joint letter of herself and her husband, to consider any overdraft on her private account secured by the administration account. The administration account was subject to the trusts of the settlement. At her death the private account was overdrawn:—Held, that she had contracted so as to bind her separate estate, and that the bankers had a lien on the administration account in respect of the overdrawn private account. *London Chartered Bank of Australia v. Lempriere*, 9 Moore, P. C. C., N. S. 426; 4 L. R., P. C. 572; 42 L. J., P. C. 49; 29 L. T. 186; 21 W. R. 513.

A man had for a series of years lodged money in two several banks on deposit receipts, some of which were in his own name, and others in the joint names of himself and of his wife, and he frequently changed deposits already made in his own name into their joint names. There was some evidence of statements made by him to his wife, but resting on her testimony, that he had acted thus with the object of enabling the survivor to take the principal. At his death there were in the two banks four deposit receipts in their joint names and one in his own name alone:—Held, that the joint lodgments were advancements for the wife, who survived. *Tulbot v. Cody*, 10 Ir. R., Eq. 138.

Receipts in the joint names of husband and wife at law and in equity considered. *Id.*

A husband, who was in failing health, opened a new banking account in the joint names of himself and wife, authorizing the bank to cash cheques drawn by either of them, and telling the bank manager that the balance of the account would belong to the survivor of himself and his wife. Cheques were thenceforward drawn by the wife only, and were applied by her in payment of household and other expenses, the husband paying in sums of money from time to time to the credit of the account. At the time of his death there was a large sum standing to the credit of the account, which the wife claimed to be entitled to for her own use:—Held, that the evidence of circumstances was not sufficient to rebut the presumption of a resulting trust in favour of the testator. *Marshall v. Crutwell*, 20 L. R., Eq. 328; 44 L. J., Ch. 504.

**Married Women.**—In an action for breach of contract by a married woman against her bankers, the first count was for not presenting for payment a bill of exchange deposited with them for that purpose; the second count was for not

giving her notice of the dishonour of a bill of exchange entrusted to them for collection, and the third count was for dishonouring a cheque drawn by her upon them, they having at the time funds to meet it. Plea, that the plaintiff was a married woman. Replication, that the causes of action arose exclusively from earnings, money, chattels and property within the meaning of the Married Women's Property Act, 1870, 33 & 34 Vict. c. 93, and that the bankers knew when they accepted her banking account that she was a married woman carrying on her business separately from her husband:—Held, that the replication was good as shewing that she was seeking a remedy for the protection of her earnings and property within the meaning of the Married Women's Property Act, 1870, s. 11. *Summers v. City Bank*, 9 L. R., C. P. 580; 43 L. J., C. P. 261; 31 L. T. 268.

A wife with a separate estate, over which she had power of disposition notwithstanding coverture, gave by will the whole of the funds constituting such separate estate upon trust for her nephews and nieces, and also bequeathed all funds purchased out of the savings of her separate estate upon the like trusts. She died, leaving a large balance on her current account at her bankers:—Held, that she had not purchased any funds out of the savings at her bankers, and that such savings were undisposed of, and passed to her husband as administrator. *Askew v. Rooth*, 17 L. R., Eq. 426; 43 L. J., Ch. 368; 30 L. T. 155; 22 W. R. 524. *And see preceding cases.*

**Trustees.**—When a trustee pays trust money into his banker's account, thereby mixing the money with his own, subsequent sums drawn out by him will be attributed to the earliest items on the credit side of his account for the time being, and the trust money will in this way, in its turn, be considered as drawn out, whether or not the result be that a balance remains of his own moneys. *Brown v. Adams*, 39 L. J., Ch. 67.

H. having a balance of 3,961l. 10s. 3d. at his bank, paid in 5,000l. trust money. Between the time of doing so and his death, he paid in various sums, together amounting to 12,533l. 11s. 6d., and in the same interval drew out 18,847l. 4s. 4d. No part of this sum was devoted to the purposes of the trust, and he was still liable for the 5,000l. at the date of his death:—Held, that the balance remaining at his bank formed part of his general estate, and could not be appropriated by the beneficial owner of the 5,000l. *Id.*

When a customer has opened with his bankers separate accounts specially headed with the names of the trusts to which the moneys paid into those accounts belong, the bankers are not at liberty, upon the bankruptcy of the customer, to apply those moneys in payment of the balance due to them upon the customer's overdrawn private account. *Kington, Ex parte, Gross, In re*, 6 L. R., Ch. 632; 40 L. J., Bk. 91; 25 L. T. 250; 19 W. R. 910.

A county treasurer used to pay the county moneys into Bacons' Bank, but kept his private account at the National and Provincial Bank, and carried over the police rates to this account by cheques drawn on Bacons' Bank. In 1869, he opened a separate account with the National and Provincial Bank, headed "Police Account." Some of the items to his credit in this account could be traced as having come from county funds, but most of them could not. The cheques



which he drew upon it were all headed "Police Account," and appeared to have been drawn only for county purposes. For the purposes of interest the National and Provincial Bank treated the accounts as one account, and the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened, the manager of the bank knew that he was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. In April, 1870, he absconded, his private account being overdrawn, and the police account being in credit:—Held, that the bank was not entitled to set off the one account against the other, but that the county magistrates were entitled to recover the balance standing to his credit on the police account. *Ib.*

**Executors and Administrators.]**—An executrix kept an executorship account with a bank, and having a power, under the will, to mortgage the real estate in aid of the personality, she deposited with the bank the title deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn by the executrix, and the moneys to a great extent misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against the testator's estate for the difference:—Held, that they were not entitled to prove; for that a person cannot, by contract with an executor, acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets. *Farhall v. Farhall*, 7 L. R., Ch. 123; 41 L. J., Ch. 146; 25 L. T. 685; 20 W. R. 157.

The mere fact that an executor has opened an account with a banker as executor does not entitle the banker to rank as a creditor upon the testator's estate in respect of an overdrawn balance of the account. *Ib.*

A banking firm stopped payment in July, 1870, and was at once adjudged bankrupt. At the time of the stoppage, the defendant had an account with the bank, which he had overdrawn about 300*l.* At the end of 1869 a Mrs. A. died, appointing the defendant sole executor of her will, and leaving a balance of about 600*l.* in the hands of the bank. This balance was at once transferred by the bank from the account of Mrs. A. to his account, "as executor of the late Mrs. A." In the interval before the stoppage, he had drawn out about 200*l.* of this account, and paid in about 100*l.*, leaving a balance in his favour of about 500*l.* The executor was also sole residuary legatee by Mrs. A.'s will. There were several pecuniary legacies which he had paid at the date of the stoppage of the bank; but there was a sum of 800*l.* to be invested for the benefit of certain persons, and an annuity of 100*l.* charged on the real and personal estate; and at the date of the bankruptcy he had not specifically provided for these bequests; but there were in his hands, besides the balance in the bank, other personal assets of the testatrix; and after providing for these bequests there would have been a surplus of 1,900*l.* to which he was entitled as residuary legatee. The trustee of the bankrupt's estate having brought an action against him to recover the amount of his overdrawn account, he sought to set off the

balance in his favour on the executorship account:—Held, that the transfer of the balance of the deceased's account to his account, as executor, was equivalent to drawing out the whole amount and paying the same amount into a fresh account, and created a personal debt for money lent between him and the bank; the effect of it being opened as an executorship account was to affect the bank with notice if there were any equities attaching to the fund; but that under the circumstances there were no such equities as to prevent his treating the balance as a fund to which he was beneficially as well as legally entitled; and that, consequently he was entitled to set it off against the claim of the trustee of the bankers. *Bailey v. Finch*, 7 L. R., Q. B. 34; 41 L. J., Q. B. 83; 25 L. T. 871; 20 W. R. 294.

An administrator who had deposited trust moneys in a private bank on a separate account current, using ordinary prudence, was held not to be liable for the loss of the moneys through the failure of the bank, although the moneys had been suffered to remain so deposited for three and a half years after the death of the intestate, and for nearly a year and a half after the administrator had carried into chambers, in the suit, his accounts shewing a large balance against himself. *Marcon, In re, Finch v. Marcon*, 40 L. J., Ch. 537.

A wife being executrix of her father, paid money which she had received as such into a bank to an account in her own name as executrix. Her husband paid money of his own to this account, and the wife had drawn cheques upon the account for payment of debts due by the husband and for payment of household expenses. The husband died:—Held, that the wife was merely the agent of her husband, and that the money remaining in the bank belonged to his estate, and not to the wife's estate. *Lloyd v. Pugh*, 8 L. R., Ch. 88; 42 L. J., Ch. 282; 28 L. T., 250; 21 W. R. 346.

**Company—Cheques of Directors.]**—Directors of a company are not to be held personally liable to find cash for cheques drawn by them as officers of their company upon the company's bank, and which the bank may choose to honour when the company has no funds at the bank. *Beattie v. Ebury (Lord)*, 7 L. R., H. L. 102; 44 L. J., Ch. 20; 30 L. T. 581; 22 W. R. 897. Affirming 7 L. R., Ch. 777; 41 L. J., Ch. 804; 27 L. T. 398; 20 W. R. 994.

A letter written by such directors, at a time when the company has funds at the bank, requesting the bankers to honour cheques of the company drawn in a particular manner, is only an intimation not to treat cheques as cheques of the company, unless signed in that manner; it is not any representation either of any authority in the directors to overdraw the account or that there will be funds forthcoming to answer the cheques, and it does not imply any undertaking on the part of any director signing it that he will personally pay or be answerable for any cheques, though drawn in that particular manner, if they should not be paid by the company. *Ib.*

As neither the directors who signed such letter nor those who, by cheques drawn in conformity therewith, subsequently overdraw the account incur any personal liability, so neither do such directors as at subsequent meetings confirm the

letter, or acquiesce in the cheques drawn in conformity with it. *Id.*

Bankers, to whom on such cheques large sums were owing by a railway company, having obtained a transfer to two of their number of preference shares, on which nothing had been paid, as a collateral security for the advances made by them:—Held, that as on the literal construction of the correspondence which resulted in the transfer there was nothing to show that the shares were to be fully or at all paid up, there was no misrepresentation or liability on the part of the directors to pay what was due upon the shares. But that under the circumstances the bankers were entitled to be relieved from liability in respect of such shares, and to have their names cancelled in the register of the shareholders of the company. *Id.*

Two of the directors of a company, by a letter to the company's bankers, notified that their manager had authority to draw cheques on account of the company. Such two directors did not form a majority of the directors of the company, as required by their act of incorporation, so as to bind the company. Although the company's account was at the time overdrawn, and that fact was known to the two directors, the bankers honoured the manager's cheques on the authority so given to them. In an action by the bank against the two directors for advances made on account of the company upon the faith of their letter:—Held, that there was an implied warranty on their part, and that they were personally liable to the bank to the extent of the sums overdrawn by the manager subsequently to the date of their letter. *Cherry v. Colonial Bank of Australasia*, 3 L. R., P. C. C. 24; 6 Moore, P. C. C., N. S. 235.

## 2. THE ACCOUNT GENERALLY.

**Relation between Customer and Bank is that of Creditor and Debtor.**—The ordinary relation between a banker and his customers is merely that of debtor and creditor, and not of trustee and cestui que trust. *Agra and Masterman's Bank, In re, Waring, Ex parte*, 36 L. J., Ch. 151.

Therefore, where a firm paid a cheque into a branch bank in India to their current account after the stoppage of the parent bank in England, but before the branch had notice of that stoppage, and afterwards, on the same day, the branch received notice of the stoppage of the bank in England, and stopped itself:—Held, that an application by the firm to be repaid the amount of the cheque in full must be refused; but this order was without prejudice to a renewal of the application, if the applicants should find that their cheque had not been cashed until after the branch had received notice of the stoppage of the bank in England. *Id.*

The relation between a banker and customer who pays money into the bank, is the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to honour the customers' drafts; and that relation is not altered by an agreement by the banker to allow interest on the balances in the bank. *Foley v. Hill*, 2 H. L. Cas. 28.

Giving a bond by a customer and his surety to the bankers of the former to secure all sums advanced or to be advanced to the customer, will not preclude the bankers from suing the customer

for a balance of his account as upon a debt by simple contract. *Holmes v. Bell*, 3 M & G. 213; 3 Scott, N. R. 479.

**Guarantees, continuing.]**—A father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for 2,000*l.*, and gave the bank an agreement under seal to this effect, that, in consideration of the bank discounting the note for his son, certain deeds and documents which the father had deposited with the bank should remain with the bank as security for the payment of all money due or to become due from the son to the bank on any account whatsoever, and that he would pay the bank upon demand all such money, and he thereby charged the property comprised in such documents with the repayment:—Held, that this agreement was not limited to the 2,000*l.*, but was a continuing guarantee for all money already due, or which should become due, from the son to the bank. *Burgess v. Ere*, 13 L. R., Eq. 450; 41 L. J., Ch. 515; 26 L. T. 540; 20 W. R. 311.

Certain of the directors of a company guaranteed personally to the company's bankers the drafts of the agent of the company to the extent of 1,000*l.*, and 1,000*l.* further, undertaking, to provide the bankers with funds to meet the acceptances before maturity. The company kept a current account with the bankers, and the drafts of its agent were from time to time honoured and debited to this current account. One of the guarantors died and his estate was under the administration of the court. The company's current account had been constantly overdrawn; at the date of the testator's death it was overdrawn to the amount of 1,605*l.* 18*s.* 6*d.*; and the company was now in liquidation:—Held, that the guarantees given were a continuing security not satisfied by the earlier credits in the current account, and that, therefore, the bankers were entitled to prove against the testator's estate for the sum of 1,605*l.* 18*s.* 6*d.*, and interest at four per cent. from the date of the testator's death. *Booth, In re, Browning v. Baldwin*, 40 L. T. 248; 27 W. R. 644.

**Determinable by Death.]**—F. gave a guarantee to secure his son's account current with a bank, the guarantee to continue until six months after notice "under my hand of my intention to discontinue the same." He died, appointing his son his executor, and the account was continued nearly three years after his death, when the son became insolvent. No notice was ever given by the father or his son to determine the guarantee; but the bank was aware shortly after his death that his personal estate was of trifling amount, and that his realty was given to persons other than the son. On the bank seeking to prove against the father's estate under the guarantee:—Held, by Lord Romilly, M. R., that the power to determine was personal to the guarantor, and could not be exercised by his executors, and therefore that the guarantee determined on his death. *Harris v. Fawcett*, 8 L. R., Ch. 866; 42 L. J., Ch. 502; 29 L. T. 84.

On appeal, this view was doubted by the lords justices, who held, however, that the bank, knowing it was the debtor's duty, as executor, to give notice of determination, could not rely on its not being given. *Id.*

Held, also, that the guarantee had been treated

by the parties as determined, and that, on that ground also, it could not be relied on. *Id.*

A continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor. (*Couthard v. Clementson*, 5 Q. B. D. 42; 49 L. J., Q. B. 204; 41 L. T. 798; 28 W. R. 355.)

**Credit Account.**—The defendants, bankers in London, agreed with K. & Co., merchants in New York, to open a credit account in favour of K. & Co. upon the terms that the defendants would accept drafts upon themselves by K. & Co. to be drawn against shipping documents for shipments of cotton by K. & Co. to Liverpool, and also against simultaneous remittances of bills on houses of first-rate standing without any bills of lading attached. The defendants charged K. & Co. a commission on all transactions effected under this agreement. The credit was subsequently divided into two accounts, A. and B., account A. being for drafts against simultaneous remittances, and account B. for drafts against blank credits and shipping documents. After the separate accounts were opened K. & Co. drew drafts upon and made remittances to the defendants in respect of each account; and K. & Co. inclosed each remittance in a letter to the defendants, specifying, almost invariably, the account to which it was to be credited, and each draft was also notified by a letter specifying the account to which it was to be debited. The defendants, in reply to such letters, notified the remittances and drafts to have been credited or debited to the respective accounts as directed. On the 22nd September, 1874, K. & Co. forwarded to the defendants two bills on mercantile firms and advised two drafts by themselves at sixty days upon the defendants. By a letter, inclosing the bills and advising the drafts, K. & Co. directed the defendants to place the bills to K. & Co.'s credit, and the drafts to their debit, in account A. Before the defendants received the bills and letter K. & Co. stopped payment and were afterwards adjudicated bankrupts under the law of the United States, and their property vested in the plaintiffs, who were assignees in bankruptcy. At the time K. & Co. stopped payment a considerable balance was due to the defendants on account B. The defendants refused to accept K. & Co.'s two drafts on them of the 22nd of September, and having retained the two bills until they became due, received payment on them and refused to give up the acceptances to the plaintiffs or to pay over to them any part of the proceeds:—Held, that the defendants held the two bills upon the condition precedent that they would accept the plaintiffs' drafts upon themselves, and that, the condition having been broken, the plaintiffs were entitled to recover the proceeds of the two bills which the defendants had wrongfully converted to their own use. *Seligmann v. Huth*, 37 L. T. 488—C. A.

Held, also, that the defendants were not entitled to any set-off or counter-claim against the plaintiffs in respect of the balance due to the defendants on account B. at the time of the bankruptcy. *Id.*

**Banker improperly transferring "Estate Account" to "Private Account."**—P., being receiver of the rents of the R. estate, had a private account with his bankers. He asked leave to overdraw that account, to which the bankers as-

sented, and at the same time he promised to introduce the R. estate account to the bankers. He accordingly overdraw his private account, and opened a separate account, called the "R. Estate Account." Afterwards the bankers, by his direction, transferred the balance of the R. estate account to the private account, which was then overdrawn. P. became insolvent:—Held, that the bankers were liable to the owner of the R. estate for the balance. *Bodenham v. Hoskins*, 2 De G., M. & G. 903; 21 L. J., Ch. 864; 16 Jur. 721.

**Accounts with Trustees.**—When a trustee pays trust money into a bank to his credit to a simple account with himself, not distinguished in any other manner, the debt thus constituted from the bank to him is one which belongs as specifically to the trust as the money would have done had it specifically been placed by the trustee in a particular repository, and so remained; and the case would not be varied by the circumstance of the bank holding also for the trustee, or owing also to him money, in every sense his own. But cheques drawn by the trustee in a general manner upon the bank, would for every purpose be ascribed and affect the account in the mode explained and laid down in *Clayton's case*, 1 Mer. 572. *Pennell v. Deffell*, 4 De G., M. & G. 372; 23 L. J., Ch. 115; 18 Jur. 273.

When money has been paid into the ordinary banking account of a company, not being in any way ear-marked, the company will not on an allegation that the money is impressed with a trust, such allegation not being admitted by the company, be restrained, on motion, from dealing with the money. *Bank of Turkey v. Ottoman Company*, 14 L. T. 884; 14 W. R. 819.

A., the farming bailiff of D. (after his employment as such had ceased), received a cheque in payment for wheat belonging to D., which he had sold on his account while acting as bailiff, and paid it in to his own account with his bankers, who received the cash for it, and gave A. credit for the amount, but afterwards, under an indemnity from D., refused to honour his drafts:—Held, that even assuming that the cheque had been improperly obtained by A., still, as between him and his bankers, the amount was recoverable by A., as money received by them to his use, or money paid. *Tassell v. Cooper*, 9 C. B. 509.

**Charge of Commission and Interest.**—A banking account, which was largely overdrawn, was for the half-year ending June, 1867, charged with interest at 5l. per cent., and with a gross sum of 500l. for commission, in lieu of the charge of one-half per cent. previously made. The pass-book balanced on this footing was sent to the customer, and the charges were explained to his agent (the customer himself being in weak health, and unable to attend to business matters). The customer died in December, 1867, and did not raise any objection to these charges:—Held, that the charge of 500l. for commission had been acquiesced in, and was valid for the half-year ending June, 1867; but that acquiescence could not be inferred for subsequent half-years, there being nothing in the entry for the particular half-year that amounted to a contract to the same effect in futuro. *Williamson v. Williamson*, 7 L. R., Eq. 542; 20 L. T. 389; 17 W. R. 607.

Held, also, that the right of the bank to charge compound interest terminated with the death of the customer; and that from that period simple interest only at 5l. per cent. was chargeable on the account. *Ib.*

**Compound Interest.]**—Where an account between a banker and his customer is kept at compound interest, and the customer dies, the final balance at his death, in the absence of contract, carries no interest. It is the same where the balance is in the customer's favour, and the banker dies or ceases to carry on business, or becomes bankrupt. *Crosskill v. Bower*, 32 Beav. 86; 32 L. J., Ch. 540; 9 Jur., N. S. 267; 8 L. T. 135; 11 W. R. 411.

A bankers' account was kept at compound interest. In 1847, the customer gave the bankers a security for all moneys then due, or thereafter to become due, "with interest for the same after the rate of 5l. for every 100l. by the year." In 1855 the customer assigned all his estate to trustees for the benefit of his creditors, and his banking account ceased:—Held, that under this security the bankers were entitled to compound interest down to the date of the creditors' deed, but to simple interest only afterwards. *Ib.*

Three trustees, two of whom were bankers, were employed to carry on a business and to borrow money "from any bankers or other persons" for that purpose. The bankers made advances of money to the trustees at compound interest:—Held, that, having regard to their fiduciary character, they could make no profit, and were entitled to simple interest only on their advances. *Ib.*

A firm of two bankers was accustomed to keep the accounts, both of the customers and of the partners, at compound interest. One partner died:—Held, that, in the absence of any special agreement, it was not proper to continue the accounts as between the surviving partner and the estate of the deceased partner at compound interest. *Bate v. Robins*, 32 Beav. 73.

When the accounts between banker and customer have been carried on for a series of years on a particular principle, the court will assume there is an agreement to that effect; but acquiescence in it does not amount to a settlement of account. *Mosse v. Salt*, 32 Beav. 269; 32 L. J., Ch. 756.

When a mortgage is given by a customer to his banker for a fixed sum, and not for the running balance, the banker cannot include that sum in the banking account, and charge compound interest on it. *Ib.*

Bankers had a mortgage and a banking account with their customer:—Held, that in ascertaining the amount due between them, the accounts must, in the first instance, be taken separately and on different principles. *Ib.*

**Overdrawn.]**—Where a customer gets his bankers to discount bills at a time when his account is largely overdrawn, and the amount is simply carried to the credit of his account, the bankers are holders for value, though no money was actually paid. *Carew, In re*, 31 Beav. 39.

Where interest is payable on an overdrawn banking account at the time of the bankruptcy of the bankers, their assignees may recover interest accruing subsequently to the bankruptcy. *Pott v. Bevan*, 8 Scott, N. R. 319; 7 M. & G. 604; 1 C. & K. 335; 13 L. J., C. P. 187.

VOL. I.

**— Account at Branch Bank.]**—In the absence of any special agreement or arrangement, there is no obligation on a banking company to honour the cheque of a customer presented at one of its branches where he has a balance standing to his credit, when he has overdrawn his account at another branch to an amount greater than such balance, so that the company is in fact not indebted to him. *Garnet or Garnett v. McKewan*, 8 L. R. Ex. 10; 42 L. J., Ex. 1; 27 L. T. 560; 21 W. R. 57.

Therefore, where a customer having an account at the Leighton Buzzard branch of a bank, which shewed a balance to its credit exceeding 25l., drew cheques to that amount on that branch. At the same time he was indebted to the bank at their Stony Stratford branch in an amount which having regard to his whole account, reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the Stony Stratford debt to the Leighton Buzzard branch, and refused to pay the cheques on presentment. There was no special contract between the parties that each account should be kept separate:—Held, that the bank was entitled at any time to combine the accounts, and to charge the Leighton Buzzard account with the Stony Stratford debt. *Ib.*

**General Principles of Branch Bank.]**—The position of branch banks is, that in principle and in fact they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes, e. g., that of estimating the time at which notice of dishonour should be given; or of entitling a banker to refuse payment of a customer's cheque except at that branch where he keeps his account. *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325; 47 L. J., P. C. 42; 38 L. T. 41; 26 W. R. 543.

The holder of a promissory note presented it at the head office of the bankers of the maker for payment. They sent it to their branch at the place where the note was payable, where the clerk cancelled the signature, wrote "Paid" on the note, and transmitted a draft in respect of it to the head office:—Held, that the head office and branch being one and the same bank, the act of the clerk did not operate to charge the bank with money had and received to the use of the holder. *Ib.*

**Joint or Separate.]**—Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons, without the authority of the other. *Innes v. Stephenson*, 1 M. & Rob. 145.

But where the relation of banker and customer does not exist between a debtor and two or more joint creditors, payment of the debt to one is a good payment to all. *Husband v. Davis*, 2 L. M. & P. 50; 10 C. B. 645; 20 L. J., C. P. 118.

The rule that when money is deposited with a banker by two or more persons, not partners, payment is insufficient unless made to all, arises out of the relation of banker and customer, and is part of the law merchant. *Ib.*

The fact of an account having been opened with a banker by one of two partners in his own name is not conclusive to shew that the account.

X

was opened on his own behalf; but it is competent for the banker to prove that he was acting as the agent of the partnership, and that the account was theirs. *Cooke v. Seeley*, 2 Ex. 746; 17 L. J., Ex. 286.

The mere circumstance, however, of the money deposited being partnership property is not sufficient for that purpose. *Id.*

Where a banking firm makes payments professedly on behalf of a customer (who has an account with the firm), but without his authority, and the sum so paid is entered to his debit in the books of the firm, and the firm afterwards admits new partners, the new firm is not liable to the customer for such payments unless there is an agreement between the two firms and the customer, that the new firm shall take upon themselves the actual liabilities of the old firm. *Crawford v. Cocks or Cox*, 6 Ex. 287; 20 L. J., Ex. 169.

**Transfer of Accounts.]**—The acting member of a firm has implied authority to assent to the transfer of their account from one banker to another, without the express assent of the others. *Beal v. Caddick*, 2 H. & N. 326; 26 L. J., Ex. 356.

Upon such a transfer, however, the actual amount due is alone transferred, and the banker to whom the amount is transferred has no other rights than the party from whom it is transferred. *Id.*

In an action by the banker against the partner, whose express assent to the transfer was not obtained, to recover the alleged balance of the account transferred, the question would be what was the real and true balance of account as between the original parties, debtor and creditor; and the partner sued is entitled to raise any question as to the amount due from the firm which he might have raised in an action at the suit of the original creditor. *Id.*

But where the balance due from the firm at the time of their transfer of their account has been overstoppped by subsequent payments to their credit, as to which there has been nothing to take the case out of the ordinary principle of appropriation of payments to the earlier items, the cause of action is not the balance of account existing at the time of transfer (which has thus been extinguished), but the balance subsequently become due. *Id.*

A. signed a note jointly and severally with B., the elder, as security for his account with his bankers. They were aware that B., the elder, a maltster, paid in to his account sums received by him from his son, who was in business as a miller, and paid his son such sums as he required; but the cheques were drawn and the accounts kept in the name of the father, and it did not appear that he and his son were partners. Afterwards, a balance being due from the father, he, in the son's presence, agreed with the bankers that in future the cheques should be drawn and the accounts kept in the name of B. & Son, and this was done, but nothing was said to the son as to the transfer to the new account of the old balance due to the bankers from B., the elder, and no balance was struck on their books; it was simply carried on to the new account, with the account of the credit on the other side, and the pass book was unaltered. Afterwards a larger amount than the amount of the old balance was paid in generally to the new account,

but B. & Son failed, there being then a balance against them exceeding the amount of the note. In an action against the sureties, the judge having left it to the jury whether the arrangement really was made as appeared in the books, and they having found for the bankers, the court refused to set aside the verdict as against the weight of evidence, that the old account was transferred to the father and son; so that A. was not discharged. *Allaway v. Harris*, 29 L. J., Ex. 214.

**Right of Set-off.]**—If a customer borrows money from his bankers, and gives a bond to secure its repayment, and the balance upon the general banking account is afterwards in favour of the customer, a right to set off such balance against the amount due on the bond exists both at law and in equity. *Cavendish v. Geaves*, 24 Beav. 168; 27 L. J., Ch. 314; 3 Jur., N. S. 1086.

But if the firm is altered, and the bond is assigned by the obligees to the new firm, with notice of the assignment to the obligor, and the balance upon the general banking account is afterwards in favour of the customer, no right of set-off exists at law; but in equity the customer is entitled to set off the balance due on the banking account against the amount due on the bond. *Id.*

So, if the bond is assigned to a stranger, without notice to the obligor, the same right of set-off exists, and the assignee takes the assignment, subject to all the equities which affected the assignors. *Id.*

The defendants, being indebted for money advanced to them on their banking account by their bankers, who subsequently became bankrupts, received from their customers, on the day on which the bank stopped payment and the day following, but without notice of an act of bankruptcy, and before any docket had been struck, certain £l. notes of the bank payable to bearer, on demand, in part payment of antecedent debts, on the condition that they were to debit themselves with so much only as they should receive from the assignees for such notes. They also received, during the same period, other £l. notes of the bank, for which they were to pay so much only as they should receive from the assignees for such notes. An action having been brought by the assignees of the bankrupts against the defendants for money lent by the bankrupts before their bankruptcy:—Held, that the defendants had a beneficial interest in the first-mentioned class of notes, and were, therefore, entitled to set them off; but that they were not entitled to set off the last-mentioned class, as they held them merely as trustees for others. *Forster v. Wilson*, 12 M. & W. 191; 13 L. J., Ex. 209.

A corporation (which besides its municipal character, filled those of managers of public baths and warehouses, and of a local board of health) kept three separate accounts at its bankers, viz., "The Corporation Account," "The Baths and Washhouses Revenue Account," and "The Local Board of Health Account." Upon the first account the corporation was indebted to the bank, and upon the others the bank was indebted to the corporation in an equal amount. In an action by the banker to recover the balance due to him on account No. 1:—Held, that the corporation was entitled to set off the debts due to it on the other two accounts,

*Padder v. Preston (Mayor, &c.)*, 12 C. B., N. S. 535; 31 L. J., C. P. 291; 9 Jur., N. S. 496; 10 W. R. 773.

**Appropriation of Money by Bank.**—C. draws a cheque on his bankers, payable to A. and B., assignees of D., or bearer, and writes the name of their bankers across it. B., who has another private account with the bankers, pays the cheque in to that account:—Held, that the bankers are justified in applying it to that account; the drawer's writing the names of the bankers of the payees of the cheque across it not being, according to the custom of trade, information to the bankers that the money is that of the payees. *Stewart v. Lee*, M. & M. 158.

To an action on a joint and several note of the defendant and S., payable to the plaintiff at six months after date, the defendant pleaded payment, and by way of equitable defence, that he made the note at the request and as surety for S., to secure a debt due from S. to the plaintiff (a banking company), and without value; that the plaintiff took the note from the defendant as surety only; that the plaintiff, without the knowledge or consent of the defendant, for a good and valuable consideration, gave S. time for payment of the note, and forebore to enforce payment: and that the plaintiff could, and might, and ought to have obtained payment from S., had he required it, and had not given him time for the payment:—Held, that proof that the plaintiff had funds to the credit of the principal debtor shortly after the bill became due, and had abstained from applying those funds in discharge of the note, which remained unpaid, did not sustain either the plea of payment or the equitable defence. *Strong v. Foster*, 17 C. B. 201; 25 L. J., C. P. 106.

But where money was paid into a banking-house for the purpose of taking up a particular bill, which was then lying there for payment; and the bankers' clerk said at the time that he could not give up the bill till he had seen his master:—Held, that it was money had and received to the use of the owner and holder of the bill, and could not be applied by the bankers to the general account of the acceptor who had paid in the money. *De Bernales v. Fuller*, 14 East, 590, n.; 2 Camp. 426.

Two several banking firms, carrying on business in the same country town, were in the habit of exchanging notes and securities with each other, and settling their balance by a prescribed mode. One of the firms became bankrupt, and, at the time of the act of bankruptcy, each firm had in its possession notes and securities of the other to nearly the same amount. The provisional assignee of the bankrupt firm being apprised of this fact, presented and obtained payment of the notes of the solvent firm, partly at their bank, and partly from their agents in London, who did not know the situation of the parties:—Held, that the solvent firm might recover the amount of the notes, in an action for money had and received, against such assignee. *Edmeads v. Newman*, 2 D. & R. 568; 1 B. & C. 418. See 7 D. & R. 523.

— **Transferring from Account of one Customer to that of another—Equal to Payment.**—The plaintiff and defendant each kept an account with a banker at M. In October the plaintiff desired the defendant to pay into his account a

sum due to him for rent. The defendant wrote to the plaintiff, stating that he had caused the amount to be transferred to his account, and the plaintiff sent him a receipt by return of post; the sum, however, was not actually transferred until the 8th of December. On the 9th, notice of the transfer was sent to the plaintiff by post, which did not reach him till the 11th. On the 10th the banker stopped payment:—Held, that the transfer was equivalent to payment. *Eyles v. Ellis*, 12 Moore, 306; 4 Bing. 112.

— **Against amount of Bill discounted by Bank.**—Where bankers had discounted a bill for one of their customers, and on the morning of the day on which it became due wrote it off in his account, having no notice that he was then dead:—Held, that they might reimburse themselves out of funds belonging to him in their hands. *Rogerson v. Ladbroke*, 1 Bing. 93; 7 Moore, 412.

A. & B. severally kept cash at the same banking-house. On the 13th of November, A. paid in a draft for 250*l.* drawn by B. in favour of the former, upon the bankers, to whom the latter was considerably indebted. The draft was received by the bankers' clerk without anything being said respecting it, or any entry made of it in their books. In the course of the same day, the bankers discounted bills for B. to the amount of 1,600*l.*, the produce of which they expressly appropriated to the charges of the day, consisting of bills accepted by him for 1,342*l.*; two drafts for 50*l.* each, given to other persons; and the draft for 250*l.* in favour of A., which was presented before the latter drafts. The bills and the two 50*l.* drafts were paid by the bankers on the same day, leaving a balance only of 137*l.* in their hands. On the morning of the 14th they wrote a letter to A., stating that they had not carried the draft for 250*l.* to his credit, but that they would "retain it by them in the hope of its being provided for;" and they promised B. that they would pay it when they had funds. On that day the bankers discounted other bills for B. to the amount of 699*l.*, the produce of which they specifically appropriated to claims upon him, amounting to 599*l.*; after which an unappropriated balance of 98*l.* remained in the bankers' hands:—Held, that they were liable to A. for the whole amount of the 250*l.* draft, though they had not at any moment an unappropriated sum in their hands sufficient to cover the draft. *Kilsby v. Williams*, 1 D. & R. 476; 5 B. & A. 815.

**Payment of Cancelled Cheque—Reasonable Ground for Suspicion—Liability of Bank.**—If bankers pay a cancelled cheque drawn by a customer, under circumstances which ought to have excited their suspicion, and induced them to make inquiries before payment, they cannot take credit for the amount. *Scholey v. Ramsbottom*, 2 Camp. 485.

**Duty and Obligation in paying Acceptances under Instructions of Customers.**—A merchant instructed his banker to accept the drafts of a third person, on being handed a clean bill of lading of a cargo consigned to the latter; a bill of lading, professing to answer the description in the instructions, was handed by such third person to the banker, who accepted his drafts, and, it turning out that the bill of lading was forged, paid the amount of the acceptances:—Held, that

the banker was not bound to see that the bill of lading was genuine, but only that it was regular on the face of it. *Ulster Bank v. Synnott*, 5 Ir. R., Eq. 595.

The indorsement of the bill of lading purported to be signed by an agent of the shippers:—Held, that the banker was not responsible for the authority of the agent to sign for his principals. *Ib.*

There are in mercantile transactions two forms of indorsement by an agent; one, simply "p.," "pro," "for," which expresses an authority generally; the other, "per pro," or "p.p.," which expresses an authority created by procuration or power of attorney: the bill of lading was indorsed by the agent in the first of the above forms:—Held, that this did not make the indorsement so irregular on the face of it as to render the banker liable for neglect of duty. *Ib.*

A merchant, being indebted to his banker, deposited with him certificates of railway debenture stock, accompanied by a letter stating that they were so deposited "against acceptances made" on his account:—Held, that the expression "acceptances made" might mean either "acceptances which have been heretofore made," or "acceptances which shall have been made during the continuance of the security;" and that being, therefore, ambiguous, parol evidence was admissible to aid the construction as to whether it was intended to cover future as well as past acceptances. *Ib.*

**Disclosing State of Customer's Account.]**—In an action by a customer against his banker for disclosing the state of the customer's account without justifiable cause, the question was left to the jury whether under the circumstances it was reasonable and proper to make such disclosure:—Held, that assuming the existence of a legal duty on a banker not to disclose his customer's account, except upon a reasonable and a proper occasion, the question whether the disclosure was made on such an occasion was rightly left to the jury. *Hardy v. Veasey*, 3 L. R., Ex. 107; 37 L. J., C. P. 76; 17 L. T. 607.

Bankers having disclosed the state of a customer's account to another of their customers, one of his creditors:—Held, that it was for the jury whether there was a duty not to make such a disclosure, although there was no evidence of it beyond the existence of the relation of banker and customer. *Foster v. Bank of London*, 3 F. & F. 214.

**Under Companies Acts.]**—A banker with whom a contributory has formerly kept an account may be summoned under the Companies Act, 1862, s. 115, and compelled to produce his books relating to the contributory's account, and to give all information in his power touching his affairs. *Contract Corporation, In re, Forbes's case*, 41 L. J., Ch. 467; 26 L. T. 680; 20 W. R. 585; *S. C.*, nom. *Druitt's case*, 14 L. R., Eq. 6.

**Following Trust Money.]**—If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, and has a charge on the balance in the bankers' hands. *Dale & Co., Ex parte* (11 Ch. D. 772), dissented from. *Hallett's Estate, In re, Knatchbull v. Hallett*, 13 Ch. D. 696; 49 L. J., Ch. 415; 42 L. T. 421; W. R. 732—C. A. Reversing 41 L. T. 186.

**Choses in Action.]**—On discounting bills of a firm of merchants drawn on their consignees, the bankers gave (according to the usual custom) marginal notes to represent the balance of the price of the bills which was retained by them till the bills were paid, and which was to be then paid over, subject to any claim by the bankers. These notes were deposited by the merchants as security, and were so held when the merchants went into liquidation, the bills of exchange not having then been paid:—Held, that the notes did not represent "debts" within the meaning of the Bankruptcy Act, 1869, s. 15, subs. 5, but that they were excepted from the operation of the clauses as choses in action. *Kempe, Ex parte, Fastnedge, In re*, 9 L. R., Ch. 383; 43 L. J., Bk. 50; 30 L. T. 109; 22 W. R. 462.

**Deposit Note—Not a Security for Money.]**—A banker's deposit note is not a security for money so as to pass under a bequest in a will "of all bonds, promissory notes, and other securities for money." *Hopkins v. Abbott*, 19 L. R., Eq. 222; 44 L. J., Ch. 316; 31 L. T. 820; 23 W. R. 227.

**Acceptance of New Firm.]**—A firm of bankers was in the habit of receiving money on deposit, paying interest thereon, and giving deposit notes. Whenever a change was made, either by additional payments or by drawings out, in the amount of the deposit, the old deposit note was given up, and a new one given for the new balance. In 1872 two new partners were taken into the firm. One of the original partners died in the same year, the other original partner died in 1874. The business was carried on by the new partners alone until 1875, when the bank stopped payment. The firm continued to receive money on deposit, giving notes as before, such notes bearing the same signature as those issued by the original partnership. The new firm also paid, or credited, interest to the depositors until the bank failed. After the failure the depositors carried in proofs against the estates of the bankrupt partners, and then sought to prove for the balance against the estates of an original partner:—Held, that the depositors had, by their acts, accepted the liability of the new partners in lieu of that of the old partners, and that the latter were consequently released. *Billborough v. Holmes*, 5 Ch. D. 255; 46 L. J., Ch. 446; 35 L. T. 75; 25 W. R. 297.

**Negotiability of.]**—M., shortly before his death, indorsed a bank deposit receipt, and delivered it to S., stating that it was for his (M.'s) niece H. S. indorsed the document, and, after M.'s death, presented it to the bank, who transferred the amount to S. without having had notice of M.'s death; in an action by the administratrix of M. against the bank:—Held, first that the deposit receipt was not a negotiable instrument passing by indorsement. *Moore v. Ulster Banking Company*, 11 Ir. R., O. L. 512.

Held, secondly, that there was no equitable assignment of it. *Ib.*

Held, thirdly, that if the transaction constituted S. an agent of M., his authority was revoked by M.'s death. *Ib.*

Held, fourthly, that the transaction did not amount to a donatio mortis causa. *Ib.*

**Pass-Books.]**—A change of the title of the

firm in a banker's pass-book, and entries therein to the credit of a new firm, of the interest of securities given by the customers to the original firm, is notice of the assignment to the new firm of the securities given by the customer to the old firm. *Cavendish v. Geaves*, 24 Beav. 163; 26 L. J., Ch. 314; 3 Jur., N. S. 1086.

Entries in a pass-book are only *prima facie* evidence against a banker. *Commercial Bank of Scotland v. Rhind*, 1 Macq. H. L. Cas. 643.

Where an entry is alleged to have been made by mistake in the wrong place in a customer's pass-book, by the banker's clerk, but by the customer denied to be any mistake, the question is for the jury upon the evidence. *Snead v. Williams*, 9 L. T. 115.

**Operation of the Statute of Limitations.]**—C., being about to open an account with a banking company, gave them a promissory note, dated the 4th of December, 1855, whereby he and S., the defendant, jointly and severally promised to pay to the company, on demand, 200*l*. At the same time they signed and delivered to the company a memorandum, stating that the note was given as a collateral security for the banking account intended to be kept by C., and that the company should be at liberty at any time thereafter to recover from them, or each of them, up to the full amount thereof, every sum which C. should at any time thereafter become indebted or liable to the company, for any moneys paid, lent, or advanced by them to or for him; and in case of the company suing on the note, its production should be conclusive evidence of the amount claimed by them from C. being due and owing by him. The banking account was accordingly opened with C., and on the 31st of December, 1855, he was indebted to the company in 173*l*. No demand of payment was made, or balance struck until the 30th of June, 1858, when the sum of 194*l*. was due from C. to the company. A balance was afterwards struck every half year, the company from time to time making advances, and C. paying money into the bank with which his account was credited. The sums so credited exceeded the amount of the note. The account continued until February, 1861, when it was closed with a balance due to the company of 175*l*. In March, 1862, the company brought an action against the defendant on the note:—Held, that the cause of action was not barred by the Statute of Limitations. *Hartland v. Jukes*, 1 H. & C. 667; 9 Jur., N. S. 180; 7 L. T. 7902; 11 W. R. 519.

If money deposited with a banker by his customer remains in the banker's hands for six years, without any payment by him of the principal or allowance of interest, the statute of limitations is a bar to its recovery. *Pott v. Clegg*, 16 M. & W. 321; 16 L. J., Ex. 210; 11 Jur. 289.

**Retaining Balance to meet Discounted Bills.]**—Bankers having in their hands a balance standing to the credit of a customer, refused to honour his cheques, and claimed a right to retain the balance in their hands to cover a possible liability from the customer in respect of running bills which they had discounted for him. The customer brought an action against the bankers for the balance of his account in their hands and to obtain damages for breach of contract, by reason of such refusal. After the commencement

of the action, one of the bills was dishonoured, and the acceptors of others stopped payment. The court, on the eve of trial, granted an injunction to restrain the customer from proceeding with the action. *Agra and Masterman's Bank v. Hoffman*, 34 L. J., Ch. 285; 11 Jur., N. S. 335; 11 L. T. 701; 13 W. R. 226.

### 3. APPROPRIATION OF PAYMENTS.

**Ordinary.]**—In an ordinary banking account the first item of the debit side is discharged by the first item of the credit side. *Henniker v. Wigg*, D. & M. 160; 4 Q. B. 792.

But where the plaintiffs were bankers, and one of the defendants, upon opening an account with them, had borrowed of them 1,000*l*., for which he, with the other defendants, became bound to the plaintiffs, with a condition for repayment with interest by a certain day, and continued afterwards to pay in and draw out money upon the usual footing of a banker's account, and the first sum entered to his debit on the account was partly made up of the 1,000*l*., to secure which the bond had been given:—Held, that the bond was not satisfied by sums subsequently paid in exceeding in amount the 1,000*l*., it not being the intention of the parties that the first item of the debit side should be reduced by the first item of the credit side, but that the bond should stand to secure the plaintiffs against such advances as they should from time to time make to the defendant. *Id*.

An account was continued in the ordinary form of banking accounts, charging the customer with the whole debt, from time to time, in the half-yearly balances; but the parties were ignorant of the fact that the legal rule of appropriation would carry subsequent payments to the discharge of the earlier guaranteed debt. At a later period, one of the executors, also a partner in the bank, wrote a letter to the customer, amounting to a representation that the payments into his account were appropriated to the latter (unsecured) items of debt:—Held, that the ignorance of the parties did not prevent the operation of the rule in Clayton's case (1 Mer. 585). *Merriman v. Ward*, 1 Johns. & H. 371.

Held also, that an appropriation of past payments could not be made by an executor, so as to revive a lapsed liability of his estate, and that the letter had no retrospective operation. *Id*.

Held also, that the subsequent payments by the creditor, made on the faith of the representations in the letter, must be appropriated to the later items of debt. *Id*.

A payment by a customer can be appropriated by the bank to a debt due to the banker and his former partner, instead of to a debt due to the banker alone. *Snead v. Williams*, 9 L. T., 115.

**Money Paid into Bank to meet Bills of Exchange.]**—A merchant in England proposed that his consignees, merchants in Sydney, should make advances against bills to be drawn by him for the amount of goods shipped to their care, and that the proceeds of the sales above the advances should be placed in liquidation of an old claim which they had against him. This was assented to, and by letter they stated that "they should retire the acceptances to bills from the proceeds of the sales." Afterwards the consignees, being in want of money, directed that a firm of bankers



(in whose partnership they had a common partner) should receive, in satisfaction of advances made by them to the consignees, the proceeds of the sales of the goods so sent to the consignees by the merchant. The consignees became bankrupts:—Held, that the bankers had, by the action of the common partner, notice of the arrangement as to the proceeds of the sales of the goods consigned and that remittances in the hands of the bankers were to be appropriated first to the payment of the merchant's acceptances, and subject thereto to the discharge of the old claim of the consignees. *Steele v. Stuart*, 14 L. T., 620.

A, having accepted a bill of exchange paid money into his bank upon the express understanding that it was to be applied in taking up the bill at maturity. He suddenly died before the bill fell due, and the bank retained the money in satisfaction of moneys owing to them upon his general account. The bill was returned dishonoured to the drawers, who thereupon sued the bank in equity for the amount:—Held that there was no privity to sustain the suit. *Hill v. Royds*, 8 L. R., Eq. 290; 38 L. J., Ch. 538; 20 L. T., 842.

The assignees of a bankrupt brought an action against a bank to recover a sum belonging to the bankrupt, and alleged to have been in the hands of the bank at the date of adjudication of bankruptcy. The sum, in pursuance of an agreement between the bank and the bankrupt previously to adjudication, had been carried by the bank to a special account, as security against bills, not yet at maturity, drawn by the bankrupt and discounted by the bank:—Held, that the action failed, since by the contract the sum claimed formed no part of the bankrupt's estate, but was rightly in the hands of the bank at the time of the action. *Chartered Bank of India, Australia and China v. Evans*, 21 L. T., 407—P. C.

Customers of country bankers paid into the bankers a sum of money in bank notes and also some bills of exchange to be remitted to London in order to meet certain acceptances. The bankers sent to their London agents the bills and some bank notes, with a letter directing them to pay a certain sum of money, also giving them notice of the acceptances as payable at their bank, and giving directions as to other business. The country bankers stopped payment, owing a large balance to the London bankers:—Held, that as between the country customers and the London bankers there was no appropriation of the bills and notes to meet the acceptances, and that the London bankers could retain the bill and notes without meeting the acceptances. *Johnson v. Roberts*, 10 L. R., Ch. 505; 44 L. J., Ch. 678; 33 L. T., 138; 23 W. R. 763 (affirming 44 L. J., Ch. 465; 32 L. T. 446).

M. paid a certain sum into a country bankers' with written directions to apply it to meet a bill of exchange payable the next day at the country bankers' London agents. The country bankers stopped payment the next day without having advised their London agents of the payment of the sum, and the bill on being presented was dishonoured:—Held, that the country bankers having made no specific appropriation of the sum, A. was only entitled to prove as a general creditor. *Barned's Banking Company, In re, Massey, Ex parte*, 39 L. J., Ch. 635; 22 L. T. 853; 18 W. R. 818.

Where an acceptor of a bill of exchange paid money to his bankers (at whose correspondents' house it was payable), for the purpose of taking

it and other bills up, and they promised him to apply it to such purposes, and entered the particular bill to their credit in their books, but it did not appear that they had advised their correspondents to pay it:—Held, that the drawer, the holder of the bill, could not sue the bankers for the amount of the bill, there being no privity to sustain the action. *Moore v. Bushell*, 27 L. J., Ex. 8.

A party, before his bankruptcy, paid into the hands of a banking company money, to be applied in discharge of three bills of exchange; but being indebted to the company to a larger amount, they, instead of performing their contract, put the money to his account. One of the bills was consequently dishonoured, and the other two remained in the hands of the holders until the bankruptcy:—Held, that the assignees were entitled to recover the full amount of the money paid into the hands of the company; as the true measure of damages was the amount which the bankrupt himself might have recovered if he had not become bankrupt, and not the ultimate loss to the bankrupt's estate according to the proofs upon it. *Hill v. Smith*, 12 M. & W. 618; 13 L. J., Ex. 243; 8 Jur. 179.

**Trustee paying in Trust Money to Private Account.**—If a person who holds money as a trustee or in a fiduciary character pays it to his account at his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner:—Held, by the Court of Appeal (dissentiente Thesiger, L. J.), that the rule in *Clayton's case* (1 Mer. 572), attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money. *Pennell v. Deffell* (4 D., M. & G. 372) on this point not followed. *Hallett's Estate, In re, Knatchbull v. Hallett*, 13 Ch. D., 696; 49 L. J., Ch. 415; 42 L. T. 421; 28 W. R. 732—C. A. Reversing 41 L. T. 186.

**As between Cestuis que Trustent.**—Held, by Fry, J., that as between two cestuis que trustent whose money the trustee has paid into his own account at his bankers, the rule in *Clayton's case* applies, so that the first sum paid in will be held to have been first drawn out. *Id.*

**Custom of Bill Brokers re-discounting Bills with their Bankers.**—It being proved to be the common and almost invariable practice of bill brokers in the city of London, not to indorse each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to the bankers a general guarantee for all bills which they re-discount with them:—Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their

guarantee. *Bishop, Ex parte, Fox, In re*, 15 Ch. D. 400; 50 L. J., Ch. 18; 43 L. T. 165; 29 W. R. 144—C. A.

**Solicitor paying Client's money into Private Account.**—A solicitor being entrusted with 5,000*l.* belonging to his client, for the purpose of investing it on mortgage, paid it to his general account at his bankers, and never applied it to the purpose intended. Before his death, which happened about eighteen months afterwards, the solicitor drew out various sums exceeding the 5,000*l.*, together with the balance previously standing to his credit, and also paid in considerable sums, so that the balance at the time of his death standing to his credit was 2,700*l.* The client filed a bill against his administrator claiming the balance at the bankers as trust money, and moved for an injunction to restrain the administrator and the bankers from dealing with the fund:—Held, that the sums drawn out by the solicitor must be appropriated to the sums paid to his credit in the order in which they had been paid in, and the injunction was refused. *Brown v. Adams*, 4 L. R., Ch. 764; 21 L. T., 71; 17 W. R. 999.

**In other Cases.**—Certain of the directors of a company guaranteed personally to the company's bankers the drafts of the agent of the company to the extent of 1,000*l.*, and 1,000*l.* further, undertaking to provide the bankers with funds to meet the acceptances before maturity. The company kept a current account with the bankers, and the drafts of its agent were from time to time honoured and debited to this current account. One of the guarantors died and his estate was under the administration of the court. The company's current account had been constantly overdrawn; at the date of the testator's death it was overdrawn to the amount of 1,605*l.* 18*s.* 6*d.*; and the company was now in liquidation:—Held, that the guarantees given were a continuing security not satisfied by the earlier credits in the current account, and that, therefore, the bankers were entitled to prove against the testator's estate for the sum of 1,605*l.* 18*s.* 6*d.* and interest at four per cent. from the date of the testator's death. *Booth, In re, Browning v. Baldwin*, [40 L. T. 248; 27 W. R. 644.

A customer borrowed from his bankers 2,000*l.*, which was placed to the credit of his current account, and to secure the debt gave them ten promissory notes payable at intervals of a week, a surety undertaking that in the event of the notes not being paid to secure the amount due. On the first five due dates, the sums represented by the first five notes respectively were debited by the bankers to the customer in the current account; and on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of C. to his current account and to another special account after the last note became due, were sufficient to cover all debits up to and including the last note; but the accounts were during all this time overdrawn:—Held, that the bankers were bound to apply all moneys paid in first to the notes

secured by the surety which had fallen due; and that the debt was, moreover, discharged, on the principle of *Clayton's case* (1 Mer. 605). *Kinnaird v. Webster*, 10 Ch. D. 139; 48 L. J., Ch. 348; 39 L. T. 494; 27 W. R. 212.

A customer paid in a sum of money to a country banker, with instructions to remit 500*l.*, part of the sum, to a London banker to meet acceptances of the customer. The banker on the same day sent several bills to a bill-broker, directing him to remit the proceeds to the London banker, and directed the London banker to meet the acceptances. Next day the country banker stopped payment:—Held, that the 500*l.* was appropriated, and that the customer was entitled to recover it back in full. *Farley v. Turner*, 26 L. J., Ch. 710; 3 Jur., N. S. 532.

#### 4. ADVANCES.

**On Security of Consignments—Duty of Bank as to honouring Cheques of Borrower.**—Where bankers have taken up bills for a customer on the security of the produce of consignments, and by a course of dealing with him have permitted him to draw on his account current, without reference to the advances on the consignments, they cannot, by charging that account with the advances, in the absence of express notice, treat it as overdrawn, and dishonour his cheques, before the consignments are realized. *Cumming v. Shand*, 5 H. & N. 95; 29 L. J., Ex. 129; 1 L. T., 300; 8 W. R. 182.

**By Agent of Bank—Knowledge of Agent that Money would be Misapplied.**—Where a local agent of a banking company in that character advances money of the company by way of loan, and the borrower, to the agent's knowledge, is obtaining the money for the sole purpose of misapplying it, the company acquires no better title than the agent would have had, had the case been his own, or than the borrower. *Collinson v. Lister*, 7 De G., Mac. & G. 634.

**On Railway Stock—Constructive Notice as to Ownership.**—Bankers advanced to customers 300*l.* to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated that they had been requested by their principal to extend the term of the loan on the stock. The stock actually belonged to a third party, A:—Held, that, after the receipt of this letter, the bankers had constructive notice of A.'s right to the stock, and that no subsequent advances made by the bankers to the customers could affect the stock. *Locke v. Prescott*, 32 Beav. 261.

**Bank Paying Proceeds of Note Given by Minor to his Creditor.**—When a bank, with knowledge of the relative position of the parties, places the proceeds of a promissory note, which has been made in their favour by A. (a person just come of age), unreservedly in the power of B. (a person who stands in loco parentis to A.), knowing at the time that B. claims to be a creditor of A. to a large amount for necessities supplied, and B. afterwards misappropriates the money, the bank will be restrained from suing on the note. *Dettmar v. Metropolitan and Provincial Bank*, 1 H. & M. 641; 10 L. T. 63.

**To Promoters of Railway Bill.]—**A bank agreed to advance to the promoters of a railway bill the sum required by the standing orders, on the undertaking that unless the money was repaid before the third reading in the House of Lords, the bill should not be proceeded with. The money was not repaid before the third reading, but the bank agreed that the bill should be read a third time on the undertaking that a bond should be executed in pursuance of a clause in the act, and that the directors should concur in all acts necessary to obtain a return of the deposit. The directors having refused to join in such an application, and a bill having been filed in equity in consequence by the bank:—Held, that such a bill was sustainable. *Scott v. Oakeley*, 33 Beav. 501; 33 L. J., Ch. 612; 10 Jur., N. S. 648; 10 L. T. 801; 12 W. R. 897.

**Agreement by Customer to give Security—Consideration—Forbearance of Bank.]—**Where a customer being called on by his bankers to give security for money due from him on a loan account, agreed by letter to give security, and a bill which had been filed in equity to enforce such agreement, was demurred to, on the ground that the agreement was without consideration:—Held, that the forbearance of the bankers to enforce payment of the existing debt, in consequence of the agreement, was a sufficient consideration to support it, and the demurrer was overruled. *Alliance Bank v. Broom*, 2 Drew. & Sm. 289; 34 L. J., Ch. 256; 10 Jur., N. S. 1121.

**To Agent Pledging Bill of Lading—Mala Fides—Rights of Principal.]—**A banian or an agent in India was entrusted by his principals with a bill of lading for a particular purpose, and he pledged the same mala fide, without the consent of his principals, to a native banker, for advances made to himself:—Held, that in order to invalidate a pledge so made, under 5 & 6 Vict. c. 39, s. 3, it is necessary that the court or jury should find that the lender had notice of the agent's mala fides, or want of authority to pledge the goods. *Gobind Chunder Sein v. Ryan*, 15 Moore, P. C. C. 230.

To establish such notice, it is sufficient to shew that the circumstances attending the transaction were such as that a reasonable man of business, applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if the agent was not also acting mala fide towards his principals. *Id.*

**Discounting Bills given by Partner in the Name of Firm, for Partner's own Purposes—Notice to Bank.]—**A partner has, generally, full authority to deal with the partnership property for partnership purposes, and if the business is such as ordinarily requires bills of exchange, he can, unless restrained by agreement, draw, indorse and accept bills in his own name for partnership purposes. But if a person dealing with the individual partner has reason to think that what is done in the partnership name is done for private purposes, he is put upon inquiry to ascertain the extent of the partner's authority; otherwise he must depend on the right of the partner, or rely on circumstances sufficient to repel the presumption of fraud. *Darlington*

*Joint Stock District Banking Company, Ex parte, Riches, In re*, 34 L. J., Bk. 10; 11 Jur., N. S. 122; 11 L. T. 651; 13 W. R. 353.

So where a partner drew bills in the name of a partnership firm, and obtained acceptances to them from various persons by fraudulent misrepresentation of what it was that was being signed, and then indorsed the bills, so accepted, with the name of the firm, and again indorsed them over to himself:—Held, that the partner's private bankers, who had discounted the bills, having full notice that their customer was using partnership property for his private purposes, and seeing that all the signatures, except the acceptances, were in his handwriting, were guilty of gross negligence, and could not be allowed to prove in bankruptcy for the loss they had sustained on the fraudulent acceptances against the estate of the surviving partners. *Id.*

**To Executor privately out of Executorialship Account.]—**A. being indebted at his death to a bank for a sum, as a security for which he had deposited with them the title deeds of an estate, by his will empowered his executors to charge his real estates in aid of his personal estate. His widow and sole executrix was allowed by the bank to draw upon "A's Executorialship Account," and had deposited the title deeds of part of A's real estate as a security for the increased amount due to the bank and future advances. The moneys were drawn out from time to time in small sums, and applied by the widow for her own personal expenses, and in carrying on A's farm, as well as in payment of his debts:—Held, that, in the absence of any notice to the bank that the widow was committing a breach of trust in applying the money for her own purposes, they were entitled to prove as creditors for the amount of their advances on the executorialship account secured by the deposit of title deeds made by A's widow. *Farhall v. Farhall*, 7 L. R., Eq. 286; 38 L. J., Ch. 281.

**To an Executor for Executorial Purposes—Separate Account of Executor.]—**One of two executors, who was himself a residuary legatee, entered an account with a banker in his own name for executorial purposes, and the banker with notice of the dispositions under the will, made advances to the executor for payments connected with the executorialship, and securities were deposited for repayment of the advances. The co-executor assented to the first advance, but upon a second advance being made to the acting executor upon other securities, he withdrew his assent, and objected to the banker being repaid out of the trust property, on the ground that the money had been placed to the separate account of the acting executor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien upon the second securities for repayment of his advances:—Held, that the banker was justified in advancing money to the acting executor for executorial purposes, and that the assent of the co-executor in the first instance was a further justification for placing confidence in the acting executor and in making further advances to him. The repayment was therefore decreed with mortgagee's costs. *Child v. Thorley*, 16 Ch. D. 151; 29 W. R. 417.

### 5. IN RESPECT OF BILLS PAYABLE AT BANKERS.

**Generally.**—If in the ordinary course of business a banker pays, on behalf of a depositor in his bank, the amount of a bill accepted by such depositor payable at the bank, the banker has consented to treat the acceptance as tantamount to an order on him to pay the bill according to the tenor of the acceptance; *i. e.* if the acceptance is in blank, according to the tenor of the bill; or if the acceptance is special, then to the person duly authorized to claim payment of the amount; and if, in either case, the banker fails to obey exactly the order which he has accepted, he cannot charge his customer with a payment made for him without his authority. *Roberts v. Tucker*, 16 Q. B. 560; 20 L. J., Q. B. 270; 15 Jur. 987—Ex. Ch.

**Right of Bank to apply Funds of Customer to meet Acceptance.**—In an action against a banker for not honouring a customer's cheque for 7l. 11s., it appeared that on the 20th March the balance in his favour was 21l. 4s. On that day an acceptance of the customer, made payable by him at his banker for 42l., was presented and paid. The cheque was presented a week afterwards. On the 20th, after the acceptance had been paid, a clerk of the banker called on the customer to know what should be done about that acceptance, not stating that it had been paid; he directed that it should not be paid; the clerk endeavoured to get the money back, marking the acceptance as paid and cancelled by mistake, but did not succeed; and the banker, on the 24th March, honoured a cheque drawn by the same customer for 13l. 13s.—Held, that the banker had authority to apply the funds of the customer in his hands towards payment of the acceptance; and that what took place afterwards did not alter or destroy the authority. *Keymer v. Laurie*, 18 L. J., Q. B. 218; 13 Jur. 426.

The plaintiff was holder of a foreign bill of exchange which the acceptor had made payable at the defendant's banking house in London. The bill was delivered to the defendant by the plaintiff's banker on the morning of the day it became due. The defendant (acting throughout according to the practice of London bankers), intending to pay the bill, and having sufficient assets of the acceptor in his hands, drew lines across and along the name of the acceptor; but in the course of the day, having received orders from the acceptor not to pay, he wrote upon the bill the words, "cancelled by mistake; orders not to pay," and in that state returned it the same afternoon to the plaintiff's bankers.—Held, first, that this was a cancellation and defacing of the acceptance; secondly, that it was a cancellation by error and mistake; thirdly, that the defendant had taken due care to prevent the acceptance from being defaced; fourthly, that the defendant was not liable to pay the amount of the bill; and, lastly, that the only duty imposed on him was to take due care of the bill, and if he did not choose to pay it, to return it uncanceled, unless cancelled by mistake, and in that case to indicate that it had been so cancelled. *Warwick v. Rogers*, 5 M. & G. 340; 6 Scott, N. R. 1; 12 L. J., C. P. 113.

In an action by a customer of a bank against bankers to try their right to debit him with a bill, it appeared that the plaintiff was drawer

of the bill, which was accepted payable at the bank. The plaintiff discounted the bill with the bank, and indorsed it to them; they re-discounted the bill, and indorsed it to the re-discounter. On the maturity of the bill, it was presented by the holder at the bank, along with several other bills payable there, all of which bore the bank's indorsement. The bank paid the amount of the whole without any indication of whether they paid as indorsees or as agents for the acceptors. The account of the acceptor of this bill was at this time overdrawn; he stopped payment on that day, and on the next notice of dishonour was given by the bank to the plaintiff, and he was debited with the amount. It was left to the jury to say whether the bank paid the bill on their own account as indorsees, or as agents of the acceptor. The jury found that they paid as indorsees.—Held, that the question was properly left, that the bank had a right to pay the bill as indorsees, reserving to themselves time to inquire whether they would honour the bill or not, that it was a question of fact whether they intended to do so, and that there was no obligation on them to inform the holders in what capacity they paid. *Pollard v. Ogden*, 2 El. & Bl. 459; 22 L. J., Q. B. 439.

**Bank dishonouring Acceptance—Presentment made after Banking Hours.**—Where a customer of the Bank of England was in the habit of making his acceptances payable at the bank, and one of such acceptances being presented for payment at eleven o'clock in the morning was dishonoured for want of assets, and was presented again by a notary at six o'clock in the evening when the same answer was given by a person stationed for that purpose.—Held, that the bank, although they had before six o'clock received assets, was not bound to pay the bill, it being after the usual hours of business. *Whitaker v. Bank of England*, 1 C., M. & R. 744; 5 Tyr. 268; 6 C. & P. 700; 1 Gale, 54.

### 6. AUTHORITY TO ACCEPT AGAINST BILLS OF LADING.

A customer of a bank having desired them to procure to be accepted bills of exchange which a correspondent of his would draw against bills of lading he should send, and the bank having got their agents to accept the bills of exchange on a document which was sent to them as, and purported to be, the bill of lading referred to, but which was in fact a forgery, no goods having been shipped, and the transaction being a fraud on the part of the customer's correspondent.—Held, that the bank was entitled to recover from the customer the amount they had paid in respect of the bills of exchange. *Woods v. Thiedemann*, 1 H. & C. 478; 10 W. R. 846.

### 7. ACTING AS AGENTS.

The defendant kept an account with the Hull Bank, upon the terms that they should procure P. & Co., their London agents, to accept on their credit bills drawn by the foreign correspondents of the defendant against their consignments to them, and of which P. & Co. were advised by the Hull Bank. The defendant paid the Hull Bank a quarter per cent. on the amount of the acceptances, and P. & Co. a fixed annual sum for transacting his London business. When a bill was accepted

by P. & Co. the Hull Bank debited the defendant with the amount, and they charged him interest from the time the bill was due. The Hull Bank became bankrupt, and P. & Co. paid all bills accepted by them which were due after the bankruptcy:—Held, that the assignees of the Hull Bank, and not P. & Co., were entitled to recover from the defendant the amount of such bills. *Barkworth v. Ellerman*, 6 H. & N. 605; 7 Jur., N. S. 829; 9 W. R. 377—Ex. Ch.

#### 8. SECURITIES, DEPOSIT, PLEDGE, AND MORTGAGE.

**Right of Bank to negotiate Bills of Customer—Pledge and Deposit.**—Bankers may pledge bills deposited with them by a customer, though such customer is a creditor, when the parties receiving the bills are unacquainted with that circumstance. *Collins v. Martin*, 1 B. & P. 648; 2 Esp. 250.

So, they may negotiate them to such an extent as the necessary demands of the customer require, without his express authority. *Thompson v. Giles*, 3 D. & R. 733.

Where indorsed bills of exchange are deposited by a customer with a banker, the latter has the absolute power of disposing of them. Such absolute power, however, may be qualified by circumstances: as where the banker is agent for his country correspondent, to receive and pay bills for him, with an allowance for so doing; or, where, in an annual account stated between them, the banker has entered the bills as the property of the correspondent in the one case, considering him as a factor, and the bills as remitted for a particular purpose, viz., to be received and carried to account as cash when due, and his power over them limited to that object: in the second case, raising an express declaration of trust. *Pearce, Ex parte*, 1 Rose, 232; 19 Ves. jun. 25.

When a banker's acceptances exceed the cash balance in his hands, he holds collateral securities for value. *Bosanquet v. Dudman*, 1 Stark. 1.

He may recover against the acceptor of an accommodation bill (deposited with him as a collateral security before it became due), although the party who deposited the bill had it in his hands when it became due, and had received satisfaction from the drawer. *Id.*

A., having been in partnership with B., on the dissolution undertook to collect and pay the partnership debts. A. and B., during their partnership, had kept a joint account with a branch bank; but after the dissolution there was only a single account of A. kept there. A., having greatly overdrawn that account, obtained a promissory note from B., his former partner, which he endorsed to the bank as a security for his debt, just previous to a quarterly inspection of the accounts of the branch, the clerk who managed the branch promising that it should not be presented. He, however, kept it, and it was found among the securities of the branch, in his portfolio, when he was discharged from his situation:—Held, that the directors of the bank might recover the amount from B. *Bosanquet v. Forster*, 9 C. & P. 659.

**Bills not due—Bankruptcy of Bank before Bills become Due.**—A customer was in the habit of indorsing, and paying into his bankers' hands, bills not due, which were immediately entered as cash to his credit, to the full amount, and he was then at liberty to draw for that amount by cheques

on the bank. The bankers became bankrupt, and at the period of their bankruptcy they had in their possession bills paid in by their customer, but not then due; and there was likewise at that time a balance of cash, independently of the bills, in favour of the customer. The evidence failed to show that the customer knew of the manner in which the bankers had dealt with the bills, although it was admitted that there was an understanding between the customer and the bankers, that the latter should deal with the bills as their property whenever the state of the account might require it:—Held, that the bills did not form part of the bankrupts' assets; and their assignees were accordingly ordered to deliver them up to the customer. *Barkworth, Ex parte*, 2 De G. & J. 194; 27 L. J., Bk. 5; 4 Jur., N. S. 547.

**Shares deposited by Partner—Subsequent Bankruptcy of Firm.**—M., senior partner of M. & L., was owner of railway shares, which he had deposited with a bank where the firm had a joint account, and where he also had a separate account. The deposit was accompanied with a written memorandum that the shares were to be held as a collateral security for a note of his own which had been discounted by the bank, or for any other sum or sums of money in which he might thereafter become indebted to them; and he empowered the bank to sell the shares should the note, or any other advance, not be regularly paid at maturity. The shares subsequently became the property of the firm. M. & L. became bankrupt. On their bankruptcy there was a large sum due from them to the bank, which was unsecured:—Held, that the bank was not entitled to hold and retain the shares as security for the debt due from the bankrupts jointly. *McKenna, Ex parte, Mortimore, In re*, 30 L. J., Bk. 20; 7 Jur., N. S. 588; 9 W. R. 490.

**Note paid to Bank—Death of Maker insolvent—New Note by Wife—Her Liability.**—A banking firm advanced money to A., and took a note for such advance, which was signed by A. and his wife, who had no separate property. A. died insolvent; nine days after his death, one of the partners in the bank went to the house of the widow, taking with him a proper stamp, and asked her if she could pay any money on account, and on her answering that she could not, obtained her signature to a new note written by himself upon the stamp. It being doubtful whether the widow knew that she was not liable upon the original note and nothing having been mentioned at the interview concerning her non-liability:—Held, that the note so obtained was invalid. *Coward v. Hughes*, 1 Kay & Johnson, 443.

— **When note made jointly by Husband and Wife.**—But where a woman, with separate estate, joined with her husband in a note, payable on demand, to secure the balance against him at his bankers, and the balance continued against him till his death, which happened seven years afterwards, and after that event she signed a note for the unsecured balance:—Held, that the foregoing transaction constituted a good consideration for the latter note. *La Touche v. La Touche*, 3 H. & C. 576; 34 L. J., Ex. 85; 11 Jur., N. S. 271; 13 W. R. 563; 11 L. T. 773.

**Negligence—Claim of Banker.**—Where the

bankers of an individual member of a firm, knowing that the firm banked elsewhere, received from and discounted for their customer bills of exchange, purporting to be drawn and indorsed by the firm, and also indorsed by the customer, the signatures of the firm as drawers and indorsers and of the customer as indorser, as well as the whole of the bills with the exception of the signatures of the acceptors, being in the customer's handwriting:—Held, that the transaction shewed on its face a conversion by the customer of partnership property to his own purposes; and that the bankers had been guilty of great negligence in abstaining from inquiry; and they could only claim as against the customer's co-partners so far as the customer himself might have claimed compensation from them in respect of moneys paid by him out of his private account for partnership purposes. *Darlington District Joint Stock Banking Company, Ex parte, Riches, In re, & De G., J. & S. 581.*

**Improper Sale of Bonds—Measure of Damages.**—A banking company who were mortgagees of Spanish bonds, employed the defendant to raise money upon them by deposit in his own name; the party with whom the defendant deposited them called on the defendant for repayment, and, on default, sold the bonds, with the concurrence of the defendant, without the knowledge of the company, and paid the balance of the proceeds to the defendant. The company was afterwards compelled by their mortgagor to replace the bonds or their value:—Held, that the defendant was answerable to the company for the market price of the bonds at the time of the actual sale, and that he was not answerable for the value of the bonds at any other time. *Gordon v. Pym, 3 Hare, 223.*

**Effect of Security—Onus of Proof.**—On a question of evidence whether a security was intended to cover a particular debt (present or future) or the balance of an account current, the burden of proof is on those who assert that it was intended to secure the balance of the account current. *Boys, In re, Eedes v. Boys, 10 L. R., Eq. 467; 39 L. J., Ch. 655.*

**Benefit of Securities.**—By the Australian Act, 22 & 23 Vict. 1859, the South Australian Branch of the National Bank of Australia is constituted a bank of issue, with all such powers as are usual for establishments carrying on the business of banking; and by s. 7, such bank is empowered to take and hold for reimbursement only, not for profit, freehold and leasehold lands, houses, &c., in satisfaction of any debt due to the bank, or security for any liability previously incurred, but not in anticipation of such, and to sell and dispose of the same; provided, that it shall not be lawful for the bank to advance or lend money upon the security of lands, houses, &c. A., who had an account with the bank in 1861, obtained leave to overdraw to the extent of 10,000*l.* on the security of the deposit of title deeds respecting lands; having, however, in 1866, overdrawn to an amount exceeding 13,000*l.*, the bank brought an action against him for that amount, and recovered judgment, but agreed not to enforce the judgment in consideration that the title deeds so deposited were to remain as security for the money due, for which judgment was, after the approaching harvest, to be signed,

and the land sold for the liquidation of such debt. Judgment was accordingly signed; but before the lands were sold he was declared insolvent, and the bank, under the provisions of the Colonial Insolvent Act of 1860, required the assignees, to whom the title deeds were delivered, to sell the lands, which they accordingly did, and paid the proceeds of the sale into court. To a bill filed by the bank against the assignees claiming the benefit of these securities, and for the proceeds of the sale, the assignees put in a general demurrer on the ground, that the title deeds were deposited for future advances to be made by the bank contrary to the provisions of the act of 1869:—Held, that there being in 1866 a valid subsisting debt between the bank and A., the agreement then made was within the enabling part of the 7th section of the act, and the demurrer overruled. *National Bank of Australasia v. Cherry, 3 L. R., P. C. 299.*

**Charge on Calls.**—A company being in want of funds, its directors obtained an advance from the company's bankers, for which they gave their promissory notes, and passed resolutions making the advance a charge on a call then made and on one made a few months previously. The directors were called upon to pay and paid the balance due on their promissory notes, and they also advanced other moneys for the benefit of the company:—Held, that the bankers had obtained a valid charge on the calls, and that the directors were entitled to the benefit of that charge as well for what they had paid in respect of their promissory notes as for what they had advanced independently. *International Life Assurance Society, In re, Gibbs, Ex parte, 10 L. R., Eq. 312; 39 L. J., Ch. 667; 23 L. T. 350; 18 W. R. 970.*

**Mortgage.**—A company in difficulties, but not in the immediate prospect of winding-up, deposited the deeds of freehold property with their bankers, to secure their current account, then largely overdrawn. They afterwards continued to draw upon their account, and to pay in moneys for a period of two months until the bank stopped payment. The company resolved upon a voluntary winding-up rather more than six months after the transaction:—Held, that the mortgage was valid. *Patent File Company, In re, Birmingham Banking Company, Ex parte, 6 L. R., Ch. 83; 40 L. J., Ch. 190.*

A banker holding securities which have been deposited with him by way of equitable mortgage, must deliver up the securities upon being paid the amount covered by the deposit. *Adair, Ex parte, Gross, In re, 24 L. T. 198.*

**Trust Money.**—A trustee laid out trust-money, together with other money in his hands, upon mortgage in his own name, and executed a declaration of trust as to so much of the mortgage debt as represented the trust-money. He afterwards deposited the mortgage deed with his bankers as security for money advanced to him, and absconded. In the absence of negligence on the part of the cestui que trust, the deposit of the deed passed no interest in the trust fund to the bankers. *Stackhouse v. Jersey (Countess), 30 L. J., Ch. 421.*

**Debt growing Due.**—N. arranged with a banking company that all his acceptances should

be made payable at the bank, he providing the bank with approved remittances prior to the maturity of such acceptances. He afterwards handed to the bank bills drawn by him on and accepted by a third party. Before these bills arrived at maturity he mortgaged to the bank all remittances in cash, bills, or produce then on their way to him from Barbadoes; and it was agreed that such remittances should be held by the bank as a security to it as long as any debt should be due or growing due from him to the bank under the existing or any future arrangement. The bills were dishonoured:—Held, that the contingent liability of N. in respect of the bills was a debt growing due within the meaning of the security. *Merchants' Bank of London v. Maud*, 19 W. R. 657.

**Proving.]**—A banking company at the request of A., a speculator in cotton, issued a letter of credit authorizing J., a merchant at Pernambuco, to draw upon them to the amount of 10,000*l.*, the drafts to be covered by bills of lading of cotton, to be addressed to the company by the same mail which should bring the acceptances; on receipt of which bills the company engaged to honour the draft. A similar letter of credit for 17,000*l.* was issued to J. at the request of B., another speculator in cotton. J. accordingly drew drafts under the first letter of credit to the amount of 9,690*l.* 0*s.* 9*d.*, and under the second letter of credit to the amount of 13,062*l.* 15*s.* 1*d.* The first set was accepted by the banking company, which received the corresponding bills of lading. The second set was not presented till after the banking company had stopped payment, and was therefore not accepted. The first set was dishonoured:—Held, that the cotton represented by the bills of lading was the property of the banking company, and that J. could only prove against the company for the amount of the several bills after deducting the value of the cotton which was sold, and the proceeds received by J. *Banner v. Johnston, Barned's Banking Company, In re*, 5 L. R., H. L. 157; 40 L. J., Ch. 730; 24 L. T. 542.

**Extent of Security.]**—The articles of association of a company provided that all securities made on behalf of the company should be sealed with the company's seal, signed by two of the directors and countersigned by the secretary, and when so sealed, signed, and countersigned, should be valid and enforceable against the company. The company requiring accommodation from their bankers, the directors passed a resolution, that certain title deeds should be deposited with the bankers as collateral security for bills under discount, and the deeds were deposited accordingly. The bankers then discounted bills directly for the company, and also bills for third persons on which the company was liable, and the company being afterwards wound up, the bankers sold the property comprised in the title deeds for a sum greater than would cover the amount due on the bills directly discounted, but less than their general debt:—Held, first, that the deposit was only intended as a security for bills discounted directly for the company. *General Provident Assurance Company, In re, National Bank, Ex parte*, 14 L. R., Eq. 507; 41 L. J., Ch. 823; 27 L. T. 433; 20 W. R. 939.

Held, secondly, that the bankers not being officers of the company had not imposed upon

them the duty of seeing that the formalities required by the articles of association were complied with; and that the equitable mortgage by deposit was valid, although these formalities were not complied with, and although it was not registered under the Companies Act, 1862, s. 43. *Ib.*

Held, thirdly, that the bankers had, as mortgagees, a right to retain as against the liquidators of the company the balance which would remain in their hands after paying the amount due on the bills directly discounted for the company, in satisfaction of their general debt. *Ib.*

H. & Co., at Manchester, consigned goods for sale to L. & Co., at Hong Kong, upon the terms that the proceeds should be remitted to H. & Co. to meet the acceptances of L. & Co. L. & Co. indorsed the bill of lading for consideration to their bankers, and on the arrival of the goods they were delivered to the bankers. The bill of lading omitted the words "or order of assigns:—" Held, that the omission of these words did not operate as notice of the agreement between H. & Co. and L. & Co., and that the bankers had a good legal and equitable title to the goods. *Henderson & Co. v. Comptoir d'Escompte de Paris*, 5 L. R., P. C. 253; 42 L. J., P. C. 60; 29 L. T. 192; 21 W. R. 873.

A wool broker gave to a bank, to secure an advance, a letter of hypothecation on certain wools, promising to lodge warehouse warrants for them next day. The bank made repeated application for the warrants, but did not obtain them. After a few days, the broker having left his house, the bankers by pressure obtained the keys of his warehouse, where the wool was stored, and took possession. Part of the wool had belonged to a customer of the broker, but he was under advances and made no claim:—Held, that the bank acquired a valid charge on the wool under the provisions of the Factors Act, 6 & 7 Vict. c. 39. *North Western Bank, Ex parte, Slee, In re*, 15 L. R., Eq. 69; 42 L. J., Bk. 6; 27 L. T. 461; 21 W. R. 69.

In leaving his house the broker was, as it turned out, absconding:—Held, that the bank had no notice of this. *Ib.*

By an instrument under seal dated the 2nd of November, a customer gave to his bankers a charge on the premises mentioned in the schedule as a security for all moneys then due or thereafter to become due from him to them, subject to a prior mortgage of the 3rd of October to a building society, and he covenanted to execute a legal mortgage when required. The schedule described the property as "three leasehold houses in *Coity* held by the mortgagor under a lease of the 25th of September." The lease of the 25th of September in fact comprised only one house. There was evidence that on the 2nd of November the bankers agreed to make further advances to the customer, upon his giving them satisfactory security; that he then offered to give them a charge upon three leasehold houses, which he pointed out to the manager; that the manager agreed to accept those three houses as security; and that the deed of charge was then drawn up at the bank, the description in the schedule being inserted from the customer's instructions. One only of the three houses thus pointed out was comprised in the lease of the 25th of September, and the two others were comprised in a lease of the 31st of December, which, as well as the lease of the 25th of September, was subject to a prior

mortgage to the building society:—Held, that this evidence was admissible, and that the bankers were entitled to a charge on the two houses comprised in the lease of the 31st of December. *Boulter, In re, National Provincial Bank of England, Ex parte*, 4 Ch. D. 241; 46 L. J., Bk. 11; 35 L. T. 673; 25 W. R. 100.

Bankers at Lima established a credit agency with the General Company in London, and agreed to send remittances within ninety days to cover drafts. The General Company, being in difficulties, obtained an advance of money from the Peruvian Bank, to be repaid out of expected remittances from the Lima Bank, to cover bills then current, and the Peruvian Bank employed as agents to receive and select from the expected securities, the managing director of the General Company and their own managing director, who had been, two years previously, the manager of the General Company, and was cognizant of and party to the arrangement with the Lima Bank. The securities were selected by and handed over to the Peruvian Bank upon their arrival, and the following day the General Company stopped payment and was wound up:—Held, that the Lima Bank had no title to recover the securities from the Peruvian Bank. *Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. D. 160; 38 L. T. 130.

A merchant in London obtained from his bankers a letter of credit for 15,000*l.* as security; the merchant, who was shipping goods to S. in Uruguay, handed to the bankers the shipping documents and bills drawn by him upon and accepted by S., and also authorized the bankers to realize the goods in case of a deficiency. Some of the bills were dishonoured on presentation, and on the bankers threatening to sell the goods, the merchant handed to them 2,500*l.* as collateral security for payment of the bills, at the same time asking them to adopt such measures for the settlement of the business as were likely to cause the merchant the least possible loss. Subsequently an arrangement was made between S. and the bankers, to which he was not a party, and by which the materials were to be realized by the bankers, and the bills to be given up to S. The value of the materials and the 2,500*l.* did not together amount to 15,000*l.*:—Held, that the merchant was not entitled to recover from the bankers the 2,500*l.*, as the cancellation of the bills, although absolute as far as the right to sue upon them was concerned, did not take away their right to retain the 2,500*l.* under their contract with the merchant. *Yglesias v. Mercantile Bank of the River Plate*, 3 C. P. D. 330; 38 L. T. 464; 26 W. R. 454.

**Liability for Loss or Theft of Securities—Deposit for Safe Custody—Bank not receiving Commission.**—Securities deposited by a customer with his bankers for safe keeping, were stolen by a clerk of the bankers:—Held, that the bankers were not liable unless the loss was occasioned by their gross negligence. *Giblin v. M'Mullen*, 2 L. R., P. C. 317; 38 L. J., P. C. 25; 21 L. T. 214; 17 W. R. 445.

A customer deposited with his bankers a box containing securities, of which he kept the key. The box was kept in a strong room of the bank, where the manager's box was, containing the securities of the bank. Access to the strong room was only obtained by passing through a

compartment where a cashier sat by day and a messenger slept by night. In this compartment was a door leading to the strong room, which room had two iron doors opened by separate keys, which during the day were kept by the cashier who occupied the compartment. This cashier stole the securities. The bank received no consideration for taking care of the securities of their customers:—Held, that, under the circumstances, there was no evidence of negligence to render the bank liable for the loss of his securities. *Id.*

A customer, who kept an account with a banker, made a special deposit of certain bonds for safe keeping, paying nothing for the privilege; the bonds were stolen by the teller of the bank, who had always borne a good character:—Held, first, that the bank was a gratuitous bailee, and as such not liable, except for gross negligence. *Scott v. National Bank of Chester Valley*, 10 Canada L. J., N. S. 182.

Held, secondly, that neither the fact, that the bank might have discovered that the latter was dishonest, by a more frequent or accurate examination of his accounts, nor that he was allowed to keep the individual ledger, which was the only book which was a check upon him, nor that he was not dismissed when it was discovered that he had made a successful speculation in stocks, was such negligence as to render the bank liable. *Id.*

Held, thirdly, that nothing short of knowledge or reasonable grounds of suspicion by the bank that the teller was unfit to be appointed or retained would render the bank liable. *Id.*

**—Receiving Commission.**—An owner of railway shares in two companies deposited the certificates for safe custody with a banking company, who undertook to receive the dividends for a small commission. On receiving the certificates from the railway companies, he gave his address in one instance at the office of the bank, and in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, and forged the name of the owner to the transfer. The companies wrote to him informing him of the transfers, and receiving, in one instance, no answer, and in another an answer in his name forged by the manager, registered the transfer. He afterwards, on discovery of the fraud, brought suits against the two companies and the transferees of the shares, in which he recovered the shares, but the court gave him no costs. The banking company being wound up, he claimed to prove against the company for the amount of his costs in the suits which had been occasioned by their negligence:—Held, that the banking company was a bailee for reward of the certificates, and that they had been guilty of culpable negligence in keeping them, but that the loss of the costs was too remote a consequence of the negligence of the company for them to be held liable for it. *United Service Company, In re, Johnston, Ex parte*, 6 L. R., Ch. 212; 40 L. J., Ch. 286; 24 L. T. 115; 19 W. R. 467. Affirming 9 L. R., Eq. 181; 39 L. J., Ch. 390.

**Allowing Income Tax on Mortgages.**—Bankers cannot refuse to allow income tax to a customer upon interest accruing on a mortgage security. *Mosse v. Colt*, 32 L. J., Ch. 756.



**Misappropriating Securities.**—See 24 & 25 Vict. c. 86, ss. 75, 76, and CRIMINAL LAW.

### 9. LIEN.

**General Lien of Banker.**—The Oriental Bank kept three accounts at the Agra Bank, namely, a loan account, a discount account, and a general account. They from time to time received advances from the Agra Bank, which were entered in the loan account, and to meet which they deposited securities with the Agra Bank. In the course of the transactions the Oriental Bank deposited three bills of exchange with the Agra Bank, accompanied by a letter stating that they proposed to draw upon them for 10,500*l.*, but that as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The Oriental Bank became insolvent and was wound up:—Held, that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien on the securities deposited by a customer for the customer's general balance, and that the balance of the loan account being satisfied, the Agra Bank might retain the bills for the balance of the general account. *European Bank, In re, Agra Bank's Claim*, 8 L. R., Ch. 41; 27 L. T. 732; 21 W. R. 45—L. J. Affirming 20 W. R. 937.

Bankers have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances that shew an implied contract inconsistent with the lien:—Held, that the bankers having acquiesced in the finding of the first court, that the securities deposited with them were in respect of specific sums and not on the general account, and not having objected thereto in their grounds of appeal to the Supreme Court, were precluded from raising that question in appeal to the Privy Council. *London Chartered Bank of Australia v. White*, 4 App. Cas. 413; 48 L. J., C. P. 75.

Simple interest only should be allowed on such specific amount, as to a mortgagee. *Ib.*

Bankers improperly or without title retaining moneys overpaid to them as mortgagees are chargeable with interest thereon. *Ib.*

A banking company incorporated by charter, which contained a clause declaring that it should not be lawful for the company to advance money on the security of merchandise, advanced money on the faith of receiving as security a preferential lien on the wool of an ensuing clip to be shorn from the sheep of the party in whose favour the advances were made, but who was not in the actual possession of the sheep, though a part owner of the sheep and the agent of the other owners for whose benefit the advances had been made:—Held, in an action of trover by the company on such agreement giving them a preferable lien, that it was maintainable, and that the banking company was entitled to recover for the value of the wool on such preferential lien. *Ayers v. South Australian Banking Company*, 3 L. R., P. C. 548; 40 L. J., P. C., 22; 19 W. R. 860; 7 Moore, P. C. C., N. S. 432.

Bankers have a lien upon bills or notes paid into their houses for the balance of a general account. *Jourdaine v. Lefevre*, 1 Esp. 66.

A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him he applies it to

the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect: this does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them, in order to secure the payment of his general balance. *Davis v. Boucher*, 5 T. R. 481.

A banker has a lien for the amount of his balance upon money securities paid in by a customer on his running account. *Scott v. Franklin*, 15 East, 428.

Stockbrokers advancing to bankers, their customers, a specific loan upon specific securities, have thereon not only a specific lien in respect of such loan, but also a general lien in respect of whatever else may be due to them from the bankers on account of their general business transactions; the rule in such cases being that the general lien is not excluded by special contract, unless the special contract be inconsistent with it. *Jones v. Peppercorne*, Johns. 430; 28 L. J., Ch. 153; 5 Jur., N. S. 140.

The circumstance that the securities, though treated by the bankers as their own, belonged, in fact, to third parties, if not known to the brokers when making the advance, does not affect their right to general lien. *Ib.*

Bonds payable to bearer, and passing by delivery only, were deposited with bankers for safe custody, and the bankers afterwards fraudulently deposited them with their brokers as a security for money advanced, and became bankrupt:—Held, that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers, and not merely for the advance made upon the security of those particular bonds. *Ib.*

A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer which may come to his hands. And where, taking into account the bills on both sides, the customer has a balance in his favour of a sum not equal to the amount of any one of them, this surplus cannot be appropriated to any one of the bills in reduction of the claim of the bankersuing any of the parties to the bill. *Bolland v. Bygrave*, R. & M. 271.

The general lien of bankers is part of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange. *Brandao v. Barnett*, 12 C. & F. 787; 3 C. B. 519.

A banker's lien does not arise on securities deposited with him for a special purpose, as where exchequer bills are placed in his hands to get interest upon them, and to get them exchanged for new bills; such a special purpose is inconsistent with the existence of a general lien. *Ib.*

Where a person who is in reality the agent of another deposits exchequer bills with his own bankers, without informing them whose property these bills are, the bankers may be held entitled to consider these bills as the depositor's property, and to hold them as security for any money due to them from him, if the mode of deposit, or the circumstances attending it, give them a lien on the bills as against him. *Ib.*

A. was the London agent of B., a Portuguese merchant, and in that character purchased exchequer bills for him, received interest on them,

and at proper intervals got them exchanged for others. He acted in the same manner for several other foreign customers. A. kept an account with C. as his banker, and at C.'s banking-house had several tin boxes, in which he deposited these exchequer bills, and of which he kept the keys. One day A. took out of a tin box several exchequer bills, which he delivered to C., requesting C. to get the interest due on them, and to get the exchequer bills exchanged for others. C. did so. Before A. came to take back the exchequer bills, acceptances of his, beyond the amount of his cash credit account, were presented at C.'s bank, and paid. A. afterwards became a bankrupt :—Held, that C. had not a lien on the exchequer bills in his hands for the balance due to him on A.'s account. *Ib.*

**On Securities generally.]**—A banker's lien upon all securities deposited with him by a customer, and received by him *bonâ fide*, is not affected by any equities which may exist between that customer and a third party. *Misa v. Currie*, 1 App. Cas. 544; 45 L. J., Ex. 414; 35 L. T. 414; 24 W. R. 1049—H. L.

At the commencement of the bankruptcy of the firm of A. & W. there were standing registered in the name of A. shares in a bank, whose articles of association provided that all the shares of every shareholder should be subject to a lien in favour of the bank for any debt due to the bank from him alone or jointly with any other person. The shares in question, which were originally the private property of A., became partnership assets when he entered into partnership with W., but the bank had no notice that anyone but A. was interested in the shares. The bank sought to prove against the joint estate of the firm for a large debt contracted after the shares became partnership assets :—Held, that the lien of the bank on the shares was a security on the joint estate, and that the bank could not prove for the amount of their debt without deducting the value of the shares. *Manchester and County Bank, Ex parte, Collicie, In re*, 3 Ch. D. 481; 45 L. J., Bk. 149; 35 L. T. 23; 24 W. R. 1035—C. A.

Scrup certificates, by which it was certified that, after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker, in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery :—Held, that the defendants were entitled to the scrip certificates as against the plaintiff, first, on the ground that by reason of the usage the certificates had become negotiable instruments transferable by mere delivery, and, secondly, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a *bonâ fide* holder for value, was estopped from denying that they were so trans-

ferable. *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; 46 L. J., Q. B. 346; 36 L. T. 240; 25 W. R. 366.

S. discounted with a bank bills of exchange drawn against goods consigned to India, handing over the bills of lading as security. The bank carried a part of the discount value of the bills to a suspense account till advice of the payment of the bills, to form a margin or an additional security against a fall in price of the goods, and gave accountable receipts for such margins. S. deposited three of such receipts with a party, who gave notice to the bank. The bills having been duly honoured :—Held, that the bank was entitled to a lien on the marginal receipts for such sums as were actually due and payable to them by S. at the times when the marginal receipts respectively became payable, in respect of liabilities contracted before notice of the deposit was received, but not to a lien for sums not actually due. *Jeffryes v. Agra and Masterman's Bank*, 2 L. R., Eq. 674; 35 L. J., Ch. 686; 14 W. R. 889.

The principle established in *Ex parte Waring* (19 Ves. 345), that securities held by a banker against his acceptances are available to the bill holders, if both acceptor and drawer are insolvent, does not apply where the acceptor or drawer is a joint stock company which has been ordered to be wound up, unless it is shewn that the company is actually insolvent. *New Zealand Banking Corporation, In re, Hickie, Ex parte*, 4 L. R., Eq. 226; 36 L. J., Ch. 809; 16 L. T. 654.

A security given by a customer to his bankers for the balance "which shall or may be found due on the balance of" the account covers the existing balance only, and is not a continuing security for the floating balance. *Medewe or Meadows, In re*, 26 Beav. 588; 28 L. J., Ch. 891; 5 Jur., N. S. 421; 32 L. T., O. S. 252; 7 W. R. 319.

**On Title Deeds.]**—A company deposited title deeds with a bank as collateral security for bills under discount. At the time the company was wound up it was indebted to the bank in respect of other bills than those actually discounted, and the securities realised more than was sufficient to cover the latter bills :—Held, that the company could effect a mortgage by deposit of deeds without complying with the formalities required by its articles of association upon the execution of mortgage deeds; that the bankers were not in the position of officers of the company, who are bound to see that the required formalities were complied with, and that the bank was entitled to hold the balance of the proceeds upon the sale of the securities, to meet the whole amount due to it by the company. *General Provident Assurance Company, In re, National Bank, Ex parte*, 14 L. R., Eq. 507; 41 L. J., Ch. 823; 27 L. T. 433; 20 W. R. 939.

Title deeds, which had been handed by the plaintiff to his brother, B., to enable the latter to borrow 600*l.* from H. for seven days, were deposited by B. with a bank, with a memorandum purporting to be signed by the plaintiff, and stating that the deposit was made in consideration of the bank lending B. 1,000*l.* for seven days. The bank made him no loan for seven days, but, during the seven days next after the deposit, they allowed him to draw by cheques to an amount exceeding 900*l.* Upon a

bill filed by the plaintiff against the bank for the delivery up of the deeds, on the grounds, first, that the memorandum of deposit was a forgery; and secondly, that the bank had not lent B. 1,000*l.* for seven days:—Held, that the question of forgery was one for a jury only, but that, assuming the memorandum to be genuine, the bank had no right to retain the deeds, inasmuch as they had not fulfilled the condition on which the deposit was made. *Burton v. Gray*, 8 L. R. Ch. 932; 43 L. J., Ch. 229.

A bank allowed T. & J., partners, to overdraw their account, having good security from deposit of deeds relating to separate property of T. The partners presented their petition, and the bank voted in favour of resolutions for composition, the resolutions saying nothing about their security. Afterwards, in accordance with the resolutions, a deed was executed, and this distinctly reserved to the bank their collateral security. The composition was paid to all the creditors, including the bank. On the application of T., the county court judge declared the securities forfeited, and directed the bank to deliver them up to T.:—Held, on appeal, that in a composition the county court judge had no jurisdiction to make such an order, and that the bank was entitled to retain their securities. *Manchester and Liverpool District Banking Company, Ex parte, Little, In re*, 18 L. R., Eq. 249; 43 L. J., Bank. 73; 30 L. T. 539; 22 W. R. 567.

But a banker has no lien on muniments casually left in his banking-house after he has refused to advance money on them as a security. *Lucas v. Dorrien*, 7 Taunt. 278; 1 Moore, 29.

A customer deposited with his bankers a deed of conveyance, including two distinct properties, giving to them at the same time a memorandum pledging one of the properties as a security for a specific sum advanced, and also for his general balance:—Held, that as the deposit of the deed of conveyance was for the special purpose of giving a security upon one property only, the bankers could claim no general lien, by the custom of bankers, on the other property. *Wyde v. Radford*, 33 L. J., Ch. 51; 9 Jur., N. S. 1169; 9 L. T. 471; 12 W. R. 38.

A conveyance of land is not a security within the custom which gives to bankers a general lien on securities deposited by their customers. *Id.*

A testator died indebted to his bankers, who held as a security title-deeds of his estate. His executrix being his widow was empowered by his will to charge his real estates in aid of his personal estate. She drew from the bank on the account of the testator's executors, and deposited other title-deeds of the testator's estate as a further security. The sums thus drawn were misapplied by her:—Held, that, in the absence of notice of any breach of trust, the bank was entitled to hold the title-deeds as security for the moneys advanced to the executrix. *Farhall v. Farhall*, 7 L. R., Eq. 286; 38 L. J., Ch. 281.

—**Loan by equitable Mortgagees after Notice of Contract of Sale.**—The owner of land, after depositing the title-deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards

paid into his own account at the bank, sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that, on the principle of *Clayton's Case* (1 Mer. 585), that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money by instalments to the vendor:—Held, that on the principle of *Hopkinson v. Rolt* (9 H. L. C. 514) the bank had no charge on the land as against the purchaser for the fresh advances. *London and County Banking Company v. Ratcliffe*, 6 App. Cas. 722; 51 L. J., Ch. 28; 45 L. T. 322; 30 W. R. 109—H. L.

Held, also, that the bank had no charge upon the purchase-money. *Id.*

—**Duty of Purchaser without Notice.**—A purchaser of land, with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has, after notice of the purchase, made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends to do. *Id.*

**Lien on Shares of Shareholders.**—By the articles of association of a bank, the bank would have a lien on the shares of a shareholder for all moneys due to the bank by the shareholder. The bank was wound up, and the assets were sold, one of the terms being that certain shareholders in the bank should be paid 2*l.* per share:—Held, that the bank had, on the money so to be paid to a shareholder, a lien for moneys due to the bank by the shareholder. *General Exchange Bank, In re, Lewis, In re*, 6 L. R., Ch. 818; 40 L. J., Ch. 429; 24 L. T. 787; 19 W. R. 791.

By one clause of a deed of settlement of a colonial banking company, the directors had power to issue shares on such terms as they thought expedient. By another clause the company was to have a lien for debts due to the company from the shareholders upon any shares of the debtors. The directors issued shares with powers of attorney for the express purpose of enabling the persons to whom they were issued to remit them to England, and to deal with them as negotiable securities or as money payments:—Held, that no lien attached to the shares so issued. *Hunter v. Stewart*, 4 De G., F. & J. 168.

Articles of association of a banking company provided that the bank should have a paramount lien on the shares of any shareholder for all moneys due to them from him, and that they might decline to register any transfer whilst the transferring shareholder was indebted to them. A shareholder being unable to meet certain bills of exchange accepted by him and held by the bank, the bank took from him renewed bills for the same amount. Before the renewed bills arrived at maturity the shareholder transferred his shares, but the bank declined to register the transfer:—Held, that the renewed bills, though they suspended the remedy, did not discharge the antecedent debt, and that consequently the bank had a lien on the shares and was not bound.

to register the transfer. *London, Birmingham and South Staffordshire Bank, In re*, 34 L. J., Ch. 418; 11 Jur., N. S. 316; 12 L. T. 45; 13 W. R. 446.

A deed of settlement of a banking company provided, that the directors should have a lien on the *shares and stock* of every shareholder for debts due from him to the company, and that the directors might cancel and declare forfeited or sell the shares of such shareholder, or otherwise deal with the same as the case might require, for obtaining payment of such debts:—Held, that the bank had a lien, not only on the shares, but also on the dividends of a shareholder who had overdrawn his account. *Hague v. Dandeson*, 2 Ex. 741; 17 L. J., Ex. 269.

— **When forming Part of Trust Estate.**—Trust funds were invested in the purchase of transferable shares in a banking company, in the name of one of the trustees, who was also a holder of shares in his own right in the company, and afterwards made various sales and purchases of shares therein. There was no distinguishing mark by which the shares could be traced, the same being in the nature of capital, expressed by quantity. The trustees agreed to assign some of the shares standing in his name to the company as security for repayment of advances which had been made to him, but no transfer was made. He afterwards became bankrupt, without having shares sufficient to satisfy the trusts and his agreement to assign:—Held, first, that the company had no lien on any of the shares which had been held in trust. *Murray v. Pinkett*, 12 C. & F. 764.

Held, secondly, that, although the shares held in trust might have been charged by sale and repurchase, the trustee must be considered as holding for the purposes of the trust the same number of shares, out of a larger number that were standing in his name at the time of his bankruptcy. *Ib.*

Held, thirdly, that, as no shares were transferred in pursuance of the agreement, no question as to whether the bank directors were purchasers with or without notice could arise, and of the two equities for the *cestuis que trustent* and for the bank, the former must be preferred. *Ib.*

**On Cash Balance for Discount.**—A banker who has discounted bills for a customer has no implied lien on that customer's cash balance during the currency of the bills. *Bower v. Foreign and Colonial Gas Company*, 22 W. R. 740.

**On Boxes containing Securities.**—Bankers have no general lien on boxes containing securities deposited with them for safe custody. And a customer, who had deposited such boxes for safe custody, having become lunatic, and his committee having been appointed:—Held, that the bankers had no right to retain or open the boxes as against the committee. *Leese v. Martin*, 17 L. R., Eq. 224; 43 L. J., Ch. 193; 29 L. T. 742; 22 W. R. 230.

The bankers who claimed such a lien having obtained garnishee orders against debtors of their lunatic customer through information obtained after opening the boxes, the court granted an injunction to prevent them from enforcing their garnishee orders, with respect to the securities in

question, but refused damages for the opening of the boxes. *Ib.*

**Mortgage of Leasehold Premises.**—By an indenture dated 3rd of October, 1865, a ship-building yard and works held under a lease for 999 years were assigned to the debtor, to hold as to the leasehold premises for the residue of the term, and as to the machinery and tenant's fixtures absolutely. The recitals stated the purchase-money to be 2,000*l.* for the leasehold premises and 500*l.* for the tenant's fixtures. The debtor borrowed the purchase-money from his bankers, and deposited with them as security the indentures of lease and assignment, without any memorandum. He afterwards erected considerable new machinery, and carried on business on the premises till 1876, when he became bankrupt, having incurred a further debt to his bankers:—Held, first, that the equitable security created by the deposit did not comprise tenant's fixtures. *Tweedy, Ex parte, Trethowan, In re*, 5 Ch. D. 559; 46 L. J., Bk. 43; 36 L. T. 70; 25 W. R. 399.

Held, secondly, that tenant's fixtures could not be assigned by the leaseholder so as to defeat the claim of the trustee, except by compliance with the Bills of Sale Act. *Ib.*

When leasehold property is equitably mortgaged by simple deposit of deeds, the application as to trade fixtures of the Bills of Sale Act is not excluded. *Ib.*

A., in whom a lease was vested, deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice, as the fact was, that he was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate:—Held, that the *cestuis que trustent* had priority over the bankers. *Baillie v. McKewan*, 35 Beav. 177.

**Subsequent Advances.**—Held, also, that the equitable mortgage was a security for the bankers' subsequent advances by virtue of their general lien upon the deeds. *Tweedy, Ex parte, Trethowan, In re*, 5 Ch. D. 559; 46 L. J., Bk. 43; 36 L. T. 70; 25 W. R. 399.

**On Goods deposited by Guarantor.**—Goods were deposited with bankers on behalf of A., a customer, to secure an advance made by the bankers to B., on the guarantee of A. This advance was made and repaid. Afterwards, and while the goods are still in the hands of the bankers, B. negotiates with them for another loan, to which A. is not proved to be privy; and a second loan is made by the bankers to B., which A. subsequently repays. Trover being brought against the bankers, they pleaded A.'s lien:—Held, that the second advance must be taken to have been made by the bankers on A.'s credit, and that the plea was supported by the proof. *O'Connor v. Majoribanks*, 5 Scott, N. R. 394; 4 M. & G. 435; 2 L. J., C. P. 161; 7 Jur. 834.

**On Securities deposited by Building Societies not authorized to Borrow.**—A building society not authorized to borrow money from time to time overdraw their banking account, and deposited deeds and other documents with the bank as security for the overdraft, it being agreed that the amount overdrawn should never exceed 25,000*l.* A portion of this overdraft was applied in the necessary payments of the society. The

society was subsequently wound up by order of the court:—Held, that the bankers had a lien upon the deeds in their possession for such part only of the overdrafts as had been so applied in necessary payments, and had not been covered by subsequent payments into the bank, all of which must be appropriated to reduce such lien, and an account was ordered upon that footing from the date when the balance last turned against the society, and so continued. *Blackburn Benefit Building Society (Liquidator) v. Cunliffe*, 22 Ch. D. 61; 31 W. R. 98—C. A.

—**Payments to Bankers during Winding-up Proceedings.**—The bankers had, between the date of the presentation of the winding-up petition and the winding-up order, received payments from certain borrowing members and delivered up to them their securities:—Held, that the bankers must account to the society for the sums so received by them. *Id.*

**On Moneys in the Hands of Trustees—Trustees authorized by Cestui que trust to pay Moneys to Bank.**—A cestui que trust, entitled to moneys payable out of a fund in the hands of trustees, was indebted to his bankers in a large amount, by which his account was overdrawn, and, in consideration of not being pressed to reduce this amount, he agreed to give the bankers a lien on the moneys coming to him out of the trust fund. He thereupon addressed a note to one of the trustees, requesting and authorizing the trustee to pay to the credit of the account of the cestui que trust at the bank the moneys payable to him out of the trust fund. The trustee was apprized of the arrangement between the parties:—Held, on the cestui que trust becoming bankrupt, that the bank had a good lien, and that the authority given by the note was not countermandable. *Steward, Ex parte*, 3 Mont., D. & D. 265.

**Of London Bank on Bills paid them by Country Bank.**—Where a country banker has short bills of his customer in his possession, and sends them to his London bankers, and becomes bankrupt, the short bills remaining in that condition continue the property of the holder; but the London bankers acquire a lien on the bills, and they are a security to them for the general balance due to them from the country banker. The assets available to the London bankers must be marshalled, and the residue, after satisfying the London bankers' lien, is payable among the short bill holders equally. *Froggatt, Ex parte*, 3 Mont., D. & D. 322; 7 Jur. 910. See *Barkworth, Ex parte*, 2 De G. & J. 194; 27 L. J., Bk. 5.

**Acceptances of Customer given to Bank to meet Acceptances of Bank—Insolvency of Bank—Rights of Holders of Customer's Acceptances.**—B. was in the habit of drawing bills on H. & Co., bankers, and of remitting bills to them to an amount fully sufficient to meet their acceptances. H. & Co. became bankrupt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B. upon H. & Co., and accepted by them; but H. & Co. had misappropriated the greater part of the bills remitted, to meet them:—Held, that B. could not claim to have returned to him such of the remitted bills as remained in the hands of H. & Co. at the time of their bankruptcy, but that they must be applied so far as they would extend in

payment of the bills accepted by H. & Co. *Currick, Ex parte*, 2 De G. & J. 208.

**On Partner's Separate Account for Debt due from Firm.**—Bankers have no lien on the deposit of a partner on his separate account for a balance due to the bank from a firm. *Watts v. Christie*, 11 Beav. 546; 18 L. J., Ch. 173; 13 Jur. 244, 845.

A partner continued with the bankers of his firm, who were also his private bankers, a deposit of the certificates of railway shares which he had originally purchased in his own name; with a memorandum to the effect that the object of the deposit was to secure sums of money due on promissory notes of the partner discounted by the bankers, and any future sums in which he might become indebted to them. The firm, as between themselves and the partner, had previously to the date of the memorandum adopted the purchase of the shares. The moneys raised by the discount were employed for the purpose of the firm, who made to the bankers payments on account of the money due on the promissory notes. On the firm becoming bankrupt, with a large balance due from them on their partnership account with the bankers, and a smaller balance due from the partner on his separate account:—Held, that neither the above state of circumstances, nor the general lien of the bankers, entitled them to hold the shares as a security for the balance due from the firm. *McKenna, Ex parte, Laurence, In re*, 3 De G., F. & J. 629; 30 L. J., N. S., Bk. 20.

**Charge on Negotiable Instrument Stolen.**—A bank advanced moneys to a customer upon promissory notes, on the back of each of which he placed an indorsement by which he charged all his property, shares, or securities, which then were, or which might be, at any time prior to the payment of the note, "in the possession or power of the holder thereof for the time being," with the payment of the promissory note, and interest. After several such transactions had taken place, the customer obtained an advance upon a French bond, payable to bearer and transferable by delivery, and he subsequently handed the bank another French bond, and requested that both might be sold on his account. On the latter occasion he obtained no advance of money. On the bonds being sent to the bank's brokers for sale it was discovered for the first time that both had been stolen:—Held, that as to the first bond, the bank had a charge upon it, since an advance had been obtained upon it, but that, as to the second bond, there was no such charge, since no advance having been made upon it, there could be no charge otherwise than by virtue of the charge endorsed upon the promissory note, which did not apply to the case, because it could only apply to property of the drawer of the note placed in the possession or power of the holder for a purpose not inconsistent with an assertion of such a charge, and the bond in question was not so situated. *Symons v. Mulhern*, 46 L. T. 763; 30 W. R. 875.

**Lien of Army Agents for Balance due to them.**—K., an officer in the army, mortgaged to R., to secure 5,000*l.*, all moneys which should be realized by sale of his commission. In December, 1877, K. obtained leave to retire from the army, and his commission was valued at 3,000*l.*, which

on the 6th of December, 1877, was paid by the Paymaster-General to C. & Co., the army agents of the regiment, and was carried to the deposit account kept by C. & Co. with the Army Purchase Commissioners, there to remain till K.'s retirement was gazetted. K. kept an account current with C. & Co. as his bankers, which was overdrawn to the amount of 647*l.* K.'s retirement was gazetted on the evening of the 18th of December, and as soon as C. & Co.'s office opened on the 19th, R. gave them notice of his security. R. having claimed payment of the 3,000*l.*, C. & Co. claimed to retain out of it the 647*l.*:—Held, by Bacon, V.-C., that C. & Co. received the 3,000*l.* as K.'s bankers, and had a banker's lien upon it for the balance due to them, and were, therefore, entitled to retain the 647*l.*:—Held, on appeal, that as soon as K.'s retirement was gazetted the 3,000*l.* became money had and received by C. & Co. for his use, and for which he could have brought an action at law; that they had a right to set off the balance due to them against this demand; that this set-off was equally available against R., of whose security C. & Co. had no notice until after their right to set off had arisen; and that, therefore, independently of any question of banker's lien, C. & Co. were entitled to retain the 647*l.* *Roeburghe v. Cor*, 117 Ch. D. 520; 50 L. J., Ch. 772; 45 L. T. 225; 30 W. R. 74—C. A.

**Handing over Securities not a Fraudulent Preference.**—Bankers agreed to allow their customer W. to overdraw his account to the extent of 1,800*l.* upon his brother, father, and the bank manager becoming sureties for him to that amount. W.'s overdraft exceeded 2,400*l.*, and the bankers repeatedly pressed him to reduce his account within the limits of their security. Subsequently the manager, at an interview with W., who said "he was fast," pressed him to square his account, whereupon he handed to the manager 2,460*l.* in cheques and bills, against which he had drawn largely. The same evening the manager wrote to W. that the bank would not honour any more of his cheques. W. filed a liquidation petition within a week after this interview, and the creditors having resolved upon a liquidation by arrangement, the trustee claimed repayment of the 2,460*l.* upon the ground that the delivery of the cheques and bills constituted a fraudulent preference and an act of bankruptcy:—Held, in the absence of evidence to shew that the payment was made with a view to release the sureties, or otherwise than in the ordinary course of a current account, the general lien of the bankers attached for their benefit; and that the payment was neither a fraudulent preference within s. 92, nor an act of bankruptcy within s. 6 of the Bankruptcy Act, 1869. *Carlisle Banking Company, Ex parte, Walton, In re*, 36 L. T. 522. See *S. C.*, on appeal, 5 Ch. D. 882.

**Notice to affect Lien.**—In a suit which had been registered as a *lis pendens*, a decree was made for the administration of a testator's estate. The executrix subsequently deposited an asset of the testator with a bank as security for advances. The bank had not actual notice of the suit:—Held, that the registration of the suit as a *lis pendens* was not notice to the bank of the decree for administration which prevented the executrix from dealing with the assets, and that the bank obtained a lien on the property deposited. *Berry*

*v. Gibbons*, 8 L. R., Ch. 747; 42 L. J., Ch. 89; 29 L. T. 88; 21 W. R. 754.

A customer deposited the title-deeds of an estate with his bankers, and signed a memorandum charging the estate with payment of a sum due from him to them. He afterwards married, and in consideration of such marriage he settled the estate by articles, and shortly after marriage executed a settlement conveying the legal estate to a trustee. During the negotiations he told the lady's solicitor that he was entitled to the estate free from incumbrances, and that the deeds were at his bank for safe custody:—Held, that the solicitor ought to have inquired of the bankers whether they had a charge upon the deeds, and that, as he omitted to do so, all persons claiming under the settlement were fixed with constructive notice of the charge. *Marfield v. Burton*, 17 L. R., Eq. 15; 43 L. J., Ch. 46; 29 L. T. 571; 22 W. R. 148.

B. and C. carried on business together in partnership, under articles by which the real estate upon which their business was carried on, and of which they were seised as tenants in common in fee, was made partnership assets. B., to secure a separate debt, mortgaged his moiety of the estate to bankers, who were aware when they took the mortgage that the premises were in the occupation of the partners, and that they carried on their business thereon. B. absconded, leaving partnership debts which C. was obliged to pay:—Held, that the bankers had constructive notice that the property belonged to the partnership, and that C. was entitled to be paid out of the property what was due to him from the partnership in priority to the bankers' claim under their mortgage. *Cavander v. Bullock*, 9 L. R., Ch. 79; 43 L. J., Ch. 370; 29 L. T. 710; 22 W. R. 177. Reversing 28 L. T. 620; 21 W. R. 647.

The directors and secretary of a company joined in depositing the certificates of shares belonging to them with a bank, as a security for money advanced:—Held, that this transaction amounted to a sufficient notice to the company of an equitable assignment of the shares belonging to the secretary, so as to support the title of the equitable mortgagee against his assignees in bankruptcy. *Stewart, Ex parte, Shelly, In re*, 24 L. J., Bk. 6; 11 Jur., N. S. 25; 11 L. T. 554; 13 W. R. 356.

#### 10. RECEIVING DIVIDENDS.

**By Power of Attorney—Payment by Bank to Creditor of Payee.**—C. and M., since deceased, holders of stock as trustees, had given a power of attorney to bankers, to receive the dividends and pay them to the *cestui que trust*, a married woman. She had given them directions to pay the dividends, when received, to S., who had lent money to her and her husband. Subsequently, however, she wrote to the bankers that in consequence of the death of one of the trustees she had been obliged to have a new power of attorney made to receive her own dividends, and that she would not trouble them any longer to receive them. No new power of attorney was in fact made. After this letter the bankers received a dividend, and paid it over to S.:—Held, that an action by C. against the bankers for not paying the dividend to the *cestui que trust* could not be sustained, as her letter did not amount to a revocation of the direction to pay S. *Clarke v. Lawrie*,  
Y 2

26 L. J., Ex. 317; 3 Jur., N. S. 647; 1 H. & N. 52—Ex. Ch.

**Entered in Books as Received—Stock Sold by Partner in Bank by Forged Powers of Attorney.]**

—Stock was vested in trustees, to pay the dividends to A. during his life, and after his death, for his wife and children. M. & Co. were the bankers of the trustees, and employed by them to receive the dividends. During the life of A. the dividends were regularly carried to his account in the books of the firm, and drawn for and received by him. A. died on the 23rd of January, 1824, and on his death a new account was opened with the trustees in the books of the bankers; and in that account credit was given to the trustees for dividends, as received in April and July, 1824, and the trustees were debited with several sums paid by cheques drawn upon the house, on the presumption that the dividends had been actually received. In point of fact, these dividends had not been received by M. & Co.; F., a partner in that house, having, in the lifetime of A., sold and transferred the stock, by means of forged powers of attorney. F. continued after this transfer to enter in the day-book of M. & Co. the amounts of the half-yearly dividends, on the days when they would have become due, as if he had duly received the same at the Bank of England, which amounts were in the course of business regularly posted from such day-book to the credit of the trustees by the clerks of M. & Co. Commissions of bankrupt issued against M. & Co. in September and October, 1824:—Held, that at the date of those commissions they were not indebted to the trustees for the balance of the dividends appearing by the books to have been received. *Hume v. Bolland*, 1 C. & M. 130; 2 Tyr. 575; R. & M. 371.

**Evidence as to Receipt.]**—Held, also, that although the entries in the books, coupled with the payments on account of the supposed dividends, were *prima facie* evidence against the firm that they had received the dividends to the use of the trustees; yet, that inasmuch as the transfer under the forged powers was absolutely void, the property in the stock and dividends due thereon remained in the trustees; and that, as they were entitled to receive the dividends at the Bank of England, they could not treat those dividends as money had and received to their use by the bankers, although the bankers might be liable to an action for deceit, in which damages might be recovered in proportion to the injury arising from their untrue representation that they had received the dividends for the use of the trustees. *Id.*

# 11. INVESTING MONEYS.

Where a partner in a banking-house undertook to invest a sum of money on good security for a customer of the firm, and such person was induced, from the belief that she was dealing with him as a partner, to advance the money, and the representations of the partner proved to be fraudulent:—Held, that in the absence of evidence of notice to the other partners, they could not be made liable for such a transaction. *Bishop v. Jersey (Countess)*, 2 Drew. 143; 2 Eq. R. 545; 23 L. J., Ch. 483; 18 Jur. 765.

It is not part of the business of bankers to invest money generally for their customers. *Id.*

# 12. EFFECT OF BANK STOPPING PAYMENT.

**Money Paid to Credit of another Person, conditionally—Who takes the Risk.]**—Payment of money into a banking-house to be placed to the credit of another, upon a condition, the money in the meantime to stand in the bankers' books in the name of the party paying it in; it is at his risk, and the loss is his, if the bankers fail before the condition is complied with, though the other party had written to desire it to be paid in generally. *Colley v. Short*, Coop. C. C. 148.

A landowner agreed to sell his land to a company, and the company, requiring immediate possession of it, offered to deposit the purchase-money in a bank in the names of the vendor and the chairman of the company, pending the investigation of the title. The vendor assented to the deposit being made, but in a different bank, and stipulated also that he should be paid 5l. per cent. interest from the time possession was given. The deposit was accordingly made, and possession taken by the company. Before the conveyance was completed the banker with whom the money stood became bankrupt, and most of it was lost:—Held, that the loss must be borne by the vendor, the deposit, having been made and accepted as payment, and not merely as security. *N. Paul v. Birmingham, Wolverhampton, and Stour Valley Railway Company*, 11 Hare, 305; 17 Jur. 1176.

**Money Paid in after Hours and not carried to Customer's Account—Bank Stopping Payment next Day.]**—By the custom of a bank, money paid in after banking hours was put into a separate place of deposit, and entered in a counter book, but not carried to the customer's account till next day. A customer paid in a bank-note after the banking hours, and the banker, having before resolved not to open his bank again, placed the note in such separate place of deposit, without carrying it to the account of the customer, and next morning stopped payment and became bankrupt. The note was held to remain the property of the customer. *Sadler v. Belcher*, 2 M. & Rob. 489.

Money was paid into a bank, through the clerk of the bank, on Saturday evening, after office hours. On the same evening one of the partners of the bank made a declaration of insolvency, in the absence and without the knowledge of his partner. The bank never again opened for business, and the other partner concurred in allowing it to remain closed. Both partners were subsequently adjudicated bankrupts:—Held, that the money so deposited passed to the assignees. *Clutton, Ex parte*, 1 Fomb. N. R. 167.

# **Payment of Goods by Bank-notes after Failure of Bank—Where Vendor Guilty of Laches.]**

Where goods were paid for by country bank-notes, in the afternoon of a day, in the morning of which the bankers had stopped payment, without the knowledge of the vendor or vendee, and the former offered to return the notes to the latter, demanding payment of them:—Held, that the vendor should have promptly presented the notes to the insolvent bankers, and given notice of non-payment to the vendee according to the

law-merchant, and by his neglecting to do so he had made the notes his own. *Camidge v. Allenby*, 9 D. & R. 391; 6 B. & C. 373.

On the 23rd November country bank-notes were paid by A., a purchaser of goods, to B., the vendor. On the 28th, B. requested the purchaser's shopman as a favour to exchange the notes for money, and received the amount accordingly. The bank, which was situated at a considerable distance from the place where the shopman gave the money, had stopped payment two hours before. A., the purchaser, heard of it on the 29th, and on the 30th wrote to B., to inform him of the event, and that he, B., was to be liable for the notes, but did not tender them to him then or for some days after, nor were they ever presented at the bank:—Held, that A. should have returned them to B. without delay, or presented them at the bank as holder; and that having done neither, he could not recover the amount from B. *Rogers v. Langford*, 1 C. & M. 637; 3 Tyr. 654.

— **Vendor not Guilty of Laches.**—Where a bank has suspended its payments, and notes of such bank have been promptly returned or tendered back to the party from whom they were received, the want of presentment at the bank is no defence to an action for money had and received to recover the amount of the notes. *Turner v. Stones*, 1 D. & L. 122; 12 L. J., Q. B. 303; 7 Jur. 745.

**Failure after Money paid in, but before Advice of Receipt.**—The plaintiff's broker, by his direction, was accustomed to pay his dividends into the defendant's bank in London to the plaintiff's credit, in account with K. and Co., bankers at Abingdon, where the plaintiff resided. On the 14th October, 1847, the broker so paid into the bank 127l. 5s. 9d. On the 15th, and before advice of the receipt, K. and Co. stopped payment. The plaintiff having sued the defendant for the sum so paid into his bank:—Held, that the payment into the defendant's bank was a payment to K. and Co., and that the banker was entitled to a verdict. *Williams v. Deacon*, 4 Ex. 397—Ex. Ch.

A. deposited with a banking company 80l., consisting partly of notes of a country bank, payable either at that bank or in London, and representing 80l. The company gave a receipt as follows: "Received of A. 80l., for which we are accountable; 80l. at three per cent. interest, with fourteen days' notice." The company sent the notes on the same day to their agents in London, who presented them on the following day, when they were dishonoured. The agents sent them back by that evening's post to the company, who on the following day gave notice of dishonour to A., and, on A.'s giving fourteen days' notice of withdrawal, tendered the notes back, which he refused. The company refused to pay the notes. The country bank, which was about five miles from the office of the company, had stopped payment from the close of the day on which the notes were deposited:—Held, that A. could not recover the amount of the notes from the company, either as money lent, or as money had and received. *Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J., Q. B. 403; 17 Jur. 378.

**Bond—Payment by Notes of Bank which Failed—Discharge of Sureties.**—A treasurer of

a poor-law board entered with sureties into a bond, with a condition that he should honestly, diligently, and faithfully perform the duties of his office, one of which was to pay orders for money which should be drawn upon him by the guardians. He was a banker issuing his own notes. On a Friday he paid orders drawn upon him by the guardians, partly in cash and partly in his own notes: and again on Monday forenoon paid similar orders in a similar way, and also gave in exchange for their order, in favour of persons from London, a banker's draft upon London, afterwards dishonoured. The bank stopped payment on Monday afternoon:—Held, that the sureties were discharged, because as to the notes given on Friday, the guardians, having kept them during Saturday, conclusively elected to treat the orders as paid; as to all the notes, the guardians, who were entitled to receive cash, thought fit to receive the notes; and as to the banker's draft upon London, the guardians received it for their own convenience. *Lichfield Union v. Greene*, 1 H. & N. 884; 26 L. J., Ex. 140; 3 Jur., N. S. 247.

## V. LETTERS OF CREDIT AND CIRCULAR NOTES.

### Letters of Credit—Proving against Company.]

—A banking company, at the request of D., a speculator in cotton, issued a letter of credit, authorizing C., a merchant at Bombay, to draw upon them to the amount of 23,150l., the drafts to be accompanied by bills of lading of cotton to be delivered on their acceptance of the drafts. A similar letter of credit for 50,000l. was issued to C., at the request of another speculator in cotton. C. accordingly drew drafts under the first letter of credit to the full amount, and under the second letter of credit to the amount of 33,635l. The first set was accepted by the banking company, which received the corresponding bills of lading. The second set was not presented till after the banking company had stopped payment, and was therefore not accepted. The first set was dishonoured:—Held, that C. could only prove against the company for the amount of the several bills, after deducting the value of the cotton which was sold, and the proceeds received by C. and Co. *Barned's Banking Company, In re, Coupland, Ex parte*, 5 L. R., Ch. 167; 39 L. J., Ch. 287; 21 L. T. 807.

A banking company addressed to a firm of merchants a letter of credit in these terms:—"No. 394. You are hereby authorized to draw upon this bank, at six months' sight, to the extent of 15,000l., and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit No. 394 of the 31st of October, 1865." The merchants drew bills under the letter to the amount of 6,000l., and sold them to third persons, who duly indorsed particulars. The bank, on payment of the bills being demanded, set up a cross claim against the merchants for 7,000l.:—Held, that the purchasers of the bills had a clear right in equity to recover the amount free from the cross claim. *Agra and Masterman's Bank, In re, Asiatic Banking*



*Corporation, Ex parte*, 2 L. R., Ch. 391; 36 L. J., Ch. 222; 16 L. T. 162; 15 W. R. 414.

— **Paying.**—A letter of credit saying, "Please to honour the drafts of A. to the amount of 460*l.*, and charge the same to the account of B." is an authority to make the payment, but the possession of it by the person to whom it is addressed does not prove that the payment has been made. *Orr v. Union Bank of Scotland*, 1 Macq. H. L. Cas. 513; 2 C. L. R. 1566; 24 L. T. 1—H. L.

To shew that the payment has been made there must be a draft by A. *Ib.*

The person presenting a letter of credit is not necessarily the person who is entitled to make the draft. *Ib.*

Therefore a banker, to whom a letter of credit is addressed, ought to see that the signature to the draft is genuine. If he does not, the loss will be his own. *Ib.* See 16 & 17 Vict. c. 59, s. 19.

When, for a sum paid down, a banker grants a letter of credit, he must shew that it has been complied with, or pay back the money. *Ib.*

In such a case the banker cannot insist on having the letter of credit brought back to him. *Ib.*

The rules applicable to negotiable securities do not hold with respect to letters of credit. *Ib.*

On payment of a sum of money by B. into a bank, a letter of credit for the amount was given by the bank in favour of A. It was presented to the bank's agent with the name A. K., a forgery, indorsed on it:—Held, that payment upon this forgery did not discharge the bank. *British Linen Company v. Caledonian Insurance Company*, 4 Macq. H. L. Cas. 107; 7 Jur., N. S. 587; 4 L. T. 162; 9 W. R. 581—H. L.

— **Contract created by.**—Letters of credit, containing a promise to accept bills, create a contract between the giver of the letters and the person who advances money on the faith of them only when such letters are intended to be shewn to third persons for the purpose of obtaining advances, or where the giver of the letters has so conducted himself that such an intention may fairly be presumed. *Union Bank of Canada v. Cole*, 47 L. J., C. P. 100—C. A.

Documents in the form of letters of credit were addressed by the defendants to S. & Co., corn merchants, authorizing them to draw bills on the defendants against shipments of grain. To the documents certain conditions were appended. S. & Co. drew bills upon the defendants under the credit so opened without performing the conditions. The plaintiffs, having notice of the conditions, and knowing that they were unfulfilled, advanced money on the bills so drawn, which the defendants refused to accept. In an action against the defendants for not accepting the bills:—Held, that if the documents created a contract between the plaintiffs and defendants, that contract was subject to such of the conditions as were not necessarily subsequent to the advance. *Ib.*

The defendants at New York granted to M. & Co., of Rio and New York, a letter of credit dated 1st February, 1864, authorizing M. & Co. to draw on the defendants' house in London at ninety days' sight, for any sums not exceeding 20,000*l.*, for the invoice cost of coffee, to be shipped from Rio to New York, Philadelphia or

Baltimore; advice of the bills to be given to the defendants in London accompanied by bills of lading filled up to order of the shipper, and blank indorsed with abstract of invoice thereon for the property shipped; all the bills of lading issued (except one to be forwarded by the vessel to the defendants at New York, and the one retained by the captain of the vessel) to be forwarded direct to the defendants in London; and the defendants by the letter of credit, agreed with the drawers, indorsers, and bonâ fide holders of bills, drawn in compliance with the terms of it, that the same should be duly honoured on presentation at their office in London. On the 11th October, 1864, M. & Co. having purchased coffee at Rio, drew upon the defendants in London, under the letter of credit, for the invoice price of the coffee to the order of the plaintiffs at ninety days' sight; and the plaintiffs, having referred to the letter of credit, purchased or cashed the bill. The coffee was shipped at Rio, and four bills of lading, all of the same tenor, and dated 14th October, 1864, were given by the captain, in which the vessel was stated to be "bound for St. Thomas for orders." Two of these documents were delivered by M. & Co. to the plaintiffs, but only one of them was forwarded by the latter to the defendants in London; and with it was also sent to the defendants in London, a letter of advice from M. & Co., dated 17th October, 1864, stating that the coffee was shipped to St. Thomas for orders, for either New York, Philadelphia, or Baltimore. On the bill of exchange being presented by the plaintiffs to the defendants in London, on the 21st November, 1864, together with the bills of lading and letter of advice, the latter refused to honour the bill of exchange on the ground that the bills of lading were not in accordance with the terms of the letter of credit. In pursuance of written directions sent by M. & Co., at the request of the defendants in New York, on the 2nd December, to the captain of St. Thomas, the vessel proceeded thence to New York, and on arrival there on the 30th December, 1864, the coffee was landed and sold, realizing less by 1,500*l.* than the amount of the bill of exchange. In an action, by the plaintiffs to recover that deficiency from the defendants, as damages for their refusal to honour the bill of exchange:—Held, that the conditions in the letter of credit on which the defendants engaged to accept to the amount of 20,000*l.* were unperformed, and consequently the obligation upon them to accept under the letter of credit never attached, and the action therefore could not be maintained. *Brazilian and Portuguese Bank v. British and American Exchange Banking Corporation*, 18 L. T. 823.

A bonâ fide holder of a bill of exchange drawn under an open letter of credit, and taken by him on the faith of such letter of credit, has a right of action against the grantor of the letter of credit in case of his refusal to accept the bill. *Maitland v. Chartered Mercantile Bank of India, London and China*, 2 H. & M. 440; 38 L. J., Ch. 363; 12 L. T. 372.

M. & Co., by their bill of complaint, averred that according to the ordinary course of dealing in reference to letters of credit granted to foreign firms, the foreign firm could only obtain letters of credit upon the guarantee of some English firm, and that the foreign firm stipulated to use the letters of credit only for the purpose of buying goods to be consigned to England, and to

transmit the bills of lading to the English firm as a security for the repayment of the bills of exchange drawn under the letters of credit by a mail not later than that which carried the bills of exchange. Open letters of credit were granted to F. & Co., a China firm, on the guarantee of M. & Co., an English firm, and F. & Co., in fraud and violation of their agreement with M. & Co., drew bills under them not protected by shipping documents and indorsed them for value to the C. bank, who had no actual notice of the agreement between F. & Co. and M. & Co. :—Held, that the C. bank was entitled to require the grantors of the letters of credit to accept the bills, and that M. & Co. had no equity to restrain them from procuring such acceptance. *Ib.*

Held, also, that in reference to open letters of credit, no such custom exists as M. & Co. averred, and that even if there was such a custom, the rights of the C. bank as bona fide holders for value could not be affected by the mere constructive notice of the agreement between M. & Co. and F. & Co. which the custom would imply. *Ib.*

— **Not specific Appropriation.**—A letter by bankers, stating that a special credit for a certain sum has been opened by them at the instructions of their customer, in favour of any particular person who supplies goods on the faith of it, does not constitute a specific appropriation or an equitable assignment of that sum in their hands, for which they are liable to be sued in a Court of Equity as if they were trustees for the person in whose favour the credit had been opened. *Morgan v. Larivière*, 7 L. R., H. L. 423; 44 L. J., Ch. 457; 32 L. T. 41; 23 W. R. 537.

L. had contracted to supply the French Government with a certain number of cartridges by a given time, and in consequence of his request for some guarantee for the payment of the price, the bankers in London of the government wrote by direction of the agent of the government a letter advising L. that by such direction a special credit for 40,000*l.* had been opened with them in his favour, and that it would be paid rateably as the goods were delivered, upon receipt of certificates of reception issued by the agent of the French Government :—Held, that this letter did not constitute an assignment in equity, or a specific appropriation, so as to impress a trust upon the moneys in the bankers' hands, for which they could be sued in equity. Whatever responsibility they incurred under that letter could be enforced at law. *Ib.*

The French Government did not appear to the bill, nor in any way submit to the jurisdiction of the court :—Held, that if the fund had been affected by the trust, the court would have administered it in the absence of the government interested in the moneys. *Ib.*

— **Effect of Failure of Bank.**—A bank granted a letter of credit to a company on terms that the company should ship tea and forward bills of lading, invoices, and policy of insurance on the tea to the bank, and should also draw on B. & Co. bills, to be accepted by B. & Co. to an amount sufficient to cover the amount authorized by the letter of credit. B. & Co. guaranteed the performance by the company of these terms, "holding themselves responsible for the same."

The company drew on the bank, and the bank accepted the bills, but owing to the failure of the bank after the dates when the bills were drawn and before they became due the company shipped no tea, and did not perform any of the terms agreed on. All the bills were eventually paid :—Held, that the failure of the bank was no reason why the company should not have performed its part of the contract, and that B. & Co. were not relieved from their guarantee. *Agra Bank, Ex parte, Barber, In re*, 9 L. R., Eq. 725; 39 L. J., Bk. 39.

When a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading to a like amount, suspension of payment by the bank before there has been time for the letter of credit to be used, is not a breach or a repudiation of contract; inasmuch as permission might have been given to the liquidators under the winding-up to negotiate the bills; and a claim by the holder of the letter of credit, for damages for the alleged breach, was disallowed. *Agra Bank, In re, Tondeur, Ex parte*, 5 L. R., Eq. 160; 37 L. J., Ch. 121; 16 W. R. 270.

— **Circular Notes.**—A banker cannot be called upon to return the amount paid for a circular note so long as such note is outstanding and there remains a possibility of his being called upon to pay a correspondent who may cash the same. *Conflans Stone Quarry Company v. Parker*, 3 L. R., C. P. 1; 37 L. J., C. P. 51; 17 L. T. 283; 16 W. R. 127.

Where, therefore, the plaintiffs, who had purchased certain circular notes of a bank, posted them with the usual letter of indication to their agent at Paris, whose name appeared, both in the notes and letter, as the person who was to receive the amount of such notes, and the letter, but not the notes, duly reached him, and it did not appear what had become of the notes, or by whose fault they had been lost :—Held, that as there was a possibility of the notes being made available and of the bank becoming liable to repay any of the indicated correspondents who might cash them, there was no obligation on the bank to refund to the plaintiffs the money they had paid simply on their offer to return the letter of indication. *Ib.*

Semble, that they had a claim to equitable relief on giving the bank a sufficient indemnity against the outstanding notes, but such claim could only be enforced at law by application to the court or a judge, under the C. L. P. Act, 1854, s. 87. *Ib.*

— **Fraudulent Alteration of.**—G., who had a circular letter of credit for 210*l.*, from a bank in New York, authorizing him to draw for that amount on the Union Bank of London, in favour of certain named correspondents in foreign countries, went to St. Petersburg, and having fraudulently altered the figures in the letter of credit, so as to make it appear to be a letter of credit for 5,210*l.*, presented it so altered to W. & Co., of St. Petersburg, one of the correspondents, and drew in their favour, on the Union Bank, a cheque for 1,200*l.* This cheque was cashed for G. by W. & Co., who sent it to London and had it presented at the Union Bank, and the bank, discovering the fraud, refused to pay it :—Held, that G. was not indictable for an

attempt to obtain the 1,200*l.* by false pretences from the Union Bank, since, if W. & Co. had obtained payment it would not have been in pursuance of G.'s wish or desire, and W. & Co. would have obtained the money for their own, and therefore there would have been no obtaining of any money by him. *Reg. v. Garrett*, Dears. C. C. 232; 23 L. J., M. C. 20. See 24 & 25 Vict. c. 96, s. 89.

## VI. SAVINGS BANKS.

**Legal Status of.]**—A savings bank company is not necessarily a banking company within the acts relating to joint-stock companies. *Coe, Ex parte*, 3 De G., F. & J. 335; 10 W. R. 138.

**Action by Depositor.]**—Since 9 Geo. 4, c. 92, an action is not maintainable by a depositor against the trustees of a savings bank; the only mode of adjusting disputes is by arbitration, as pointed out by s. 45. *Crisp v. Bunbury*, 1 M. & Scott, 646; 8 Bing. 394.

Where money belonging to the depositors has been embezzled, the remedy of the depositors is not by action against the trustees and managers, but by mandamus to compel them to appoint an arbitrator. *Re v. Mildenhall Savings Bank*, 2 N. & P. 278; 6 A. & E. 952.

**Claim made Seven Years after Death of Depositor.]**—Where, by a rule of a savings bank, no claim for any sum of money could be made more than seven years from the death of a depositor, the court discharged a rule nisi for a mandamus to the trustees of such a bank to appoint an arbitrator, to decide a dispute as to money, the alleged depositor of which had been dead more than seven years. *Reg. v. Northwich Savings Bank (Trustees)*, 1 P. & D. 477; 9 A. & E. 729.

**Deposit by one Person in Name of another—Withdrawal without Authority.]**—By the rules of a savings bank, deposited with the clerk of the peace pursuant to 57 Geo. 3, c. 130, s. 2, entries of deposits were to be made in a book kept by the bank for that purpose, and in a duplicate account-book to be kept by the party making the deposit, which duplicate was to be a voucher for the party producing it, and a receipt for the bank when handed over to them. A deposited in the name of B., and afterwards, without B.'s authority, received back the amount and delivered up the duplicate account-book:—Held, that B. still continued to be a depositor. *Re v. Cheadle Savings Bank (Trustees)*, 3 N. & M. 418; 1 A. & E. 323.

**Arbitration.]**—A party is not entitled to a mandamus to compel a savings bank to refer to arbitration, unless he shews himself to be at the time a depositor. *Ib.*

The directors were not compellable to appoint an arbitrator under 9 Geo. 4, c. 92, s. 45, for the purpose of deciding upon the claims of persons professing to apply on behalf of a body of depositors, if it was a matter of dispute whether the applicants were entitled to represent the body. *Re v. Witham Savings Bank*, 3 N. & M. 416; 1 A. & E. 321.

**Deposits in fictitious Names—Illegality.]**—By the 26 & 27 Vict. c. 87, s. 38, it is provided that it shall not be lawful for a depositor in a savings bank to make any deposit in any other account at the same or any other savings bank, and that every depositor at the time of the first deposit, and at such other times as such depositor shall be required so to do by the trustees and managers of the bank, shall make a declaration that he is not entitled to any deposit in or any benefit from the funds of any savings bank other than that into which such deposit shall be made, or any other funds in the said savings bank; and if such declaration shall not be true, or if any person shall at any time have any deposit or funds in more than one savings bank within the United Kingdom (except as provided by the act), every such person shall, if such deposit be, in the opinion of the barrister-at-law appointed under the act, made with a fraudulent intention, forfeit all right to any deposit in or funds of any and every such savings bank. By s. 48 it is provided that if any dispute shall arise between the trustees and managers of any savings bank and any individual depositor therein, or his personal representatives claiming to be entitled to any money deposited in such savings bank, the matter in dispute shall be referred to the barrister appointed under the act, whose award shall be binding and conclusive. By the 39 & 40 Vict. c. 52, s. 2, the duty of determining any such disputes is transferred to the assistant-registrar of friendly societies in Ireland. C., after the passing of the act 26 & 27 Vict. c. 87, placed various sums of money on deposit in a savings bank in fictitious names, with, however, the knowledge of the officers of the bank. He had also deposits remaining in his own name previously made. The deposits in the aggregate exceeded considerably 200*l.*, notwithstanding that the commissioners for the reduction of the national debt had directed that the trustees of any savings bank should not add interest to any annual account so long as it continued at or above 200*l.* C. died in 1880, leaving these moneys on deposit. His personal representatives claimed them, but the trustees refused to pay the sums deposited in fictitious names. On an application by C.'s personal representatives for a mandamus to the assistant-registrar of friendly societies to hear and determine his claim as a dispute between him and the trustees:—Held, first, that there was no forfeiture of the deposits under the 38th section. *Reg. v. Littledale*, 10 L. R., Ir. 78. Affirmed, 12 L. R., Ir. 97.

Held, secondly, that the claim made by the personal representatives, and resisted by the trustees, constituted a dispute within the meaning of s. 48, which the assistant-registrar had jurisdiction to entertain. *Ib.*

Held, thirdly, that the deposits in the fictitious names having been made illegally, and in wilful contravention of the 38th section, and contrary to the policy of its provisions, the writ of mandamus, which is one in subsidium justitiæ, ought not to be granted. *Ib.*

## BANKRUPTCY.

### I. STATUTES, 667.

### II. COURTS OF BANKRUPTCY.

1. *Jurisdiction of Court.*
  - a. Generally, 668.
  - b. London Court of Bankruptcy, 684.
  - c. County Courts, 684.
  - d. Court of Appeal, 686.
2. *Officers of Court.*
  - a. Commissioners, 686.
  - b. Registrars, 688.
  - c. Trustees.—*See post*, IX.
  - d. Receivers, 690.
  - e. Solicitors, 693.
  - f. Messengers, 697.

### III. WHO MAY BE BANKRUPT.

1. *Aliens*, 698.
2. *Auctioneers*, 699.
3. *Bill Brokers*, 699.
4. *Brickmakers*, 700.
5. *Builders*, 700.
6. *Butchers*, 701.
7. *Clergymen*, 701.
8. *Coach Proprietors*, 701.
9. *Company, Members of*, 701.
10. *Cowkeepers*, 701.
11. *Executors*, 702.
12. *Farmers and Graziers*, 702.
13. *Felons*, 703.
14. *Fishermen*, 703.
15. *Horse Dealers and Livery Stable Keepers*, 703.
16. *Infants*, 704.
17. *Land Owners*, 706.
18. *Lodging and Boarding House Keepers*, 706.
19. *Lunatics*, 707.
20. *Market Gardeners*, 707.
21. *Married Women*, 707.
22. *Medical Practitioners*, 708.
23. *Mine Owners*, 708.
24. *Parliament, Members of*, 709.
25. *Pawnbrokers*, 709.
26. *Publishers*, 710.
27. *Scavengers*, 710.
28. *Schoolmasters*, 710.
29. *Scriveners*, 710.
30. *Shipbrokers*, 711.
31. *Stockbrokers*, 711.
32. *Undischarged Bankrupts*, 711.
33. *What constitutes Trading*, 711.
34. *Ceasing to Trade*, 713.
35. *Proof of Trading*, 714.
36. *Irish Traders*, 715.

### IV. ACT OF BANKRUPTCY.

1. *Generally*, 715.
2. *Acts of Bankruptcy relating to the Person of the Debtor.*
  - a. Departing the Realm or Remaining Abroad, 718.
  - b. Departing from Dwelling House, 720.
  - c. Otherwise Absenting, 723.
  - d. Beginning to keep House, 727.
  - e. Lying in Prison or Escaping therefrom, 729.

### 3. *Acts of Bankruptcy relating to the Property of the Debtor.*

- a. *Generally*, 730.
  - b. *Fraudulent Surrender of Copyholds*, 732.
  - c. *Fraudulent Executions*, 733.
  - d. *Giving Money or Security to Petitioning Creditor*, 733.
  - e. *Assignments for Benefit of Creditors*, 734.
  - f. *Assignment of Debtor's Whole Property.*
    - i. *To Secure an Existing Debt*, 737.
    - ii. *To Secure an Existing Debt and Present Advances*, 741.
    - iii. *To Secure an Existing Debt and Future Advances*, 745.
    - iv. *For a New Consideration*, 746.
    - v. *In Performance of a Previous Contract*, 748.
  - g. *Assignment of Part of Debtor's Property to Secure Existing Debt*, 750.
  - h. *Execution against Goods of Trader*, 753.
  - i. *Filing Declaration of Insolvency*, 753.
4. *Non-Compliance with Debtor Summons.*—*See post*, V.
5. *Relation Back of Bankruptcy to Act*, 754.
6. *Proof of Act of Bankruptcy*, 756.
7. *Notice to Dispute*, 757.

### V. DEBTOR SUMMONS.

1. *Trader Debtor Summons under 12 & 13 Vict. c. 106, and previous Statutes.*
  - a. *Proceedings by Creditor*, 757.
  - b. *Debtor Failing to Pay, Secure, or Compound for Debt*, 763.
2. *Judgment Debtor Summons under 12 & 13 Vict. c. 106, s. 76, 764.*
3. *Debtor Summons under 32 & 33 Vict. c. 71.*
  - a. *Who may obtain*, 764.
  - b. *Against whom*, 766.
  - c. *In what Cases*, 767.
  - d. *Form of Summons and Affidavit in Support*, 769.
  - e. *Service of Summons*, 770.
  - f. *Proceedings when Debt Disputed*, 772.
  - g. *Paying or Compounding for Debt*, 775.
  - h. *Act of Bankruptcy on Neglect to Pay, Secure, or Compound for Debt*, 776.
  - i. *Adjudication on*, 777.

### VI. THE PETITIONING CREDITOR AND HIS DEBT.

1. *Who may be*, 778.
2. *Liabilities of Petitioning Creditor*, 782.
3. *Amount of the Debt*, 782.
4. *Nature of the Debt*, 783.
5. *Particular Cases*, 787.
6. *Substitution*, 791.
7. *Forfeiture of Petitioning Creditor's Debt*, 792.
8. *Proof in Actions of Petitioning Creditor's Debt*, 794.

# VII. PROCEEDINGS AFTER ACT OF BANKRUPTCY AND BEFORE ADJUDICATION.

1. *Petition, Fiat and Commission*, 794.
2. *Consolidation of Proceedings*, 802.
3. *Effect of Death of Debtor*, 802.
4. *Suspending Proceedings in Bankruptcy*, 803.

# VIII. ADJUDICATION.

1. *When and how made*, 804.
2. *Joint and Separate*, 807.
3. *Appeal against Adjudication*, 809.
4. *Annulling Adjudication*, 812.
5. *Effect of Annulling*, 817.
6. *Action for Malicious Adjudication*, 820.

# IX. ASSIGNEES AND TRUSTEES.

1. *Official Assignees*, 821.
2. *Creditors' Assignees*.
  - a. Choice and Appointment, 821.
  - b. Removal, 823.
  - c. Powers and Liabilities.
    - i. Generally, 825.
    - ii. Power to Lease Bankrupt's Property, 826.
    - iii. Power to Sell Bankrupt's Property, 826.
    - iv. Power to Sell Book Debts and Goodwill of Business, 828.
    - v. Power to Appeal against Directions of Creditors, 829.
    - vi. Power to Continue or Compromise Actions, 829.
    - vii. Power to Appoint a Solicitor, 830.
    - viii. Power to Continue or Disclaim Contracts, 830.
    - ix. Power to Purchase Creditor's Debt, 830.
    - x. Liability on Keeping Property in Hand, 831.
    - xi. Liability to Account, 831.
    - xii. Liability of New Trustee for Non-payment of Moneys received by his Predecessor, 832.
    - xiii. Liability to pay Costs, 832.
    - xiv. Liability to Indemnify Bankrupt, 833.
  - d. Remuneration and Allowances, 833.
  - e. Release, 834.
  - f. Enforcing Bond for Discharge of Duties, 835.
  - g. Bankruptcy of Assignee, 835.
3. *Trustees in Liquidation*.—See post, XVII.
4. *Trustees of Composition Deeds*.—See post, XVIII.

# X. PROPERTY OF THE BANKRUPT OR LIQUIDATING DEBTOR AND THE TRUSTEE'S TITLE THERETO.

1. *General Principles*.
  - a. Assignees take subject to all Equities, 835.
  - b. Property out of Jurisdiction, 836.
  - c. Relation of Title of Assignees, 836.
  - d. Delay of Trustee in taking Possession, 837.
  - e. Prerogative of Crown, 838.

f. Compelling Bankrupt to Convey prior to Bankruptcy Act, 1869, 839.

# 2. Real Property.

- a. Freeholds, 839.
- b. Copyholds, 841.
- c. Powers of Appointment, 841.
- d. Chattels Real.
  - i. Leaseholds.
    - a. Prior to the Bankruptcy Act, 1869, 842.
    - β. Under the Bankruptcy Act, 1869, 847.
    - γ. When Bankruptcy works a Forfeiture, 849.
  - ii. Growing Crops, Fixtures and Goodwill, 850.
  - iii. Shares in Companies holding Real Estate, 852.
3. *Things in Action*, 852.
4. *Bankrupt's Books*, 856.
5. *Bills of Exchange*, 857.
6. *Goods appropriated to meet Bills of Exchange*, 861.
7. *Materials being used by Bankrupt in Execution of Contracts*, 866.
8. *Ships, Cargoes, and Freights*, 870.
9. *Legacies*, 872.
10. *Licence of Public-House*, 872.
11. *Money payable to Bankrupt on a Contingency*, 872.
12. *Patent Rights*, 873.
13. *Pensions and Allowances*, 873.
14. *Stocks and Shares*, 874.
15. *Stock Exchange Differences*, 875.
16. *Property of Bankrupt's Wife*, 876.
17. *Partnership Property*, 877.
18. *Property vested in Trustee under prior Bankruptcy*, 878.
19. *Property held by Bankrupt as Trustee for Others*, 879.
20. *Secured Creditors, and Property held as Security*, 881.
21. *Disclaimer of Onerous Property*.
  - a. Under Statutes prior to the Bankruptcy Act, 1869, 884.
  - b. Under the Bankruptcy Act, 1869, 886.
22. *Order and Disposition*.
  - a. Generally, 894.
  - b. Goods and Chattels not subject to Reputed Ownership, 897.
  - c. Property of Bankrupt Conveyed or Assigned by Bill of Sale, 901.
  - d. Ships and Cargoes, 911.
  - e. Goods Sold by Bankrupt, but not Delivered, 914.
  - f. Goods of Bankrupt in Warehouses, 919.
  - g. Goods of Bankrupt taken in Execution, 920.
  - h. Goods of Bankrupt in Hands of Agent, 922.
  - i. Property Incapable of Manual Delivery.
    - i. Policies of Assurance, 923.
    - ii. Shares in Companies, 929.
    - iii. Debts, 932.
    - iv. Things in Action, 932.
    - v. Right to Publish Newspapers, 938.
  - j. Property of which the Bankrupt was not the Original Owner.
    - i. Goods to be dealt with in way of Bankrupt's Trade, 939.

- ii. Goods in Bankrupt's Hands for Specific Purposes, 942.
- iii. Goods in Hands of Bankrupt's Agent, 944.
- iv. Goods Distrained on Bankrupt's Premises, 945.
- v. Goods Purchased by Bankrupt, but not Delivered, 945.
- vi. Goods Let on Hire to Bankrupt, 947.
- vii. Property Held by Bankrupt as Trustee for Others, 951.
- viii. Partnership Property, 955.
- k. Evidence as to Ownership, 961.
- l. Order for Sale by Court of Bankruptcy, 962.

- iii. When Value of Security must be Deducted, 1062.
- iv. When Value of Security need not be Deducted, 1065.
- v. Sale of Security by Order of the Court, 1070.
- i. Sureties, 1074.
- j. By and Against Trustees, 1079.
- k. Wife of Bankrupt, 1083.
- l. Person Appointed by Court of Chancery in Administration Suit, 1084.
- 24. *Mode of Proof*, 1084.
- 25. *Practice on Proof*, 1085.
- 26. *Amount of Proof*, 1089.
- 27. *Effect of Proof*, 1090.
- 28. *Expunging or reducing Proof*, 1095.
- 29. *Proof against Several Estates*, 1098.

## XI. PROOF OF DEBTS.

- 1. *General Principle*, 963.
- 2. *Nature of Debt*, 964.
- 3. *Debts entitled to Priority*.
  - a. *Assessed Taxes and Parochial Rates*, 971.
  - b. *Debts Due by Officers of Friendly Societies and Savings Banks*, 971.
  - c. *Wages and Salaries*, 973.
- 4. *Annuities*, 975.
- 5. *Apprentice Fees*, 982.
- 6. *Awards*, 983.
- 7. *Barristers' Fees*, 983.
- 8. *Bills and Notes*, 983.
- 9. *Bonds*, 990.
- 10. *Calls*, 993.
- 11. *Contingent Debts and Liabilities*, 995.
- 12. *Costs*, 1002.
- 13. *Damages*, 1003.
- 14. *Guarantees*, 1010.
- 15. *Interest on Debts*, 1011.
- 16. *Judgments, Orders, and Decrees*, 1013.
- 17. *Leases disclaimed by Trustee*, 1018.
- 18. *Parochial Rates*, 1019.
- 19. *Periodical Payments*, 1019.
- 20. *Premiums upon Policies of Insurance*, 1020.
- 21. *Rent*, 1020.
- 22. *Stock Contracts*, 1022.
- 23. *By and against Particular Persons*.
  - a. *Against Assignees of a Bankrupt*, 1022.
  - b. *By Bankrupt as Trustee for Others*, 1023.
  - c. *Bankers*, 1024.
  - d. *Creditors having Notice of Act of Bankruptcy*, 1026.
  - e. *Infants*, 1027.
  - f. *Legatees*, 1027.
  - g. *By and Against Partners*.
    - i. *Joint Estate and Separate Estate*, 1028.
    - ii. *Character of Debts*, 1032.
  - iii. *Change of Character of Debts*, 1036.
  - iv. *Against what Estate*, 1041.
  - v. *Election by Creditors*, 1045.
  - vi. *By Firm against Member*, 1047.
  - vii. *By Member against Firm*, 1049.
  - viii. *By one Partner against another*, 1052.
  - ix. *Inspectors*, 1056.
- h. *Secured Creditors*.
  - i. *Generally*, 1057.
  - ii. *Who are secured Creditors*, 1060.

## XII. MUTUAL CREDITS, DEBTS AND DEALINGS.

- 1. *Generally*, 1104.
- 2. *Mutual Credits*, 1105.
- 3. *Mutual Dealings*, 1111.
- 4. *Time when Credit given or Debt accrued*, 1112.
- 5. *Right of Set-off depends upon Beneficial Interest*, 1115.
- 6. *Parties must be Debtors and Creditors in the same Right*, 1118.
- 7. *Set-off of Claims for Unliquidated Damages*, 1121.

## XIII. DIVIDENDS.

- 1. *Dividend Lists under 24 & 25 Vict.* c. 134, s. 178, 1123.
- 2. *Who entitled to Dividend*, 1123.
- 3. *Recovery of Dividend*, 1123.
- 4. *Staying Payment*, 1124.
- 5. *Opening a Dividend*, 1125.
- 6. *Final Dividend*, 1125.
- 7. *Effect of Payment*, 1125.
- 8. *Unclaimed Dividends*, 1125.
- 9. *Under Composition Deed.—See post, XIX. COMPOSITION DEEDS.*
- 10. *Under Liquidation Proceedings.—See post, XVII.*
- 11. *Under Composition Proceedings.—See post, XVIII.*

## XIV. THE ORDER OF DISCHARGE AND ITS EFFECT.

- 1. *Proceedings on Granting Order*, 1126.
- 2. *Grounds for Refusing, Suspending, or Qualifying Discharge*.
  - a. *Generally*, 1129.
  - b. *Trading by Means of Fictitious Capital*, 1130.
  - c. *Contracting Debts without Reasonable Expectation of Ability to Pay*, 1130.
  - d. *Falsifying Books*, 1133.
  - e. *Rash and Hazardous Speculation*, 1134.
  - f. *Unjustifiable Extravagance in Living*, 1135.
  - g. *Frivolous or Vexatious Defence to Actions*, 1135.
  - h. *Concealing Property*, 1136.
  - i. *Gaming or Wagering*, 1136.
  - j. *Frauds by Solicitors*, 1137.
  - k. *Other Cases of Fraud*, 1137.

- l. Departing the Realm, 1140.
- m. Filing Incorrect Statement of Accounts, 1140.
- n. Refusing to Exercise Profession for Benefit of Creditors, 1140.
- o. Where Certificate of Conformity previously Refused, 1141.
3. *Conditions annexed to Certificate*, 1141.
4. *Time of Operation*, 1142.
5. *Rescinding or Annulling*, 1142.
6. *Agreements in Consideration of not opposing Discharge*, 1142.
7. *Effect of Discharge*.
  - a. Generally, 1144.
  - b. On Co-Debtors and Sureties, 1146.
  - c. On Joint and Separate Liabilities of Partners, 1147.
  - d. On Liabilities in Respect of Shares in Companies, 1147.
  - e. Irish or Scotch Discharge, 1148.
  - f. Colonial Discharge, 1149.
  - g. Under Indian Insolvency Acts, 1149.
  - h. Foreign Discharge, 1150.
8. *How available in Pleading*, 1150.
9. *Promise to pay Debt barred by Discharge*, 1151.

#### XV. FRAUDULENT PREFERENCES.

1. *Under Statutes prior to the Bankruptcy Act, 1869*.
  - a. Generally, 1153.
  - b. Must be Voluntary, 1154.
  - c. Must be in Contemplation of Bankruptcy, 1159.
2. *Under the Bankruptcy Act, 1869*.
  - a. Generally, 1160.
  - b. Must be Voluntary, 1164.
  - c. Must be in Contemplation of Bankruptcy, 1170.
3. *Effect of Preference*, 1171.
4. *Remedies in Respect of Preference*, 1171.

#### XVI. FRAUDULENT CONVEYANCES AND PROTECTED TRANSACTIONS.

1. *Under Statutes prior to the Bankruptcy Act, 1869*.
  - a. Sale of Goods, 1172.
  - b. Gifts of Money, 1173.
  - c. Claims of Lien, 1173.
  - d. Attachments of Money and Goods, 1174.
  - e. Mortgages, 1175.
  - f. Delivery of Bills or Cheques as Security, 1176.
  - g. Delivery of Goods as Security, 1178.
  - h. Goods Returned by Bankrupt to Seller, 1179.
  - i. Warrants of Attorney, 1180.
  - j. Partnership Transactions, 1180.
  - k. Seizing Debtor's Goods, 1183.
  - l. Other Cases, 1184.
2. *Under the Bankruptcy Act, 1869*.
  - a. Fraudulent Conveyances, 1195.
    - i. What are.
      - α. Assignments of Debtor's Property, 1187.
      - β. Assignments on Marriage, 1195.
    - ii. Setting aside, 1198.
  - b. Protected Transactions.

- i. Transactions Protected by Sect. 34, 1199.
- ii. Transactions Protected by Sect. 92, 1203.
- iii. Transactions Protected by Sects. 94 and 95, 1206.
3. *Notice of Act of Bankruptcy to invalidate Transactions*.
  - a. Generally, 1211.
  - b. Under the Bankruptcy Act, 1869, 1214.

#### XVII. LIQUIDATION BY ARRANGEMENT UNDER THE BANKRUPTCY ACT, 1869.

1. *Petition for Liquidation*, 1217.
2. *Staying Bankruptcy Proceedings*, 1219.
3. *Meetings of Creditors, their Debts and Right to Vote*, 1220.
4. *Debtor's Statement of Affairs*, 1224.
5. *Omission to insert Creditor's Name and Debt in Statement of Affairs*, 1226.
6. *Examination of the Debtor*, 1227.
7. *The Resolutions*.
  - a. Generally, 1228.
  - b. Validity with Reference to Amount of Assets or Dividends, 1231.
  - c. Vacating or Setting Aside, 1233.
8. *The Trustee*.
  - a. Appointment, Powers and Duties, 1235.
  - b. Vesting of Debtor's Property, 1237.
  - c. Sale of Estate to Debtor, 1241.
9. *Scheme of Arrangement*, 1241.
10. *Employment of Debtor to realize Estate*, 1243.
11. *Adjudicating Liquidating Debtor a Bankrupt*, 1243.
12. *Second Liquidation*, 1244.
13. *Stamp Duty on Assets*, 1246.
14. *Jurisdiction of Court of Bankruptcy*, 1246.
15. *Transfer from one District to another*, 1251.
16. *Costs of Liquidation*, 1252.

#### XVIII. COMPOSITION UNDER THE BANKRUPTCY ACT, 1869.

1. *General Principles*, 1253.
2. *Staying Bankruptcy Proceedings*, 1254.
3. *Meetings of Creditors*, 1255.
4. *Debtor's Statement of Affairs*, 1256.
5. *Omission to insert Creditor's Name and Debt in Statement of Affairs*, 1257.
6. *Examination of Debtor*, 1262.
7. *Resolutions*.
  - a. Generally, 1262.
  - b. Validity with Reference to Amount of Assets and Dividends, 1265.
  - c. Vacating or Setting Aside, 1266.
8. *Proof of Debts*, 1266.
9. *Effect of Composition*, 1268.
10. *Payment of Composition and Effect of Failure to Pay*, 1271.
11. *Adjudicating Debtor a Bankrupt*, 1276.
12. *Second Composition*, 1277.
13. *Jurisdiction of Court of Bankruptcy*, 1277.
14. *Costs of Composition*, 1279.

## XIX. COMPOSITION DEEDS.

1. *General Characteristics and Incidents.*
  - a. What are, 1280.
  - b. Validity, 1281.
  - c. What Property Passes, 1282.
  - d. Preliminary Agreements for Composition, 1283.
  - e. Time and Mode of Accession, 1286.
  - f. Amount and Nature of Debt, 1290.
  - g. Creditors must be Treated on an Equal Footing, 1291.
  - h. Reasonable and Unreasonable Provisions, 1299.
  - i. Covenants to pay Composition, 1311.
  - j. Schedule of Creditors, 1311.
  - k. Verification of Debts, 1312.
  - l. Examination of Debtor, 1312.
  - m. Right of Debtor to Allowances, 1312.
  - n. Re-assignment of Property to Debtor, 1312.
  - o. Form of Release, 1313.
  - p. Execution of Deed obtained by Misrepresentation, 1315.
  - q. Private Agreement with particular Creditors, 1317.
2. *Under the Bankruptcy Act of 1849.*
  - a. Under Control of the Court of Bankruptcy, 1323.
  - b. By Deed, 1325.
3. *Under the Bankruptcy Act of 1861.*
  - a. Requirements of Act.
    - i. Majority of Creditors, 1329.
    - ii. Execution by Trustees, 1333.
    - iii. Attestation of Execution by Debtor, 1334.
    - iv. Registration of Deed, 1334.
    - v. Surrender of Debtor's Property, 1337.
  - b. Deeds in Form of Schedule D, 1338.
4. *Deeds in Cases of Partnership*, 1339.
5. *Rights, Duties, and Liabilities of Trustees and Inspectors*, 1341.
6. *Liability of Sureties for Payment of Composition*, 1350.
7. *Proof of Debts under Trust Deeds*, 1351.
8. *Tender or Payment of Composition*, 1355.
9. *Recovery of Composition*, 1360.
10. *Deeds compounding for particular Debts only*, 1361.
11. *Effect of Deeds upon Actions and Suits*, 1363.
12. *Operation of Certificate of Registration*, 1369.
13. *Jurisdiction of the Court of Bankruptcy*, 1374.

## XX. EFFECT OF BANKRUPTCY AND LIQUIDATION.

1. *On Executions.*
  - a. Under Statutes prior to the Bankruptcy Act, 1869.
    - i. Executions founded on Warrants of Attorney or Cognovits, 1377.
    - ii. Executions founded on Judges' Orders, 1380.
    - iii. Other Executions, 1381.
    - iv. Proceedings by Assignees, 1383.
  - b. Under Bankruptcy Act, 1869.
    - i. Fieri Facias against Goods of

- Non-Traders or of Traders for Sums not exceeding 50*l.*, 1384.
- ii. Fieri Facias against Goods of Traders for Sums exceeding 50*l.*
  - a. Who is a Trader, 1386.
  - b. What is an Execution for a Sum exceeding 50*l.*, 1386.
  - γ. Who Entitled to Proceeds, 1389.
  - δ. Right of Sheriff to Expenses, 1392.
  - e. Liability of Sheriff, 1393.
- iii. When Composition resolved on, 1393.
- iv. Elegit, 1395.
- v. Equitable Execution, 1396.
- vi. Sequestration, 1397.
2. *On Crown Process*, 1397.
3. *On Actions*, 1398.
4. *On Contracts*, 1399.
5. *On Authority of Agent*, 1401.
6. *On Bequests by Will*, 1401.
7. *Creditor's Remedy after Close of Bankruptcy*, 1403.

## XXI. THE BANKRUPT OR LIQUIDATING DEBTOR.

1. *Surrender*, 1403.
2. *Examination*, 1405.
3. *Committal for not answering Questions*, 1407.
4. *Privilege and Protection*, 1409.
5. *Discharge from Custody*, 1412.
6. *Allowance to Bankrupt*, 1415.
7. *Rights of Bankrupt.*
  - a. Submitting to Arbitration, 1416.
  - b. Suing as Trustee, 1416.
  - c. Suing in respect of Contracts, 1417.
  - d. Suing in respect of Torts, 1419.
  - e. Future Property, 1419.
  - f. Surplus, 1423.
  - g. Setting aside Irregular Proceedings, 1423.
  - h. Appealing against Injunction, 1424.
  - i. Taking Part in Winding-up Proceedings, 1424.
  - j. Costs, 1425.
  - k. To Demand Delivery of Bill of Costs, 1426.
8. *Trading by Bankrupt*, 1426.
9. *Removal of Bankrupt Trustee*, 1428.
10. *Bankrupt holding Power of Attorney*, 1428.
11. *Actions against Bankrupt*, 1428.
12. *Proceedings against Estate of Deceased Bankrupt*, 1428.
13. *Procedure in Actions to which Bankrupt is Party*, 1429.
14. *Liability on new Promise to pay Debts.—See ante, XIV.*

## XXII. OFFENCES BY BANKRUPT.

1. *Not Surrendering*, 1430.
2. *Fraudulently obtaining Goods on Credit*, 1431.
3. *Concealing, Disposing of, or Pawning Property*, 1432.
4. *Tampering with Books*, 1437.
5. *Prosecution of Bankrupt*, 1437.



## XXIII. PRACTICE AND PROCEDURE.

1. *Rules and Orders*, 1443.
2. *Petitions*, 1443.
3. *Affidavits*, 1444.
4. *Service of Summonses and Notices*, 1445.
5. *Trial of Issues of Fact*, 1446.
6. *Transfer of Proceedings*, 1448.
7. *Committal for Contempt of Court*, 1448.
8. *Re-direction of Bankrupt's Letters*, 1450.
9. *Re-hearing*, 1450.
10. *Costs*, 1451.

## XXIV. APPEAL.

1. *Time for Appealing*, 1454.
2. *Who may Appeal*, 1458.
3. *From and to Whom*, 1460.
4. *Appeal to the House of Lords*, 1462.
5. *In what Cases*, 1463.
6. *Practice on Appeal*, 1463.

## XXV. EVIDENCE IN BANKRUPTCY.

1. *Proof of Bankruptcy*, 1467.
2. *Notice to dispute Bankruptcy*, 1470.
3. *Compelling Attendance of Witnesses*, 1471.
4. *Rights and Duties of Witnesses*, 1473.
5. *Depositions and Examinations*, 1476.

## XXVI. ACTIONS BY AND AGAINST ASSIGNEES AND TRUSTEES.

1. *By Official Assignees*, 1478.
2. *Instituting*, 1478.
3. *Limitation*, 1478.
4. *Parties*, 1479.
5. *Form of Remedy*, 1480.
6. *On Contracts of Bankrupt*, 1481.
7. *For Conversion of Bankrupt's Property*, 1484.
8. *Where Debt incurred by Fraud*, 1487.
9. *Pleadings*, 1487.
10. *Interrogatories*, 1488.
11. *Evidence*, 1488.
12. *Costs*, 1489.
13. *Practice*, 1490.

## XXVII. INSOLVENT DEBTORS AND DEBTORS TO SMALL AMOUNTS.

1. *Statutes*, 1490.
2. *Persons entitled to Benefit*, 1491.
3. *Assignment*, 1491.
4. *Operation of Discharge*, 1495.
5. *Protection from Process*, 1499.
6. *Rights of Insolvents after Discharge*, 1500.
7. *Effect of 32 & 33 Vict. c. 83*, 1500.

## XXVIII. SCOTCH BANKRUPTCY OR SEQUESTRATION, 1501.

## XXIX. IRISH BANKRUPTCY, 1505.

## XXX. FOREIGN OR COLONIAL BANKRUPTCY OR INSOLVENCY, 1505.

## I. STATUTES.

[The present Bankruptcy Act is 45 & 46 Vict. c. 52.]

The bankrupt statutes do not bind the crown. *Russell, Ex parte*, 19 Ves. 165.

Though the crown is named in some of the sections of the Bankruptcy Act, 1869, it is not bound by the other provisions of the Act. In particular, the relation back of the title of the trustee in a liquidation to the filing of the petition does not affect the rights of the crown under an extent issued against the property of the debtor between the filing of the petition and the appointment of a trustee. Notwithstanding the filing of a liquidation petition and the appointment of a receiver by the court on the application of the debtor, his property remains vested in him as before, until the creditors have determined what they will do, and the property is bound by an extent issued by the crown between the filing of the petition and the appointment of a trustee. *Postmaster-General, Ex parte, Bonham, In re*, 10 Ch. D. 595; 48 L. J., Bk. 84; 40 L. T. 16; 27 W. R. 325—C. A.

The 12 & 13 Vict. c. 106, does not extend to the colony of New Zealand. *Bunny v. Hart*, 11 Moore, P. C. C. 189.

The 12 & 13 Vict. c. 106, does not interfere with rights accruing under any of the acts repealed by the 1st section, notwithstanding such rights may have accrued after the passing of the act. *Birch or Bissell, In re*, 2 Kay & J. 328; 25 L. J., Ch. 323; 2 Jur., N. S. 370.

A bankrupt had been guilty of an offence against 12 & 13 Vict. c. 106, s. 251, in not surrendering himself to the court, and an information had been laid before a magistrate, who had issued a warrant for his apprehension. Subsequently the 24 & 25 Vict. c. 134, came into operation, which, by s. 230, repeals 12 & 13 Vict. c. 106, s. 251, subject to the exceptions therein contained. The bankrupt was afterwards indicted and convicted under the repealed enactment:—Held, that this was a proceeding pending within 24 & 25 Vict. c. 134, s. 230; and, secondly, that the word "penalty" in that section extends to any penal consequences whatsoever, and is not restricted to a pecuniary penalty only. *Reg. v. Smith*, 1 L. & C., C. C. 131; 9 Cox, C. C. 110; 31 L. J., M. C. 105; 8 Jur., N. S. 199; 5 L. T. 761; 10 W. R. 271.

The effect of an act of bankruptcy under the former law is saved by the repealing section of 32 & 33 Vict. c. 83, s. 20. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

## II. COURTS OF BANKRUPTCY.

## 1. JURISDICTION OF COURT.

## a. Generally.

**Under 24 & 25 Vict. c. 134.**—The jurisdiction in matters of insolvency transferred to the commissioners in bankruptcy by 24 & 25 Vict. c. 134, is exercisable by them in the same manner, and subject to the same right of appeal, as their ordinary business in bankruptcy. *Perkins, Ex parte*, 34 L. J., Bk. 37; 11 Jur., N. S. 895; 12 L. T. 784; 13 W. R. 1001.

When creditors have by the requisite statutory majority resolved under the Bankruptcy Act, 1861, s. 110, to suspend proceedings in bankruptcy, and to have the estate wound up by trustees, the Court of Bankruptcy has still power under s. 136 to determine any questions that may arise in the winding up of the estate by the trustees, and will, therefore, restrain a

chancery suit for the administration of the estate. *Penyston, Ex parte, Partridge, In re*, 31 L. T. 259—L. J.

The Bankruptcy Act, 1861, s. 137, does not apply to a sale of a bankrupt's interest in a partnership of which some of the partners are solvent. *Motion, In re, Maule v. Davis*, 9 L. R., Ch. 192; 43 L. J., Bk. 59; 29 L. T. 757; 22 W. R. 225.

**Under 32 & 33 Vict. c. 71.]**—The Court of Bankruptcy has jurisdiction to decide questions between a debtor and a secured creditor who has opposed a composition, if the composition forms part of a scheme that has been approved and carried out by the court under which the bankruptcy of the debtor has been annulled. *Lenard, Ex parte, Chidley, In re*, 1 Ch. D. 177; 45 L. J., Bk. 49; 33 L. T. 553; 24 W. R. 182—C. A.

A bill was filed by a debtor, who had presented a petition for an arrangement with his creditors under 7 & 8 Vict. c. 70, against his trustees, praying for the rectification of certain deeds, and that accounts might be taken against his trustees on the ground of wilful default and neglect. A demurrer to this bill was allowed, on the ground that by 7 & 8 Vict. c. 70, s. 15, that act was to be construed by the existing bankruptcy laws, and that under the present act the Court of Bankruptcy had jurisdiction to give the debtor the relief he sought. *Hutchinson v. Baslam*, 35 L. T. 467; 25 W. R. 54.

**Where Trustee's Right more extensive than Bankrupt's.]**—Where a trustee in bankruptcy claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals. But where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt (where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy), the Court of Bankruptcy ought to decide the matter itself. *Brown, Ex parte, Yates, In re*, 11 Ch. D. 148; 48 L. J., Bk. 78; 40 L. T. 402; 27 W. R. 651—C. A.

**Action of Account.]**—A liquidating debtor had consigned goods to commission merchants for sale, and they had made advances to him. They alleged that a balance was due to them from his estate, and the trustee in the liquidation alleged that a balance was due from them to the estate. They had not, however, tendered any proof or made any formal claim against the estate:—Held, by the chief judge and by the Court of Appeal, that, inasmuch as, if the trustee was right, there was a mere money demand by him against a stranger to the liquidation, the Court of Bankruptcy ought not, on the application of the trustee, to order accounts to be taken of the dealings between the debtor and the commission merchants; but that the trustee ought to proceed by action in the High Court. *Musgrave, Ex parte, Wood, In re*, 10 Ch. D. 94; 48 L. J., Bk. 39; 39 L. T. 647; 27 W. R. 372—C. A. Affirming 26 W. R. 915.

**Simple Money Demands.]**—The Court of Bankruptcy, even if it possesses jurisdiction under s. 72 of the Bankruptcy Act, 1869, to enforce a

simple money demand by the trustee of a bankrupt's property against a third party, ought not to exercise jurisdiction, but ought to leave the demand to be enforced by the trustee in an action in the ordinary way. *Dicken, Ex parte, Pollard, In re*, 8 Ch. D. 377; 38 L. T. 860; 26 W. R. 731—C. A.

Commission agents accepted bills drawn upon them by their principals for part of the value of goods consigned to the agents for sale. After the principals had filed a liquidation petition the agents sold the goods in order to reimburse themselves the amount of one of the bills which they had paid, and to provide funds to meet the others which were soon to become due. Before the latter bills were paid the agents filed a liquidation petition. They had spent all the proceeds of the sale. Their creditors agreed to accept a composition, which was paid to the holders of the bills, some of whom claimed to prove in the liquidation of the principals. The principal's trustee applied to the county court for an order that the agents should pay to him the balance of the proceeds of sale, after deducting the amount of the bill which they had paid in full, and the composition which they had paid in respect of the others:—Held, by the chief judge, that the trustee was not entitled to the order. *1b*.

Held, by the Court of Appeal, that the trustee's demand against the agents was a mere demand for a debt due to the principal's estate, and that the Court of Bankruptcy ought not to assume jurisdiction to try it. *1b*.

A trader opened with a railway company a credit account for freight, by which it was agreed that the company should have a general lien for all moneys due by him to them on any account on all goods belonging to him in their hands. He afterwards filed a liquidation petition, under which a receiver of his property and manager of his business was appointed. In order to carry on the business the receiver bought some goods, which he paid for with his own money, and sent them to the company consigned to the trader. The company claimed the benefit of the agreement, and refused to deliver the goods until they were paid the amount which the trader owed them for freight due at the time of the filing of the petition. The receiver, in order to obtain the goods, paid the company 50*l.* under protest, and then applied to the Court of Bankruptcy to order the company to repay him the 50*l.*, and an order was made accordingly:—Held, that the Court of Bankruptcy had no jurisdiction to make the order. *Great Western Railway Company, Ex parte, Bushell, In re*, 22 Ch. D. 470; 52 L. J. Ch. 734; 48 L. T. 196; 31 W. R. 419—C. A.

**Election of Remedy in other Court.]**—A judgment creditor levied execution against his debtor, and the sheriff took possession of the debtor's goods; but before the sale took place the debtor filed a petition for liquidation, and a receiver was appointed, who obtained an injunction restraining the sale on giving an undertaking to abide by any order as to damages. The liquidation proceedings became abortive, and a petition for adjudication was presented, under which the debtor was adjudicated bankrupt, and the sheriff gave up the goods to the trustee. The execution creditor then brought an action against the sheriff for damages sustained by his parting with the goods. The action was determined in the sheriff's favour, on the ground that the

debtor was a trader, and had committed an act of bankruptcy by suffering the execution. Afterwards, the execution creditor made an application in bankruptcy for damages under the undertaking given by the receiver, in which he relied on the same point as in the action, namely, that the debtor was not a trader:—Held, that the matter was *res judicata*, and as the creditor had elected to take his remedy at law against the sheriff, the Court of Bankruptcy could not entertain the question. *Harper, Ex parte, Bremner, In re*, 10 L. R., Ch. 379; 44 L. J., Bk. 57; 32 L. T. 317; 23 W. R. 433.

**Superseding or overriding Jurisdiction in Chancery.**—Articles of partnership between a father and his son provided that upon the father's death the son's share in the business should vest in the father's executors. The father died, and the son, who was constituted his sole executor, continued for about a year to carry on the business with the testator's assets. An administration suit was instituted by the creditors of the father. Shortly afterwards the son presented a petition for liquidation by arrangement, and a trustee was appointed, who took possession of the property belonging to the business, and sold a considerable portion of it. The bill was then amended by making the trustee a defendant to the suit, and praying an injunction to restrain him from meddling with the testator's assets. An application by the trustee to the Court of Bankruptcy for an order to restrain proceedings in the suit was refused, and an order was made in the suit directing the trustee to deposit in a bank the proceeds realized by the sale of the property, to be dealt with as the Court of Chancery should direct, and in default of his making such deposit, awarding an injunction against him as prayed by the bill:—Held, that the Court of Bankruptcy was the proper tribunal to determine the questions arising in the matter, and that an injunction must be awarded restraining the proceedings in chancery as against the trustee, in respect of any property coming to his hands under the liquidation. *Morley v. White, White, In re*, 8 L. R., Ch. 214; 42 L. J., Bk. 76; 27 L. T. 736; 21 W. R. 746.

A partner in a distillery business filed a bill in chancery against his co-partners for the dissolution of the partnership, and a decree was made for a dissolution, and afterwards an order was made for a sale of the business and property as a going concern by public auction. During the progress of the suit he became bankrupt, and the creditors' assignee sold the bankrupt's interest in the partnership property to his co-partners, and procured an order of the Court of Chancery sanctioning the sale. The co-partners then sold the whole business to a purchaser, and the creditors were paid 20s. in the pound out of the purchase-money. New assignees were afterwards appointed, who obtained an order in the Court of Bankruptcy, at the instance of the bankrupt, to set aside the sales as being made collusively, and at an undervalue:—Held, that there was no breach of trust on the part of the assignee in selling the share of the bankrupt partner by private contract, and that there was no proof of collusion in obtaining the order for sale; but it appearing to the court that the valuation of the property for the purposes of the sale had in some respects been made on an

erroneous principle, a reference was directed as to the true value of the property, the purchaser consenting to pay any excess which might be found due from him on such reference. *Motion, In re, Maule v. Davis*, 9 L. R., Ch. 192; 43 L. J., Bk. 59; 29 L. T. 757; 22 W. R. 225. *S. C.*, Cor. C. J. R.; 28 L. T. 905; 21 W. R. 904.

The 72nd section of the Bankruptcy Act, 1869, does not enable the Court of Bankruptcy to draw within its jurisdiction property or the owners of property not vested in the trustee, and not originally subject to the administration in bankruptcy; and *a fortiori* does not authorize that court to work out a decree which has been made in chancery against such persons. *Id.*

**Concurrent Chancery Jurisdiction.**—When a suit would, but for the fact of a bankruptcy, be fit to be entertained by the Court of Chancery, the jurisdiction is not taken away by the Bankruptcy Act, 1869. *Ellis v. Silber*, 8 L. R., Ch. 83; 42 L. J., Ch. 666; 28 L. T. 156; 21 W. R. 346.

Therefore, when the trustee has, in respect of the bankrupt's estate, a claim against a third person, that claim may be prosecuted at law or in equity, and is not subject to the jurisdiction of the Court of Bankruptcy. *Id.*

S., having created an equitable mortgage in favour of the plaintiff of his share in the assets or a partnership, subsequently became bankrupt. To a bill by the plaintiff against the trustee under the bankruptcy, praying for the appointment of a receiver of the property, subject to the mortgage, and that the defendant might be restrained from obtaining possession thereof, demurrer for want of jurisdiction overruled. *Coulthurst v. Smith*, 29 L. T. 714—C. A. Affirming 29 L. T. 243.

A composition deed, by which all the creditors of a debtor agreed to accept a composition of 7s. 6d. in the pound on the amount of and in full discharge of their debts, was duly executed by all the creditors and registered under the Bankruptcy Act, 1861, and all the property of the debtor was assigned to a trustee to provide for the composition. The payment of part of one of the debts to which the plaintiffs were now entitled was afterwards agreed to be postponed till all the other creditors had received their composition in full, and the entire estate then available was distributed in paying the composition on all the debts except the portion of the plaintiffs' which was postponed. Some years elapsed, and it was then discovered that there was real estate at Monte Video which had become vested in the trustee of the composition deed, and had remained unadministered, and the plaintiffs instituted a suit in the Chancery Division to have this property realized with a view to payment of the balance still due:—Held, on motion by the trustee of the composition deed to have the proceedings stayed on the ground that the case ought to be dealt with by the Court of Bankruptcy, that the Chancery Division had at least concurrent jurisdiction, and that the fact that there was no body of creditors amongst whom a fund was to be distributed was a circumstance which made it expedient to exercise that jurisdiction. *Jenney v. Bell*, 2 Ch. D. 547; 43 L. J. 369; 34 L. T. 485; 24 W. R. 550.

Held, also, that the fact of the deed containing a clause which made it doubtful whether it came within ss. 192 and 197 of the Bankruptcy Act, 1861, would of itself be a strong ground for not

compelling the parties to go to the Court of Bankruptcy. *Ib.*

The plaintiffs brought an action against the trustee of a composition deed, registered in bankruptcy, to compel him to sue for some of their debtor's estate, outstanding in Trinidad. The plaintiffs were the only creditors interested under the deed. They relied upon this: that the deed contained clauses which, since it was executed, had been decided to be invalid. The defendant objected to the jurisdiction of the Court of Chancery:—Held, that the Court of Bankruptcy had not the exclusive jurisdiction; and a motion to stay the action, and transfer the matters to that court, was therefore refused, with costs. *Ib.*

**Jurisdiction of Chancery exclusively.]**—The jurisdiction of the Court of Chancery is not ousted by a limited statutory jurisdiction conferred upon another court, and is properly invoked where the purposes for which the limited jurisdiction is conferred are at an end, or where the limited jurisdiction is not equal to the comprehension of the matter in dispute or can only be exercised on terms destructive of the right claimed. *Troup v. Ricardo*, 4 De G., J. & S. 489; 34 L. J., Ch. 91.

An insolvent debtor's estate had been fully administered in the Insolvent Debtors Court, and a sum paid out of court to him as surplus; but he had obtained no order to annul the insolvency or to re-vest his property in him:—Held, that he was nevertheless entitled to sue in chancery, in order to impeach the dealings of his assignees in insolvency with his property. *Ib.*

**Extraordinary Jurisdiction of Court, Objection to.]**—An objection to the exercise of the extraordinary jurisdiction conferred on the Court of Bankruptcy by s. 72 of the Bankruptcy Act, 1869, ought to be taken at the earliest opportunity, and it is too late to take such an objection after the objecting party has taken the chance of a decision in his favour on the merits. But the court itself may at any time decline *mero motu* to exercise the jurisdiction. *Swinbanks, Ex parte, Shanks, In re*, 11 Ch. D. 525; 48 L. J., Bk. 120; 40 L. T. 825; 27 W. R. 898—C. A.

An uncertificated bankrupt carried on business for several years after his bankruptcy, with the knowledge of his assignees and executors, who were his creditors at the time of the bankruptcy. He died possessed of considerable property. On a claim filed by one of his executors against the other, and the official assignee under the bankruptcy:—Held, that the creditors subsequent to the bankruptcy were entitled to priority over the former creditors, and that the estate ought to be administered in chancery. *Tucker v. Hernemann*, 4 De G., M. & G. 395; 1 Eq. R. 360.

**Vested Reversion of Deceased Insolvent falling into Possession.]**—Sect. 9 of the act 5 & 6 Vict. c. 116, applies only to a living insolvent, and does not enable the assignee of a deceased insolvent to obtain possession of property which, though it becomes vested in the insolvent in reversion expectant on a life estate after his final order, does not fall into possession until after his death. In such a case the proper remedy of the unsatisfied creditors under the

insolvency is to commence an action for the administration of his estate. *Welchman, Ex parte, Hare, In re*, 11 Ch. D. 48; 40 L. T. 45; 27 W. R. 774—C. A.

**Time for taking Objection to Jurisdiction.]**—The trustee in a bankruptcy applied to a county court to set aside as fraudulent a mortgage which the bankrupt had executed. The court directed the trial of certain issues by a jury, and the jury found that the deed was executed by the bankrupt without consideration, and with intent to defeat and delay his creditors. The county court then declared the deed to be void, and ordered it to be delivered up to be cancelled. The mortgagee applied for a new trial, but the application was refused. He appealed to the Chief Judge from the order which declared the deed void, but did not appeal from the refusal of a new trial. On the hearing of the appeal, the objection was taken that the case was not one in which the Court of Bankruptcy ought to exercise its extraordinary jurisdiction under s. 72:—Held, that the objection was raised too late after the mortgagee had taken his chance of a decision in his favour on the merits in the county court. *Butters, Ex parte, Harrison, In re*, 14 Ch. D. 265; 43 L. T. 2; 28 W. R. 876—C. A. Reversing *S. C.*, 13 Ch. D. 603; 49 L. J., Bk. 30; 28 W. R. 280; *nom. Harrison, Ex parte, Harrison, In re.*

**Objection, how raised.]**—A foreigner properly raises his objection to the jurisdiction by applying to have an order for service of a bankruptcy petition on him discharged. *Blain, Ex parte, Sawers, In re*, 12 Ch. D. 512; 41 L. T. 46; 28 W. R. 334—C. A.

**Costs on Appeal when Objection not taken below.]**—No costs given on appeal when objection to jurisdiction not raised in court below. *Eutough, Ex parte, Cliffe, In re*, 42 L. T. 95; 28 W. R. 433.

**Exercising Jurisdiction over Third Parties.]**—On the 23rd of May the tenant for life of a mansion-house and lands demised the same, for the rest of his life, at a gross undervalue, to a confidential servant, and seven days afterwards left Ireland, taking his servant with him. On the 15th of June he was adjudicated a bankrupt:—Held, that under these circumstances, the Irish Court of Bankruptcy had jurisdiction to decide on the validity of the lease. *Domvile, In re*, 9 Ir. R., Eq. 456; 23 W. R. 369.

The Court of Bankruptcy has jurisdiction to take an account, between a debtor and the trustees under a composition deed, of a fund paid to the trustees for distribution among the creditors. *Carew, Ex parte, Carew, In re*, 10 L. R., Ch. 308; 44 L. J., Bk. 67; 32 L. T. 318; 23 W. R. 459.

C. bought goods on credit from H. After delivery, but before the time for payment, C. became bankrupt. H., when the time for payment arrived, commenced an action against S., for the price, alleging that C. had bought the goods by the authority of S., and either on account of S. or on the joint account of S. and C. S. thereupon served the trustee with a notice under Ord. XVI. r. 18, of the Rules of Court, 1875. The trustee then applied for and obtained in bankruptcy an order restraining S. from taking or continuing any proceedings against the trustee under Ord. XVI.:—Held, that this order must be discharged,

for that the case between H. and S. could not be tried in bankruptcy, and that S., if found liable in the action, ought not to have to try the same question again in bankruptcy between himself and the trustee. *Smith, Ex parte, Collic. In re*, 2 Ch. D. 51; 45 L. J., Bk. 116; 34 L. T. 603; 24 W. R. 310—C. A.

When a stranger to a bankruptcy is willing to submit to the court of bankruptcy the determination of his rights in relation to property of the bankrupt, it is improper for the trustee in the bankruptcy to raise objections to the exercise of jurisdiction by that court. Such a person ought to be encouraged to submit to the jurisdiction. *Fletcher, Ex parte, Hart, In re*, 9 Ch. D. 381; 39 L. T. 187; 26 W. R. 843—C. A.

— **Under Old Law.**—The court had no jurisdiction over strangers to the fiat. *Holder, Ex parte*, 1 Mont. & Ayr. 518; *S. P., Pease, Ex parte*, 1 Rose, 242; 19 Ves. 47; *Bennett, Ex parte*, 10 Ves. 382; *Crow, Ex parte*, Mont. & Mac. 281; *Wackerbeth, Ex parte*, 2 Gl. & J. 156.

— **To prevent or restrain Acts of Injury by Injunction.**—The Court of Bankruptcy has jurisdiction upon a summary application on notice, or upon ex parte application, to grant an injunction against persons strangers to the bankruptcy, restraining them from doing acts which may be material to the estate of the bankruptcy. *Ander-son, In re*, 5 L. R., Ch. 473; 39 L. J., Bk. 49; 22 L. T. 361; 18 W. R. 715.

When an order for such an injunction is obtained ex parte by the assignee or trustee, it must be upon an absolute personal undertaking as to damages, and not an undertaking limited to the estate of the bankrupt, and it must put the person obtaining it upon terms of actively prosecuting the claim upon which it is founded. *Id.*

When at the time of the filing of a liquidation petition the grantee of a bill of sale given by the debtor is in actual uncontrolled possession of the property comprised in the deed, the court ought not to interfere by injunction with the exercise of the grantee's legal rights upon the mere suggestion that, if an injunction is granted, it is possible that the trustee in the liquidation, when appointed, may be able to raise a case for impeaching the validity of the deed. In order to justify such an interference the applicant for the injunction must at least swear to his belief of some facts which, if established, would render the deed invalid, as against the trustee in the liquidation. *Bayly, Ex parte, Hart, In re*, 15 Ch. D. 223; 43 L. T. 181; 29 W. R. 28—C. A.

— **Sequestration to compel Appearance—Action against Bankrupt in Colonial Court.**—Before issuing a sequestration against real estate of a bankrupt situate in a colony, for the purpose of compelling his appearance in an action in the Colonial Court to realize a mortgage given by him of other real estate in the colony, the leave of the Court of Bankruptcy ought to be obtained. *Rogers, Ex parte, Boustead, In re*, 16 Ch. D. 663; 44 L. T. 357—C. A.

— **Issued without Leave—Undertaking.**—But where such a sequestration had been issued without leave, and an appearance had been entered in the colonial action:—Held, that it was sufficient that the plaintiffs in the action should

undertake not to use the sequestration for any other purpose. *Id.*

— **Restraining Actions.**—The power of the Court of Bankruptcy to restrain suits in other courts by injunction is untouched by the Judicature Act, 1873, s. 24, sub-s. 5, and remains as before the passing of the act. *Dutton, Ex parte, Woods, In re*, 1 Ch. D. 557; 45 L. J., Bk. 87; 34 L. T. 100; 24 W. R. 289—C. A.

An order was made in the London Court of Bankruptcy restraining an equitable mortgagee of certain property of a bankrupt from proceeding in a foreclosure suit against the trustee, and ordering him to give up the deed to the trustee, and concur with him in selling the property; and that on completion of the purchase the sum claimed by the mortgagee should be paid into the Court of Bankruptcy. On appeal the court varied the order, directing that the mortgagee should not give up the deed till payment into the Court of Bankruptcy of the amount claimed by the mortgagee. *Id.*

The court will, on the motion of a petitioning creditor, restrain creditors proceeding in their actions against the debtor, provided it has some guarantee that the petitioning creditor will proceed with his petition. *Davies, In re*, 21 L. T. 685.

A suit in chancery was instituted by legatees under the will of a testator against his executors, and against the continuing partners of a firm of which he had been a member at the time of his death, and D., another partner who had retired after the testator's death, for the purpose of winding up the affairs of the partnership as they existed at the time of the testator's death, and obtaining payment to his estate of the share of the capital which was due to him. After the bill was filed the continuing partners filed a petition for liquidation by arrangement, and a trustee was appointed. The trustee was made a party to the suit by a supplemental order, but no relief was prayed against him. The trustee having applied to the Court of Bankruptcy for an injunction to restrain the proceedings in the suit as against him, Bacon, C. J., held, that the court had no jurisdiction to grant the injunction. After the order was made D. also filed a petition for liquidation:—Held, that the chief judge was right in refusing the injunction, D. being then solvent. *Gordon, Ex parte, Dixon, In re*, 8 L. R., Ch. 555; 42 L. J., Bk. 41; 28 L. T. 858; 21 W. R. 690.

Held, also, on evidence, that D. had also become a liquidating debtor, that all the matters in question in the suit might be properly determined in bankruptcy, and that the trustee was entitled to the injunction asked for. *Id.*

Quære, whether the jurisdiction under sect. 13 of the Bankruptcy Act, 1869, to restrain proceedings can be exercised in an action. *Leman v. Yorkshire Railway Waggon Company*, 50 L. J., Ch. 293; 29 W. R. 466.

— **Fraud.**—The Court of Bankruptcy has no jurisdiction to restrain an action for false representation or fraud. *Baum, Ex parte, Edwards, In re*, 9 L. R., Ch. 673; 44 L. J., Bk. 25; 31 L. T. 12.

Therefore, when an action had been commenced against a debtor for damages for breach of contract and for a tort by reason of a false representation, both grounds of complaint having

arisen out of the same transaction, the Court of Bankruptcy in proceedings under a composition under the provisions of the Bankruptcy Act, 1869, restrained the plaintiff in the action from proceeding therewith only so far as concerned the breach of contract, but did not restrain him from proceeding in respect of the tort:—Held, that the claimant was put to his election between his remedies, and if he proceeded with his action upon the tort, he could not also prove under the composition. *Ib.*

A. filed a bill against B., praying that an agreement might be cancelled and a sum of money paid under it repaid, on the ground of fraudulent misrepresentations by B. Before the suit came to a hearing B. became a liquidating debtor, and the suit was revived against his trustee. The trustee then applied to the Court of Bankruptcy for an injunction to restrain the suit in chancery:—Held, that A. had a right to prosecute his remedy against the debtor personally in the suit, notwithstanding the proceedings in liquidation, and the injunction was refused. *Coker, Ex parte, Blake, In re, 10 L. R., Ch. 652; 44 L. J., Bk. 126; 24 W. R. 145.*

The Court of Bankruptcy will not restrain proceedings in a suit or an action to which the discharge of the debtor in bankruptcy would be no defence. *Ib.*

—**Tort.**—After the registration of liquidation proceedings a creditor, who was not included in the debtor's statement of affairs, and who had no notice of the proceedings, brought an action against the debtor for money had and received, and also in detainue:—Held, that, so far as the action was founded on the count in detainue, it was an action in tort, and that the court had no power to restrain it, and that in other respects the court, in the exercise of the discretion given by r. 289 of the Bankruptcy Rules, 1870, ought not to restrain the action. *Meade, In re, Harold, Ex parte, 3 Ch. D. 119; 45 L. J., Bk. 121; 34 L. T. 649; 24 W. R. 903.*

—**Foreclosure Action.**—After an adjudication in bankruptcy, a foreclosure action was commenced against the trustee of the bankrupt by an alleged equitable mortgagee. The trustee pleaded that nothing was due on the mortgage, which he alleged was a sham to defraud the bankrupt's creditors. An application by the trustee to restrain the mortgagee from proceeding with the action, and for an order directing him to deliver up the title deed to the trustee was refused by the court, with liberty to either party to apply in the matter after the determination of the foreclosure action. *England, In re, Pannell, Ex parte, 6 Ch. D. 335; 37 L. T. 450; 26 W. R. 194—C. A.*

—**Administration Action.**—A., B., and C. were in partnership together, carrying on business under the style or firm of T. C. and Co., and were also individually trustees of the will of T. C. deceased, a former partner in the firm. The firm having presented a liquidation petition, under which resolutions were passed for a composition, was subsequently adjudicated bankrupt. Previously, however, to the adjudication, an administration action had been brought by beneficiaries under the will of T. C. deceased, charging A., B., and C., and also a firm of B. and Co., with breaches of trust and fraud in the

administration of the testator's estate, under which a receiver had been appointed, and he, by order of the court, had taken possession of the property of the firm, and was carrying on the partnership business:—Held, that an order in bankruptcy restraining the administration action was an improper exercise of the power of the court, inasmuch as the matters in dispute could be better considered in the administration action in chancery than by the Court of Bankruptcy. *Charlton, Ex parte, Charlton, In re, 38 L. T. 295; 26 W. R. 468.*

—**Action by Equitable Second Mortgagees for Redemption and Foreclosure.**—An equitable second mortgagee commenced an action against the liquidation trustee of the mortgagor, and the first mortgagees, claiming an equitable charge on the property, redemption against the second mortgagees, and, if necessary, foreclosure. Order of County Court in bankruptcy, restraining the action, discharged. *Hirst, Ex parte, Wherly, In re, 11 Ch. D. 278.*

—**Restraining Executions.**—A creditor obtained a judgment, but before he delivered the writ of execution to the sheriff he had notice that the debtor had filed his petition, and had obtained an interim injunction, restraining further proceedings in the action. A composition was afterwards resolved upon, and the injunction was made absolute:—Held, that the order making the injunction absolute was right, and that the creditor was bound by the composition. *Mauthner, Ex parte, Lewis, In re, 3 Ch. D. 113; 45 L. J., Bk. 125.*

—**Notice of Injunction—Proper Mode of Giving.**—A London solicitor, who obtains an order from the Court of Bankruptcy in London restraining a sale under an execution in the country, ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solicitor at the place, as his agent, asking him to give notice of it to the persons affected. *Langley, Ex parte, Smith, Ex parte, Bishop, In re, 13 Ch. D. 110; 49 L. J., Bk. 1; 43 L. T. 181; 28 W. R. 174—C. A.*

—**Notice by Telegram.**—Sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the court must decide upon the particular facts, whether he had in fact notice of the injunction, and it is the duty of those who ask for the committal to prove this beyond reasonable doubt. *Ib.*

—**Committal of Person believing Telegram a Hoax.**—A person who has violated an injunction will not be committed for contempt when he swears that, though he had received notice of it by telegram, he bona fide believed that no injunction had been granted, and the circumstances show that such a belief was not unreasonable. *Ib.*

—**Duty of Sheriff's Officer receiving Telegram.**—It is the duty of a sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the Court of Bankruptcy to restrain a sale in the country under an execution, to telegraph to the Court of Bankruptcy, or to the

London agents of the sheriff, to ascertain whether an injunction has really been granted. *Ib.*

— **Duty of Auctioneer.**—This, however, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell. *Ib.*

— **Liability of Sheriff's Officer for acts of Deputy.**—A sheriff's officer, who is not himself present at the sale, and who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram. *Ib.*

— **After Bankruptcy Annulled.**—A trader was adjudicated bankrupt on the petition of a creditor who was, under an execution, in possession of chattels belonging to the trader. Under orders of the court, the bankruptcy was afterwards annulled, and the property of the debtor was assigned by him to the same person who was trustee in the bankruptcy, on trust to secure payment of a composition which the majority of the creditors had agreed to accept. The execution creditor then threatened to proceed with his execution:—Held, that as the assignment had been made, and the composition had been accepted with the approval of the court, the court retained jurisdiction over the execution creditor, though the bankruptcy had been annulled. *Chidley, In re, Lennard, In re*, 1 Ch. D. 177; 45 L. J., Bk. 49; 33 L. T. 553; 24 W. R. 182—C. A.

Held, also, that the chattels were vested in the trustee discharged from the execution, and that the creditor ought to be restrained from proceeding with the execution. *Ib.*

— **Appointment of Guardians ad litem.**—The Court of Bankruptcy has power to appoint a guardian ad litem, to represent and protect the interests of minors in property that is being dealt with by the court, and will exercise such jurisdiction in cases where complete justice cannot otherwise be done. *Darcy, In re*, 11 Ir. R., Eq. 13.

— **Reference to Arbitration—Compelling Attendance of Witnesses.**—A matter in dispute between a trustee in a liquidation and a third party was, by an order made by consent, referred to arbitration. A witness refused to attend before the arbitrator:—Held, that the court could issue a subpoena for the attendance of the witness before the arbitrator. *Ackary, In re, Bolland, Ex parte*, 3 Ch. D. 125; 45 L. J., Bk. 133; 34 L. T. 666; 24 W. R. 932.

— **Property.**—S. was a woolbroker and warehouseman in Liverpool who also acted as the Liverpool agent of C. & Co., wool merchants, of London. S. pledged the wools of C. & Co. to a bank as security for advances made to him by the bank under the Factors Acts. Subsequently to these advances S. absented himself from his home, and while the intention of his absence was still doubtful, the bank obtained possession of the wools hypothecated. S. was adjudicated bankrupt as an absconding debtor. C. & Co. claimed these wools against the bank; the trustee in the bankruptcy who had also originally claimed them withdrew his claim:—Held, that

the Court of Bankruptcy had no jurisdiction under these circumstances to try the right to the goods as between the bank and C. & Co. *North Western Bank, Ex parte, Slee, In re*, 41 L. J., Bk. 72; 20 W. R. 980.

It is not the intention of the Bankruptcy Act, 1869, that the Court of Bankruptcy should draw within its jurisdiction all property that may be claimed as against the trustee of a bankrupt's estate by a third party. *Pannell, Ex parte, England, In re*, 6 Ch. D. 335; 37 L. T. 450; 26 W. R. 194—C. A.

Therefore, when a person, claiming to be equitable mortgagee of property, commenced a foreclosure action in the Chancery Division against the trustee of the estate of the mortgagor who had been adjudicated a bankrupt, and the trustee, alleging that the mortgage was a sham, applied to the Court of Bankruptcy for an order that the plaintiff in the action should deliver up the title-deeds to him, the Court of Bankruptcy refused the application, with liberty to either of the parties to apply after the conclusion of the proceedings in the action. *Ib.*

H., having borrowed 120*l.* from P., for the repayment of which sum and interest T. was surety, an agreement was entered into in September, 1875, between H. and T., that H. should execute a mortgage of certain premises to P., to secure the repayment of the loan and interest. The agreement contained a proviso that if T. should at any time be called upon and compelled to pay the 120*l.* and interest, or if H. should become bankrupt or file a petition for liquidation, it should be lawful for T. immediately to enter upon the premises so agreed to be mortgaged. T. having been served with a writ, jointly with H., to pay the 120*l.* and interest, paid the money in August, 1876, and immediately entered upon the premises agreed to be mortgaged, which were in the occupation of H., and upon which H. had expended considerable sums. In September, 1876, H. filed a liquidation petition, and in June, 1882, the trustee in the liquidation sought to have the agreement set aside as fraudulent and void, and that T. might be ordered to withdraw from possession upon payment into court by the trustee of 125*l.* in respect of the debt and interest:—Held, that the provision for re-entry upon the bankruptcy of H., not having come into operation, the Court of Bankruptcy had no jurisdiction to decide the matter. *Hutchinson, Ex parte, Holt, In re*, 47 L. T. 483.

Semble, the Court of Bankruptcy ought not after the lapse of six years to entertain such an application. *Ib.*

— **Bills of Sale.**—The Court of Bankruptcy has power to restrain a creditor from bringing against the trustee under a liquidation an action upon a bill of sale given by the debtor, the validity of which is disputed by the trustee. *Cohen, Ex parte, Sparke, In re*, 7 L. R., Ch. 20; 41 L. J., Bk. 17; 25 L. T. 473; 20 W. R. 69.

L. filed a petition for liquidation by arrangement or composition. B. was appointed receiver, and took possession of the stock-in-trade of the bankrupt. By an extraordinary resolution, which was duly registered, the creditors accepted a composition of 7*s.* 6*d.* in the pound, to be paid in three instalments. When two instalments had been paid and the third provided for by promissory notes, B., who had previously given up possession of the stock-in-trade, sent in a bill of

costs to L. for 400l. L. agreed to the amount, entered into a covenant under seal to pay it, and by the same instrument assigned his stock-in-trade to B. by way of bill of sale. B. subsequently took possession of part of the property under the assignment. Thereupon L. moved in the Court of Bankruptcy for an order for B. to bring in a bill of costs to be taxed, to deliver up the property, and that the bill of sale might be delivered up to be cancelled:—Held, that the court had no jurisdiction to entertain the application. *Lyon, Ex parte, Lyon, In re*, 7 L. R., Ch. 494; 41 L. J., Bk. 41; 26 L. T. 491; 20 W. R. 566.

Semle, that if the stock-in-trade had remained in B.'s possession qua receiver and therefore subject to his lien on it for his costs, and if no covenant under seal had been entered into, the court on application by L. to have the stock-in-trade delivered up would have had jurisdiction to order, and would have ordered an account of B.'s charges to be taken in bankruptcy. *Ib.*

**Foreclosure of Mortgaged Property of Bankrupt.]**—An order having been made by the Court of Bankruptcy foreclosing the trustee of a bankrupt in respect of leasehold property mortgaged by the bankrupt, six months being allowed for redemption, the mortgagee appealed, insisting that, as the trustee had admitted that he had no assets of the bankrupt other than the equity of redemption of the mortgaged property, only one month ought to be allowed for redemption:—Held, that the trustee was entitled to six months in which to redeem. *Fletcher, Ex parte, Hart, In re*, 10 Ch. D. 610; 27 W. R. 622—C. A.

Held, also, that no application having been made by the mortgagee to the registrar for a sale of the property under r. 78 of the Bankruptcy Rules, 1870, an order for sale could not be made on the appeal without the consent of the trustee. *Ib.*

Observations on the jurisdiction of the Court of Bankruptcy with regard to foreclosure. *Ib.*

When a mortgagee or other person having rights outside the bankruptcy comes to the court and submits his rights to be determined there, the court has jurisdiction to order the trustee to deliver up possession, without compelling the mortgagee to assert his right by action. *Fletcher, Ex parte, Hart, In re*, 9 Ch. D. 381; 39 L. T. 187; 26 W. R. 843—C. A.

Semle, that in a proper case the Court of Bankruptcy would also have jurisdiction to decree foreclosure. *Ib.*

Order made that the trustee in a bankruptcy should deliver possession of a house, of which the bankrupt had been weekly tenant, to the lessee of the house, who, as between himself and the bankrupt, was mortgagee of the lease from the bankrupt. *Ib.*

The trustee in bankruptcy of an equitable mortgagee by deposit may bring an action in the Chancery division for foreclosure against the trustee in bankruptcy of the mortgagor instead of applying in bankruptcy to have the property sold. *Waddell v. Toleman*, 9 Ch. D. 212; 38 L. T. 910; 26 W. R. 802.

**Realisation of Mortgage Securities—Concurrent Chancery Jurisdiction.]**—When a trustee has been appointed under a liquidation of the affairs of an equitable mortgagor, the mortgagee may, instead of applying in bankruptcy, proceed in chancery against the trustee for the purpose

of having the security realized, the jurisdiction in chancery not being taken away by the Bankruptcy Act, 1869. *White v. Simmons*, 6 L. R., Ch. 555; 40 L. J., Ch. 689; 19 W. R. 939.

**Interpleader.]**—Where goods seized by a sheriff under a writ of *fi. fa.* issued by the London Court of Bankruptcy, are claimed adversely, that court has jurisdiction, on the application of the sheriff, to make an interpleader order. *Middlesex (Sheriff) Ex parte, Buck, In re*, 10 Ch. D. 575; 48 L. J., Bk. 33; 39 L. T. 653; 27 W. R. 309—C. A.

**Impounding Documents.]**—The court has no power to retain a deed which has been produced by a witness merely out of courtesy and to facilitate proceedings. *Till, In re, Parson, Ex parte*, 19 W. R. 325.

A witness having a lien upon a deed was asked by the court to produce it. The deed was, upon its production, impounded by the court:—Held, that the court had no power to retain the deed, even though it might be fraudulent. *Ib.*

**To award Damages for excessive Distress.]**—A landlord seized goods under a distress prior to, and sold them subsequently to, the commencement of the tenant's bankruptcy, and the trustee was declared by a county court in bankruptcy to be entitled to damages for an excessive distress:—Held, on appeal, that there was no jurisdiction in bankruptcy to make the order appealed from. *Eatough, Ex parte, Cliffe, In re*, 42 L. T. 95; 28 W. R. 433.

**In Cases of Composition Deeds.]**—The Court of Bankruptcy has jurisdiction, under the Bankruptcy Act, 1869, s. 72, to decide all questions necessary to make a complete distribution under a deed of composition registered under the Bankruptcy Act, 1861, even though the deed contains no assignment by the debtor of his estate. *Rumbold, Ex parte, Taylor, In re*, 6 L. R., Ch. 842; 40 L. J., Bk. 82; 25 L. T. 253; 19 W. R. 1102.

See further, post, COMPOSITION DEEDS.

**Order for Payment of Assets admitted on Examination.]**—An application to a registrar under the Bankruptcy Act, 1869, s. 98, that A. may be ordered to pay to the applicant assets of the bankrupt in his possession, without notice to A., is irregular and improper. *Schofield v. Holt, Lumb, In re*, 19 W. R. 525.

S., alleging that H. had admitted assets of certain bankrupts in his possession, applied to the registrar of a county court that H. might be ordered to pay the same with costs. No notice at the time was given to H. of the intended application. The registrar made an order for the payment by H. of the amount therein specified, but not the whole amount of the assets alleged to be admitted. S. appealed to the county court judge, who simply rescinded the order, without specifying anything as to the payment of any money by H. S. appealed:—Held, that the order of the county court judge was right, and that the appeal must be dismissed with costs; the proper course for S., on the rescission of the registrar's order, being to com-



mence de novo, as if no such order had been made. *Ib.*

**To Imprison.]**—A person who has been ordered to repay to the trustee of a bankrupt's estate money which he had received by way of fraudulent preference does not hold the money in a fiduciary capacity within the meaning of s. 4 of the Debtors Act, 1869, and cannot, therefore, if he makes default in payment of the money, be committed to prison under that section. *Hooson, Ex parte, Chapman, In re*, 8 L. R., Ch. 231; 42 L. J., Bk. 19; 28 L. T. 4; 21 W. R. 152—L. J.

The 9th section of the Debtors Act, 1869, is only intended to preserve to the Court of Bankruptcy the special powers of imprisonment conferred upon it by such sections as the 19th, 70th, and 98rd of the Bankruptcy Act, 1869, and is not intended to preserve to the Court of Bankruptcy any powers of imprisonment for debt which have been taken away from other courts by the Debtors Act, 1869. *Ib.*

Money received by a creditor, who was a married woman, by way of fraudulent preference, does not constitute a trust fund for the benefit of the bankrupt's estate, and the non-compliance by the creditor with the order of the court to pay the fund over to the trustee in the bankruptcy does not subject such creditor to imprisonment, as being within the third exception to the 4th section of the Debtors Act, 1869. *Wood, Ex parte, Chapman, In re*, 21 W. R. 71.

**To modify special Resolutions.]**—When special resolutions in a bankruptcy proper are submitted to the court for approval, the court can only confirm or reject the resolutions, and cannot alter the same, or annex conditions thereto. *Hunt, Ex parte, Winn, In re*, 19 W. R. 714.

**To close Bankruptcy—Where Bankrupt without Assets.]**—The court has power, under s. 47 of the Bankruptcy Act, 1869, to make an order closing a bankruptcy in a case where it does not appear that the bankrupt has any assets. *Pitt, Ex parte, Gosling, In re*, 20 Ch. D. 308; 51 L. J., Ch. 733; 47 L. T. 263; 30 W. R. 763—C. A.

**To re-open Proceedings.]**—After an order has been made closing a bankruptcy, the court has, under s. 71, power to re-open it. *Ib.*

**To tax Bills of Costs.]**—The jurisdiction of the Court of Bankruptcy to tax the bill of costs of the solicitor to the estate is independent of the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 37, and the registrar is bound to tax such bill, without special circumstances, notwithstanding the lapse of twelve months from its delivery. *Blair, Ex parte, Machle, In re*, 5 L. R., Ch. 482; 39 L. J., Bk. 45; 22 L. T. 287; 18 W. R. 615.

**To entertain Claim against Debtor.]**—The Court of Bankruptcy has no jurisdiction to entertain a claim for a personal demand against the debtor himself, when there is no property for the court to administer. *Lacey, Ex parte, Lacey, In re*, 16 Ch. D. 131; 50 L. J., Ch. 207; 43 L. T. 579; 29 W. R. 299—C. A.

**Over Creditor residing out of Jurisdiction.]**—

A foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, by proving a debt in a bankruptcy or liquidation, brings himself within the general jurisdiction of the court as to the administration of the estate, just as if he were residing within it. An order can therefore be made on him to restore property of the bankrupt or debtor improperly in his possession. *Robertson, Ex parte, Morton, In re*, 20 L. R., Eq. 733; 44 L. J., Bk. 99; 32 L. T. 697; 23 W. R. 906.

#### b. London Court of Bankruptcy.

Sect. 65 of the Bankruptcy Act, 1869, confers on the London Court of Bankruptcy for the purposes of that act all the jurisdiction formerly possessed by the Superior Courts of Common Law. *Middlesex (Sheriff), Ex parte, Buck, In re*, 10 Ch. D. 575; 48 L. J., Bk. 33; 39 L. T. 653; 27 W. R. 309—C. A.

When proceedings have been instituted in the London Bankruptcy Court, and that court, pursuant to s. 74 of the Bankruptcy Act, 1869, requests a local court to act as auxiliary to it, and to hear and determine some matter arising in such proceedings, the finding and order of the local court on such matter will be treated as an original order of such local court, and an appeal will accordingly lie therefrom to the chief judge in bankruptcy. *Jackson, Ex parte, Vaughan, In re*, 36 L. T. 711; 25 W. R. 561. Affirmed nom. *Fletcher, Ex parte*, 6 Ch. D. 350; 37 L. T. 282; 25 W. R. 870—C. A.

**Debtors with London Agents.]**—C. & Co. had their chief business offices at Sheffield, and were tenants of three rooms in London, in which an agent carried on business on behalf of the firm. On their becoming bankrupt:—Held, that the Bankruptcy Court of Sheffield, and not the Bankruptcy Court in London, had jurisdiction in the matter. *Charles, Ex parte, Charles, In re*, 13 L. R., Eq. 638; 41 L. J., Bk. 43; 20 W. R. 524.

**Bank Clerk.]**—A debtor, who was employed as a clerk in a bank, the office of which was within the district of the London Bankruptcy Court, is, within the meaning of r. 17 of the Bankruptcy Rules, 1870, "carrying on business" within the district of that court, and consequently, that court had jurisdiction to grant a debtor's summons against him. *Breull or Brewell, Ex parte, Bowie, In re*, 16 Ch. D. 484; 50 L. J., Ch. 384; 43 L. T. 580; 29 W. R. 299—C. A.

**Residence.]**—The debtor's private residence was in one of the suburbs, outside the district of the London court:—Held, by James, L. J., that he was also, within the meaning of r. 17, "residing" within the district of the London court. *Ib.*

#### c. County Courts.

**Before the Bankruptcy Act, 1869.]**—When a debtor petitions for adjudication in the county court it is not necessary that he should wait till he has ascertained with absolute certainty the amount of his debts; it is sufficient if he makes a bonâ fide estimate of their probable amount. And if the debts should turn out to exceed 300*l.* the bankruptcy will not be annulled if he took

reasonable pains to ascertain their true amount. *Rose, Ex parte*, 4 L. R., Ch. 648; 20 L. T. 688; 17 W. R. 938.

Where the registrar of a county court of the district in which a debtor is in gaol, upon being satisfied that his debts do not exceed 300*l.*, has made an order of adjudication in bankruptcy, and directed that it shall be prosecuted in the county court for the district in which the debtor had resided for the previous six months, the latter court has jurisdiction, notwithstanding it should turn out that the debts in fact exceed 300*l.* *Harrison, In re*, 1 H. & C. 319; 32 L. J., Ex. 159; 9 Jur., N. S. 338; 7 L. T. 829; 11 W. R. 467.

The 24 & 25 Vict. c. 134, s. 94, does not apply to a prisoner presenting a petition in form *a pauperis*, and owing debts exceeding 300*l.* *Coombes, In re*, 3 B. & S. 296; 32 L. J., Q. B. 65; 9 Jur., N. S. 572; 7 L. T. 379; 11 W. R. 114.

Therefore, where in such a case a judge of a county court of the district in which a bankrupt was in prison adjudicated him bankrupt, and transferred the proceedings to the county court of the district in which the bankrupt had resided for six months next before the filing of the petition:—Held, that the judge of the latter county court was right in refusing to entertain the case. *Ib.*

A., shortly before the bankruptcy, which took place under the act of 1861, purchased from his uncle, a bankrupt, pictures, constituting the principal part of the estate, and paid for them 4,000*l.*, the object of the sale being to enable the bankrupt to pay his creditors a composition, which a large majority of them had agreed to accept. The assignee, upon an *ex parte* application alleging that the sale had been made at an under value, obtained from the county court, to which the bankruptcy had been referred, an order restraining A. from proceeding with a sale of the pictures which had been advertised:—Held, that the county court had jurisdiction to grant such an order. *Anderson, In re*, 5 L. R., Ch. 472; 39 L. J., Bk. 49; 23 L. T. 274; 18 W. R. 1124.

In such case the appeal from the order of the county court judge lies to the chief judge in bankruptcy, and not to the court of appeal. *Ib.*

**Under Bankruptcy Act, 1869.**—After proceedings had been instituted in a county court for winding up a debtor's affairs in liquidation:—Held, that an application relating to costs claimed under a deed of assignment executed by the creditor should have been made by proceedings in bankruptcy, not by plaint in equity. *Graham v. Winterson*, 16 L. R., Eq. 243; 42 L. J., Ch. 633; 28 L. T. 803; 21 W. R. 722.

The order of a local court sitting in bankruptcy directing payment of a sum to the trustee of a bankruptcy does not impress upon the debtor a fiduciary relation towards the creditors of the bankrupt within the Debtors Act, 1869, s. 4, sub-a. 3, so as to make him liable to committal in default of payment. The powers of arrest and imprisonment preserved by s. 9 are those only which are created by the Bankruptcy Act, 1869. *Hooson, Ex parte, Chapman, In re*, 8 L. R., Ch. 231; 42 L. J., Bk. 19; 28 L. T. 4; 21 W. R. 152.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 72, enacts that "every court having jurisdiction in bankruptcy under this act shall have full

power to decide all questions, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any such case":—Held, that this section gives any Court of Bankruptcy jurisdiction to determine as matter of fact the expediency or necessity for entertaining and deciding any question which affects the realization and distribution of the property of the bankrupt,—subject only to the appeal given to the chief judge in bankruptcy and the Court of Appeal in chancery by s. 71. *Halliday v. Harris*, 9 L. R., C. P. 668; 43 L. J., C. P. 350; or *Harris v. Halliday*, 30 L. T. 680; 22 W. R. 756.

Therefore, where a judge of a county court had deemed it expedient to restrain a person trading in London from enforcing in a vice-admiralty court abroad a claim of lien on a ship (part of the bankrupt's estate) for necessaries supplied abroad on the orders of the captain after the filing of the petition, and to direct an issue to try the matter in his court, the court refused to grant a prohibition,—holding that the county court had by its decision given itself jurisdiction, subject only to appeal. *Ib.*

Seemle, per Brett, J., that the matter was not one which a county court having no admiralty jurisdiction ought to have entertained. *Ib.*

A county court judge, in the exercise of his bankruptcy jurisdiction, has power, under s. 72 of the Bankruptcy Act, 1869, to grant an injunction restraining an action for foreclosure brought by a mortgagee of the bankrupt and then pending in the Chancery Division; and it makes no difference that such action has been commenced before the institution of the bankruptcy proceedings. *Snow v. Sherwell*, 25 W. R. 433—C. A.

#### d. Court of Appeal.

The primary jurisdiction in bankruptcy being, by 12 & 13 Vict. c. 106, s. 12, transferred to the commissioners, and the jurisdiction of the vice-chancellor under that act having been exclusively appellate, and transferred to the court of appeal by 14 & 15 Vict. c. 83, the court of appeal cannot order the payment of money out of the bankruptcy court, unless the application is made by way of appeal from a commissioner. *Cheetham, In re*, 2 De G., Mac. & G. 223; 21 L. J., Bk. 5.

A commissioner refused to adjudicate a trader a bankrupt:—Held, that upon a just exposition of the whole of 12 & 13 Vict. c. 106, the court of appeal has jurisdiction to declare whether there is upon the evidence sufficient to warrant an adjudication, and to remit the matter to the commissioner. *Crabb, Ex parte*, 25 L. J., Bk. 45; 2 Jur., N. S. 628—L. J.

It is not incumbent on the appellate court to decide a question as to the scale of charges of an agent employed by the assignees to sell a bankrupt's stock by tender, although the parties submit to its jurisdiction. *Hurst, Ex parte*, 5 De G., Mac. & G. 387.

## 2. OFFICERS OF COURT.

### a. Commissioners.

**Jurisdiction.**—The senior commissioner having

transacted the business before him, left the court for the day. This was held an unavoidable absence within 12 & 13 Vict. c. 106, s. 20, so as to enable a junior commissioner, present in court, to act for the senior commissioner in the matter of the application. *Sewell, Ex parte*, 22 L. J., Bk. 29; 17 Jur. 333.

Commissioners, authorized to act in the prosecution of fiats, although constituted courts of record, as they possess no common-law jurisdiction, have no other powers than those which the statutes of bankruptcy give, or which are necessary incidents to those powers. *Watson v. Bodell*, 14 M. & W. 37; 14 L. J., Ex. 281; 9 Jur. 626.

They may commit for a contempt of court in the same manner as any other court of record. *Id.*

**Liability.**—Commissioners of bankruptcy are liable to be sued in trespass for false imprisonment, if they arrest in a case where they have no jurisdiction. *Wright v. Maude*, 10 M. & W. 527; 2 D., N. S. 517; 12 L. J., Ex. 22; 6 Jur. 953.

**Discretion—Appeal.**—The sale of a bankrupt's estate is a matter peculiarly within the discretion of the commissioner, with which the court of appeal will not interfere upon a mere doubt. *Ford, Ex parte*, 5 De G., Mac. & G. 398; 24 L. J., Bk. 1.

**Commissioners may Act for each Other.**—A petition was allotted by ballot to commissioner G., but the subsequent proceedings were either before commissioner H. or commissioner F., and the summons to surrender required the bankrupt to appear on a day named before commissioner G., whereas commissioner G. did not sit on that day:—Held, on an indictment under 12 & 13 Vict. c. 106, s. 251, against the bankrupt for not surrendering, that one commissioner might sit and act for another, and the proceedings were therefore valid. *Reg. v. Gordon*, Dears. C. C. 586; 25 L. J., M. C. 19; 2 Jur., N. S. 67.

**Appeal from Decision.**—Where a mortgagee submitted the validity of his security to the jurisdiction of a commissioner, on an application of the petitioning creditor to set it aside:—Held, that the commissioner, in deciding the question, acted judicially, and not as an arbitrator, and that his decision was subject to appeal. *Bland, Ex parte*, 6 De G., Mac. & G. 757.

**Jurisdiction to Re-hear.**—Where the residence of the party applying for a re-hearing was at Buenos Ayres, and it was necessary for him to obtain further evidence in support of his case than that which was before the commissioner on the original hearing, notwithstanding the twenty-one days limited by 12 & 13 Vict. c. 106, s. 12, had expired:—Held, that the commissioner had jurisdiction to re-hear the case, there being no laches on the part of the applicant. *Imbert, Ex parte*, 1 De G. & J. 152; 26 L. J., Bk. 65; 3 Jur., N. S. 801.

**Facts giving Commissioner Jurisdiction under 12 & 13 Vict. c. 106, s. 223, must be stated in Order of Adjudication.**—Where under 12 & 13 Vict. c. 106, s. 223, a commissioner adjudicated a trader, who petitioned under s. 211, to be a bankrupt, he must state in the order of adjudication the facts giving him jurisdiction so to do under s. 223, otherwise the order of adjudication was

void. *Lee v. Rowley*, 8 El. & Bl. 857; 27 L. J., Q. B. 193; 4 Jur., N. S. 583.

**Deputy.**—A registrar appointed to act in the place of a commissioner under 17 & 18 Vict. c. 119, s. 6, has no jurisdiction after the commissioner's death. *Corles, Ex parte*, 3 De G. & J. 484; 28 L. J., Bk. 15; 5 Jur., N. S. 110; 32 L. T. 326; 7 W. R. 220.

#### b. Registrars.

**Under 12 & 13 Vict. c. 106, s. 27.**—This section, enabling the registrar to sit for the commissioner during the vacation, applies to the 19th of August, and is not confined to courts where there is only one commissioner. *Burnett, Ex parte*, 4 De G. & S. 54; 20 L. T., Bk. 3; 15 Jur. 617.

**— Powers of Registrars sitting for a Commissioner.**—The registrar, sitting for the commissioner, extended the time for shewing cause against an adjudication to a specified day. When the time arrived the parties attended, and the registrar (who had not the power of reversing an adjudication) again sat for the commissioner, and further adjourned the time for shewing cause beyond the extended time authorized by the act:—Held, that the registrar sitting for the commissioner could so adjourn it. *Washbourne, Ex parte*, 4 De G. & S. 193.

Bankrupts gave a notice on the 27th December of their intention to shew cause on the 29th of that month against an adjudication. On the 29th December, in the absence of the commissioner, the registrar made an order extending the time for shewing cause, and in the interim suspending advertisements:—Held, that such order was not ultra vires the registrar. *Jacobson, Ex parte*, 7 Jur., N. S. 322; 4 L. T. 102—L. J.

An order made by a registrar acting as the deputy of a commissioner, should shew upon the face of it that he was appointed by, and duly authorized to act for, the commissioner. *Morgan, Ex parte*, 32 L. J., Bk. 61; 9 Jur., N. S. 881; 7 L. T. 778; 11 W. R. 1048.

A registrar acting as the deputy of the commissioner has power to grant orders of discharge in unopposed cases. The order of discharge in such cases ought to be signed by the registrar and by the commissioner. *Lees, Ex parte*, 33 L. J., Bk. 25; 12 W. R. 697.

**Under 17 & 18 Vict. c. 119, s. 6.**—A registrar appointed to act in the place of a commissioner under 17 & 18 Vict. c. 119, s. 6, had no jurisdiction after the death of the commissioner. *Corles, Ex parte*, 3 De G. & J. 484; 28 L. J., Bk. 15; 5 Jur., N. S. 110; 32 L. T. 326; 17 W. R. 220.

**Under 32 & 33 Vict. c. 71.**—The registrar, when holding a meeting in a district court of bankruptcy, had no jurisdiction to make an order for the delivery up by the creditors' assignee of documents of the bankrupt in his custody. *Thwaites, Ex parte*, 16 W. R. 660.

**Nature of Proceedings before.**—The examination of a prisoner in gaol by a registrar was a public judicial proceeding; and therefore a fair and correct report, without comment, of the examination was privileged, even though it may have contained statements which injuriously affected the character of a third person. *Ryalls v.*

*Leader*, 1 L. R., Ex. 296; 35 L. J., Ex. 185; 12 Jur., N. S. 503; 14 L. T. 562; 14 W. R. 838.

**Sitting as Chief Judge.**—The registrar sitting as chief judge ought only to act in cases where he has the decisions of the chief judge or of the court to guide him. *English Joint Stock Bank, Ex parte, Finney, In re*, 6 L. R., Ch. 79; 40 L. J., Bk. 43; 23 L. T. 652; 19 W. R. 140—L. J.

The registrar, sitting as chief judge, ought not to decide points of novelty and difficulty, but should reserve them for the opinion of the chief judge. *Llynvi Coal and Iron Company, Ex parte, Hide, In re*, 7 L. R., Ch. 28; 41 L. J., Bk. 5.

**Power to Re-hear.**—A registrar sitting as chief judge may re-hear a case, although his order has been appealed from and varied by a court of appeal, if the special point to be re-argued was not dealt with on the appeal. *Mackay, Ex parte, Jeavons, In re*, 9 L. R., Ch. 127; 43 L. J., Bk. 105; 29 L. T. 713; 22 W. R. 198.

**Registration of Resolutions.**—The office of the registrar is purely ministerial with regard to the registration of resolutions passed by creditors. *Levy, Ex parte, Varbetian, In re*, 11 L. R., Eq. 619; 40 L. J., Bk. 40; 24 L. T. 332; 19 W. R. 586.

The registrar has no power when a resolution is brought in for registration to institute an inquiry, or examine the debtor upon oath at the instance of a dissenting creditor, who objects to the registration. He must satisfy himself upon the evidence before him that the requirements of the statute have, or have not, been complied with, and register or refuse to register accordingly. *Id.*

The registrar can reject such of the resolutions tendered to him for registration as are *ultra vires*, and register the remainder. *Ashworth, Ex parte, Hoare, In re*, 18 L. R., Eq. 705; 43 L. J., Bk. 142; 30 L. T. 906; 22 W. R. 925.

**Affidavits by.**—The court disapproves of its registrars making affidavits in proceedings concerning matters that have come before them in their official capacity. *Till, Ex parte, Ratcliffe, In re*, 10 L. R., Ch. 631; 44 L. J., Bk. 103; 32 L. T. 521; 23 W. R. 670.

**Power to tax Costs.**—A solicitor who tenders a proof in the bankruptcy of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the taxing master, but the registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the taxing master. *Ditton, Ex parte, Woods, In re*, 13 Ch. D. 318; 28 W. R. 402—C. A.

**Appeal.**—An appeal from the decision of a registrar sitting as judge cannot be heard by a county court judge, but must be to the chief judge in bankruptcy, or the lords justices of appeal, as the case may be. *Nicholson, Ex parte, Marsden, In re*, 34 L. T. 592.

An appeal from the registrar of a county court, sitting as registrar, must be before the judge of his court in the first instance. *Sidey, Ex parte*, 24 L. T. 143.

**Deputy.**—The deputy registrar of a county court may have delegated to him by the judge the power of making an adjudication. *Lindsay,*

*Ex parte, Lindsay, In re*, 19 L. R., Eq. 52; 44 L. J., Bk. 5; 31 L. T. 415; 23 W. R. 44.

Deputy registrars have all the powers of registrars. *Id.*

#### c. Trustees.

*See post*, ASSIGNEES OR TRUSTEES.

#### d. Receivers.

**Appeal against Appointment.**—Immediately after a debtor had filed a liquidation petition two sets of persons, each professing to be a majority in value of his creditors, respectively signed two nomination papers, nominating and appointing two different persons to be receiver of the debtor's property. Upon the application of one of these sets of persons the registrar appointed their nominee receiver:—Held, that the nominee of the other persons had no locus standi to appeal from the registrar's order, though the persons who had nominated him would have had a right to appeal. *Cooper, Ex parte, Joseph, In re*, 6 Ch. D. 256; 46 L. J., Bk. 123; 37 L. T. 283; 25 W. R. 860—C. A.

**When Creditors may Appoint.**—The power of appointing a receiver given to the creditors by the first part of r. 262 of the Bankruptcy Rules 1870, can only be exercised when no receiver has been appointed by the court. *Rylands, Ex parte, Chesters, In re*, 6 Ch. D. 57; 46 L. J., Bk. 120; 36 L. T. 839; 25 W. R. 786—C. A., affirming: 36 L. T. 524; 25 W. R. 516.

The latter clause of the rule means that the nominee of the creditors, after they have acquired the status of creditors by proving their debts at the first meeting, shall be substituted for the receiver previously appointed by the court, the object being to provide for the possibility of the creditors at the first meeting not being able to agree upon a trustee, and adjourning the meeting for the further consideration of his appointment. *Id.*

**Receiver already appointed by Court.**—When creditors are desirous that the receiver nominated by themselves should displace the receiver appointed by the court under r. 262, they must make a substantive application to the court and shew, first, that it is the right thing to do; and, secondly, that the receiver to be displaced has been, or will be fully indemnified against all costs, charges, and liabilities incurred by him. *Rylands, Ex parte, Chesters, In re*, 36 L. T. 264.

There is no rule in bankruptcy requiring that the high bailiff of the court is invariably to be appointed receiver under a liquidation petition. Where, upon the application of creditors for the appointment of a certain person as receiver and manager under a liquidation petition, the judge of a county court appointed the high bailiff of the court to that office, the appointment was on appeal discharged and the nominee of the creditors appointed. *Walton, Ex parte, Walton, In re*, 51 L. J., Ch. 539; 46 L. T. 433; 30 W. R. 642.

**Right to Issue Debtor's Summons.**—A receiver in chancery has a right, without any authority or direction from the Court of Chancery, to issue a debtor summons to compel payment of a debt due to him in his character of receiver. *Harris, Ex parte, Lewis, In re*, 2 Ch.

D. 423; 45 L. J., Bk. 71; 34 L. T. 261; 24 W. R. 851.

**Interference with or Dispossession of.]**—When a receiver has been appointed by the Court of Bankruptcy, it is a contempt of court for the holder of a valid bill of sale of goods of the bankrupt to oust the receiver from possession which he has taken of such goods. *Cochrane, Ex parte, Mead, In re*, 20 L. R., Eq. 282; 44 L. J., Bk. 87; 23 W. R. 726.

The only person who may interfere with the possession of a receiver is a landlord distraining for a year's rent. *Id.*

Any other person who claims a better title than the receiver ought to apply to the court for leave to enforce his rights. *Id.*

A firm of merchants having filed a petition for liquidation, and a receiver having been appointed, the solicitor of the debtors induced the receiver not to interfere with the continuance of the business by the debtors, and undertook to indemnify him:—Held, that such interference with its officer was a contempt of the Court of Bankruptcy, and that such court could declare the party who had interfered, for such interference, and not because he was the solicitor, liable for the loss sustained by the estate through the continuance of the business, and direct an account for the purpose of ascertaining such loss, but that the account ought to be taken against the receiver jointly with the solicitor. *Hayward, Ex parte, Plant, In re*, 45 L. T. 326—C. A.

**Undertaking to Answer for Damages.]**—A petition for liquidation having been presented, a receiver was appointed and ordered to take possession of the fixtures and stock-in-trade at the debtor's brewery; and an injunction was granted restraining a mortgagee, who was in possession of the brewery under a bill of sale, from intermeddling with the chattels in the brewery. When the injunction was granted the receiver and the debtor gave undertakings to be answerable for damages. The mortgagee afterwards established his title to the brewery and the chattels in it, and then applied for an inquiry as to damages sustained by the occupation of the receiver:—Held, that the receiver must be treated as the agent of the creditors, and not of the mortgagee, and could not charge the mortgagee with the expense of carrying on the business; and that he was liable, under his undertaking, for damage for deterioration of the property, and for rent for use and occupation of the fixtures and stock-in-trade; and an inquiry was directed accordingly. *Warren, Ex parte, Joyce, In re*, 10 L. R., Ch. 222; 32 L. T. 288; 23 W. R. 401.

**Enforcement—Delay.]**—An application to enforce an undertaking to be answerable in damages, given by a receiver in bankruptcy on the granting of an injunction to restrain proceedings in relation to property alleged to form part of the bankrupt's estate, ought to be made within a reasonable time after it is ascertained that the injunction has been improperly granted. *Hall, Ex parte, Wood, In re*, 23 Ch. D. 644; 52 L. J., Ch. 907; 49 L. T. 275; 32 W. R. 179—C. A.

Unexplained and unreasonable delay in making such an application will be a sufficient

ground for refusing it, even if the bankruptcy proceedings are still pending and the receiver has not obtained his discharge:—Held, that an unexplained delay of nearly four years in making such an application was a sufficient answer to it, though the applicant had shewn a *prima facie* case. *Id.*

**Right to expend Money on behalf of the Estate.]**—A receiver and manager of the property and business of traders who had filed a liquidation petition was appointed by the court under r. 260. Without obtaining any previous sanction from the court or the creditors, he expended a considerable sum in obtaining a valuation of the debtor's assets, and he also employed the debtors to assist in managing the business at a weekly salary:—Held, that the court had a discretion as to allowing the sums so expended, and that under the circumstances they had been properly allowed. *Gordon, Ex parte, Gomersall, In re*, 20 L. R., Eq. 291; 44 L. J., Bk. 97.

Held, also, that the sanction of the court to the expenditure could be given after it had been made. *Id.*

It is the duty of a receiver, whether appointed by the court or nominated by the creditors, to investigate the state of the debtor's affairs, and inform the creditors at their first meeting what he believes to be the value of the debtor's assets. *Id.*

**Costs and Charges—Application of Funds in Receiver's Hands.]**—In administering the estate of a liquidating debtor the trustee should, after deducting his own actual disbursements, apply the amount actually in his hands, first, in payment of the receiver's charges under the petition, and then of the solicitor's costs under the liquidation. *Johnston, In re, Royle, Ex parte*, 20 L. R., Eq. 780; 32 L. T. 39; 23 W. R. 908.

When, therefore, the trustee paid the taxed costs of the solicitor in the matter of a petition without first communicating with his co-trustee, who had been the receiver, and six months afterwards the receiver sent in his bill of costs, which was taxed at 14l. 8s. 10d.:—Held, that the trustee must pay the receiver's charges although he had but 2l. 10s. in hand. *Id.*

**Accountant appointed Receiver is entitled to Charge for Services.]**—A debtor prior to filing a liquidation petition, employed an accountant to post up his books. Upon the filing of the liquidation petition, the accountant was appointed receiver and manager, but the liquidation proceedings having been superseded by a bankruptcy, the receiver paid over to the trustee in the bankruptcy the balance of the debtor's property in his hands. The receiver subsequently applied to the trustee for payment of his bill of charges for services rendered by him prior to the liquidation:—Held, upon appeal, that the services of the receiver having been beneficial to the bankrupt's estate, he was entitled, under the 7th Bankruptcy Rule, 1871, to payment of his charges so incurred. *Greener, Ex parte, George, In re*, 41 L. T. 739.

**Taxation.]**—Under r. 5 of the Bankruptcy Rules, 1871, the charges of a receiver and manager of a business for disbursements out of pocket (e.g., travelling expenses and salaries of assistants) are liable to taxation. *Izard, Ex parte, Bushell,*

*In re* (No. 1), 23 Ch. D. 75; 52 L. J., Ch. 678; 48 L. T. 751; 31 W. R. 418—C. A.

**Money advanced without Authority of Court—Right to Indemnity.]**—A receiver and manager of a business who desires to advance money of his own for the purposes of the business may, before doing so, apply to the court for its authority, and the court will, as a general rule, allow him interest at 5 per cent. on the amount which it authorizes him to advance, and will give him a charge on the debtor's assets for the advance and the interest. If the receiver and manager advances money without such a previous authority, he is entitled to an indemnity out of the assets, but he cannot obtain a personal order against the trustee for payment. *Id.*

**Bill of Sale given to Receiver to secure Charges.]**—A debtor filed a petition for liquidation by arrangement or composition, and a receiver of his property was appointed. The creditors agreed to accept a composition, and the receiver was appointed trustee. He afterwards delivered to the debtor an account of his charges, and the debtor gave him a bill of sale of his stock-in-trade to secure the amount claimed. The debtor applied to the Court of Bankruptcy for an order that the receiver should bring in his bill of charges for taxation, that he should deliver up the debtor's property to him, and give an account of all moneys received by him, and that the amount due from him to the debtor might be taxed, and that he might be ordered to pay what should be found due from him to the debtor, and that the bill of sale might be delivered up to be cancelled:—Held, that the Court of Bankruptcy had no jurisdiction to entertain the application, inasmuch as the substance of it was an attempt to set aside the bill of sale. *Lyons, Ex parte*, 7 L. R., Ch. 494; 41 L. J., Ch. 41; 26 L. T. 491; 20 W. R. 566.

**Payment of Remuneration, from what Fund.]**—A receiver in bankruptcy or liquidation has no lien upon the assets for his remuneration; he is only entitled to be paid out of the net assets. *Broune, Ex parte, Maltby, In re*, 16 Ch. D. 497; 43 L. T. 682; 29 W. R. 921—C. A.

**Complaint against Trustee.]**—He is not entitled to come to the court to complain of the conduct of the trustee in the administration of the assets; such a complaint can be made only by the creditors. *Id.*

**Action by Debtor against—Stay of Proceedings.]**—Any proceeding against a receiver appointed by the Court of Bankruptcy in respect of acts done *virtute officii* must be taken into that court. Where, therefore, a liquidating debtor had commenced an action in the High Court of Justice against the receiver in the liquidation, claiming damages done to his goods when in the possession of the receiver:—Held, that the debtor will be personally restrained from instituting any proceedings against the receiver elsewhere than in bankruptcy. *Day, Ex parte, Potter, In re*, 48 L. T. 912.

#### e. Solicitors.

**Right of Audience—Solicitor's Clerk.]**—A commissioner in bankruptcy is not bound to

hear a person who, although a duly-admitted solicitor of the court, does not appear as the solicitor of the party for whom he appears, but only as the clerk of such solicitor. *Broadhouse Ex parte*, 2 L. R., Ch. 655; 36 L. J., Bk. 29; 17 L. T. 126; 15 W. R. 126.

B. gave notice to dispute an adjudication which had been made against him, the notice being signed by D. & L., as his solicitors. When the validity of the adjudication came on for argument before the commissioner, R., who was the managing clerk of D. & L., and who was himself a solicitor of the court, appeared for the bankrupt. The commissioner, however, declined to hear him, and, although the bankrupt, who was in court, said that he wished R. to be heard on his behalf, the commissioner confirmed the adjudication with costs against the bankrupt:—Held, that the commissioner was right in refusing to hear R., so long as he appeared in the character of clerk to D. & L.; but that the bankrupt ought to have been more fully informed of the position in which he stood, and to have had an opportunity of constituting R. his solicitor if he desired to do so. *Id.*

**Right to Costs.]**—Where a solicitor persuaded a party to sue out a fiat as petitioning creditor (who was afterwards chosen assignee), upon an invalid act of bankruptcy, which was concerted between the solicitor and the bankrupt, and there did not appear any other act of bankruptcy to support the fiat, the court refused to make an order on the assignee to pay the solicitor's bill of costs up to the choice of the assignees. *Woodward, Ex parte*, 2 Mont. D. & D. 249; 5 Jur. 733.

**Statute of Limitations.]**—A bill for business done in relation to a bankruptcy after the choice of assignees became due to a solicitor, the last item in which occurred more than six years before 1844. In 1844 a sum of money belonging to the bankrupt's estate came into the hands of the official assignee. The solicitor presented a petition that his bill might be paid by the official assignee out of this sum. There was no imputation on the conduct of the solicitor, and the delay was explained to the satisfaction of the court:—Held, that the Statute of Limitations did not apply to such a case, and that he was entitled to the payment of his bill. *Brutton, Ex parte*, 1 De Gex, 116; 14 L. J., Bk. 15; 9 Jur. 96.

**Lien.]**—A solicitor, claiming to have a lien on a deed of a bankrupt for professional business done for him, was summoned to attend before the commissioner acting in the prosecution of the fiat, to be examined touching the estate of the bankrupt, and to produce the deed. The solicitor obeyed the summons and produced the deed, when the commissioner, being of opinion that he had no lien, ordered him to deliver up the deed to the solicitor of the fiat, and, on his declining to do so, unless his lien was first discharged, directed an officer of the court to seize the deed:—Held, that the commissioner, in making such order, exceeded his jurisdiction. *Lewellin, Ex parte*, 8 Jur. 816.

Where the claim of a solicitor to a lien on a deed of the bankrupt is disputed, the remedy of the assignees for recovering the deed is by an action of trover. *Id.*

Assignees have no higher rights with regard to

deeds belonging to a bankrupt's estate, on which a solicitor claims a lien for costs, than the bankrupt himself had. *Underwood, Ex parte*, 9 Jur. 632.

A partner in a trading firm, which had become bankrupt, was also one of a firm of solicitors whom the trading firm had employed in the conduct of suits which were pending at the time of the bankruptcy. The assignees, having retained other solicitors, were not entitled to an order for a delivery up to them of the papers in the possession of the solicitors, subject to their existing lien. *Moss, In re*, 1 L. R., Eq. 345; 35 L. J., Ch. 554.

A trustee was removed from his office and a new trustee appointed. The old trustee's solicitor, on being applied to, gave up all the account books of the estate, but refused to deliver up certain documents and papers on which he had expended labour as solicitor, and upon which he claimed a lien for costs. Thereupon the new trustee applied to the court for an order upon the old trustee and his solicitor to deliver up all documents relating to his office as trustee:—Held, that the solicitor was entitled to a lien on the documents which he had retained, and that the old trustee was not bound to discharge that lien by paying the costs out of his own pocket. *Yalden, Ex parte, Austin, In re*, 4 Ch. D. 129; 46 L. J., Bk. 59; 35 L. T. 720; 25 W. R. 134—C. A.

—**Money received after Fiat.**—Where a solicitor was employed by the trustees under a trust-deed in the preparation of the deed, and the execution of the trusts, and the trustees were afterwards chosen assignees under a subsequent fiat issued against the party who had assigned his effects under the trust-deed:—Held, that the solicitor could not retain a sum which had come to his hands since the bankruptcy, in satisfaction of his charges relating to the trust-deed. *Dean, Ex parte*, 2 Mont. D. & D. 438.

—**Refusal to act as Solicitor.**—Traders, before their bankruptcy, deposited their books with a solicitor, with a view to his effecting for them a compromise with their creditors. Terms were arranged, but the bankrupts were unable to comply with them, and the solicitor refused to act further in the matter. Adjudication followed, and the solicitor, although ordered to deliver up to the official assignees the books of the bankrupts in his hands, refused to do so, alleging a lien on them for costs. A commissioner ordered him to be committed for contempt:—Held, that the solicitor was entitled to the lien which he claimed. *Jabet, Ex parte*, 6 Jur., N. S. 387.

—**Solicitor for Mortgagor and Mortgagee—Sale of Equity of Redemption.**—On a mortgage of property the same solicitor acted both for mortgagor and mortgagee. At the time of the mortgage the solicitor had a lien on the deeds against the mortgagor for costs and charges. Being also solicitor to the mortgagee, he, on the completion of the mortgage, continued to hold the deeds. The mortgagor filed a petition for liquidation, and a trustee was appointed, and the same solicitor acted for the trustee. The property was sold, subject to the mortgage, and the solicitor received the price for the equity of redemption. In an account between the solicitor and the trustee, the solicitor deducted the amount due to him from the debtor, on the ground that he had a lien on

the deeds as security:—Held, that the solicitor had a lien on the deeds for the amount due to him. *Calvert, Ex parte, Messenger, In re*, 3 Ch. D. 317; 45 L. J., Bk. 134; 34 L. T. 920.

—**Solicitor constituting himself Trustee for Creditors.**—The creditors of a debtor who had filed a liquidation petition resolved to accept a composition, payable in two instalments, the second instalment being secured by the joint and several promissory note of two sureties. No trustee was appointed. The debtor's solicitor registered the resolution; and he, by means of money supplied to him by the debtor, paid the creditors the first instalment. A sum sufficient to provide for the payment of the second instalment was placed in the solicitor's hands, partly by the debtor, but mainly by one of the sureties. The debtor gave the surety a bill of sale as security for the amount which he advanced. The solicitor sent a circular to the creditors, stating that he should be prepared on a specified day to pay them the second instalment at his office. He after this paid some of the creditors, but most of them were left unpaid. One of the latter applied to the court for an order that the solicitor should pay him. The solicitor claimed a lien on the moneys in his hands for costs due to him by the debtor, who had absconded:—Held, that he had constituted himself a trustee of the money for the creditors, and that the court had jurisdiction to order him to pay the applicant his proportion of the second instalment, which he was accordingly ordered to pay, with costs. *Clarke, In re, Newland, Ex parte*, 4 Ch. D. 515; 35 L. T. 916; 25 W. R. 275.

—**Costs—Country Solicitor attending Appeals in London.**—A country solicitor who attends an appeal to the chief judge, instead of employing his London agent, is entitled to the extra costs of such attendance. *Foster, In re, Dickens, Ex parte*, 8 Ch. D. 598; 26 W. R. 915.

—**One-sixth taxed off.**—One of three co-assignees, who, in opposition to the wish of his co-assignees, proceeded to tax the solicitor's bill, and succeeded in taxing off one-sixth of the amount, is entitled to his extra costs incurred in so doing, by being obliged to employ a solicitor for himself. *Fosbrooke, Ex parte*, 1 Mont. D. & D. 533; 5 Jur. 370.

—**Bankrupt Solicitor—Liability of Assignees.**—Upon a taxation under 6 & 7 Vict. c. 73, s. 37, assignees of a bankrupt solicitor are personally liable for the costs of taxation of a bill of costs delivered by them, where more than one-sixth is taken off. *Peers, In re*, 21 Beav. 520.

—**Application to Tax.**—The solicitor to the fiat having delivered his bill of costs, and retained the amount of it before the end of 1850, was discharged in July, 1851. No application for taxation was made before October, 1852:—Held, that it was not consistent with safety or propriety to direct taxation in a summary way, even if the court had jurisdiction to do so. *Pemberton, Ex parte*, 2 De G., Mac. & G. 960; 22 L. J., Bk. 76.

—**Taxation made Ex parte—Re-taxation.**—The solicitors of the assignees of a bankrupt had

their bills of costs taxed in 1851, by the registrar of a district court of bankruptcy. The taxation was made *ex parte*, without notice to the assignees. In 1853 the assignees and several of the creditors applied to the district court for a retaxation of the bills which had not been paid:—Held, that such re-taxation ought to be ordered. *Bateman, Ex parte*, 23 L. J., Bk. 8; 18 Jur. 455.

## f. Messengers.

**Seizing Goods of Wrong Person.**—A messenger under a warrant to seize the goods of A., seized the goods of B., acting *bonâ fide* with the intention to carry the warrant into execution:—Held, that he was not entitled to the demand of a perusal and a copy of the warrant under 12 & 13 Vict. c. 106, s. 107, and that he was liable in trespass brought against him alone, though no such demand had been made or left at his usual place of abode. *Munday v. Stubbs*, 10 C. B. 422; 1 L. M. & P. 675; 20 L. J., C. P. 59.

**Conversion of Property after Notice from Messenger.**—If the messenger shews his warrant to a person supposed to be in possession of some bacon, the property of the bankrupt, and the person says, "I have it not; I have some that came from a shop in Exeter;" (which was that of the son and daughter of the bankrupt); and the messenger desires him to take care of it, and not to part with it, as more would be heard about it, and he afterwards suffered it to be removed; this is a conversion. *Hawkes v. Dunn*, 1 Tyr. 413; 1 C. & J. 519.

**Power to Break open Houses.**—The 6 Geo. 4, c. 16, s. 27, similar to s. 109 of the 12 & 13 Vict. c. 106, did not give power to break open all houses, &c., where the bankrupt's property was reputed to be, but only any houses, &c., of the bankrupt. *Edge v. Parker*, 8 B. & C. 700.

**Claim for Goods Seized—Jurisdiction of Court.**—There is no jurisdiction in bankruptcy to order goods seized by a messenger to be delivered up to a person claiming them as his. *Craggs, Ex parte*, 1 Rose, 25.

An accountant who had a demand against a bankrupt for making up his books before the bankruptcy, was deprived of the books by the messenger. On a petition praying either the restoration of the books or the payment of the demand, the court ordered that the assignees should either restore the books, without prejudice to any question, or at their election should pay the demand. *Southall, Ex parte*, 17 L. J., Bk. 21; 12 Jur. 576.

**Remedy against Messenger.**—The messenger is to enter and seize, at his own hazard, the property of the bankrupt; but if he enters the house and seizes the property of another, acting under authority, he cannot be turned out, but the party must take his remedy at law. *Page, Ex parte*, 1 Rose, 1; 17 Ves. 59.

**Obstructing Messenger.**—Obstructing a messenger in the execution of his warrant, is a contempt. *Ib.*

Where the messenger was put out of possession of property on board a ship, by threatening to throw him overboard, the parties also using contemptuous language, they were ordered to give

security for answering the bankrupt's interest. *Dixon, Ex parte*, 8 Ves. 104.

**Fees.**—In an action by a messenger against J. S. for fees due from him as petitioning creditor under a fiat:—Held, that he proved a *prima facie* case by putting in the proceedings under the fiat, without shewing the identity of the defendant with the J. S. named therein as the petitioning creditor. *Hamber v. Roberts*, 7 C. B. 861.

A trade assignee under a fiat is not personally liable to the messenger for work done in his time, unless there is either an express contract or an express employment of the messenger by the trade assignee. *Stubbs v. Twynam*, 7 C. B., N. S. 719; 30 L. J., C. P. 8.

The petitioning creditor is personally liable under 12 & 13 Vict. c. 406, s. 114, for the fees of the messenger, down to the choice of assignees. And the trade assignee is liable for the expenses incurred subsequently, where there is evidence of personal interference by him, such as giving directions as to the management of the bankrupt's property while in the possession of the messenger. *Stubbs v. Horn*, 1 L. R., C. P. 56; 12 Jur., N. S. 210.

He is also liable to the messenger under a commission of bankruptcy, for the costs and expenses attending it, notwithstanding such messenger was employed by the solicitor. *Hart v. White*, Holt, 376.

But he is only liable to the messenger for necessary expenses. *Billings v. Waters*, 1 Stark. 363.

Therefore, he is not liable for the expenses of an unnecessary and fruitless journey to the Isle of Man, unless upon special contract. *Ib.*

The trade assignee in insolvency was not liable under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, s. 4, as such, to pay for the messenger's charges for keeping possession of the insolvent's goods under the petition. *Hamber v. Hall*, 10 C. B. 780; 20 L. J., C. P. 157; 15 Jur. 682.

The solicitor is not liable in the first instance to the messenger whom he nominates for his bill of fees; but if the solicitor agrees with the petitioning creditor to work a commission for a sum certain, and receives a great part of that sum, he will be liable to such messenger. *Hartop v. Jukes*, 2 M. & Scott, 438; 2 Rose, 263.

An assignee was not liable, under 5 Geo. 2, c. 30, s. 25, to repay the messenger the costs incurred by him previously to the appointment of the assignee. *Burwood v. Felton*, 4 D. & R. 621; 3 B. & C. 43.

In an action by a messenger against a sole assignee of a commission under 6 Geo. 4, c. 16, for the costs of advertising a meeting of the creditors, and for the hire of the room in which the meeting was held:—Held, that it was not necessary for him to prove an employment by the assignee, nor any express recognition of him as messenger, as the fact of his having acted as a messenger and of the expenses incurred must have been known to the assignee. *Hamber v. Purser*, 2 C. & M. 209; 4 Tyr. 41.

## III. WHO MAY BE BANKRUPT.

### 1. ALIENS.

**Aliens.**—An alien non-trader domiciled



abroad who contracts debts in England, is liable to be made a bankrupt under the Bankruptcy Act, 1869, if he commits an act of bankruptcy in England, although he may have left England before the petition for adjudication is presented. But he cannot be made a bankrupt upon an alleged act of bankruptcy committed abroad. *Crispin, Ex parte*, 8 L. R., Ch. 374; 42 L. J., Bk. 65; 28 L. T. 483; 21 W. R. 491.

**Foreigner who has never been in England.]**—A foreigner who has never been in England is not subject to the bankruptcy law. *Blain, Ex parte, Savers, In re*, 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334—C. A.

**— Trading in England but Resident Abroad.]**—A bankruptcy petition was presented against a firm trading in England, two of its partners being Chilian subjects domiciled in Chili, and never having been in England. The alleged act of bankruptcy was an execution against the goods of the firm, for a judgment for more than 50*l.*, for a debt contracted in England:—Held, that the order for service of the petition upon the Chilian partners must be set aside. *Id.*

**— Not a Debtor.]**—He is not a debtor within s. 6 of the Bankruptcy Act, 1869. *Id.*

**— Member of English Firm.]**—Where he is a member of a firm against which judgment has been recovered by default, and whose goods have been taken in execution, this is no "act or default" of his such as to constitute an act of bankruptcy within s. 6 of the act. *Id.*

## 2. AUCTIONEERS.

**Quære**, whether an auctioneer is a trader. *Semble*, he is. *Moore, Ex parte, Moore, In re*, 3 Mont. & A. 130; 2 Dea. 287; 6 L. J., Bk. 72; 1 Jur. 184.

## 3. BILL BROKERS.

**Bill Broker—Evidence of Trading.]**—A person ostensibly carrying on the profession of a proctor may be made a bankrupt as a bill-broker, and the evidence to prove the trading is generally "that he procured bills to be discounted, that he carried on the business of a bill-broker, and that on one occasion he was employed to get a bill for 48*l.* discounted:—"Held, that this was insufficient evidence of the trading, as the affidavits did not specify the name of any party to whom the bankrupt applied to discount any bills, or with whose money the same was cashed, nor even stated the whole of the particulars of any one of such bills. *Harvey, Ex parte*, 1 Dea. 571; 2 Mont. & A. 593.

**— Accommodation Bills.]**—A mere dealing in accommodation bills will not constitute a trading as a bill-broker; more especially when there is no proof that the party had any counting-house or capital for carrying on the alleged business, and no particulars are given of any one bill alleged to have been discounted. *Phipps, Ex parte*, 2 Dea. 487; 6 L. J., Bk. 93; 1 Jur. 561.

Merely drawing bills on a person's own account, at the expense of paying a quarter per cent. commission, besides interest at 5 per cent. for their

being discounted, and borrowing accommodation notes in exchange for his own to the same amount, will not make a man an object of the bankrupt laws. *Hankey v. Jones*, Cowp. 745.

## 4. BRICKMAKERS.

**Own Materials.]**—Before 12 & 13 Vict. c. 106, s. 65, a person who rented a brick-ground, and made bricks thereon for public sale, was held subject to the bankrupt laws. *Wells v. Parker*, 1 T. R. 34; 1 Bro. P. C. 545. But afterwards held, that a man, whether termor or freeholder, who sells bricks made from the produce of his soil, is not a trader within the bankrupt laws; but he is if he purchases the materials of his manufacture. *Gallimore, Ex parte*, 2 Rose, 424.

And where a devisee for life of an estate, part of which was a brick-ground, made bricks there for sale generally, with a view to profit, he was not a trader though he purchased the coals and some of the wood used in burning the bricks, and occupied the same ground as a brickmaker for general sale before the estate came to him by devise: for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state; and it is not a buying of any commodity to sell it again. *Sutton v. Weeley*, 7 East, 442; 3 Smith, 445; *S. P.*, *Burgess, Ex parte*, 2 Glyn. & J. 183.

If a person manufactures bricks from his own estate, and according to the usual mode of burning the clay into bricks, he buys chalk and burns it with the clay, not for the purpose of carrying on lime-burning as a business, but as the most convenient mode of burning the clay into bricks; it is not a trading, although the use of the chalk was not necessary for the manufacture of the bricks, and he subsequently sells the lime produced in the process. *Paul v. Dowling*, M. & M. 263; 3 C. & P. 500.

A person purchasing land for the purpose of making bricks from it, and selling them, and agreeing to pay 4*s.* per thousand bricks in part of the purchase-money, and making and selling bricks accordingly, is not a trader. *Hearne v. Rogers*, 4 M. & R. 486; 9 B. & C. 577.

**Taking Clay from the Waste.]**—A brickmaker taking the earth off the waste, for which he afterwards paid a consideration, and selling the bricks, is a trader. *Harrison, Ex parte*, 1 Bro. C. C. 173.

## 5. BUILDERS.

**Building on his own Land.]**—A builder is a person who builds either on his own or another's land for a profit. *Neiricks, Ex parte*, 2 Mont. & Ayr. 384; 1 Dea. 78.

**Finishing Carcasses.]**—A party who bought six carcasses of houses for the purpose of finishing them, and selling them again when he had made them habitable, and who ordered materials for this purpose, representing himself to be a builder, might be made a bankrupt as a builder. *Id.*

A man, by purchasing land with unfinished houses upon it, and employing persons to complete these houses, is not a trader unless he holds himself out as a builder, or expresses his intention of continuing in that business. *Edwards, Ex parte*, 4 Jur. 153.

— **By Mortgagees.**—Two attorneys in partnership lent money on mortgage to a party engaged in a building speculation; and the mortgage being forfeited, they took possession of the carcasses of the houses, and finished them at their own expense, for the purpose of selling or letting them; they also purchased a few other carcasses, not in their character of mortgagees, which they employed a builder to finish, for the same purpose:—Held, that this was not a joint trading as builders, within the meaning of the bankrupt laws. *Edwards, Ex parte*, 1 Mont., D. & D. 3.

**Isolated Building Transactions.**—A barrister bought land in two several places, and commenced building a number of houses thereon, which he sold as opportunity occurred. He had also built and sold another house in a different place, and had on one occasion accepted a bill describing him as a builder. The jury found that these were isolated transactions, and not part of a general system of business:—Held, that he was not liable to be made a bankrupt as a builder. *Stewart v. Sloper*, 3 Ex. 700; 3 De G. & S. 557; 18 L. J., Ex. 321; 18 L. J., Bk. 14; 13 Jur. 581.

#### 6. BUTCHERS.

A butcher is within the bankrupt laws. *Dalby v. Smith*, 4 Burr. 2148.

#### 7. CLERGYMEN.

If a clergyman trade, though illegal, he is liable to be made a bankrupt. *Meymot, Ex parte*, 1 Atk. 196.

#### 8. COACH PROPRIETOR.

Semble, coach proprietor, as such, is not a trader. *Walker, In re*, 2 Mont. & A. 267.

#### 9. COMPANY, MEMBERS OF.

Even before 6 Geo. 4, c. 16, s. 92, holders of stock in public companies were not liable to the bankrupt laws, in that character merely. *Bull, Ex parte*, 15 Ves. 257.

**Banking Company under 7 Geo. 4, c. 46.**—A member of a banking company established under 7 Geo. 4, c. 46, cannot be proceeded against in bankruptcy for a debt due from the company, no judgment for the debt having been recovered against the public officer of the company, although the company may have ceased to carry on business, and an order has been obtained for winding it up prior to such proceedings. *Darison v. Farmer*, 6 Ex. 242; 20 L. J., Ex. 177.

#### 10. COWKEEPERS.

**Cows kept to consume Roots.**—A farmer, who was under covenant with his landlord to consume the whole of the turnips and other roots upon his farm, kept cows as part of his stock, the milk from which, beyond what was consumed by himself and family, he was in the habit of selling, and for that purpose he daily sent a man to sell and deliver the milk, some of the purchasers being regular, and some chance customers; if he had not sold the milk, he would

have sustained a loss by keeping so many cows upon the farm; but keeping cows to the extent he did, and selling their milk, was a husbandlike and profitable way of using the farm:—not a cowkeeper. *Bell v. Young*, 15 C. B. 254; 24 L. J., C. P. 66; 1 Jur., N. S. 167; *S. P., Dering, Ex parte*, 1 De Gex, 398; 16 L. J., Bk. 3; 11 Jur. 92.

#### 11. EXECUTORS.

An executor, who carries on the business for the benefit of the testator's children, may be a bankrupt. *Viner v. Cadell*, 3 Esp. 88.

#### 12. FARMERS AND GRAZIERS.

**Farmer Dealing in Horses.**—A farmer buying and selling horses to an extent unauthorized by his character of farmer may be a bankrupt as a horse-dealer, although he may have so bought and sold without a licence to deal in horses. *Gibbs, Ex parte*, 2 Rose, 38.

**Feeding Pigs for Sale.**—A person who buys pigs or other stock with a view to a resale of them, as ancillary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader. *Patten v. Browne*, 7 Taunt. 409.

**Mixing bought Seed with own Crop.**—A farmer bought rye-grass seed, mixed it with seed of his own growth, and sold the mixture; he bought pigs, put them on his farm, fed them on the stubbles, and resold them, some after a week, some after longer periods:—Held, that neither of these was an act of trading. *Id.*

**Occasional Buying and Selling.**—Nor does a farmer, who occasionally buys hay, corn, horses, &c., with a view to sell them again for profit, thereby become a trader. *Stewart v. Hall*, 2 N. R. 78. But see *Bartholomew v. Sherwood*, 1 T. R. 573, n.

**Habitual Buying and Selling.**—A farmer, who is in the habit of buying half as many more sheep as are necessary to stock his farm, and of selling the surplus at a profit, is a trader as a sheep salesman. *Newall, In re*, 3 Deac. 33.

**Buying and Selling Pigs.**—A., an officer in the army, retired to the country, where he rented a dwelling-house and three acres of land, bought pigs, and consumed part in his family, and sold the rest at a neighbouring market; he made no show as a dealer, and was proved not to have bought more than fourteen pigs in one year:—Held, a trader. *Newland v. Bell*, 221.

**Buying standing Crops.**—Buying standing crops of grass, cutting them down, and making them into hay, is a trading within the bankrupt law. *Bloxham v. Graham*, Peake's Add. Cas. 3.

**Selling Lime off Farm.**—A farmer, making lime from a lime pit, opened and worked before the commencement of his term, and selling the surplus beyond what he required for manure, is not a trader. *Ridge, Ex parte*, 1 Ves. & B. 360.

**Dealing in Cattle.**—A farmer and grazier,

exercising also the business of a drover, by buying and selling cattle from time to time, beyond the occasions of his farms, was exempted from the operation of the bankrupt laws by 5 Geo. 2, c. 30, s. 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, did not make him a trader. *Belton v. Soverby*, 11 East, 274.

One who bought cattle at one fair, kept them three or four days on his own ground, and drove them to another fair to sell, was a drover within 5 Geo. 2, c. 30, s. 40. *Mills v. Hughes*, Bull. N. P. 39.

### 13. FELONS.

**Person attainted.**—Quære, whether a commission cannot issue against a person attainted, as he may be sued in a civil action even when attainted of treason. *Ramsay v. McDonald*, 1 W. Bl. 30; *S. C. nom. Ramsden v. Macdonald*, 1 Wils. 217.

**Convicted Felon not complying with Debtor's Summons.**—Notwithstanding the provision contained in s. 8 of the act 33 & 34 Vict. c. 23, that every convicted felon shall, during the time while he shall be subject to the operation of the act, be incapable of alienating or charging any property, such a convict can pay a debt which is claimed by a debtor's summons issued and served on him after his conviction, and if he fails to pay the debt within the time limited by the summons, he will commit an act of bankruptcy, upon which an adjudication can be made against him. *Graves, Ex parte, Harris, In re*, 19 Ch. D. 1; 51 L. J., Ch. 1; 45 L. T. 397; 30 W. R. 51; 46 J. P. 70; 14 Cox, C. C. 629; 15 Cox, C. C. 118—C. A.

### 14. FISHERMEN.

A fisherman buying fish of other boats at sea, and selling it on shore, is a trader. *Heaney v. Birch*, 1 Rose, 356; 3 Camp. 233.

A fisherman who buys occasionally fish to make up for market a cargo otherwise deficient is not a trader. *Gallimore, Ex parte*, 2 Rose, 424.

### 15. HORSE DEALERS AND LIVERY STABLE KEEPERS.

**Dealing without a Licence.**—Buying and selling horses with an avowed intention to take out a licence, and become a dealer, is sufficient to constitute a trading, however limited the trading, and though no licence has been actually taken out. *Wright v. Bird*, 1 Price, 20.

**Buying Dead Horses.**—But a person who purchases dead horses for his dogs, and sells the skins and bones, does not thereby become a trader, although he might sell such skins at a profit. *Summersett v. Jarvis*, 6 Moore, 56; 3 B. & B. 2.

**Selling Hay and Straw.**—A person who keeps livery stables and buys large quantities of hay and straw and oats, which he supplies to the horses standing in the stables, and sells to any person generally, is a trader. *Cunnam v. Deneo*, 3 M. & Scott, 761; 10 Bing. 292.

### Widow continuing Business without a Licence.]

—A. was a horse dealer and livery-stable keeper: after his death his widow carried on the business of the livery stable, but without any licence, and bought horses to let, which she occasionally sold to customers:—Held, a sufficient trading to support a commission against her. *Martin v. Nightingale*, 3 Bing. 421; 11 Moore, 305.

### 16. INFANTS.

**Before 12 & 13 Vict. c. 106.**—A commission of bankruptcy could not be supported against a person under age. *O'Brien v. Currie*, 3 C. & P. 283; *S. P., Adam, Ex parte*, 1 Ves. & B. 494.

Such a commission was void, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365; 2 M. & Scott, 496.

But if a petition to annul the adjudication on the ground of infancy is not presented within the time required by the statute, it is unimpeachable and valid. *West, In re*, 3 De G., Mac. & G. 198; 22 L. J., Bk. 71.

A fiat was superseded with costs to be paid by the petitioning creditor, on the ground of the bankrupt's minority. *Hehir, Ex parte*, 3 Deac. & Chit. 107.

**Infant Partner.**—A partnership of three becoming insolvent, and one being an infant, a joint commission against the other two was superseded, as separate commissions ought to have been taken out. *Henderson, Ex parte*, 4 Ves. 163; *S. P., Layton, Ex parte*, 6 Ves. 440.

A joint commission was superseded, on the ground of the infancy of one partner, on the petition of the assignees under a separate commission. *Barwis, Ex parte*, 6 Ves. 601.

**Since 24 & 25 Vict. c. 134.**—An infant, whether a trader or not, is liable to the operation of the bankrupt laws. *Smedley, In re*, 10 L. T. 432.

**Infant Partner.**—An infant entered into partnership with two adults. During the absence of all the partners, a clerk, who held a power of attorney from the two adult partners, signed a bill of exchange on behalf of the firm. This bill was presented for payment to the infant, who refused it, denying his liability. The holders of the bill thereupon presented a petition under the Insolvent Traders Act (Barbadoes), and obtained an adjudication of insolvency against the infant and his partners:—Held, first, that there was no petitioning creditor's debt; and, secondly, that being an infant, he could not be adjudicated insolvent, and that therefore the proceedings in the court must be superseded. *Maclean v. Dummett*, 22 L. T. 710—P. C.

**Fraudulent assertion of Full Age.**—The decided cases only establish that an infant may be made bankrupt where he has obtained credit and contracted debts by means of a false and fraudulent assertion that he was of age. *Id.*

— **Liability to Pay.**—To create an equitable liability in an infant to pay, on the ground of fraud, it is necessary to prove express representations by him that he was of age and that they were reasonably believed in and relied on by the person to whom they were made. *Jones, In re, Jones, Ex parte*, 18 Ch. D. 109; 50

L. J., Ch. 673; 45 L. T. 193; 29 W. R. 747—C. A. Reversing 44 L. T. 588.

A trader who, being an infant, has represented himself to be of age, may, after majority, be adjudicated bankrupt in respect of a debt incurred under age. *Lynch, In re*, 2 Ch. D. 227; 45 L. J., Bk. 48; 34 L. T. 34; 24 W. R. 375.

**Filing Liquidation Petition by Infant does not alter his Status.**—An infant who had carried on business, and become indebted for goods supplied in the course of such trading, filed a petition for liquidation, but no resolutions were passed, and the liquidation proceedings fell through. Subsequently alleged trade creditors filed a petition for adjudication in bankruptcy against him, and the county court judge adjudicated him a bankrupt. The infant had not represented himself to be an adult.—Held, that the infant did not by merely trading constitute himself a debtor; that by taking the step, which only an adult trader could take, of presenting a liquidation petition, he did not alter his status or give the court jurisdiction under s. 125, sub-s. 12 of the Bankruptcy Act to adjudicate him bankrupt. *Lynch, In re, Lynch, Ex parte* (2 Ch. D. 227), overruled. *Jones, In re, Jones, Ex parte*, 18 Ch. D. 109; 50 L. J., Ch. 673; 45 L. T. 193; 29 W. R. 747—C. A. Reversing 44 L. T. 588.

**Since 37 & 38 Vict. c. 62.**—An infant cannot be adjudicated a bankrupt in respect of debts contracted since the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), and falling within its provisions. I., an infant, carried on trade in conjunction with S. They effected an arrangement in the Court of Bankruptcy, suppressing the fact of I.'s infancy, and passed their promissory notes for the composition payable in the matter. They failed to carry out the arrangement, and subsequently made an assignment of all their property to trustees for the benefit of their creditors. Both I. and S. were adjudicated bankrupts on the petition of creditors in respect of a debt incurred after the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), came into operation. The petitioning creditors had proved in the arrangement, and held composition notes of I. and S. I., having shewn cause against the adjudication.—Held, that there was no sufficient petitioning creditor's debt to support the adjudication as against I., and that the cause shewn by him should be allowed. *Rainey, In re*, 3 L. R., Ir. 459.

W. was convicted under s. 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for that he, within four months before the presentation of a bankruptcy petition against him upon which he was adjudged bankrupt, quitted England, taking with him, with intent to defraud, property exceeding 20*l.*, which ought by law to have been divided amongst his creditors.—At the times when he quitted England and when he was adjudged bankrupt, W. was an infant. The debts proved against his estate in the bankruptcy were trade debts, contracted since the passing of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), and it did not appear that any debts for necessities supplied to him existed.—Held, by Cockburn, C. J., Huddleston, B., Lindley, Manisty, and Hawkins, J.J., that the conviction could not be upheld. *Reg. v. Wilson*, 5 Q. B. D. 23; 14 Cox. C. C. 378; 49 L. J., M. C. 13; 41 L. T. 480; 28 W. R. 307; 44 J. P. 105.

VOL. I.

## 17. LANDOWNERS.

**When a Trader.**—If a man exercises a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he will not be considered as a trader, though he buys necessary ingredients to fit it for the market; but where the produce of the land is merely the raw material of the manufacture, and the manufacture not the necessary mode of enjoying the land, there he is a trader. *Wells v. Parker*, 1 T. R. 34; 1 Bro. P. C. 545. And see *S. C.*, 1 T. R. 783.

**Selling Timber.**—A man may sell such timber as he cuts down on his own land, without subjecting himself to the bankrupt laws. *Holroyd v. Gwynne*, 2 Taunt. 176; 1 Rose, 113.

**Selling Lime.**—If a person burns chalk, not the produce of his own land, and sells the lime, it is a trading. *Paul v. Dowling, M. & M.* 263; 3 C. & P. 500.

## 18. LODGING AND BOARDING HOUSE KEEPERS.

An innkeeper or a victualler was not a trader as such. *Saunderson v. Bowles*, 4 Burr. 2064.

**Selling Food to Lodgers.**—A boarding and lodging house keeper, who also keeps a stock of wine, which she supplies to her boarders and lodgers by a bottle at a time as each of them may require it, is an hotel keeper. *Gibson v. King*, Car. & M. 458; 10 M. & W. 667; 12 L. J., Ex. 9; 6 Jur. 1044; *S. C., Birch, Ex parte*, 2 Mont., D. & D. 659; *Daniell, Ex parte*, 7 Jur. 334; *King v. Simmons*, 1 H. L. Cns. 754; 12 Jur. 903.

A keeper of a private lodging-house, who also seeks a profit by furnishing her guests with provisions, is subject to the bankrupt laws as an hotel keeper, although the provisions are set apart as the separate property of each guest. *Smith v. Scott*, 9 Bing. 14; 2 M. & Scott, 35.

**Buying Furniture for furnishing Lodgings.**—A party who lets furnished lodgings is not a trader, notwithstanding he buys the furniture for the purpose of being let with the lodgings. *Bowers, Ex parte*, 2 Deac. 99.

**Nurse keeping Lodgings.**—It is settled law that a lodging-house keeper who supplies his lodger with board at a profit is an hotel keeper, and is therefore a trader within the Bankruptcy Act, 1869, and it makes no difference that the lodging-house keeper is a professional nurse who only receives invalids recommended to her by medical men and other persons. *Jones, In re, Thorne, Ex parte*, 3 Ch. D. 457; 45 L. J., Bk. 158; 35 L. T. 532; 25 W. R. 186—C. A.

A professional nurse, who keeps a lodging house for invalids and supplies them with board at a profit, as well as lodging and nursing, is a keeper of an hotel, and therefore a trader within the Bankruptcy Act, 1869. *Id.*

**Lodgers in House used by Debtor's Wife as Boarding-school.**—A foreman tailor's cutter, who took in lodgers at his house where his wife also kept a boarding-school, is a trader within

A A

the Bankruptcy Act, 1869. *National Deposit Bank, Ex parte, Wills, In re*, 26 W. R. 624—C. A.

#### 19. LUNATICS.

**Lunatic.**—Leave given to the committee of the estate of a lunatic trader to consent to an adjudication in bankruptcy against the lunatic. *Lee, In re*, 23 Ch. D. 216; 48 L. T. 193; 31 W. R. 802—C. A.

A lunatic may be a bankrupt, if the act of bankruptcy is committed during a lucid interval. *Anon.*, 13 Ves. 590.

#### 20. MARKET GARDENERS.

A tenant of 130 acres who, under a farming lease, which obliged him to fallow or plant with peas or potatoes every third year, had on his farm twelve acres of young potatoes and twenty acres of green peas growing in open fields every year, and consigned the produce, for table consumption, to London salesmen, to whom he allowed such commission as is usually allowed by market gardeners, is not a market gardener. *Hammond, Ex parte, De Gex*, 93; 14 L. J., Bk. 14; 9 Jur. 358.

#### 21. MARRIED WOMEN.

By 45 & 46 Vict. c. 75, s. 1, sub-s. 5, *every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.*

**A sole Trader in London.**—A wife being a sole trader in London is liable to a commission of bankruptcy, and her assignees will come in paramount to the assignees of the husband, though his was the prior bankruptcy. *La Vie v. Philips*, 1 W. Bl. 570; 3 Burr. 1776.

**Wife of a Convict.**—The wife of a convict sentenced to transportation may be a trader and a bankrupt, although the husband is only on board the hulks, and she has occasional intercourse with him. *Franks, Ex parte*, 7 Bing. 762; 1 M. & Scott, 1.

**Trading before Marriage.**—A commission having issued against a married woman, on a trading before marriage, it was superseded. *Mear, Ex parte*, 2 Bro. C. C. 266.

**Prosecution of Fiat suspended.**—After the issuing of a fiat, the petitioning creditor heard and believed that the party against whom it was issued was a married woman. The court would not for this cause, on the petition of the petitioning creditor, order the fiat to be annulled, but merely suspended the prosecution of it. *Harland, Ex parte*, 1 Deac. 75.

**Married Woman adjudged Bankrupt on Representation of Widowhood.**—A married woman, on her own petition, in which she stated herself to be a widow, was adjudicated bankrupt, and she was afterwards indicted for concealment and embezzlement of her property, with intent to defraud her creditors, and two other persons were also indicted with aiding her. The examinations and answers of the three in bankruptcy were given in evidence in support of the

prosecution. No caution was given to them by the commissioner on such examination, and they did not object to answer on the ground that their answers might tend to criminate them:—Held, that although the wife was adjudicated a bankrupt, the property belonged to her husband, and that the property was not proved as laid in the indictment. *Reg. v. Robinson*, 1 L. R., C. C. R. 80; 36 L. J., M. C. 78; 16 L. T. 605; 15 W. R. 966; 10 Cox, C. C. 467.

**Plea of Bankruptcy Proceedings pending against Married Woman is good so long as such Proceedings remain undisturbed.**—A writ of summons was issued for goods sold and delivered against a wife trading separately from her husband; part of the defence raised was, that proceedings in bankruptcy were then pending:—Held, that as long as these proceedings remained undisturbed, an application to recover the debt must be made in bankruptcy, and leave was given to go in and prove for the debt and the costs of the action. *Day v. Freund*, 35 L. T. 551; 25 W. R. 222.

**Cannot be adjudicated Bankrupt on Debt incurred before Marriage.**—A married woman was sued at law by a creditor for a debt contracted by her before her marriage, which took place in 1872, and a judgment was obtained against her. The creditor then sued out a debtor summons, and, the debt not being satisfied, filed a petition for adjudication of bankruptcy against her. She had no separate property:—Held, that she could not be adjudicated a bankrupt. *Holland, Ex parte, Heneage, In re*, 9 L. R., Ch. 307; 43 L. J., Bk. 85; 30 L. T. 106; 22 W. R. 425.

Quære, whether a married woman can be made a bankrupt if she has separate property. Per Mellish, L. J. *Id.*

**Under 33 & 34 Vict. c. 93.**—A married woman is not liable to the bankrupt law, even though she has separate estate and has contracted engagements after her marriage. The Married Women's Property Act, 1870, has made no difference in this respect. *Jones, Ex parte, Grissell, In re*, 12 Ch. D. 484; 48 L. J., Bk. 109; 40 L. T. 790—C. A.

#### 22. MEDICAL PRACTITIONERS.

A surgeon who dispenses and is paid for medicines administered to his own patients is an apothecary within the meaning of the bankrupt laws, and liable as such to become bankrupt. *Crabb, Ex parte*, 8 De G., Mac. & G. 277; 24 L. J., Bk. 45; 2 Jur., N. S. 628.

Retailing of drugs by a surgeon apothecary makes him a trader. Selling drugs, as ancillary to the business of a surgeon, is not a trading. *Daubenny, Ex parte*, 3 Mont. & Ayr. 16, 17; 2 Deac. 72.

#### 23. MINE OWNERS.

A., who held a lease of mines of coal and ironstone, and carried on the business of smelting, adding to the iron ore produced from his own mines from 65 to 70 per cent. of ore which he bought elsewhere, and smelting the whole into pig iron, which he sold in the market, is a trader within the 12 & 13 Vict. c. 106, s. 65. *Turner v.*

*Hardcastle*, 11 C. B., N. S. 683; 31 L. J., C. P. 193.

The owner of a colliery, buying articles and selling them to his own pitmen, is not a trader. *Gallimore, Ex parte*, 2 Rose, 424.

One who buys a coal mine, and works it, and sells the coals, is not a trader. *Port v. Turton*, 2 Wils. 169; *S. P., Wells v. Parker*, 1 T. R. 38.

The owner of a phosphate mine who sells the phosphate is not a trader within the meaning of the bankruptcy laws. *Schomberg, Ex parte, Schomberg, In re*, 10 L. R., Ch. 172; 31 L. T. 665; 23 W. R. 204.

A., in conjunction with T., took a lease of salt-works and brine pits, for the purpose of manufacturing and selling salt, which was made by them chiefly from the springs and rock salt upon the premises demised; but some of the brine they obtained by channels from adjoining premises:—Held, that this was not a trading, as a workmanship of goods and commodities, within 6 Geo. 4, c. 16, s. 2. *Atkinson, Ex parte*, 1 Mont., D. & D. 300.

A person who works a slate quarry in the ordinary way, upon lease from the owner, is not a trader within the meaning of the bankrupt laws; and purchasing a stock of tools and materials and selling them again to the quarry men, which appears to be the custom in quarries, does not constitute a trading on the part of such a person. *Cleland, In re*, 2 L. R., Ch. 466; 36 L. J., Bk. 33; 16 L. T. 403; 15 W. R. 681.

A person selling stone delivered from his own quarry, is not a trader. *Gardner, Ex parte*, 1 Rose, 377; 1 Mont. & Bligh, 45.

#### 24. PARLIAMENT, MEMBERS OF.

**Under 45 Geo. 3, c. 124.**—A trader having privilege of parliament, by not paying money under an order of court, committed an act of bankruptcy. *Read v. Phillips*, 16 Ves. 437.

**Under 12 & 13 Vict. c. 106, s. 66.**—A member of parliament may become bankrupt under the above section. *Griffiths, Ex parte*, 3 De G., Mac. & G. 174; 22 L. J., Bk. 50; 17 Jur. 655.

The direction in the Bankruptcy Act, 1869, s. 122, that if within the time therein mentioned the order of adjudication against a bankrupt member of the House of Commons is not annulled and his debts are not fully paid or satisfied, the court shall certify the same to the Speaker of the House of Commons, is not, by s. 125, sub-s. 7, made applicable in the case of a member who has not become bankrupt but whose affairs are in liquidation. *Pooley, Ex parte, Russell, In re*, 7 L. R., Ch. 519; 41 L. J., Bk. 67; 26 L. T. 813; 20 W. R. 735.

**Peers of the Realm.**—A peer, whether trader or non-trader, was capable of being adjudicated a bankrupt under the Act of 1861, and no privilege exists exempting a member of parliament from liability to be made a bankrupt. The privilege which such persons have at common law of freedom from arrest is not affected by the Bankruptcy Acts. *Newcastle (Duke) v. Morris*, 4 L. R., H. L. 661; 40 L. J., Bk. 4; 23 L. T. 569; 19 W. R. 26. Affirming, 5 L. R., Ch. 172.

#### 25. PAWNBROKERS.

Pawnbrokers are traders.—*Rawlinson v. Pearson*, 5 B. & A. 124.

#### 26. PUBLISHERS.

The publisher of a newspaper, buying the whole daily impression from the proprietors, reselling it at a profit, and bearing the loss of such as remain unsold, is a trader. *Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.

#### 27. SCAVENGERS.

Semble, that a scavenger is not a trader. *Collins, Ex parte*, 1 Rose, 373.

#### 28. SCHOOLMASTERS.

A schoolmaster buying books and shoes, and selling them at an advanced price to his scholars, is not a trader. *Valentine v. Vaughan*, 1 Peake, 108.

#### 29. SCRIVENERS.

**Who is a Scrivener.**—A scrivener within the bankrupt laws is one who, with an intention thereby to get a living, receives into his custody other men's money to be laid out on their account, according to the purpose for which it is deposited. The mode of his remuneration, whether by procuration fees, by a charge for commission, or otherwise, is a circumstance immaterial; the actual deposit of, and complete control over, the money of others till invested, and the intention thereby to get a living, being the essence of this species of trading. *Malkin, Ex parte*, 2 Rose, 27; 2 Ves. & B. 31.

A scrivener has been held to be a person entrusted with the money of his employer, and who, for commission, finds a borrower. *Bath, Ex parte*, 1 Mont. 82; *S. P., Yeo v. Allen*, 3 Dougl. 214.

**Attorney.**—An attorney is not necessarily a scrivener. *Malkin, Ex parte*, 2 Ves. & B. 175.

Unless he has been in the habit of having money deposited with him for the purpose of laying it out on securities. *Adams v. Malkin*, 3 Camp. 534. See *Hurd v. Brydges*, Holt, 654.

An attorney does not become a scrivener, liable to be made a bankrupt, by lending the money of clients and charging a procuration fee to the borrowers. *Lott v. Melville*, 3 M. & G. 40; 3 Scott, N. R. 346; 9 D. P. C. 882; 5 Jur. 436.

A transaction in which an attorney calls in and receives the money of a client, and retains the money in his possession, paying interest to that client upon the amount, is not a trading as a money scrivener. *Id.*

A scrivener is one whose trade is to procure loans for such persons as want to borrow money, and investments for those who wish to lend, who charges procuration fees for this work. *Id.*

But, in order to bring him within the statute, so as to be liable to be a bankrupt, he must be one whose business is (as a general means of obtaining a livelihood) to receive other men's moneys or estates for the purpose of so laying them out in securities. *Id.*

Where an attorney was in the habit of having the money of his clients deposited with him to lay out for them upon mortgage, and received from others a compensation or gratuity for procuring

loans of money for them, besides his charges for preparing the mortgage securities, he was held to be a trader as a money broker and a person receiving other men's moneys into his trust or custody, whether or not he might be considered liable to the bankrupt law as a banker or scrivener. *Gem, Ex parte*, 2 Mont., D. & D. 99; 5 Jur. 683.

A partner in a firm of two solicitors received moneys belonging to the sister of the other, for investment, and in a few instances without any specific security having been arranged. The usual charges of an attorney or solicitor were alone made upon the transactions:—Held, not to amount to trading as a scrivener. *Dufaur, Ex parte*, 2 De G., Mac. & G. 246; 21 L. J., Bk. 38. See *Harman v. Johnson*, 2 El. & Bl. 61; 3 C. & K. 272; 22 L. J., Q. B. 297; 17 Jur. 1096.

An attorney employed to receive money and pay it to the client's account, paid it to his own; and, on the client bringing an action, vexatiously defended it, and filed a bill (which was dismissed) to restrain execution. He was afterwards found bankrupt as a scrivener:—Held, that the conduct of the bankrupt was not conduct as a scrivener, so as to be capable of being regarded in reference to the allowance of his certificate. *Spicer, Ex parte*, 3 De G. & S. 601; 14 Jur. 30.

On an indictment against an attorney for not surrendering to the fiat:—Held, that he was liable to be made a bankrupt as a scrivener, it being shewn that in one or more instances he had acted as such in procuring loans of and lending other persons' money out on interest; and that one such instance being shewn, it might be presumed that he carried on the business, until the contrary was shewn. *Reg. v. Hughes*, 1 F. & F. 726.

### 30. SHIPBROKERS.

Shipbrokers may be bankrupts. *Pott v. Turner*, 6 Bing. 702; 4 M. & P. 551.

### 31. STOCKBROKERS.

The word "brokers" includes not only brokers who buy and sell goods, but stockbrokers. *Anon.*, Cullen, Bkt. Laws, 18.

### 32. UNDISCHARGED BANKRUPTS.

**Undischarged Bankrupt, Second Adjudication of.**—An adjudication of bankruptcy against a debtor who has not obtained his discharge under a previous adjudication and has been allowed by the trustee to resume business is not void. *Watson, Ex parte, Roberts, In re*, 12 Ch. D. 380—C. A.

### 33. WHAT CONSTITUTES TRADING.

**Trading to England.**—One who has traded to England, whether native, denizen, or alien, though never a resident trader in England, but comes over here occasionally, and commits an act of bankruptcy, is an object of the bankrupt laws. *Alexander v. Vaughan*, Cowp. 398. And see *Smith, Ex parte*, Cowp. 402.

**Buying in England.**—A person residing in the Isle of Man, but coming from time to time

to this country, and buying goods here, which were afterwards sold in that island, is a trader against whom a commission of bankruptcy may issue in this country, although he only bought and never sold any goods here. *Allen v. Cannon*, 4 B. & A. 418.

**Drawing Bills upon England.**—A person residing in India, and trading there, and in the course of that trading drawing bills upon England for the value of other bills sent thither, upon which he got a profit by the exchange, and in the course of that sort of dealing contracting debts in England, is a trader. *Ingliss v. Grant*, 5 T. R. 530.

**Buying in England through Agent.**—A trader in London purchases goods to be sold by A. & B., partners in trade in Dublin, and charges them to A. & B. at prime cost; this creates a debt due from B. in England, and makes him a trader here. *Williams v. Nunn*, 1 Taunt. 270; 1 Camp. 152.

**Number of Acts of Trading.**—Whether or not a person is a trader, does not depend upon his occasionally doing acts of trading, but upon the intention generally so to get his living. *Patterson, Ex parte*, 1 Rose, 402; *S. P., Maginnis, Ex parte*, 1 Rose, 84; *Patman v. Vaughan*, 1 T. R. 572.

Generally, the trifling amount of trading is immaterial, if there is an intention to continue the trading. *Moole, Ex parte*, 14 Ves. 603.

Therefore, the purchase of one lot of timber, with intent to sell again, will make a man a trader. *Holroyd v. Gwynne*, 2 Taunt. 176; 1 Rose, 113.

But one solitary act of dealing is not sufficient to prove the trading, unless coupled with evidence of a general intention to trade. *Wilkes, Ex parte*, 2 Deac. 2.

A single act of buying and selling by a farmer, with evidence of intent to continue, is a sufficient act of trading. *Lavender, Ex parte*, 4 Deac. & Chit. 487; 2 Mont. & Ayr. 11.

Where a person engaged in the Greenland whale fishery made three purchases of oil, one of which he sold again:—Held, that it was a question for the judge to determine, whether these dealings constituted a trading. *Gale v. Halfknight*, 3 Stark. 56.

**Pretended Trading.**—A country attorney hired a room in Bell Court, Brook's Market, London, which he kept for four weeks, and in which he put eighty-two old volumes of books, sticking up a paper in the window, in which his name was written, with the addition of bookseller; a fiat having been issued against him by this description, was annulled on the ground of fraud. *Dart, Ex parte*, 2 Deac. & Chit. 543.

**Profit on Act of Trading.**—The smallness of the profit is no consideration, and one act of buying and selling is sufficient to constitute a trader. *Newland v. Bell*, 1 Holt, 221.

**Illegal Trading.**—A smuggler, dealing in contraband goods, by buying and selling, is a trader, and therefore liable to a commission, although such buying and selling are illegal. *Cobb v. Symonds*, 1 D. & R. 111; 5 B. & A. 516.

A trader may be a bankrupt, although he may not have taken out a licence necessary to legalize his trade. *Saunderson v. Bowles*, 4 Burr. 2064.

But a buying in connection with others, to carry on a system of fraud, is not a trading. *Milliken v. Brandon*, 1 C. & P. 380.

If a clergyman trade, though illegal, he is liable to be made a bankrupt. *Meymot, Ex parte*, 1 Atk. 196.

### 34. CEASING TO TRADE.

— **Debts Contracted Prior thereto.**—A man who has retired from business may become a bankrupt in respect of debts contracted during the period of his trading. *Willoughby v. Thornton*, 1 Selw. N. P. 175; *S. P., Doe d. Barnard v. Lawrence*, 2 C. & P. 134; *Dawe v. Holdsworth*, Peake, 64; *Dewdney, Ex parte*, 15 Ves. 495.

— **Ceasing to Manufacture, but soliciting Orders.**—So, if a trader ceases to manufacture, but still continues to solicit orders and to execute them, and holds himself out to the world as capable of executing them. *Wharam v. Routledge*, 5 Esp. 235.

— **Pawnbroker continuing to Sell Unredeemed Pledges.**—A person who had formerly taken in goods on pledge, and had ceased to do so, but continued to sell the unredeemed pledges, is still a trader as a pawnbroker. *Rawlinson v. Pearson*, 5 B. & A. 124.

**Discontinuance of Trade with Intention of resuming it.**—Whether or not a trader has ceased his trading does not depend upon the mere discontinuance of it, or the absence of any specific act of trading, but whether there is an intention to exercise or resume it, and that is a question for a jury. *Paterson, Ex parte*, 1 Rose, 402; *S. P., Cundy, Ex parte*, 2 Rose, 357; *Dance v. Wyatt*, 4 M. & P. 201.

Where a party having manufactured goods for sale discontinues the sale almost entirely, and uses all his produce himself, but occasionally allows parties applying to have small quantities on payment, it is a question for the jury whether these sales are with the intention of continuing trade, or for the accommodation of the applicants; and in the latter case he ceases to be a trader. *Paul v. Dowling*, M. & M. 263; 3 C. & P. 500.

If a debtor, who has been a trader, is not actually carrying on trade at the time when it is alleged by a petitioning creditor that he has done or omitted to do that, the doing or omission of which would be an act of bankruptcy only if it was done or omitted by a trader, it is a question of intention, to be decided on the evidence, whether the debtor has permanently ceased to trade, or has only temporarily discontinued his trade with the intention of resuming it. In the latter case he is still a trader within the meaning of the Bankruptcy Act. The law on this point is still as it was laid down in *Paterson, Ex parte* (1 Rose, 402), and *Cundy, Ex parte* (2 Rose, 357). *Salaman, Ex parte, Taylor, In re*, 21 Ch. D. 394; 47 L. T. 495; 81 W. R. 282—C. A.

**Traders—Persons who were such at Time**

**when Act came into Operation.**—The Bankruptcy Act, 1869, has no retrospective operation, and where it speaks of traders, it means such persons only as were traders at the time when it first came into operation. *Bailey, Ex parte, Jecks, In re*, 13 L. R., Eq. 314; 41 L. J., Bk. 1; 25 L. T. 918; 20 W. R. 76.

— **Trading Debts Contracted before Commencement of Act.**—Therefore where a person had ceased to trade in 1868, but in 1871 owed various debts contracted during the period he was in trade:—Held, that he was not a trader within the meaning of the Bankruptcy Act, 1869. *Id.*

— **"Being a Trader"—Assignment of Business—Time of Ceasing to Trade.**—The act of bankruptcy, alleged in a petition, was that the debtor had, being a trader, departed from his dwelling-house or otherwise absented himself with intent to defeat or delay his creditors. As a fact the debtor, who had been in trade, upon the 4th of October, 1882, executed an assignment of his business, and later on in the same day left his place of business and went abroad:—Held, that upon the execution of the deed of assignment of his business, the debtor ceased to be a trader. *Reynolds, Ex parte, Reynolds, In re* (No. 2), 52 L. J., Ch. 431; 47 L. T. 448; 31 W. R. 323.

— **"Departing from Dwelling-house or otherwise absenting himself"—Summary Adjudication.**—The words "being a trader," in sub-s. 3 of s. 6 of the Bankruptcy Act, 1869, are to be construed in the same way as the same words in sub-s. 6 of the section, and they mean in sub-s. 3 that the debtor must be actually carrying on a trade at the time when he is alleged to have committed any of the acts therein mentioned as acts of bankruptcy if committed by a trader. It is not sufficient that he was carrying on a trade at the time when the petitioning creditor's debt was contracted. A summary adjudication cannot be obtained under r. 65, unless the debtor was a trader at the time when he is alleged to have "departed from his dwelling-house or otherwise absented himself." *McGeorge, Ex parte, Stevens, In re*, 20 Ch. D. 697; 51 L. J., Ch. 909; 47 L. T. 213; 30 W. R. 817—C. A.

### 35. PROOF OF TRADING.

**Accounts in Debtor's Handwriting—Whether Written before or after Bankruptcy.**—A fiat issued on the 7th of March, 1842, and in an action by the assignees, for goods pledged by the bankrupt on the 28th of February, the trading was disputed. The bankrupt was a boarding-house keeper, and sold wine to her boarders:—Held, that a paper in the handwriting of the bankrupt, purporting to be an account between her and one of her boarders, from December, 1840, to May, 1841, was not receivable to prove the trading, unless it could be shewn to have been written before the bankruptcy. *Gibson v. King*, Car. & M. 458.

Held also, that a book containing accounts between the bankrupt and one of her boarders, of dates all antecedent to the bankruptcy, and to which the word "settled" was added in the bank-



rupt's handwriting, was also not receivable, unless it was shewn that the entries were written before the bankruptcy. *Ib.*

**Declarations by Debtor.]**—The declarations of a bankrupt to a party with whom he is dealing, respecting his transactions in trade, are not evidence to prove the trading of such bankrupt. *Brinley v. King*, 1 C. & P. 646; *S. P.*, nom. *Bromley v. King*, R. & M. 228.

But declarations made by a party, of his object in buying a particular article, are admissible in evidence to prove his intention, and whether he thereby became a trader. *Gale v. Halfknight*, 3 Stark. 56.

An acknowledgment by a person that he was in partnership with another as a trader, who afterwards became bankrupt, is sufficient to constitute a trading, although no acts of buying or selling were proved to have taken place during the partnership. *Parker v. Barker*, 3 Moore, 226; 1 B. & B. 9.

**Fact of Trading is a Question of Law.]**—Whether a man is a trader within the bankrupt law is a question of law, and not of fact. *Hankey v. Jones*, Cowp. 752.

**Intention a Question of Fact.]**—A trading, to support a commission, depends not upon the quantity, but upon the intention; and it is a question for a jury whether there is enough to evidence that intention. *Maginnis, Ex parte*, 1 Rose, 84; *S. P.*, *Putman v. Vaughan*, 1 T. R. 572.

**When Time presumed.]**—Where a trader has been proved to have traded in the usual course once, he will be presumed to have continued to carry on his business in the same manner until the time of his bankruptcy. *Heanney v. Birch*, 1 Rose, 356; 3 Camp. 233.

**Onus of Proof.]**—If a petitioning creditor alleges that the debtor has committed an act of bankruptcy which can be committed only by a trader, the onus is on him to prove that the debtor was, within the meaning of the Bankruptcy Act, a trader at the time when the act was committed. *Salaman, Ex parte, Taylor, In re*, 21 Ch. D. 394; 47 L. T. 495; 31 W. R. 282—C. A.

### 36. IRISH TRADERS.

The time of a trader's "residing or carrying on business in Ireland," within 20 & 21 Vict. c. 60, s. 31, means the time of presenting the petition. *Sanderson, In re*, 11 Ir. Ch. Rep. 421.

The Irish court has exclusive jurisdiction over such trader, though he owes debts contracted in England, while he was residing and trading there. *Ib.*

To constitute a person a trader within the meaning of the Irish Bankruptcy Act, 20 & 21 Vict. c. 60, s. 90, it is not necessary that he should be exclusively engaged in manufacture or trade; therefore, a manufacturer of artificial teeth for sale, who also practised as a dentist, is a trader. *Brophy, In re*, 19 W. R. 176.

## IV. ACT OF BANKRUPTCY.

### 1. GENERALLY.

**Where committed.]**—The act of bankruptcy

must be committed within England or Wales. *Smith, Ex parte*, Cowp. 402. And see *Ingles v. Grant*, 5 T. R. 530.

Though the act must be committed in this country, yet a letter from a trader who has gone abroad in the course of his trade, connected with circumstances here, may be sufficient evidence of such act. *Hague, Ex parte*, 1 Rose, 150.

**After Party has ceased to Trade.]**—The act of bankruptcy may be committed after the trading has ceased. *Doe d. Barnard v. Lawrence*, 2 C. & P. 134. *S. P.*, *Bamford, Ex parte*, 15 Ves. 449.

A., not a trader, was indebted to B. to the amount of 100*l.*, and afterwards became a trader. After A. had ceased to be a trader (the debt to B. still existing) he committed an act of bankruptcy:—Held, that a commission might be supported upon B.'s debt. *Baillie v. Grant*, 2 M. & Scott, 193; 9 Bing. 121; 1 C. & P. 238.

**"Trader"—Discontinuance of Trade with Intention of resuming it.]**—If a debtor, who has been a trader, is not actually carrying on trade at the time when it is alleged by a petitioning creditor that he has done or omitted to do that, the doing or omission of which would be an act of bankruptcy only if it was done or omitted by a trader, it is a question of intention, to be decided on the evidence, whether the debtor has permanently ceased to trade, or has only temporarily discontinued his trade with the intention of resuming it. In the latter case he is still a trader within the meaning of the Bankruptcy Act. The law on this point is still as it was laid down in *Paterson, Ex parte* (1 Rose, 402), and *Cundy, Ex parte* (2 Rose, 357). *Salaman, Ex parte, Taylor, In re*, 21 Ch. D. 394; 47 L. T. 495; 31 W. R. 282—C. A.

**By Agent.]**—A man cannot commit an act of bankruptcy by the conduct of his agent, without his knowledge. *Cotton v. James, M. & M.* 273; 3 C. & P. 505.

A man cannot commit an act of bankruptcy by an act of his agent which he has not authorized, and of which he is not cognizant. *Blain, Ex parte, Sawers, In re*, 12 Ch. D. 512; 41 L. T. 46; 28 W. R. 334—C. A.

**By Partners.]**—To support a joint commission of bankrupt there must be separate acts of bankruptcy by each partner. *Allen v. Hartley*, 4 Dougl. 20.

Where one of three partners in a banking concern, who resided at the place where the banking-house was, and was the only partner who transacted business, the other two residing at a distance from it, absented himself from the banking-house, shut it up and stopped payment:—Held, that this was not evidence of a joint act of bankruptcy by all three. *Mills v. Bennett*, 2 M. & S. 556; 2 Rose, 269.

**Who may take Advantage of.]**—Parties who were privies, and had assented to a deed of assignment, could not set it up as an act of bankruptcy. *Bamford v. Baron*, 2 T. R. 594; *S. P.*, *Marshall v. Barkworth*, 1 N. & M. 279; 4 B. & A. 508.

**Assignees of Bankrupt.]**—A commission being sued out upon the petition of a creditor,

who had not concurred in a deed of conveyance, and who, together with others who had so concurred, was chosen assignee:—Held, that it was no objection to an action by them as assignees, for the recovery of part of the bankrupt's estate, that some of them had concurred in such deed. *Tuppender v. Burgess*, 4 East, 230; 1 Smith, 33.

The assignees of a bankrupt, though neither of them are petitioning creditors, cannot avail themselves of an act of bankruptcy, of which the petitioning creditor would be estopped from availing himself. *Type v. Hockin*, 9 D. & R. 881; 7 B. & C. 101.

— **Deed of Assignment—Creditor not Assenting.**—Execution by a trader of a deed of assignment of all his estate and effects for the benefit of his creditors, although purporting to be made under the arrangement clauses of the 12 & 13 Vict. c. 106, s. 224, was an act of bankruptcy, of which any creditor who had not executed or acceded to the deed might, prior to its execution by the required majority of six-sevenths in number and value of the creditors, avail himself in support of his petition for adjudication against the trader. *Alsop, Ex parte*, 1 De G., F. & J. 289; 29 L. J., Bk. 7; 6 Jur., N. S. 282.

— **Creditors Acquiescing.**—But where a creditor had advised the trader respecting a sale under such a deed, he had acquiesced in it so as to be precluded from treating it as an act of bankruptcy. *ib.*

A debtor having called his creditors together, proposals were made as to a composition. The creditors insisted on an assignment of his property to trustees for their benefit. He refused to make it; but, after the meeting had broken up, he executed such an assignment. One of his creditors was present during the preparation of this assignment, and, though he denied having been present at its execution, the court came to the conclusion that he had acquiesced in its being executed, and taken a benefit under it, by having the property protected from execution:—Held, that this creditor could not avail himself of the deed as an act of bankruptcy, although it might be that he had not so far assented to it as to be bound by its provisions. *Stray, Ex parte*, 2 L. R., Ch. 374.

A creditor who, by standing by and not objecting, assents to the execution by the debtor of a trust-deed, cannot afterwards rely on the execution of that deed as an act of bankruptcy. *Amon*, 8 Ir. R., Eq. 51.

— **Creditors' Solicitor Assenting to Resolutions.**—A bankrupt previous to the fiat, having called a meeting of his creditors at Manchester, H. & Co., creditors at Halifax, wrote to G., an attorney at Manchester, to attend the meeting on their behalf, saying, "We will leave our interest in your hands." In pursuance of the resolutions passed at the meeting, which were communicated to H. & Co., a trust-deed was prepared by G., and executed by the bankrupt and many other creditors, but not by H. & Co. A dividend was afterwards declared by the trustees, of which H. & Co. were also informed, without making any objection to the arrangement:—Held, that they could not afterwards set up this deed as an act of bankruptcy. *Tealdi, Ex parte*, 1 Mont., D. & D. 210.

— **Creditors obtaining Adjudication upon fiat Sued out by Debtor.**—Traders executed an assignment of all their effects in trust for their creditors, and afterwards sued out a fiat against themselves, but did not apply for adjudication. Two creditors who could have sued out a fiat against the bankrupts, and who could, under it, have impeached the deed, applied for and obtained an adjudication:—Held, that the assignees could successfully impeach the deed. *Jackson, Ex parte*, 1 De Gex, 609; 17 L. J., Bk. 19; 19 Jur. 770.

**Concerted Act of Bankruptcy.**—By 12 & 13 Vict. c. 106, s. 115, no fiat shall be annulled, nor any petition dismissed, nor any adjudication reversed, by reason only that the fiat, petition or adjudication, or act of bankruptcy, has been concerted or agreed upon between the bankrupt and his solicitor, or agent, or any of them, and any creditor or other person. See *Marshall v. Barkworth*, 1 N. & M. 279; 4 B. & Ad. 508; *Clare, Ex parte*, 3 Jur. 1003.

— **Under 5 & 6 Vict. c. 122.**—The 5 & 6 Vict. c. 122, s. 8, providing that no fiat shall be invalid by reason of the act of bankruptcy being concerted, did not enable a creditor to sue out a fiat founded on a trust-deed executed with his concurrence; and such a fiat might be annulled at the instance of another creditor. *Hayne, Ex parte*, 1 De G. 534; 11 Jur. 568.

**Operation of Act.**—The effect of an act of bankruptcy under the former law is saved by the repealing section of 32 & 33 Vict. c. 83, s. 20. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

## 2. ACTS OF BANKRUPTCY RELATING TO THE PERSON OF THE DEBTOR.

### a. Departing the Realm or remaining Abroad.

**Irish Trader.**—If a trader, whose house of trade is in Ireland, comes to England on business, and again quits this country to avoid an arrest, it is a departing the realm with intent to delay his creditors, sufficient to constitute an act of bankruptcy. *Williams v. Nunn*, 1 Taunt. 270; 1 Camp. 152.

**Intention.**—But a trader who leaves England, and proceeds to Ireland, where he carries on trade, with an honest intention, compatible with trade, does not thereby commit an act of bankruptcy. *Windham v. Paterson*, 2 Rose, 466; 1 Stark. 144.

— **When presumed.**—If the necessary consequence of a trader's departing the realm is that his creditors must be delayed, he thereby commits an act of bankruptcy. *Ramsbottom v. Lewis*, 1 Camp. 279.

Where a debtor absents himself from this country for three years, and thereby delays his creditors, the intent to delay will be presumed (and be a valid act of bankruptcy), although he may be pursuing his regular course of business; and it will rest upon the party wishing to supersede to negative the intent to delay the creditors. *Rhodes, Ex parte*, 5 Jur. 580.

When a debtor knows that the necessary con-

sequence of his going abroad will be to defeat or delay certain creditors, he will be held to have gone abroad with intent to defeat or delay his creditors, and will be adjudicated a bankrupt accordingly. *Goater, Ex parte, Finney, In re*, 30 L. T. 620; 22 W. R. 935—L. J.

**Departing on Business.**—A trader has a right to go abroad to look after his concerns, though his creditors may be thereby delayed, and it is no act of bankruptcy. *Warner v. Barber*, Holt, 175; *S. P., Mutrie, Ex parte*, 5 Ves. 574.

**Power of Attorney.**—If a trader goes abroad, leaving a general power of attorney with his clerk to transact all his business for him, but provides no means for paying bills of exchange which fall due in his absence, he commits an act of bankruptcy. *Turner, Ex parte*, 3 Mont. & Ayr. 722; 2 Deac. 824.

**Evidence of Intention.**—Where a trader appointed to meet A. respecting some accounts in which B. was interested, and failed to do so, but left this country for France, leaving a letter for B., in which he stated that he should be back in ten days, and in the meantime would make proposals to the creditors; and on the following day he wrote another letter to B. from Calais, stating that the account current between them might be speedily settled; and a month afterwards he wrote another letter from Paris, stating that he was under the necessity of remaining in France:—Held, that the departing the realm and absence abroad, being a continuous act, these letters were admissible in evidence, and sufficient to establish an act of bankruptcy, by shewing the intent with which such trader departed. *Ravson v. Haig*, 9 Moore, 217; 2 Bing. 99; 1 C. & P. 77. And see *Bateman v. Bailey*, 5 T. R. 512.

**Intention of Returning.**—A trader, being in debt to several persons, left this country in June, 1831, for America, with some intention of returning, but did not actually return, nor did he make provision for the payment of all his debts:—Held, that the continued absence of the bankrupt, under these circumstances, amounted to an act of bankruptcy. *Kirkman, Ex parte*, 3 Deac. & Chit. 451.

**Remaining Abroad.**—An English trader having gone abroad, and remaining there, with the intent to defeat or delay his creditors, is, under 12 & 13 Vict. c. 106, s. 67, guilty of a continuing act of bankruptcy. *Bunny v. Hunt*, 11 Moore, P. C. C. 189.

Whether his going abroad was or was not an act of bankruptcy. *Bunny, Ex parte*, 1 De G. & J. 119; 26 L. J., Bk. 83; 3 Jur., N. S. 1141.

**Foreigner temporarily in England returning Home, not Absconding Debtor.**—When a debtor summons is issued against a foreigner, who is in England for a merely temporary purpose, and he then prepares to return home, there is no presumption (as there might be in the case of a domiciled Englishman going abroad) that he is going away with the intention of avoiding payment of the summoning creditor's debt. *Gutierrez, Ex parte, Gutierrez, In re*, 11 Ch. D. 298; 40 L. T. 555; 27 W. R. 497—C. A.

A non-trader, a subject of, and domiciled in

Portugal, contracted a debt in England, where he was temporarily resident. The creditor served him while in England with a writ of summons issuing out of the Court of Exchequer. The alien entered an appearance to the writ, and left England for Portugal the next day, alleging as his reason for doing so that he had been disappointed of some money which he expected, and could not pay his way in England. He afterwards said that he had left England in consequence of being served with the writ:—Held, that there was no sufficient evidence that he left England in order to defeat and delay his creditors, and that no act of bankruptcy had been committed. *Crispin, Ex parte*, 8 L. R., Ch. 374; 42 L. J., Bk. 65; 28 L. T. 483; 21 W. R. 491.

Although, in the case of a domiciled Englishman, the fact of his leaving England after service of a writ, and so escaping a debtor summons, would afford a strong presumption that he intended to defeat and delay his creditors, yet the same presumption does not apply to a foreigner who is returning to his own country. *Ib.*

In order to constitute an act of bankruptcy by remaining out of England, it is necessary that the debtor should be a person who has his home or place of business in England. *Ib.*

#### b. Departing from Dwelling-house.

**What a Departure.**—Departure from home, with intent to delay creditors, is an act of bankruptcy, although there has been no actual delay of any creditor. *Rouch v. Great Western Railway Company*, 4 P. & D. 686; 1 Q. B. 51; 2 Railw. Cas. 505; 5 Jur. 826.

A letter therefore written by a trader during his absence from home; stating that he was absent to avoid writs that were out against him, is evidence of an act of bankruptcy, without proof aliunde that any such writs were out, or that he was under any pressure from creditors. *Ib.*

B., being considerably indebted, left his house without leaving any money, and taking his tools and the greater part of his furniture, without saying why or where he was going, and leaving directions to that effect. He was in the same month duly declared bankrupt:—Held, a departing with intent to defeat or delay his creditors, and therefore an act of bankruptcy. *Hobson v. Brown*, 1 Jur., N. S. 920; *S. P., Birch, Ex parte*, 2 Mont., D. & D. 659.

The act of bankruptcy, by leaving his house to avoid a creditor, without collusion, is complete at the instant of his departure; and therefore not affected by a subsequent residence with the petitioning creditor. *Gardner, Ex parte*, 1 Ves. & B. 45; 1 Rose, 377.

**What a Dwelling-house.**—A trader, who has no settled house or counting-house, but takes up a temporary abode at a public-house, in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors. *Holroyd v. Gwynne*, 2 Taunt. 176; 1 Rose, 113.

**Partners.**—Where there were two partners, one of whom resided in Manchester and the other in London, and the London partner having left his own home without intent to delay his creditors, and having been a few days on a visit at Manchester, both of them left the house of

business there to avoid an arrest, at the same time carrying their books of account along with them:—Held, that they both thereby committed an act of bankruptcy. *Spencer v. Billing*, 3 Camp. 314; 1 Rose, 362.

**Debtor must be shewn to be Alive.]**—A petitioning creditor, who alleges that his debtor has committed an act of bankruptcy, by departing from his dwelling-house with intent to defeat and delay his creditors, is bound to shew that the debtor is alive and in some other place. *Geisel, Ex parte, Stanger, In re*, 22 Ch. D. 436; 48 L. T. 408; 31 W. R. 264—C. A.

**Cause of Departure.]**—Leaving his house to avoid his creditors is a sufficient act of bankruptcy, though no creditor called in his absence. *Hammond v. Hicks*, 5 Esp. 139; *S. P., Wydown's case*, 14 Ves. 86.

A departure to avoid an arrest is an act of bankruptcy. *Warner v. Barber*, 175.

Though under a groundless apprehension. *Bamford, Ex parte*, 15 Ves. 447; *S. P., Newman v. Stretch, M. & M.* 338.

**Domestic Dissensions.]**—And where a trader departs from his dwelling-house on account of domestic dissensions, if he makes no arrangement for carrying on his business in his absence, and he foresees that, as a necessary consequence, his establishment must be broken up, and his creditors must be delayed, which events accordingly happen, he thereby commits an act of bankruptcy. *Holroyd v. Whitehead*, 3 Camp. 530; 2 Rose, 145; *S. P., Vincent v. Prater*, 4 Taunt. 603; 2 Rose, 275.

**Question for Jury.]**—Where a trader, whose goods are under seizure, quits his home, it is for a jury to say whether he departs with the bona fide intention to endeavour to procure the means of removing the execution, or, whether, having gone for that purpose, he stays away for the purpose of avoiding his creditors. *Batchelor v. Vyse*, 4 M. & Scott, 552; 1 M. & Rob. 331.

**Intention must be Absolute.]**—Semble, that in order to constitute an act of bankruptcy by departing from the dwelling-house, the departure must be with an absolute intent to delay creditors. If only with intent to delay creditors in case a particular event occurs, and that event does not occur, it is not an act of bankruptcy. *Fisher v. Boucher*, 10 B. & C. 705.

**Intention is Essential.]**—A petition against a trader which alleges as an act of bankruptcy that he has departed from his dwelling-house or otherwise absented himself, must allege that he did so with intent to defeat or delay his creditors, otherwise the petition will be demurrable, and must be dismissed. Such a defect is a matter of substance, not a merely formal defect, and it cannot be cured by amendment. *Coates, Ex parte, Shelton, In re*, 5 Ch. D. 979; 37 L. T. 43; 25 W. R. 800—C. A. Affirming, 36 L. T. 806.

**"Being a Trader"—Assignment of Business.]**—The act of bankruptcy, alleged in a petition, was that the debtor had, being a trader, departed from his dwelling-house or otherwise absented himself with intent to defeat or delay his credi-

tors. As a fact the debtor, who had been in trade, upon the 4th of October, 1882, executed an assignment of his business, and later on in the same day left his place of business and went abroad:—Held, that upon the execution of the deed of assignment of his business, the debtor ceased to be a trader. *Reynolds, Ex parte, Reynolds, In re* (No. 2), 52 L. J., Ch. 431; 47 L. T. 448; 31 W. R. 323.

**"Trader"—Discontinuance of Trade with Intention of resuming it.]**—If a debtor, who has been a trader, is not actually carrying on trade at the time when it is alleged by a petitioning creditor that he has done or omitted to do that, the doing or omission of which would be an act of bankruptcy only if it was done or omitted by a trader, it is a question of intention, to be decided on the evidence, whether the debtor has permanently ceased to trade, or has only temporarily discontinued his trade with the intention of resuming it. In the latter case he is still a trader within the meaning of the Bankruptcy Act. The law on this point is still as it was laid down in *Paterson, Ex parte* (1 Rose, 402), and *Cundy, Ex parte* (2 Rose, 357). *Salaman, Ex parte, Taylor, In re*, 21 Ch. D. 394; 47 L. T. 495; 31 W. R. 282—C. A.

**Proof of Intention—Declarations by Debtor.]**—A declaration by a bankrupt of his motives for absenting himself from his home, made at the time, is evidence in an action by the assignees against a creditor of the bankrupt, in order to prove the act of bankruptcy. *Bateman v. Bailey*, 5 T. R. 512.

But the declarations of a trader, made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Lees v. Marton*, 1 M. & Rob. 210.

The declaration of a bankrupt on his return, that he had absented himself to avoid a writ against him, is sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt on which it was founded, or of the creditor of the bankrupt. *Newman v. Stretch, M. & M.* 388.

**Letters Written before Departure.]**—A trader, in embarrassed circumstances, absented himself from his house from the 16th of February till the 9th of March. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of March, two letters, written by him on the 16th of January preceding, asking for time on two bills of exchange, payable by him in February, were receivable to shew the motive of his absence. *Smith v. Cramer*, 1 Scott, 541; 1 Bing. N. C. 1; 1 Hodges, 124.

**Letters found in Debtor's Possession.]**—Letters bearing post-marks before the act of bankruptcy, and found in the alleged bankrupt's possession after it, containing statements of matters material to the act of bankruptcy, are admissible, without calling the writer as evidence against the alleged bankrupt, to shew that he received intimation of these facts, though not to prove their truth. *Cotton v. James, M. & M.* 373; 3 C. & P. 505.

**Evidence—Solicitor and Client.]**—Where a trader, at the suggestion of his at-

torney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt; the attorney having advised him to remain at the office, until it was ascertained whether the creditors would engage to give him a safe conduct; the trader remained at the office accordingly, for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting:—Held, that what passed between the attorney and the trader was admissible in evidence, upon an issue whether the latter had committed an act of bankruptcy on that occasion. *Bramwell v. Lucas*, 4 D. & R. 367; 2 B. & C. 745.

— **Evidence—Subsequent Conduct of Debtor.** ]

—Upon an issue directed to try whether P. had committed an act of bankruptcy on a given day, it appeared that on the preceding day he sent a letter from his dwelling-house at Greenwich to his place of business addressed to his son, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor who might call, and immediately after despatching this letter he left home, and remained absent during the whole of that and the following day. A witness proved that P. called on the day in question at her brother's house in London; that he expressed to her an apprehension of being sent to the Fleet, and stated that he was in no hurry to get home, and would not go very early, as he had creditors who would lay hold of him, and that he did not leave till after dark. The jury were told, that if they believed the statements made by the witness, P. on that occasion committed an act of bankruptcy; they said they did believe the witness, but they did not think P. spoke *bonâ fide*:—Held, that P. had committed an act of bankruptcy; and that evidence of his conduct and conversations, on the day subsequent to the date mentioned in the issue, was not admissible to explain his conduct on that day. *Johnston v. Woolf*, 2 Scott, 372.

— **Question of Fact.** ]—Whether a departing the dwelling-house is accompanied with an intent to delay a creditor, is a question of fact for a jury to decide upon all the circumstances. *Aldridge v. Ireland*, 1 Taunt. 273, n.

c. Otherwise Absenting.

**From what Place.** ]—Absenting, unless from the place of abode or place of business, or to avoid a creditor, is not an act of bankruptcy. *Bernasconi v. Farebrother*, 10 B. & C. 549; 5 M. & R. 364.

But a trader does commit an act of bankruptcy by absenting himself from some place at which he would, in the ordinary course of his life and business, be expected to be found, or at which he has appointed to meet particular creditors. *Id.*

Where a man, in the habit of frequenting the Exchange to collect news, left it at the sight of a creditor, desiring a friend to say he was not there, it is an act of bankruptcy. *Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.

**Intention must be Absolute.** ]—If a trader, fearful that he may receive an unpleasant letter from a creditor, quits his house, and desires the letter to be forwarded to him at a turnpike; and if the letter was unfavourable, it was not his intention to return; but, if favourable, it was his intention to proceed on his regular business; and the letter which is favourable is forwarded, and he proceeds on his regular business, it is not an act of bankruptcy. *Fisher v. Boucher*, 10 B. & C. 705.

**What an Absenting.** ]—A creditor called upon a bankrupt by appointment. The bankrupt left the room and did not return, and his wife told the creditor he had gone out:—Held, that this was sufficient evidence to warrant the jury in inferring that the bankrupt left the house for the purpose of avoiding his creditor. *Charrington v. Brown*, 11 Moore, 341.

A trader left a message at his house for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and stay till dinner time:—Held, that it was for the jury to consider, whether he absented himself to delay the creditor; and this evidence warranted their conclusion that he did not. *Vincent v. Prater*, 4 Taunt. 603; 2 Rose, 275.

Where a trader went to his neighbour, and told him that he expected to be arrested, and while he remained there, was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch; and when told that the officer had gone past his house, and had left the street, immediately returned home:—Held, that this was an act of bankruptcy, within the words "otherwise absenting himself to the intent to delay creditors," although it appeared not only that no creditor was delayed, but that none could possibly be delayed. *Chenoweth v. Hay*, 1 M. & S. 676; S. C., nom. *Chenoweth v. Hayley*, 2 Rose, 137.

Where a trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt; the attorney having advised him to remain at the office until it was ascertained whether the creditors would engage to give him a safe conduct; the trader remained at the office accordingly for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting:—Held, that he had committed an act of bankruptcy on that occasion. *Bramwell v. Lucas*, 4 D. & R. 367; 2 B. & C. 745.

Where a trader, upon being arrested, escaped from the officer, and fled into the house of another, and was pursued by the officer, and inquired for at the house, but was denied, and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and when it was dark returned home to his own house, and gave directions to deny him to any one who called, and continued nearly a month in his bedchamber:—Held, that this constituted an act of bankruptcy, under the words

"otherwise absenting himself." *Bayley v. Sheffield*, 1 M. & S. 338; 2 Rose, 100.

A trader abstaining from going to a particular place through the apprehension of process (whether such apprehension is well-founded or not), thereby absents himself with intent to delay his creditors, and commits an act of bankruptcy. *Robson v. Rolfe*, 2 M. & Scott, 786; 9 Bing. 648.

— **Closing Doors and Windows.**—If bankers close the doors and windows of the bank, it seems to be an act of bankruptcy by absenting. *Cumming v. Bailey*, 6 Bing. 363; 4 M. & P. 36.

— **Remaining Absent.**—One of three partners, bankers, left his house at Bath, and went to London to raise funds; and having failed in his efforts to do so, he remained there three days:—Held, that the jury were warranted in finding that he absented himself with an intent to delay his creditors. *Ib.*

Where a trader at B. left her dwelling-house and went to London, for the purpose of persuading a creditor to withdraw his execution, and left word of the place to which she had gone, but, failing to procure the withdrawing of the execution, did not return to her dwelling-house:—Held, that this was no act of bankruptcy. *Aldridge v. Ireland*, 3 Dougl. 397; 1 Taunt. 273, n.

— **Breaking an Appointment.**—The mere failure to keep an appointment made with a creditor is not an act of bankruptcy. *Key v. Shaw*, 1 M. & Scott, 462; 8 Bing. 320; *S. P.*, *Tuleman v. Jones*, 9 Moore, 24; *S. C.*, nom. *Tucker v. Jones*, 2 Bing. 2; *Loes v. Marton*, 1 M. & Rob. 210.

Where a man, in the habit of attending the Royal Exchange, broke an appointment he had made with a creditor to meet him there; or (being the proprietor of a theatre) retired behind the scenes to avoid a sheriff's officer, at the same time giving orders to be denied to him:—Held, that each of these was an act of bankruptcy. *Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.

Where a debtor, upon applications made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places with reference to a settlement of their demands, but failed to keep such appointments:—Held, that the failures to keep the appointments constituted acts of bankruptcy, although the places at which the appointments were made were not his usual places of business. *Russell v. Bell*, 10 M. & W. 340.

A trader made an appointment with his creditor to call at the creditor's house on a particular day to make arrangements for taking up the trader's acceptance, falling due on that day; the trader failed to keep the appointment, and did not pay any money on account of the bill:—Held, the not keeping the appointment was an act of bankruptcy. *O'Neill, In re*, 9 Ir. Ch. Rep. 279.

The mere fact that a trader has failed to keep a promise which he has made to a creditor, that he will call at a specified time and pay him his debt, is not sufficient evidence of an absenting himself with intent to defeat or delay his creditors. *Meyer, Ex parte, Stephany, In re*, 7 L. R., Ch. 188; 41 L. J., Bk. 33; 25 L. T. 733; 20 W. R. 173.

A debtor promised to call at an appointed time on a creditor and pay the debt. Having failed to procure the money he did not call; but he was to be found at his own place of business:—Held, that the failure to keep the appointment did not constitute an absenting himself with intent to defeat or delay the creditor, and that no act of bankruptcy had been committed. *Ib.*

— **Absence on Business.**—A trader absented himself for three or four days from his place of business, and in his absence a bill of exchange was presented for payment and was dishonoured; and application was also made for payment of other bills. The trader was adjudicated bankrupt, the act of bankruptcy being this absence with intent to delay his creditors. A commissioner in the country annulled the bankruptcy, the bankrupt swearing that his absence was occasioned by an attempt of his to get up evidence of perjury against one of his workmen, and to obtain pecuniary assistance. Pending this dispute as to the adjudication, the trader signed a declaration of insolvency. On appeal, the decision of the commissioner was affirmed, on the ground that there was not sufficient evidence to support the adjudication; but the court refused to allow the trader his costs, as his declaration of insolvency while applying to annul an adjudication was inconsistent with an honest desire for the equal distribution of his assets. *Barney, Ex parte*, 32 L. J., Bk. 41; 7 L. T. 488.

Two traders in partnership left their shop, and told their shopman that they were going out to endeavour to get some bills of exchange discounted, and directed him to say that they were not in the way, or to make some excuse for them in case a creditor should call. On that and the following day a creditor called, when they were both at home, and desired to see either one or the other of them; when the shopman denied them without being authorized by them so to do:—Held, that the jury were warranted in concluding that they absented themselves with an intent to delay their creditors. *Cupper v. Desanges*, 3 Moore, 4; *S. C.*, nom. *Deffe v. Desanges* 8 Taunt. 671.

— **Evidence as to Reason for Absenting.**—A petition for adjudication against two partners alleged, as the act of bankruptcy, that they had absented themselves with intent to defeat or delay their creditors. This petition was directed to be heard forthwith. One had gone away only to take his wife and children to Paris, and returned immediately. He appeared when the petition was heard, admitted insolvency, but opposed the adjudication, stating that he wished to present a petition for liquidation, and he tendered evidence; but the registrar, on learning that it only related to the circumstances of his going abroad, disregarded it as immaterial, and adjudged the partners bankrupts:—Held, that this order could not be sustained, for that the 65th rule of the Bankruptcy Rules, 1870, only applies where the debtor is keeping out of the way so that the ordinary course of proceedings cannot be taken; and that, if he appears, he is entitled to insist on the proceedings being conducted in the ordinary course. *Lopez, Ex parte, Brelaz, In re*, 6 L. R., Ch. 894; 25 L. T. 403; 19 W. R. 1106.

**made.]**—Where the order to be denied is on one day, and the denial on another, the act of bankruptcy is on the latter day. *Hawkes v. Sands*, 3 Dougl. 429.

**Denial by shutting up Doors.]**—An act of bankruptcy by beginning to keep house, may be by closing the doors, without change of place or denial to creditors. *Cumming v. Bailey*, 6 Bing. 363; 4 M. & P. 36.

If bankers close the doors and windows of the bank, and their customers cannot obtain admission, and the jury find that they are so closed as to exclude the customers, and the bankers remain within, it is an act of bankruptcy by beginning to keep house. *Ib.*

**By Partners.]**—Where one of several partners in a bank, who resided at the place of business, and was the only partner who transacted the business (the others residing at a distance), shut up the banking-house, and absented himself from it and stopped payment:—Held, that this was not evidence of a joint act of bankruptcy by all three. *Mills v. Bennett*, 2 M. & S. 556; 2 Rose, 269.

**Denial at unseasonable Times.]**—It is not an act of bankruptcy for a debtor to cause himself to be denied to a creditor calling by the debtor's appointment for payment on a Sunday. *Preston, Ex parte*, 2 Rose, 21; 2 Ves. & B. 311.

So, a denial, at a late hour, after retirement to rest, is not an act of bankruptcy. *Hughes v. Gilman*, 10 Moore, 480; 2 C. & P. 32.

If a trader is denied to a clerk of a creditor, at his shop, it appearing by the evidence that the shop was shut up for the evening, but at an earlier hour than usual; it is proper to be left to the jury to say, whether the bankrupt had himself denied, to delay his creditor; or whether it was because the clerk called at an unseasonable hour. *Ib.*

**At what Place.]**—A creditor has a right to call upon his debtor for money due to him, at the lodgings of the latter, or any other place where he knows he may be found, although it is not his place of business; and a denial to a creditor there is equally an act of bankruptcy, as though he were denied at his place of business. *Park v. Prosser*, 1 C. & P. 176.

Although the debtor is always accessible at his place of business in London. *Ib.*

Where a country trader was in the habit of coming up occasionally to London, and staying a day or two at a friend's house, where he wrote his letters, and used to order goods to be sent to him there; a creditor of his lived in the same street; he told his friend not to inform the creditor that he was in town, because the latter would be asking him for his money; and shortly afterwards the creditor called at the house upon business, whereupon the bankrupt went into a back warehouse for ten minutes or a quarter of an hour, to avoid seeing him:—Held, that this was a beginning to keep house. *Curtis v. Willes*, 4 D. & B. 224; R. & M. 58; 1 C. & P. 211.

**To what Creditor.]**—The denial should be to a creditor; but a denial to several persons, who a witness proved had called frequently, and who he believed were creditors, but could not

**Denial.]**—A trader, having a creditor who called for money, was seen peeping over his partition another occasion, seeing a creditor behind a partition at the shop, and his wife coming forward, and he was not at home:—Held, that a creditor directed to consider whether he was in his house; had wilfully secreted himself, had withdrawn himself from the house where he was likely to be seen by a more retired part. *Key v. Key*, 1 M. & Scott, 462.

A debtor himself denied to a creditor frequently, and he does not come forward, remaining quiescent is from an act of bankruptcy, it is an act of bankruptcy, although he has given no direction to the creditor. *Moon, M. & M. 458.*

Bankruptcy is complete when Denial is

in fact say whether they were or not, is evidence to go to the jury. *Jameson v. Eamer*, 1 Esp. 381.

A denial to a collector of queen's taxes is an act of bankruptcy; as a denial to him is equivalent to a denial to any other creditor. *Sanderson v. Laforest*, 1 C. & P. 46; *S. P., Jeffs v. Smith*, 2 Taunt. 401; 1 Rose, 117.

So, a denial to the collector of church and highway rates, who called for assessments due from him, after he had given a general order to his wife to be denied to all comers, is an act of bankruptcy. *Lloyd v. Heathcote*, 5 Moore, 129; 2 B. & B. 388.

It has been held not to be an act of bankruptcy in a trader who denies himself, when at home, to a creditor who merely demands payment of a debt, but does not ask to see him personally. *Dudley v. Vaughan*, 1 Camp. 271; 9 East, 491.

The denial to a creditor who called, not for money, but to buy goods, meaning to take his debt out in that way, is an act of bankruptcy. *Harris, Ex parte*, 2 Rose, 67.

A denial to a clerk of a creditor, who only asks to see the debtor, but does not ask for money, is an act of bankruptcy, if in fact the clerk did, to the knowledge of the debtor, call for money. *Hughes v. Gilman*, 10 Moore, 480; 2 C. & P. 32.

If a trader denies himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the particulars of it, is dishonoured, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him. *Bleasby v. Crossley*, 3 Bing. 430; 2 C. & P. 213.

So is a denial to a servant, calling for a debt by the direction of the acknowledged agent of the creditor, and by the appointment of the debtor. *Bamford, Ex parte*, 15 Ves. 449.

A trader bought goods to be paid for by bill. A few days after the goods had been delivered the seller called and demanded a return of his goods, and at the same time threatened to have the trader arrested for swindling in taking in the goods when he knew he was in insolvent circumstances. He requested to see the trader, who refused to see him:—Held, not sufficient to raise a presumption of a beginning to keep house with intent to delay a creditor, so as to constitute an act of bankruptcy. *Clements v. McKibben*, 2 H. & N. 62.

### e. Lying in Prison or Escaping therefrom.

**Before 6 Geo. 4, c. 16.]**—The lying in prison under 21 Jac. 1, c. 19, s. 2, meant two months of actual uninterrupted imprisonment. *Barnard v. Palmer*, 1 Camp. 509.

Where a person lay in prison two months for debt, subsequently to a criminal process which had been discharged:—Held, that this constituted an act of bankruptcy, though it did not appear that he had personal notice of his discharge. *Rez v. Page*, 3 Moore, 666; 1 B. & B. 308; 7 Price, 616.

Where a person was arrested, but on account of illness was permitted to remain a few days in his own house, in the custody of the officer's follower, who was not named in the warrant, but who kept the key of the house in his possession, and he was then removed to gaol, where he continued for the remainder of two months:—Held, that this was a legal imprisonment, so as to con-

stitute an act of bankruptcy. *Stevens v. Jackson*, 1 Marsh. 469; 6 Taunt. 106; 4 Camp. 164; 2 Rose, 285.

**For what Debt.]**—A penalty due to the crown was a debt within the 21 Jac. 1, c. 19, s. 2; and, therefore, where a trader lay in prison more than two months, being unable to pay Exchequer penalties for smuggling, he committed an act of bankruptcy. *Cobb v. Symonds*, 5 B. & A. 516.

**When Act of Bankruptcy complete.]**—The act of bankruptcy, by lying in prison twenty-one days, did not relate to the first day of imprisonment, under the 6 Geo. 4, c. 16, s. 5, but only to the last of them. *Moser v. Newman*, 6 Bing. 556; 4 M. & P. 333; *S. P., Higgins v. McAdam*, 3 Y. & J. 1; *Tucker v. Barrow*, 3 C. & P. 85; M. & M. 137.

Where a trader was arrested on the 20th of March, committed to prison on the 21st of April, and discharged from prison on the 26th of May:—Held, that an adjudication of bankruptcy against him upon a petition filed on the 20th of May in the following year could not be supported, such lying in prison not having been an act of bankruptcy within twelve months previously to the filing of the petition, within 12 & 13 Vict. c. 106, s. 69. *Wallace v. Blackwell*, 3 Drew. 538; 25 L. J., Ch. 644; 2 Jur., N. S. 656.

**Imprisonment under Ca. sa. and Warrant.]**—A trader was taken in execution under a ca. sa., and whilst in the custody of the sheriff's officer was taken under warrant on a charge of felony. He remained in the county gaol under the ca. sa. and warrant for more than twenty-one days:—Held, that this was a sufficient lying in prison to constitute an act of bankruptcy. *Crabb, Ex parte*, 8 De G., Mac. & G. 277; 25 L. J., Bk. 45; 2 Jur., N. S. 628.

## 3. ACTS OF BANKRUPTCY RELATING TO THE PROPERTY OF THE DEBTOR.

### a. Generally.

**Under 6 Geo. 4, c. 16, similar to 12 & 13 Vict. c. 106.]**—The words "either within this realm or elsewhere" were inserted, because under 21 Jac. 1, c. 19, a person resident in India, and trading there, drawing bills upon England for the value of other bills sent thither, did not commit an act of bankruptcy by assigning, while resident in India, all his effects in trust for creditors. *Inglis v. Grant*, 5 T. R. 530.

The word "fraudulent" applies to each of the words "gift," "delivery," and "transfer." *Cook v. Caldecott*, 4 C. & P. 315; M. & M. 522.

The word "delivery" is of very general signification; but, being connected with the words "gift or transfer," it seems that, in interpretation, it must be confined to transactions of the same nature. *Cotton v. James*, M. & M. 273; 3 C. & P. 505.

**Property or Interest must pass.]**—A delivery of goods to be an act of bankruptcy within 12 & 13 Vict. c. 106, s. 67, must pass, or purport to pass, some property or interest in the goods. *Leitt v. Beeston*, 4 L. R., Ex. 169; 38 L. J., Ex. 89; 20 L. T. 371; 17 W. R. 620.

**Deed not Void against future Creditors.]**—A



deed for the transfer of a trader's property is not void as against future creditors, although the execution of it is an act of bankruptcy. *Oswald v. Thompson*, 2 Ex. 215; 17 L. J., Ex. 234.

**Deed must be read as a whole.**—Upon the question whether the execution of a deed is an act of bankruptcy, one part of it cannot be separated from the rest. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

**Partners.**—If one only of several partners executes a deed, which on the face of it purports to convey for himself and the other partners all their personal property, the deed operates to convey the share of that one, and where one of two partners executed such an assignment of the partnership property before, and the other did not execute it until after a fiat in bankruptcy had issued:—Held, in the absence of anything to shew that the deed was delivered as an escrow, that the former had committed an act of bankruptcy. *Bowker v. Burdekin*, 11 M. & W. 128; 12 L. J., Ex. 329.

An assignment by one of two insolvent partners of all his interest in the partnership assets to the other, in consideration of a covenant by the latter to pay all the partnership debts, is an act of bankruptcy, and is fraudulent and void as against their joint creditors. *Mayou, Ex parte*, 11 Jur., N. S. 433; 12 L. T. 254; 13 W. R. 629—C. A.

Where one partner makes a fraudulent grant by deed to another partner, it is an act of bankruptcy in the former, but not in the latter. *Whitwell v. Thompson*, 1 Esp. 68.

**Power to sell Debtor's Goods.**—McF., shortly before being made a bankrupt, being indebted to the defendant, gave him a bill for the amount and the power of selling, in case the bill was not met at the end of seven days, certain brandies which comprised all McF.'s property and which had been previously landed by the defendant and warehoused in his name and at his expense. This item was included in the bill:—Held, that the transaction was not an act of bankruptcy, not being "a conveyance, gift, transfer, or delivery" within the Bankruptcy Act, 1869, s. 6, sub-s. 2. *Philps v. Hornstedt*, 1 Ex. D. 62. Affirming, 8 L. R., Ex. 26; 42 L. J., Ex. 12; 21 W. R. 174. But see *Cooper, Ex parte, Baum, In re*, 10 Ch. D. 313; 48 L. J., Bk. 54; 39 L. T. 523; 27 W. R. 299—C. A.

**Family Settlements.**—A solicitor and money scrivener, being in insolvent circumstances, upon his marriage with a woman with whom he had for seven years previously cohabited, by a deed of settlement and articles of agreement executed prior to the marriage, conveyed and assigned his real and personal estate to trustees, for his wife, with a joint power of appointment among the children of the marriage (including an illegitimate daughter), but reserving no interest to himself; immediately after the marriage the power was exercised in favour of the illegitimate daughter. The property remained under the control of the husband; and, within two months after the marriage, a fiat issued against him:—Held, that the settlement was itself an act of bankruptcy; and void

as against the assignees. *Colombine v. Penhall*, 1 Sm. & G. 228.

**Sale of Goods.**—A fair and bona fide sale of the whole of a trader's property is not of itself an act of bankruptcy. *Rose v. Haycock*, 3 N. & M. 645; 1 A. & E. 460.

A party who impeaches the sale of the whole of a bankrupt's property must shew some facts from which fraud may be inferred. *Ib.*

A sale by a trader of his goods at prices considerably below their marketable value, is not of itself a fraudulent transfer. *Lee v. Hart*, 11 Ex. 880; 25 L. J., Ex. 135; 2 Jur., N. S. 308—Ex. Ch.

To render the transaction fraudulent, the seller must have intended by such sale to defeat or delay his creditors, and the purchaser must have had reason to know that such was the object of the seller. *Ib.*

If a trader raises money by selling his goods at an under value (not for the purpose of carrying on his business, but in contemplation of stopping payment, and for the purpose of cheating his creditors), to one who has notice, either by express information, or from the nature of the transaction that he is selling his goods, not in order to carry on his business, but with a fraudulent intention, the sale is an act of bankruptcy, and void, and the assignees may recover the goods from the purchaser. *Froser v. Lery*, 6 H. & N. 16.

A sale of the whole of a trader's stock-in-trade, with an intention to abscond with the money and cheat his creditors, to a bona fide purchaser, who is ignorant of the trader's design, is not an act of bankruptcy. *Baxter v. Pritchard*, 3 N. & M. 638; 1 A. & E. 456.

A sale by a trader in insolvent circumstances, and on the eve of bankruptcy, of his stock-in-trade and the bulk of his property to one of his creditors, the consideration being in part an old debt, is not per se an act of bankruptcy, though the effect is to stop the trading. *Hell v. Simpson*, 2 H. & N. 410; 26 L. J., Ex. 363.

A creditor, who had recovered judgment against a trader for a sum exceeding 50*l.*, issued execution, and the sheriff seized six horses belonging to the debtor. It was afterwards agreed between the creditor (who knew that the debtor was insolvent) and the debtor, that the sheriff should withdraw, and that the debtor should sell the horses to the creditor for a sum just large enough to cover the debt and the amount of the sheriff's charges, the debtor continuing in possession of the horses and paying so much a day for the use of them:—Held, that this transaction was a fraudulent transfer of a part of the debtor's property, within the Bankruptcy Act, 1869, s. 6, sub-s. 2. *Pearson, Ex parte, Mortimer, In re*, 8 L. R., Ch. 667; 42 L. J., Bk. 44; 28 L. T. 796; 21 W. R. 688.

**Voluntary Preference of Creditor.**—A voluntary preference of a creditor, though it can be set aside as a fraud on the bankruptcy law, is not an act of bankruptcy. *Stubbins, Ex parte, Wilkinson, In re*, 17 Ch. D. 58; 60 L. J., Ch. 547; 44 L. T. 877; 29 W. R. 653—C. A.

#### b. Fraudulent Surrender of Copyholds.

This was not, under 1 Jac. 1, c. 15, s. 2, an act of bankruptcy, because it was said it could not be

done with intent to defeat or delay creditors, as they could not have execution of copyhold lands. *Cockshot, Ex parte*, 3 Bro. C. C. 502.

#### c. Fraudulent Execution.

**Suffering Judgment by Default.**—A person, by suffering judgment to go by default, does not procure his goods to be taken in execution, so as to be an act of bankruptcy, although his goods are afterwards taken in an execution sued out upon that judgment. *Gibson v. King*, Car. & M. 458.

**Act not Complete until Seizure.**—An act of bankruptcy, by procuring the party's own goods to be taken in execution, is not committed till the actual seizure. *Belcher v. Gummow*, 9 Q. B. 873; 16 L. J., Q. B. 155; 11 Jur. 286.

**Bills of Exchange.**—Under 6 Geo. 4, c. 16, s. 3, a party procuring bills of exchange, his property, to be taken in execution with intent to defeat creditors, after the 1 & 2 Vict. c. 110, s. 12, committed an act of bankruptcy, though at the time when 6 Geo. 4, c. 16, passed, bills of exchange were not liable to be taken in execution. *Edwards v. Cooper*, 11 Q. B. 33.

**Judgment for Debt accruing Due—Execution levied after Accrual of Debt.**—In May, 1842, a tenant owed arrears of rent, and, on the pressing application of his landlord, executed a warrant of attorney for the amount of those arrears and of the current year's rent, upon the understanding that judgment was to be entered up thereon, and a *fi. fa.* delivered to the sheriff; but that it was not to be executed unless other writs against the tenant came to the sheriff's hands. In October, 1842, application was made to the tenant for payment of the rent, he being expressly informed that another year's rent had become due; and on that occasion he paid a sum on account, and undertook to pay the remainder before the Christmas following. In November, 1842, other writs against the tenant having come to the sheriff's hands, the *fi. fa.* issued on the judgment on the warrant of attorney was executed:—Held, that the giving of the warrant of attorney under the circumstances was not an act of bankruptcy by the tenant as a procuring of his goods to be taken in execution. *Gore v. Lloyd*, 12 M. & W. 463; 13 L. J., Ex. 366.

**Execution not at Instance of Debtor.**—A trader owed money to his brother, and the latter issued a *fi. fa.* and took the whole of the bankrupt's property. A commissioner considered that issuing the execution had not been at the instance of the bankrupt, and that, therefore, there had been no valid act of bankruptcy to support an adjudication under 12 & 13 Vict. c. 106, s. 67. On appeal the court refused to interfere with the discretion of the commissioner. *Boyd, Ex parte*, 31 L. J., Bk. 6; 6 L. T. 142—L. J.

#### d. Giving Money or Security to Petitioning Creditor.

**Assignees entitled to Recover.**—The defendants on whose petition a fiat had issued received a payment from the bankrupt, whereby they obtained more in the pound than his other creditors.

The fiat not having been proceeded in was annulled, and another fiat issued on the petition of a creditor whose debt was due before the payment made to the defendants:—Held, that this payment was an act of bankruptcy within 6 Geo. 4, c. 16, s. 8, in which the last fiat was sustainable, and that as no person had been appointed by the commissioners under that section to whom the money paid was to be returned by the defendants, the assignees of the bankrupt were entitled to recover it. *Ellis v. Russell*, 10 Q. B. 952; 16 L. J., Q. B. 428; 11 Jur. 821.

**Payment made without Knowledge or Consent of Debtor.**—An adjudication was made against a trader in 1861, which was afterwards annulled. Another adjudication was made in 1862. The act of bankruptcy on which the second adjudication was founded was the payment of 1,100*l.* to the party at whose instance the adjudication of 1861 was made, in settlement of his demand. The commissioner confirmed the adjudication of 1862. On appeal, the court (having called for other evidence than that which was before the commissioner) was of opinion that the payment of the 1,100*l.* not being proved to have been made by an agent on behalf or with the knowledge or assent of the bankrupt, was not a compounding with the petitioning creditor, within 12 & 13 Vict. c. 106, s. 71, and annulled the adjudication. *Scott Russell, In re*, 31 L. J., Bk. 37; 6 L. T. 138—L. J.

#### e. Assignments for Benefit of Creditors.

**Under old Law.**—A deed, whereby a trader conveys all his property in trust to divide amongst his creditors, is an act of bankruptcy. *Bourne, Ex parte*, 16 Ves. 149; *S. P., Smith, Ex parte*, 1 Ves. & B. 518; 2 Rose, 63.

— **Intent presumed.**—So it is an act of bankruptcy, although, in so doing, he did not intend to defeat or delay his creditors, as that being the necessary consequence of the assignment, he must, in law, be taken to have intended it. *Stewart v. Moody*, 1 C., M. & R. 777; 5 Tyr. 493.

— **Proviso for Avoidance.**—So, though the creditors with whom such deed was in the first instance concerted, afterwards, and when it was executed, changed their purpose, unknown to the bankrupt, and intended to set it up as an act of bankruptcy. And such deed is operative, though it contains a proviso to be void, if the trustees think fit. *Tappenden v. Burgess*, 4 East, 230; 1 Smith, 33.

— **Executed by Trader only.**—So, an assignment by a trader of all his estate and effects, for the benefit of all his creditors, executed by the trader, but not executed by the trustee or by any creditor, or further acted on, is an act of bankruptcy. *Botcherby v. Lancaster*, 3 N. & M. 383; 1 A. & E. 77.

— **Deed, whether Void for all Purposes.**—Proviso in a lease for re-entry, and that the lease should be void if the lessee assigned without license. The lessee by deed assigned all his property, real and personal, to trustees, for the benefit of his creditors, and was afterwards de-

**Act of Bankruptcy.**—Held, that the deed of assignment was an act of bankruptcy and void. *Wentley v. Bland*, 5 D. & R. 35; 5 B. & C. 128.

In October, 1852, E., a trader, assigned to the plaintiff his household furniture and effects at his premises, as a security for money lent, and in default of payment to seize and take possession of the property thereby assigned, and all other goods, chattels and effects which might be found on the premises. In January, 1853, E. assigned all his estate and effects to trustees for the benefit of his creditors. In the following February the plaintiff seized the goods at the premises of E., and in March a fiat of bankruptcy issued against E., the act of bankruptcy being the assignment of his estate and effects to trustees. In an action by the plaintiff against the assignees for selling the goods so seized by them:—Held, that though the assignment by E. of his estate and effects to trustees was void as against creditors, yet it operated to transfer to the assignees the property not included in the assignment to the plaintiff, and so defeated his title, which would otherwise have been valid by the seizure. *Carr v. Acraman*, 11 Ex. 566; 25 L. J., Ex. 90.

**Assignment of Bulk of Property.**—An assignment of the principal part of the assignor's property may be an act of bankruptcy, although not executed by the assignor spontaneously, if it appears that the provisions of the deed must necessarily have the effect of delaying and defeating his creditors. *Wensley, Ex parte*, 1 De G. & M. 273; 32 L. J., Bk. 23; 9 Jur., N. S. 415; 7 L. T. 518; 11 W. R. 241.

Where such an assignment was made to trustees one of whom was an accountant employed with a view to and under the assignment, upon trust out of the proceeds of the property in the first place to pay all costs, charges and expenses due or to become due to the assignor's solicitor, and the professional charges of the accountant trustee, and other expenses, and subject thereto to divide the proceeds rateably among the creditors who should execute the deed, and the deed recited that the assignor was not prepared to pay his debts in full:—Held, that the necessary effect of the deed was to defeat and delay the creditors, and that it was an act of bankruptcy. *Ib.*

**Execution of Assignment to be used in Case of Necessity.**—A trader, being pressed by a particular creditor, who had issued a fi. fa. against his goods, under which the sheriff had seized, executed an assignment of all his estate and effects for the benefit of his creditors, and, in the presence of the party to whom the assignment was made, gave it to his attorney, in order that it might be used, if circumstances should render it necessary, as an act of bankruptcy:—Held, that the deed operated as a valid act of bankruptcy. *Turner v. Hardcastle*, 11 C. B., 158; 31 L. J., C. P. 193.

**Under 24 & 25 Vict. c. 134.**—The registration of trust-deeds under 24 & 25 Vict. c. 134, ss. 192, 193, although in practice performed by the same officer, is distinct and has different operations; and where, for the want of the papers required by the orders, registration under the former section had been refused by the officer, and the applicant had registered the deed under s. 194:—

Held, that the registration did not prevent the deed, which was an assignment of all the debtor's property, from being an act of bankruptcy. *Morgan, Ex parte*, 1 De G., J. & S. 288.

**Assignment of Part of Property.**—A conveyance by a trader of part of his property for the benefit of his creditors, is not an act of bankruptcy, unless executed under circumstances of fraud; and mere conjecture of fraud, arising from extrinsic circumstances, will not be sufficient to affect the title under such conveyance. *Cattell v. Corral*, 4 Y. & C. 228.

A conveyance by a trader, for the benefit of his creditors, of his effects at a certain place is not an act of bankruptcy, unless it is shewn that he had no other effects. *Chase v. Goble*, 3 Scott, N. R. 245; 2 M. & G. 930.

**Evidence—Unstamped Deed.**—A deed of assignment for the benefit of creditors, not registered through want of the necessary assents, may be used, though unstamped, as evidence of an act of bankruptcy. *Gouldwell, In re, Squire, Ex parte*, 4 L. R. Ch. 47; 38 L. J., Bk. 13; 19 L. T. 272; 17 W. R. 40; overruling *Potter, Ex parte*, 3 De G., J. & S. 240; 34 L. J., Bk. 46; 11 Jur., N. S. 49; 11 L. T. 435; 13 W. R. 189.

**Partners—Separate Creditors.**—Where partners by deed, assigned all their partnership effects to trustees for the benefit of their creditors, and some of the separate creditors of one partner did not assent to it, the assignment was fraudulent and void, and an act of bankruptcy. *Eckhardt v. Wilson*, 8 T. R. 140.

A. and N. being in partnership, executed assignments of all their joint estate to mortgagees, and afterwards A. assigned all his separate estate and effects whatsoever, specifying them in detail, and "all other the estate and effects of him," A., unto a trustee to divide the proceeds arising from the sale amongst such of his separate creditors as should within one month become parties to and execute the deed. The deed was not registered under the Bills of Sale Act, 1854. Upon the day following the date of the last-mentioned deed a petition for adjudication was filed against A. and N., under which they were subsequently declared bankrupts, the acts of bankruptcy relied upon having been committed two or three days before the date of the last deed:—Held, that the last-mentioned deed was an act of bankruptcy, and a preference of separate creditors over the general body of creditors, and that the trustee under the deed was not entitled to the property as against the claims of the trustee under the bankruptcy. *McLean, Ex parte*, 24 L. T. 144.

**Separate Estate.**—One of two traders, in partnership, conveyed by deed his separate estate to trustees for the joint creditors of both; the joint creditors agreeing that the traders should continue in possession of their stock, and carry on business with a view to retrieve themselves; and that upon their paying 4s. 6d. in the pound by instalments, they should receive a general release:—Held, not an act of bankruptcy:—Held, also, that it was properly left to the jury to say, whether the deed was executed bona fide to enable the traders to retrieve themselves, or was executed with intent to defraud his sepa-

rate creditors. *Abbott v. Burbage*, 2 Bing. N. C. 444; 2 Scott, 656; 1 Hodges, 448.

A partnership which existed between A. and B. was dissolved by mutual consent. A., being separately possessed of freehold and leasehold estates, after the dissolution conveyed them to trustees for sale or mortgage, and empowered them to execute such conveyances as they should think fit, for the purpose of converting his estates into money, in order to enable him to carry on his trade, and to pay his creditors their debts; and it was agreed, that such conveyances might be made and executed by the trustees with or without the concurrence of A., and that they should be seised or interested in the money arising from such sale or mortgage. At the time this deed was executed, A. had stock in trade, and other personal effects to a considerable amount, independently of the partnership assets, which were not sufficient to pay the partnership debts. The trustees were not creditors of either A. or his partner. A. and his partner afterwards gave C. & Co., who were not creditors of either, a power of attorney to make demands of every description, to examine and settle all the accounts, together with other powers to act for them, they agreeing to ratify whatever should be done under it. A deed was afterwards prepared by A. and his trustees, for the purpose of conveying all his freehold and leasehold estates previously conveyed to D. & Co. to sell or mortgage, with a view to raise 130,000*l.*, and 40,000*l.* in negotiable bills of exchange, and to indemnify the drawers and acceptors; but these sums were not advanced, nor were the bills drawn, or any other act done under the latter deed.—Held, that neither the execution of the first conveyance to his trustees, nor the power of attorney, under these circumstances, constituted an act of bankruptcy by A. *Berney v. Davison*, 4 Moore, 126; 1 B. & B. 408.

So, where such partners, being in insolvent circumstances, stopped payment on the 15th of February, 1819, and dissolved their partnership on that day: and A. being separately possessed of freehold and leasehold estates, conveyed the whole of them on the same day, by indentures of lease and release, to trustees in trust for sale or mortgage, for the purpose of converting such estates into money, it being convenient to A. to raise money at an early period: and subsequently to this conveyance, A. and B. gave a power of attorney to C. & Co. to recover all debts which should be due to them, together with full powers to act for them:—Held, that these circumstances did not constitute an act of bankruptcy by A. *Berney v. Vyner*, 4 Moore, 322; 1 B. & B. 482.

The separate assignments by partners of their separate estates to trustees for the benefit of their creditors, one of which assignments is registered under the Bankruptcy Act of 1861, and the other not, do not operate as a bankruptcy of the firm so as to bring into operation the provision of the Bankruptcy Act of 1849, s. 171, as to set-off for mutual credits. *London, Bombay and Mediterranean Bank v. Narraway*, 15 L. R., Eq. 93; 42 L. J., Ch. 329; 27 L. T. 572; 21 W. R. 318.

## 2. Assignment of Debtor's whole Property.

### i. To Secure an Existing Debt.

**Generally.**—An assignment by a trader of all his estate, stock, and effects to one creditor is in VOL. I.

itself an act of bankruptcy, without any fraud on the part of the trader. *Siebert v. Spooner*, 1 M. & W. 714; 2 Gale, 135.

An assignment by a trader in insolvent circumstances of all his stock in trade to one creditor, is an act of bankruptcy. *Oriental Bank Corporation v. Coleman*, 3 Giff. 11; 30 L. J., Ch. 635; 4 L. T. 9; 9 W. R. 432.

The law that a conveyance of a man's whole property to secure a past debt, whether he is a trader or a non-trader, is an act of bankruptcy, has not been altered by the Bankruptcy Act, 1869. *Wood, In re, Luckes, Ex parte*, 7 L. R., Ch. 302; 41 L. J., Bk. 21; 26 L. T. 113; 20 W. R. 403.

**What is whole Property.**—Where a debtor, in consideration of a pre-existing debt, executes a bill of sale which is so extensive as to prevent him from carrying on his trade, and is calculated, to his knowledge, to defeat and delay his creditors, he thereby commits an act of bankruptcy, and the conveyance is void as against his assignees. *Young v. Fletcher*, 4 F. & F. 1081.

A tradesman mortgaged the freehold house in which he carried on his trade, being his only real estate, to secure an existing debt of 1,100*l.*, for which he was liable as surety, which exceeded the value of the mortgaged property. His other property was of very trifling amount. He was at the time liable as surety on a promissory note for 2,000*l.*, and afterwards the other makers having become insolvent, he was called upon for payment, and became bankrupt:—Held, that the mortgage was void as against the assignees in bankruptcy, as being an assignment made to defeat or delay creditors. *Goodricke v. Taylor*, 2 De G., J. & S. 135; 10 Jur., N. S. 414; 10 L. T. 113; 12 W. R. 632. Affirming, 2 H. & M. 380; 9 L. T. 604; 12 W. R. 301.

A trader conveyed all his property, except his furniture and book debts, to a creditor for securing a previously-existing debt:—Held, that, notwithstanding the reservation, the deed was fraudulent and void, inasmuch as it placed the bulk of his property out of the reach of his other creditors. *Fozley, Ex parte, Nurse, In re*, 3 L. R., Ch. 515; 13 L. T. 862; 16 W. R. 831.

**Pension not Assigned.**—A debtor executed as security for an antecedent debt of 1,500*l.*, an assignment which included all his property of any appreciable value, except a pension of 10*s.* 6*d.* a day to which he was entitled as a retired servant of the East India Company:—Held, that as this pension would not pass to a trustee in bankruptcy, and could not be taken in execution by a creditor, it constituted no substantial exception from the assignment, which, being an assignment of substantially the whole of the debtor's property, was an act of bankruptcy. *Hawker, Ex parte, Keely, In re*, 7 L. R., Ch. 214; 41 L. J., Bk. 34; 26 L. T. 54; 20 W. R. 322.

**Lease and Book Debts not Assigned.**—A trader assigned all her stock-in-trade, fixtures, goods, chattels and effects, in or about her place of business, to secure an antecedent debt of 200*l.* The bill of sale included goods subsequently acquired for the purposes of the business, and was expressed to be in consideration of further future advances, but contained no agreement for making such advances. The lease of

the shop and the book debts were not included in the bill of sale. Upon the trader's bankruptcy shortly afterwards, the excepted property realized about the same amount as that included in the bill of sale:—Held, that the lease and book debts formed a substantial exception, and that the bill of sale was not void as an assignment of the debtor's whole property on the eve of bankruptcy. *Bolland, Ex parte, Price, In re*, 41 L. J., Bk. 60; 20 W. R. 862.

**Motive for Assignment Immaterial.]**—Where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is a further advance, it is not a question whether the further advance is great or small, but whether there was a bona fide intention of carrying on the business. *Ellis, Ex parte, Ellis, In re*, 2 Ch. D. 797; 45 L. J., Bk. 159; 34 L. T. 705—C. A.

**Bill of Sale—Renewal.]**—An advance of 55l. was made to a trader, on the security of bills of sale of all the goods and effects of the trader, which were valued at 600l. There was an agreement between the lender and the trader that the bills of sale should be from time to time renewed, so as to render it not necessary to register them. The bills were accordingly renewed every nineteen days, and this was done three times. The trader then became bankrupt:—Held, that the last bills of sale were invalid, as constituting an act of bankruptcy. *Cohen, Ex parte, Sparke, In re*, 7 L. R., Ch. 20; 41 L. J., Bk. 17; 25 L. T. 473; 20 W. R. 69.

A bill of sale of the whole of the mortgagor's property, given by way of renewal of a former one not registered, is, if no fresh advance is made by the mortgagee, an act of bankruptcy, and void, as against the trustee in bankruptcy of the mortgagor, notwithstanding its registration in due time. *Stevens, Ex parte, Stevens, In re*, 20 L. R., Eq. 786; 44 L. J., Bk. 136; 33 L. T. 135; 23 W. R. 908.

The forbearance of the grantee under an unregistered bill of sale of the whole of the grantor's property, given for value, to seize the property comprised in it is not, as against the trustee in bankruptcy of the grantor, good consideration for the giving of a new bill of sale in lieu of the first, but the new bill of sale given under such circumstances without any fresh advance to the grantor is an act of bankruptcy, and void as against the trustee in bankruptcy of the grantor. *Payne, Ex parte, Cross, In re*, 11 Ch. D. 539; 40 L. T. 296; 27 W. R. 368.

**Consideration wrongly stated.]**—A. being indebted to several creditors, assigned to one of them, B., all his property by a bill of sale, nominally for further advances of goods, but really for the debt already due. Three days later, C., another creditor, applied to A. for payment of his debt, and was told that all the property on the premises was already assigned to B. for 90l. which he owed him. C. then accepted goods for which he gave no receipt. On the fourth day, B., who had made no further advance of goods, took possession under the bill of sale, and sold off soon afterwards. W., also a creditor, filed a petition for adjudication of bankruptcy against A., but which was not proceeded with, A. having agreed to execute a deed of assignment to trus-

tees of all his estates and effects (being the proceeds of the bill of sale and the furniture). In an action by the trustees against C. for the goods received by him:—Held, first, that the bill of sale to B. was an act of bankruptcy. *Topping v. Keynall*, 16 C. B., N. S. 258; 33 L. J., C. P. 225; 10 Jur., N. S. 774; 10 L. T. 526; 12 W. R. 756.

Held, secondly, that the statement by A. to C. was notice to C. of an act of bankruptcy. *Id.*

Held, thirdly, that the trustees under the deed were entitled to recover the goods assigned to C. *Id.*

**From Sheriff.]**—A trader being in difficulties, and having five executions against him, all his goods were conveyed to the defendant by a bill of sale from the sheriff, with an understanding that they should remain in A.'s premises to enable him to repurchase them; the jury having found that the object of the transaction was not merely to relieve A. from a forced sale of his goods, but also to protect them from the demands of other creditors:—Held, that the transaction was an act of bankruptcy. *Graham v. Furber*, 14 C. B. 410; 2 C. & P. 452; 23 L. J., C. P. 51; 18 Jur. 226.

**Security for Judgment Debt.]**—Execution was levied upon goods on the premises of a trader, who was in insolvent circumstances and had ceased to carry on his trade, for a debt exceeding 50l. The trader executed a bill of sale, by which he mortgaged all his stock in trade and effects to secure the judgment debt, and the sheriff withdrew:—Held, that whatever might have been the case before the passing of the Bankruptcy Act, 1861, s. 73, the bill of sale was an act of bankruptcy, for it prevented the creditors from treating the seizure and sale as an act of bankruptcy and obtaining a distribution of the property seized by means of an adjudication in bankruptcy; and that any benefit which might be expected to arise from postponing a forced sale was a benefit only to the execution creditor, and not to the rest of the creditors, who took no benefit under the security. *Woodhouse v. Murray*, 2 L. R., Q. B. 634; 36 L. J., Q. B. 289; 16 L. T. 559; 15 W. R. 1109; 8 B. & S. 464. Affirmed, 4 L. R., Q. B. 27; 38 L. J., Q. B. 28; 19 L. T. 570; 17 W. R. 206; 9 B. & S. 720—Ex. Ch.

**Partners—Assignment of all Personal Property of One Partner.]**—One of two partners in trade assigned the whole of his separate assets, and gave a power of attorney to assign all his personal property as security for a previously-existing separate debt. The partnership was at this time insolvent:—Held, that the execution of the deed was an act of bankruptcy, notwithstanding the fact that none of the partnership assets were in terms included in the deed. *Trevor, Ex parte, Burghardt, In re*, 1 Ch. D. 297; 45 L. J., Bk. 27; 33 L. T. 756; 24 W. R. 301.

**Assignment of Partnership Assets—Separate Debt.]**—It is a fraud upon the creditors of a firm for one of the partners, who knows that the firm is insolvent, to assign the partnership assets as security for his own private debt, or for future advances to be made to himself. Such an assignment necessarily tends to defeat the creditors of the partnership and is void as an act of bankruptcy. *Snobball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

Such an assignment will be void altogether as an act of bankruptcy, notwithstanding the fact that it is made a security as well for partnership as for private debts. *Id.*

ii. *To Secure an Existing Debt and Present Advances.*

Seventeen months before his bankruptcy a trader assigned by deed all his estate and effects by way of security for the repayment of a sum due, and a further advance of a moderate amount:—Held, that, under the circumstances, the deed was not void under 13 Eliz. c. 5, or as an act of bankruptcy. *Allen v. Bonnett*, 5 L. R., Ch. 577; 23 L. T. 437.

Semble, also, that even if there had not been a further advance, the lapse of twelve months before the bankruptcy prevented the deed from being invalidated as an act of bankruptcy. *Id.*

**Advance to pay Costs of Assignment.**—An assignment by a trader of all his property, book debts and stock in trade, in consideration of an old debt of 530*l.*, the only present advance being 20*l.* to pay the trader's attorney the costs of the assignment, amounts to a fraud in the eye of the law, and is an act of bankruptcy, notwithstanding that it was in fact, as between the parties to it, a perfectly fair and bona fide transaction. *Penson v. Moon*, 15 L. T. 444.

Book debts due to the bankrupt paid to a third party under such an assignment belong to the assignee of the bankruptcy, and may be recovered by him in an action for money had and received. *Id.*

**Right to Seize all after-acquired Property.**—A trader, in consideration of a past debt of 240*l.* and a present advance of 200*l.*, conveyed by deed substantially the whole of his property, giving the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer:—Held, that inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily defeated and delayed his creditors, though without fraud in fact, it constituted an act of bankruptcy. *Graham v. Chapman*, 12 C. B. 85; 21 L. J., C. P. 173.

A bill of sale to secure an existing debt and a present advance, which assigns the whole of the grantor's property, including that which he may purchase by means of the advance, is not necessarily void as an act of bankruptcy. *Graham v. Chapman* (12 C. B. 85) on this point overruled. *Hawswell, Ex parte, Hemingway, In re*, 23 Ch. D. 626; 52 L. J., Ch. 737; 43 L. T. 742; 31 W. R. 711—C. A.

— **With an exception.**—A bill of sale including all the existing property of a trader and containing a power to seize all after-acquired property with an exception, was made by him in favour of a creditor, in consideration partly of an existing debt and partly of a sum advanced by such creditor. This advance consisted of a sum paid to another creditor in satisfaction of a debt secured by a previous bill of sale over the same property, for the purpose of redeeming the property which he had already seized under such bill. More than twelve months after the date of the previous bill of sale proceedings were taken

for a liquidation of the debtor's affairs by arrangement, and a trustee was appointed:—Held, that the later bill of sale was not an act of bankruptcy. *Lomas v. Buxton*, 6 L. R., C. P. 107; 40 L. J., C. P., 150; 24 L. T. 137; 19 W. R. 441.

**Promise to give Bill of Sale.**—When a sum of money is advanced upon the faith of a promise by the debtor to give a bill of sale of his property, the sum so advanced is to be considered as advanced upon the security of the bill of sale; but in such a case the promise must be an absolute one. *Fisher, Ex parte, Ash, In re*, 7 L. R., Ch. 636; 41 L. J., Bk. 62; 26 L. T. 931; 20 W. R. 849.

When a doctor on the eve of bankruptcy assigns all his property to a creditor to secure a past debt as well as a fresh advance, the smallness of the fresh advance, although not necessarily making the assignment an act of bankruptcy, is strong evidence that the advance was made, not to enable the debtor to continue his trade, but to secure the past debt. *Id.*

A trader applied to a creditor, who had previously advanced him 600*l.*, for a further advance of 100*l.*, which was accordingly made on the debtor giving a conditional promise that if he did not repay the 100*l.* within ten days he would make an assignment of all his property to the creditor to secure both the past and fresh advance. Default was made in payment, and the assignment was executed. Shortly afterwards the debtor became bankrupt, and the property was sold for about 700*l.*:—Held, that, having regard to the conditional nature of the promise and the smallness of the fresh advance, the assignment was an act of bankruptcy and void against the creditors. *Id.*

**Bill of Exchange—Payment by Drawer.**—Payment of bills by the drawer at the request of the acceptor, who, in consideration, assigns to the drawer all his property to secure the amount and also certain past debts, is a substantial advance, and prevents the assignment from being an act of bankruptcy. *Reed, Ex parte, Tweddell, In re*, 14 L. R., Eq. 586; 26 L. T. 558; 20 W. R. 622.

Therefore, when, at the request of T., I., M. & Co. paid the amount due on certain bills drawn by them and accepted by T., and T. assigned to them his interest in certain marine engines and machinery (which constituted his whole property), as security for the moneys due on the bills, and also for other moneys due from him to them:—Held, that the assignment was not an act of bankruptcy. *Id.*

**Further Supply of Goods.**—A publican being indebted to his spirit merchants in 668*l.*, ordered from them goods to the value of 92*l.* 11*s.*, part of which was for immediate delivery and the rest in bond; and at the same time paid them on account 50*l.* in cash, and a cheque for 100*l.* The merchants despatched the goods ordered for delivery, which were of the value of 52*l.*, but before they reached their destination the cheque was dishonoured. The merchants stopped the goods in transitu. Thereupon the customer paid the amount of the cheque, but was informed by the merchants that they would not release the goods in transitu, or supply him with more goods, unless he gave security for his account. He then, in consideration of their releasing the goods,

torney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt; the attorney having advised him to remain at the office, until it was ascertained whether the creditors would engage to give him a safe conduct; the trader remained at the office accordingly, for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting:—Held, that what passed between the attorney and the trader was admissible in evidence, upon an issue whether the latter had committed an act of bankruptcy on that occasion. *Bramwell v. Lucas*, 4 D. & R. 367; 2 B. & C. 745.

#### —Evidence—Subsequent Conduct of Debtor.]

—Upon an issue directed to try whether P. had committed an act of bankruptcy on a given day, it appeared that on the preceding day he sent a letter from his dwelling-house at Greenwich to his place of business addressed to his son, stating that he was unable to meet his engagements, and desiring that he might be denied to any creditor who might call, and immediately after despatching this letter he left home, and remained absent during the whole of that and the following day. A witness proved that P. called on the day in question at her brother's house in London; that he expressed to her an apprehension of being sent to the Fleet, and stated that he was in no hurry to get home, and would not go very early, as he had creditors who would lay hold of him, and that he did not leave till after dark. The jury were told, that if they believed the statements made by the witness, P. on that occasion committed an act of bankruptcy; they said they did believe the witness, but they did not think P. spoke *bonâ fide*:—Held, that P. had committed an act of bankruptcy; and that evidence of his conduct and conversations, on the day subsequent to the date mentioned in the issue, was not admissible to explain his conduct on that day. *Johnston v. Woolf*, 2 Scott, 372.

—**Question of Fact.**—Whether a departing the dwelling-house is accompanied with an intent to delay a creditor, is a question of fact for a jury to decide upon all the circumstances. *Aldridge v. Ireland*, 1 Taunt. 273, n.

#### c. Otherwise Absenting.

**From what Place.**—Absenting, unless from the place of abode or place of business, or to avoid a creditor, is not an act of bankruptcy. *Bernasconi v. Farebrother*, 10 B. & C. 549; 5 M. & R. 364.

But a trader does commit an act of bankruptcy by absenting himself from some place at which he would, in the ordinary course of his life and business, be expected to be found, or at which he has appointed to meet particular creditors. *Id.*

Where a man, in the habit of frequenting the Exchange to collect news, left it at the sight of a creditor, desiring a friend to say he was not there, it is an act of bankruptcy. *Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.

**Intention must be Absolute.**—If a trader, fearful that he may receive an unpleasant letter from a creditor, quits his house, and desires the letter to be forwarded to him at a turnpike; and if the letter was unfavourable, it was not his intention to return; but, if favourable, it was his intention to proceed on his regular business; and the letter which is favourable is forwarded, and he proceeds on his regular business, it is not an act of bankruptcy. *Fisher v. Boucher*, 10 B. & C. 705.

**What an Absenting.**—A creditor called upon a bankrupt by appointment. The bankrupt left the room and did not return, and his wife told the creditor he had gone out:—Held, that this was sufficient evidence to warrant the jury in inferring that the bankrupt left the house for the purpose of avoiding his creditor. *Charrington v. Brown*, 11 Moore, 341.

A trader left a message at his house for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and stay till dinner time:—Held, that it was for the jury to consider, whether he absented himself to delay the creditor; and this evidence warranted their conclusion that he did not. *Vincent v. Prater*, 4 Taunt. 603; 2 Rose, 275.

Where a trader went to his neighbour, and told him that he expected to be arrested, and while he remained there, was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch; and when told that the officer had gone past his house, and had left the street, immediately returned home:—Held, that this was an act of bankruptcy, within the words "otherwise absenting himself to the intent to delay creditors," although it appeared not only that no creditor was delayed, but that none could possibly be delayed. *Chenoweth v. Hay*, 1 M. & S. 676; S. C., nom. *Chenoweth v. Hayley*, 2 Rose, 137.

Where a trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt; the attorney having advised him to remain at the office until it was ascertained whether the creditors would engage to give him a safe conduct; the trader remained at the office accordingly for upwards of two hours, to avoid being arrested by some or one of his creditors, until after the attorney had attended at and returned from the meeting:—Held, that he had committed an act of bankruptcy on that occasion. *Bramwell v. Lucas*, 4 D. & R. 367; 2 B. & C. 745.

Where a trader, upon being arrested, escaped from the officer, and fled into the house of another, and was pursued by the officer, and inquired for at the house, but was denied, and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and when it was dark returned home to his own house, and gave directions to deny him to any one who called, and continued nearly a month in his bedchamber:—Held, that this constituted an act of bankruptcy, under the words

"otherwise absenting himself." *Bayley v. Shofield*, 1 M. & S. 338; 2 Rose, 100.

A trader abstaining from going to a particular place through the apprehension of process (whether such apprehension is well-founded or not), thereby absents himself with intent to delay his creditors, and commits an act of bankruptcy. *Robson v. Rolis*, 2 M. & Scott, 786; 9 Bing. 648.

— **Closing Doors and Windows.**—If bankers close the doors and windows of the shop, it seems to be an act of bankruptcy by absenting. *Cumming v. Bailey*, 6 Bing. 363; 4 M. & P. 36.

— **Remaining Absent.**—One of three partners, bankers, left his house at Bath, and went to London to raise funds; and having failed in his efforts to do so, he remained there three days:—Held, that the jury were warranted in finding that he absented himself with an intent to delay his creditors. *Ib.*

Where a trader at B. left her dwelling-house and went to London, for the purpose of persuading a creditor to withdraw his execution, and left word of the place to which she had gone, but, failing to procure the withdrawing of the execution, did not return to her dwelling-house:—Held, that this was no act of bankruptcy. *Aldridge v. Ireland*, 3 Dougl. 397; 1 Taunt. 273, n.

— **Breaking an Appointment.**—The mere failure to keep an appointment made with a creditor is not an act of bankruptcy. *Key v. Shaw*, 1 M. & Scott, 462; 8 Bing. 320; *S. P.*, *Toleman v. Jones*, 9 Moore, 24; *S. C.*, nom. *Tucker v. Jones*, 2 Bing. 2; *Lees v. Marton*, 1 M. & Rob. 210.

Where a man, in the habit of attending the Royal Exchange, broke an appointment he had made with a creditor to meet him there; or (being the proprietor of a theatre) retired behind the scenes to avoid a sheriff's officer, at the same time giving orders to be denied to him:—Held, that each of these was an act of bankruptcy. *Gimingham v. Laing*, 2 Marsh. 236; 6 Taunt. 532; 2 Rose, 472.

Where a debtor, upon applications made to him by creditors for payment of their debts, made appointments with them to meet him at specified times and places with reference to a settlement of their demands, but failed to keep such appointments:—Held, that the failures to keep the appointments constituted acts of bankruptcy, although the places at which the appointments were made were not his usual places of business. *Russell v. Bell*, 10 M. & W. 340.

A trader made an appointment with his creditor to call at the creditor's house on a particular day to make arrangements for taking up the trader's acceptance, falling due on that day; the trader failed to keep the appointment, and did not pay any money on account of the bill:—Held, the not keeping the appointment was an act of bankruptcy. *O'Neill, In re*, 9 Ir. Ch. Rep. 279.

The mere fact that a trader has failed to keep a promise which he has made to a creditor, that he will call at a specified time and pay him his debt, is not sufficient evidence of an absenting himself with intent to defeat or delay his creditors. *Meyer, Ex parte, Stephany, In re*, 7 L. R., Ch. 188; 41 L. J., Bk. 33; 25 L. T. 733; 20 W. R. 173.

A debtor promised to call at an appointed time on a creditor and pay the debt. Having failed to procure the money he did not call; but he was to be found at his own place of business:—Held, that the failure to keep the appointment did not constitute an absenting himself with intent to defeat or delay the creditor, and that no act of bankruptcy had been committed. *Ib.*

— **Absence on Business.**—A trader absented himself for three or four days from his place of business, and in his absence a bill of exchange was presented for payment and was dishonoured; and application was also made for payment of other bills. The trader was adjudicated bankrupt, the act of bankruptcy being this absence with intent to delay his creditors. A commissioner in the country annulled the bankruptcy, the bankrupt swearing that his absence was occasioned by an attempt of his to get up evidence of perjury against one of his workmen, and to obtain pecuniary assistance. Pending this dispute as to the adjudication, the trader signed a declaration of insolvency. On appeal, the decision of the commissioner was affirmed, on the ground that there was not sufficient evidence to support the adjudication; but the court refused to allow the trader his costs, as his declaration of insolvency while applying to annul an adjudication was inconsistent with an honest desire for the equal distribution of his assets. *Barney, Ex parte*, 32 L. J., Bk. 41; 7 L. T. 488.

Two traders in partnership left their shop, and told their shopman that they were going out to endeavour to get some bills of exchange discounted, and directed him to say that they were not in the way, or to make some excuse for them in case a creditor should call. On that and the following day a creditor called, when they were both at home, and desired to see either one or the other of them; when the shopman denied them without being authorized by them so to do:—Held, that the jury were warranted in concluding that they absented themselves with an intent to delay their creditors. *Capper v. Desanges*, 3 Moore, 4; *S. C.*, nom. *Deffe v. Desanges* 8 Taunt. 671.

— **Evidence as to Reason for Absenting.**—A petition for adjudication against two partners alleged, as the act of bankruptcy, that they had absented themselves with intent to defeat or delay their creditors. This petition was directed to be heard forthwith. One had gone away only to take his wife and children to Paris, and returned immediately. He appeared when the petition was heard, admitted insolvency, but opposed the adjudication, stating that he wished to present a petition for liquidation, and he tendered evidence; but the registrar, on learning that it only related to the circumstances of his going abroad, disregarded it as immaterial, and adjudged the partners bankrupts:—Held, that this order could not be sustained, for that the 65th rule of the Bankruptcy Rules, 1870, only applies where the debtor is keeping out of the way so that the ordinary course of proceedings cannot be taken; and that, if he appears, he is entitled to insist on the proceedings being conducted in the ordinary course. *Lopez, Ex parte, Brelaz, In re*, 6 L. R., Ch. 894; 25 L. T. 403; 19 W. R. 1106.



#### d. Beginning to keep House.

**Order to Deny.]**—A general order to be denied to all comers, and a denial accordingly to some one in particular, is sufficient to constitute an act of bankruptcy. *Lloyd v. Heathcote*, 5 Moore, 129; 2 B. & B. 388; *S. P., Mucklow v. May*, 1 Taunt. 479.

But an order to deny, without an actual denial, is not sufficient. *Fisher v. Boucher*, 10 B. & C. 705; *S. P., Wydown's case*, 14 Ves. 86.

Where a trader, being under apprehension of arrest, gave directions to his servants to deny him in case A., a sheriff's officer, called:—Held, that the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house. *Ib.*

An order to deny, with any act done, as retreating to an unusual part of the house, is an act of bankruptcy. *Fisher v. Boucher*, 10 B. & C. 705.

And if a trader withdraws from one part of his house where he has before usually sat, and where there was free access to him, to a more retired part of it, to avoid personal application for money, by means whereof his creditors are prevented from importuning him; this will be an act of bankruptcy. *Dudley v. Vaughan*, 1 Camp. 271; 9 East, 491, c.

An order given to the servants of a trader to deny him, on the ground of being busy, is sufficient to constitute an act of bankruptcy. *Stafford v. Clarke*, 1 C. & P. 27.

But if a trader directs his servant, that if any one should come whilst he was at dinner, or engaged in business, she should deny him:—Held, that such instructions did not amount to a direction for a general denial; and therefore, although a creditor called, and was denied, it was no act of bankruptcy. *Shew v. Thompson*, Holt, 159.

Nor, in a similar case, where the trader knew of the coming of a particular creditor. *Smith v. Currie*, 3 Camp. 349; 1 Rose, 364.

Where a trader ordered his servant to say, if any creditors called, that he was not at home, and he was accordingly denied, but was in bed ill at the time:—Held, that it was properly left to the jury, whether this was a beginning to keep house with an intent to commit an act of bankruptcy; and that they were warranted in finding that it was. *Lazarus v. Waithman*, 5 Moore, 313.

**Acquiescence in Denial.]**—A trader, having been denied to a creditor who called for money, was, after a little time, seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward, said he was not at home:—Held, that a jury was properly directed to consider whether the trader had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely to meet a creditor, to a more retired part. *Key v. Shaw*, 8 Bing. 320; 1 M. & Scott, 462.

If a trader hears himself denied to a creditor by one of his family, and he does not come forward, and his remaining quiescent is from an intention to delay the creditor, it is an act of bankruptcy, though he has given no direction to be denied. *Smith v. Moom*, M. & M. 458.

**Act of Bankruptcy is complete when Denial is**

**made.]**—Where the order to be denied is on one day, and the denial on another, the act of bankruptcy is on the latter day. *Hawkes v. Sands*, 3 Doug. 429.

**Denial by shutting up Doors.]**—An act of bankruptcy by beginning to keep house, may be by closing the doors, without change of place or denial to creditors. *Cumming v. Bailey*, 6 Bing. 363; 4 M. & P. 36.

If bankers close the doors and windows of the bank, and their customers cannot obtain admission, and the jury find that they are so closed as to exclude the customers, and the bankers remain within, it is an act of bankruptcy by beginning to keep house. *Ib.*

**By Partners.]**—Where one of several partners in a bank, who resided at the place of business, and was the only partner who transacted the business (the others residing at a distance), shut up the banking-house, and absented himself from it and stopped payment:—Held, that this was not evidence of a joint act of bankruptcy by all three. *Mills v. Bennett*, 2 M. & S. 556; 2 Rose, 269.

**Denial at unseasonable Times.]**—It is not an act of bankruptcy for a debtor to cause himself to be denied to a creditor calling by the debtor's appointment for payment on a Sunday. *Preston, Ex parte*, 2 Rose, 21; 2 Ves. & B. 311.

So, a denial, at a late hour, after retirement to rest, is not an act of bankruptcy. *Hughes v. Gilman*, 10 Moore, 480; 2 C. & P. 32.

If a trader is denied to a clerk of a creditor, at his shop, it appearing by the evidence that the shop was shut up for the evening, but at an earlier hour than usual; it is proper to be left to the jury to say, whether the bankrupt had himself denied, to delay his creditor; or whether it was because the clerk called at an unseasonable hour. *Ib.*

**At what Place.]**—A creditor has a right to call upon his debtor for money due to him, at the lodgings of the latter, or any other place where he knows he may be found, although it is not his place of business; and a denial to a creditor there is equally an act of bankruptcy, as though he were denied at his place of business. *Park v. Prosser*, 1 C. & P. 176.

Although the debtor is always accessible at his place of business in London. *Ib.*

Where a country trader was in the habit of coming up occasionally to London, and staying a day or two at a friend's house, where he wrote his letters, and used to order goods to be sent to him there; a creditor of his lived in the same street; he told his friend not to inform the creditor that he was in town, because the latter would be asking him for his money; and shortly afterwards the creditor called at the house upon business, whereupon the bankrupt went into a back warehouse for ten minutes or a quarter of an hour, to avoid seeing him:—Held, that this was a beginning to keep house. *Curtis v. Willes*, 4 D. & R. 224; R. & M. 58; 1 C. & P. 211.

**To what Creditor.]**—The denial should be to a creditor; but a denial to several persons, who a witness proved had called frequently, and who he believed were creditors, but could not

in fact say whether they were or not, is evidence to go to the jury. *Jameson v. Eamer*, 1 Esp. 381.

A denial to a collector of queen's taxes is an act of bankruptcy; as a denial to him is equivalent to a denial to any other creditor. *Sanderson v. Laforest*, 1 C. & P. 46; *S. P.*, *Jeffer v. Smith*, 2 Taunt. 401; 1 Rose, 117.

So, a denial to the collector of church and highway rates, who called for assessments due from him, after he had given a general order to his wife to be denied to all comers, is an act of bankruptcy. *Lloyd v. Heatheote*, 5 Moore, 129; 2 B. & B. 388.

It has been held not to be an act of bankruptcy in a trader who denies himself, when at home, to a creditor who merely demands payment of a debt, but does not ask to see him personally. *Dudley v. Vaughan*, 1 Camp. 271; 9 East, 491.

The denial to a creditor who called, not for money, but to buy goods, meaning to take his debt out in that way, is an act of bankruptcy. *Harris, Ex parte*, 2 Rose, 67.

A denial to a clerk of a creditor, who only asks to see the debtor, but does not ask for money, is an act of bankruptcy, if in fact the clerk did, to the knowledge of the debtor, call for money. *Hughes v. Gilman*, 10 Moore, 480; 2 C. & P. 32.

If a trader denies himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the particulars of it, is dishonoured, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him. *Bleasby v. Crossley*, 3 Bing. 430; 2 C. & P. 213.

So is a denial to a servant, calling for a debt by the direction of the acknowledged agent of the creditor, and by the appointment of the debtor. *Bamford, Ex parte*, 15 Ves. 449.

A trader bought goods to be paid for by bill. A few days after the goods had been delivered the seller called and demanded a return of his goods, and at the same time threatened to have the trader arrested for swindling in taking in the goods when he knew he was in insolvent circumstances. He requested to see the trader, who refused to see him:—Held, not sufficient to raise a presumption of a beginning to keep house with intent to delay a creditor, so as to constitute an act of bankruptcy. *Clements v. McKibben*, 2 H. & N. 62.

### e. Lying in Prison or Escaping therefrom.

**Before 6 Geo. 4, c. 16.]**—The lying in prison under 21 Jac. 1, c. 19, s. 2, meant two months of actual uninterrupted imprisonment. *Barnard v. Palmer*, 1 Camp. 509.

Where a person lay in prison two months for debt, subsequently to a criminal process which had been discharged:—Held, that this constituted an act of bankruptcy, though it did not appear that he had personal notice of his discharge. *Rex v. Page*, 3 Moore, 666; 1 B. & B. 308; 7 Price, 616.

Where a person was arrested, but on account of illness was permitted to remain a few days in his own house, in the custody of the officer's follower, who was not named in the warrant, but who kept the key of the house in his possession, and he was then removed to gaol, where he continued for the remainder of two months:—Held, that this was a legal imprisonment, so as to con-

stitute an act of bankruptcy. *Stevens v. Jackson*, 1 Marsh. 469; 6 Taunt. 106; 4 Camp. 164; 2 Rose, 285.

**For what Debt.]**—A penalty due to the crown was a debt within the 21 Jac. 1, c. 19, s. 2; and, therefore, where a trader lay in prison more than two months, being unable to pay Exchequer penalties for smuggling, he committed an act of bankruptcy. *Cubb v. Symonds*, 5 B. & A. 516.

**When Act of Bankruptcy complete.]**—The act of bankruptcy, by lying in prison twenty-one days, did not relate to the first day of imprisonment, under the 6 Geo. 4, c. 16, s. 5, but only to the last of them. *Moor v. Newman*, 6 Bing. 556; 4 M. & P. 333; *S. P.*, *Higgins v. M. Adam*, 3 Y. & J. 1; *Tucker v. Barrow*, 3 C. & P. 85; M. & M. 137.

Where a trader was arrested on the 20th of March, committed to prison on the 21st of April, and discharged from prison on the 26th of May:—Held, that an adjudication of bankruptcy against him upon a petition filed on the 20th of May in the following year could not be supported, such lying in prison not having been an act of bankruptcy within twelve months previously to the filing of the petition, within 12 & 13 Vict. c. 106, s. 69. *Wallace v. Blackwell*, 3 Drew. 538; 25 L. J., Ch. 644; 2 Jur., N. S. 656.

**Imprisonment under Ca. sa. and Warrant.]**—A trader was taken in execution under a ca. sa., and whilst in the custody of the sheriff's officer was taken under warrant on a charge of felony. He remained in the county gaol under the ca. sa. and warrant for more than twenty-one days:—Held, that this was a sufficient lying in prison to constitute an act of bankruptcy. *Crabb, Ex parte*, 8 De G., Mac. & G. 277; 25 L. J., Bk. 45; 2 Jur., N. S. 628.

## 3. ACTS OF BANKRUPTCY RELATING TO THE PROPERTY OF THE DEBTOR.

### a. Generally.

**Under 6 Geo. 4, c. 16, similar to 12 & 13 Vict. c. 106.]**—The words "either within this realm or elsewhere" were inserted, because under 21 Jac. 1, c. 19, a person resident in India, and trading there, drawing bills upon England for the value of other bills sent thither, did not commit an act of bankruptcy by assigning, while resident in India, all his effects in trust for creditors. *Inglis v. Grant*, 5 T. R. 530.

The word "fraudulent" applies to each of the words "gift," "delivery," and "transfer." *Cook v. Caldecott*, 4 C. & P. 315; M. & M. 522.

The word "delivery" is of very general signification; but, being connected with the words "gift or transfer," it seems that, in interpretation, it must be confined to transactions of the same nature. *Cotton v. James*, M. & M. 273; 3 C. & P. 505.

**Property or Interest must pass.]**—A delivery of goods to be an act of bankruptcy within 12 & 13 Vict. c. 106, s. 67, must pass, or purport to pass, some property or interest in the goods. *Leitt v. Beeston*, 4 L. R., Ex. 159; 38 L. J., Ex. 89; 20 L. T. 371; 17 W. R. 620.

**Deed not Void against future Creditors.]**—A

deed for the transfer of a trader's property is not void as against future creditors, although the execution of it is an act of bankruptcy. *Oswald v. Thompson*, 2 Ex. 215; 17 L. J., Ex. 234.

**Deed must be read as a whole.**—Upon the question whether the execution of a deed is an act of bankruptcy, one part of it cannot be separated from the rest. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

**Partners.**—If one only of several partners executes a deed, which on the face of it purports to convey for himself and the other partners all their personal property, the deed operates to convey the share of that one, and where one of two partners executed such an assignment of the partnership property before, and the other did not execute it until after a fiat in bankruptcy had issued:—Held, in the absence of anything to shew that the deed was delivered as an escrow, that the former had committed an act of bankruptcy. *Bowker v. Burdekin*, 11 M. & W. 128; 12 L. J., Ex. 329.

An assignment by one of two insolvent partners of all his interest in the partnership assets to the other, in consideration of a covenant by the latter to pay all the partnership debts, is an act of bankruptcy, and is fraudulent and void as against their joint creditors. *Mayou, Ex parte*, 11 Jur., N. S. 433; 12 L. T. 254; 13 W. R. 629—C. A.

Where one partner makes a fraudulent grant by deed to another partner, it is an act of bankruptcy in the former, but not in the latter. *Whitwell v. Thompson*, 1 Esp. 68.

**Power to sell Debtor's Goods.**—McF., shortly before being made a bankrupt, being indebted to the defendant, gave him a bill for the amount and the power of selling, in case the bill was not met at the end of seven days, certain brandies which comprised all McF.'s property and which had been previously landed by the defendant and warehoused in his name and at his expense. This item was included in the bill:—Held, that the transaction was not an act of bankruptcy, not being "a conveyance, gift, transfer, or delivery" within the Bankruptcy Act, 1869, s. 6, sub-s. 2. *Philps v. Hornstedt*, 1 Ex. D. 62. Affirming, 8 L. R., Ex. 26; 42 L. J., Ex. 12; 21 W. R. 174. But see *Cooper, Ex parte, Baum, In re*, 10 Ch. D. 313; 48 L. J., Bk. 54; 39 L. T. 523; 27 W. R. 299—C. A.

**Family Settlements.**—A solicitor and money scrivener, being in insolvent circumstances, upon his marriage with a woman with whom he had for seven years previously cohabited, by a deed of settlement and articles of agreement executed prior to the marriage, conveyed and assigned his real and personal estate to trustees, for his wife, with a joint power of appointment among the children of the marriage (including an illegitimate daughter), but reserving no interest to himself; immediately after the marriage the power was exercised in favour of the illegitimate daughter. The property remained under the control of the husband; and, within two months after the marriage, a fiat issued against him:—Held, that the settlement was itself an act of bankruptcy; and void

as against the assignees. *Colombine v. Penhall*, 1 Sm. & G. 228.

**Sale of Goods.**—A fair and bona fide sale of the whole of a trader's property is not of itself an act of bankruptcy. *Rose v. Haycock*, 3 N. & M. 645; 1 A. & E. 460.

A party who impeaches the sale of the whole of a bankrupt's property must shew some facts from which fraud may be inferred. *Id.*

A sale by a trader of his goods at prices considerably below their marketable value, is not of itself a fraudulent transfer. *Lee v. Hart*, 11 Ex. 880; 25 L. J., Ex. 135; 2 Jur., N. S. 308—Ex. Ch.

To render the transaction fraudulent, the seller must have intended by such sale to defeat or delay his creditors, and the purchaser must have had reason to know that such was the object of the seller. *Id.*

If a trader raises money by selling his goods at an under value (not for the purpose of carrying on his business, but in contemplation of stopping payment, and for the purpose of cheating his creditors), to one who has notice, either by express information, or from the nature of the transaction that he is selling his goods, not in order to carry on his business, but with a fraudulent intention, the sale is an act of bankruptcy, and void, and the assignees may recover the goods from the purchaser. *Froser v. Levy*, 6 H. & N. 16.

A sale of the whole of a trader's stock-in-trade, with an intention to abscond with the money and cheat his creditors, to a bona fide purchaser, who is ignorant of the trader's design, is not an act of bankruptcy. *Baxter v. Pritchard*, 3 N. & M. 638; 1 A. & E. 456.

A sale by a trader in insolvent circumstances, and on the eve of bankruptcy, of his stock-in-trade and the bulk of his property to one of his creditors, the consideration being in part an old debt, is not per se an act of bankruptcy, though the effect is to stop the trading. *Bell v. Simpson*, 2 H. & N. 410; 26 L. J., Ex. 363.

A creditor, who had recovered judgment against a trader for a sum exceeding 50l., issued execution, and the sheriff seized six horses belonging to the debtor. It was afterwards agreed between the creditor (who knew that the debtor was insolvent) and the debtor, that the sheriff should withdraw, and that the debtor should sell the horses to the creditor for a sum just large enough to cover the debt and the amount of the sheriff's charges, the debtor continuing in possession of the horses and paying so much a day for the use of them:—Held, that this transaction was a fraudulent transfer of a part of the debtor's property, within the Bankruptcy Act, 1869, s. 6, sub-s. 2. *Pearson, Ex parte, Mortimer, In re*, 8 L. R., Ch. 667; 42 L. J., Bk. 44; 23 L. T. 796; 21 W. R. 688.

**Voluntary Preference of Creditor.**—A voluntary preference of a creditor, though it can be set aside as a fraud on the bankruptcy law, is not an act of bankruptcy. *Stubbins, Ex parte, Wilkinson, In re*, 17 Ch. D. 58; 50 L. J., Ch. 547; 44 L. T. 877; 29 W. R. 653—C. A.

#### b. Fraudulent Surrender of Copyholds.

This was not, under 1 Jac. 1, c. 15, s. 2, an act of bankruptcy, because it was said it could not be

done with intent to defeat or delay creditors, as they could not have execution of copyhold lands. *Cockshot, Ex parte*, 3 Bro. C. C. 502.

#### c. Fraudulent Execution.

**Suffering Judgment by Default.**—A person, by suffering judgment to go by default, does not procure his goods to be taken in execution, so as to be an act of bankruptcy, although his goods are afterwards taken in an execution sued out upon that judgment. *Gibson v. King*, Car. & M. 458.

**Act not Complete until Seizure.**—An act of bankruptcy, by procuring the party's own goods to be taken in execution, is not committed till the actual seizure. *Belcher v. Gummow*, 9 Q. B. 873; 16 L. J., Q. B. 155; 11 Jur. 286.

**Bills of Exchange.**—Under 6 Geo. 4, c. 16, s. 3, a party procuring bills of exchange, his property, to be taken in execution with intent to defeat creditors, after the 1 & 2 Vict. c. 110, s. 12, committed an act of bankruptcy, though at the time when 6 Geo. 4, c. 16, passed, bills of exchange were not liable to be taken in execution. *Edwards v. Cooper*, 11 Q. B. 33.

**Judgment for Debt accruing Due—Execution levied after Accrual of Debt.**—In May, 1842, a tenant owed arrears of rent, and on the pressing application of his landlord, executed a warrant of attorney for the amount of those arrears and of the current year's rent, upon the understanding that judgment was to be entered up thereon, and a *fi. fa.* delivered to the sheriff; but that it was not to be executed unless other writs against the tenant came to the sheriff's hands. In October, 1842, application was made to the tenant for payment of the rent, he being expressly informed that another year's rent had become due; and on that occasion he paid a sum on account, and undertook to pay the remainder before the Christmas following. In November, 1842, other writs against the tenant having come to the sheriff's hands, the *fi. fa.* issued on the judgment on the warrant of attorney was executed.—Held, that the giving of the warrant of attorney under the circumstances was not an act of bankruptcy by the tenant as a procuring of his goods to be taken in execution. *Gore v. Lloyd*, 12 M. & W. 463; 13 L. J., Ex. 366.

**Execution not at Instance of Debtor.**—A trader owed money to his brother, and the latter issued a *fi. fa.* and took the whole of the bankrupt's property. A commissioner considered that issuing the execution had not been at the instance of the bankrupt, and that, therefore, there had been no valid act of bankruptcy to support an adjudication under 12 & 13 Vict. c. 106, s. 67. On appeal the court refused to interfere with the discretion of the commissioner. *Boyd, Ex parte*, 31 L. J., Bk. 6; 6 L. T. 142—L. J.

#### d. Giving Money or Security to Petitioning Creditor.

**Assignees entitled to Recover.**—The defendants on whose petition a fiat had issued received a payment from the bankrupt, whereby they obtained more in the pound than his other creditors.

The fiat not having been proceeded in was annulled, and another fiat issued on the petition of a creditor whose debt was due before the payment made to the defendants.—Held, that this payment was an act of bankruptcy within 6 Geo. 4, c. 16, s. 8, in which the last fiat was sustainable, and that as no person had been appointed by the commissioners under that section to whom the money paid was to be returned by the defendants, the assignees of the bankrupt were entitled to recover it. *Ellis v. Russell*, 10 Q. B. 952; 16 L. J., Q. B. 428; 11 Jur. 821.

**Payment made without Knowledge or Consent of Debtor.**—An adjudication was made against a trader in 1861, which was afterwards annulled. Another adjudication was made in 1862. The act of bankruptcy on which the second adjudication was founded was the payment of 1,100*l.* to the party at whose instance the adjudication of 1861 was made, in settlement of his demand. The commissioner confirmed the adjudication of 1862. On appeal, the court (having called for other evidence than that which was before the commissioner) was of opinion that the payment of the 1,100*l.* not being proved to have been made by an agent on behalf or with the knowledge or assent of the bankrupt, was not a compounding with the petitioning creditor, within 12 & 13 Vict. c. 106, s. 71, and annulled the adjudication. *Scott Russell, In re*, 31 L. J., Bk. 37; 6 L. T. 138—L. J.

#### e. Assignments for Benefit of Creditors.

**Under old Law.**—A deed, whereby a trader conveys all his property in trust to be paid amongst his creditors, is an act of bankruptcy. *Bourne, Ex parte*, 16 Ves. 149; *S. P., Smith, Ex parte*, 1 Ves. & B. 518; 2 Rose, 63.

— **Intent presumed.**—So it is an act of bankruptcy, although, in so doing, he did not intend to defeat or delay his creditors, as that being the necessary consequence of the assignment, he must, in law, be taken to have intended it. *Stewart v. Moody*, 1 C., M. & R. 777; 5 Tyr. 493.

— **Proviso for Avoidance.**—So, though the creditors with whom such deed was in the first instance concerted, afterwards, and when it was executed, changed their purpose, unknown to the bankrupt, and intended to set it up as an act of bankruptcy. And such deed is operative, though it contains a proviso to be void, if the trustees think fit. *Tappenden v. Burgess*, 4 East, 230; 1 Smith, 33.

— **Executed by Trader only.**—So, an assignment by a trader of all his estate and effects, for the benefit of all his creditors, executed by the trader, but not executed by the trustee or by any creditor, or further acted on, is an act of bankruptcy. *Botcherby v. Lancaster*, 3 N. & M. 383; 1 A. & E. 77.

— **Deed, whether Void for all Purposes.**—Proviso in a lease for re-entry, and that the lease should be void if the lessee assigned without license. The lessee by deed assigned all his property, real and personal, to trustees, for the benefit of his creditors, and was afterwards de-

clared a bankrupt:—Held, that the deed of assignment was an act of bankruptcy and void. *Doe d. Lloyd v. Powell*, 8 D. & R. 35; 5 B. & C. 308.

In October, 1852, E., a trader, assigned to the plaintiff all his household furniture and effects then on his premises, as a security for money lent, with a power in default of payment to seize and take possession of the property thereby assigned, and all other goods, chattels and effects which might be found on the premises. In January, 1853, E. assigned all his estate and effects to trustees, for the benefit of his creditors. In the following February the plaintiff seized the goods then on the premises of E., and in March a fiat in bankruptcy issued against E., the act of bankruptcy being the assignment of his estate and effects to trustees. In an action by the plaintiff against the assignees for selling the goods so seized by them:—Held, that though the assignment by E. of his estate and effects to trustees was void as against creditors, yet it operated to transfer to the assignees the property not included in the assignment to the plaintiff, and so defeated his title, which would otherwise have been valid by the seizure. *Carr v. Acraman*, 11 Ex. 566; 25 L. J., Ex. 90.

— **Assignment of Bulk of Property.**—An assignment of the principal part of the assignor's property may be an act of bankruptcy, although not executed by the assignor spontaneously, if it appears that the provisions of the deed must necessarily have the effect of delaying and defeating his creditors. *Wensley, Ex parte*, 1 De G., J. & S. 273; 32 L. J., Bk. 23; 9 Jur., N. S. 315; 7 L. T. 548; 11 W. R. 241.

Where such an assignment was made to trustees, one of whom was an accountant employed with a view to and under the assignment, upon trust out of the proceeds of the property in the first place to pay all costs, charges and expenses due or to become due to the assignor's solicitor, and the professional charges of the accountant trustee, and other expenses, and subject thereto to divide the proceeds rateably among the creditors who should execute the deed, and the deed recited that the assignor was not prepared to pay his debts in full:—Held, that the necessary effect of the deed was to defeat and delay the creditors, and that it was an act of bankruptcy. *Id.*

— **Execution of Assignment to be used in Case of Necessity.**—A trader, being pressed by a particular creditor, who had issued a fi. fa. against his goods, under which the sheriff had seized, executed an assignment of all his estate and effects for the benefit of his creditors, and, in the presence of the party to whom the assignment was made, gave it to his attorney, in order that it might be used, if circumstances should render it necessary, as an act of bankruptcy:—Held, that the deed operated as a valid act of bankruptcy. *Turner v. Hardcastle*, 11 C. B., N. S. 683; 31 L. J., C. P. 193.

**Under 24 & 25 Vict. c. 134.**—The registration of trust-deeds under 24 & 25 Vict. c. 134, ss. 192, 194, although in practice performed by the same officer, is distinct and has different operations; and where, for the want of the papers required by the orders, registration under the former section had been refused by the officer, and the applicant had registered the deed under s. 194:—

Held, that the registration did not prevent the deed, which was an assignment of all the debtor's property, from being an act of bankruptcy. *Morgan, Ex parte*, 1 De G., J. & S. 288.

**Assignment of Part of Property.**—A conveyance by a trader of part of his property for the benefit of his creditors, is not an act of bankruptcy, unless executed under circumstances of fraud; and mere conjecture of fraud, arising from extrinsic circumstances, will not be sufficient to affect the title under such conveyance. *Cattell v. Corral*, 4 Y. & C. 228.

A conveyance by a trader, for the benefit of his creditors, of his effects at a certain place is not an act of bankruptcy, unless it is shown that he had no other effects. *Chase v. Goble*, 3 Scott, N. R. 245; 2 M. & G. 930.

**Evidence—Unstamped Deed.**—A deed of assignment for the benefit of creditors, not registered through want of the necessary assents, may be used, though unstamped, as evidence of an act of bankruptcy. *Gouldwell, In re, Squire, Ex parte*, 4 L. R., Ch. 47; 38 L. J., Bk. 13; 19 L. T. 272; 17 W. R. 40; overruling *Potter, Ex parte*, 3 De G., J. & S. 240; 34 L. J., Bk. 46; 11 Jur., N. S. 49; 11 L. T. 435; 13 W. R. 189.

**Partners—Separate Creditors.**—Where partners by deed, assigned all their partnership effects to trustees for the benefit of their creditors, and some of the separate creditors of one partner did not assent to it, the assignment was fraudulent and void, and an act of bankruptcy. *Eckhardt v. Wilson*, 8 T. R. 140.

A. and N. being in partnership, executed assignments of all their joint estate to mortgagees, and afterwards A. assigned all his separate estate and effects whatsoever, specifying them in detail, and "all other the estate and effects of him," A., unto a trustee to divide the proceeds arising from the sale amongst such of his separate creditors as should within one month become parties to and execute the deed. The deed was not registered under the Bills of Sale Act, 1854. Upon the day following the date of the last-mentioned deed a petition for adjudication was filed against A. and N., under which they were subsequently declared bankrupts, the acts of bankruptcy relied upon having been committed two or three days before the date of the last deed:—Held, that the last-mentioned deed was an act of bankruptcy, and a preference of separate creditors over the general body of creditors, and that the trustee under the deed was not entitled to the property as against the claims of the trustee under the bankruptcy. *McLean, Ex parte*, 24 L. T. 144.

— **Separate Estate.**—One of two traders, in partnership, conveyed by deed his separate estate to trustees for the joint creditors of both; the joint creditors agreeing that the traders should continue in possession of their stock, and carry on business with a view to retrieve themselves; and that upon their paying 4s. 6d. in the pound by instalments, they should receive a general release:—Held, not an act of bankruptcy:—Held, also, that it was properly left to the jury to say, whether the deed was executed bona fide to enable the traders to retrieve themselves, or was executed with intent to defraud his sepa-

rate creditors. *Abbott v. Burbage*, 2 Bing. N. C. 444; 2 Scott, 656; 1 Hodges, 448.

A partnership which existed between A. and B. was dissolved by mutual consent. A., being separately possessed of freehold and leasehold estates, after the dissolution conveyed them to trustees for sale or mortgage, and empowered them to execute such conveyances as they should think fit, for the purpose of converting his estates into money, in order to enable him to carry on his trade, and to pay his creditors their debts; and it was agreed, that such conveyances might be made and executed by the trustees with or without the concurrence of A., and that they should be seised or interested in the money arising from such sale or mortgage. At the time this deed was executed, A. had stock in trade, and other personal effects to a considerable amount, independently of the partnership assets, which were not sufficient to pay the partnership debts. The trustees were not creditors of either A. or his partner. A. and his partner afterwards gave C. & Co., who were not creditors of either, a power of attorney to make demands of every description, to examine and settle all the accounts, together with other powers to act for them, they agreeing to ratify whatever should be done under it. A deed was afterwards prepared by A. and his trustees, for the purpose of conveying all his freehold and leasehold estates previously conveyed to D. & Co. to sell or mortgage, with a view to raise 180,000*l.*, and 40,000*l.* in negotiable bills of exchange, and to indemnify the drawers and acceptors; but these sums were not advanced, nor were the bills drawn, or any other act done under the latter deed:—Held, that neither the execution of the first conveyance to his trustees, nor the power of attorney, under these circumstances, constituted an act of bankruptcy by A. *Berney v. Davison*, 4 Moore, 126; 1 B. & B. 408.

So, where such partners, being in insolvent circumstances, stopped payment on the 15th of February, 1819, and dissolved their partnership on that day: and A. being separately possessed of freehold and leasehold estates, conveyed the whole of them on the same day, by indentures of lease and release, to trustees in trust for sale or mortgage, for the purpose of converting such estates into money, it being convenient to A. to raise money at an early period: and subsequently to this conveyance, A. and B. gave a power of attorney to C. & Co. to recover all debts which should be due to them, together with full powers to act for them:—Held, that these circumstances did not constitute an act of bankruptcy by A. *Berney v. Vyner*, 4 Moore, 322; 1 B. & B. 482.

The separate assignments by partners of their separate estates to trustees for the benefit of their creditors, one of which assignments is registered under the Bankruptcy Act of 1861, and the other not, do not operate as a bankruptcy of the firm so as to bring into operation the provision of the Bankruptcy Act of 1849, s. 171, as to set-off for mutual credits. *London, Bombay and Mediterranean Bank v. Narraway*, 15 L. R., Eq. 93; 42 L. J., Ch. 329; 27 L. T. 572; 21 W. R. 318.

## 2. Assignment of Debtor's whole Property.

### i. To Secure an Existing Debt.

**Generally.**—An assignment by a trader of all his estate, stock, and effects to one creditor is in

itself an act of bankruptcy, without any fraud on the part of the trader. *Siebert v. Spooner*, 1 M. & W. 714; 2 Gale, 135.

An assignment by a trader in insolvent circumstances of all his stock in trade to one creditor, is an act of bankruptcy. *Oriental Bank Corporation v. Coleman*, 3 Giff. 11; 30 L. J., Ch. 635; 4 L. T. 9; 9 W. R. 432.

The law that a conveyance of a man's whole property to secure a past debt, whether he is a trader or a non-trader, is an act of bankruptcy, has not been altered by the Bankruptcy Act, 1869. *Wood, In re, Luckes, Ex parte*, 7 L. R., Ch. 302; 41 L. J., Bk. 21; 26 L. T. 113; 20 W. R. 403.

**What is whole Property.**—Where a debtor, in consideration of a pre-existing debt, executes a bill of sale which is so extensive as to prevent him from carrying on his trade, and is calculated, to his knowledge, to defeat and delay his creditors, he thereby commits an act of bankruptcy, and the conveyance is void as against his assignees. *Young v. Fletcher*, 4 F. & F. 1081.

A tradesman mortgaged the freehold house in which he carried on his trade, being his only real estate, to secure an existing debt of 1,100*l.*, for which he was liable as surety, which exceeded the value of the mortgaged property. His other property was of very trifling amount. He was at the time liable as surety on a promissory note for 2,000*l.*, and afterwards the other makers having become insolvent, he was called upon for payment, and became bankrupt:—Held, that the mortgage was void as against the assignees in bankruptcy, as being an assignment made to defeat or delay creditors. *Goodricke v. Taylor*, 2 De G., J. & S. 135; 10 Jur., N. S. 414; 10 L. T. 113; 12 W. R. 632. Affirming, 2 H. & M. 380; 9 L. T. 604; 12 W. R. 301.

A trader conveyed all his property, except his furniture and book debts, to a creditor for securing a previously-existing debt:—Held, that, notwithstanding the reservation, the deed was fraudulent and void, inasmuch as it placed the bulk of his property out of the reach of his other creditors. *Fozley, Ex parte, Nurse, In re*, 3 L. R., Ch. 515; 18 L. T. 362; 16 W. R. 831.

**Pension not Assigned.**—A debtor executed as security for an antecedent debt of 1,500*l.*, an assignment which included all his property of any appreciable value, except a pension of 10*s.* 6*d.* a day to which he was entitled as a retired servant of the East India Company:—Held, that as this pension would not pass to a trustee in bankruptcy, and could not be taken in execution by a creditor, it constituted no substantial exception from the assignment, which, being an assignment of substantially the whole of the debtor's property, was an act of bankruptcy. *Hawker, Ex parte, Krelly, In re*, 7 L. R., Ch. 214; 41 L. J., Bk. 34; 26 L. T. 54; 20 W. R. 322.

**Lease and Book Debts not Assigned.**—A trader assigned all her stock-in-trade, fixtures, goods, chattels and effects, in or about her place of business, to secure an antecedent debt of 200*l.* The bill of sale included goods subsequently acquired for the purposes of the business, and was expressed to be in consideration of further future advances, but contained no agreement for making such advances. The lease of

the shop and the book debts were not included in the bill of sale. Upon the trader's bankruptcy shortly afterwards, the excepted property realized about the same amount as that included in the bill of sale:—Held, that the lease and book debts formed a substantial exception, and that the bill of sale was not void as an assignment of the debtor's whole property on the eve of bankruptcy. *Bolland, Ex parte, Price, In re*, 41 L. J., Bk. 60; 20 W. R. 862.

**Motive for Assignment Immaterial.**—Where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is a further advance, it is not a question whether the further advance is great or small, but whether there was a bona fide intention of carrying on the business. *Ellis, Ex parte, Ellis, In re*, 2 Ch. D. 797; 45 L. J., Bk. 159; 34 L. T. 705—C. A.

**Bill of Sale—Renewal.**—An advance of 55l. was made to a trader, on the security of bills of sale of all the goods and effects of the trader, which were valued at 600l. There was an agreement between the lender and the trader that the bills of sale should be from time to time renewed, so as to render it not necessary to register them. The bills were accordingly renewed every nineteen days, and this was done three times. The trader then became bankrupt:—Held, that the last bills of sale were invalid, as constituting an act of bankruptcy. *Cohen, Ex parte, Sparke, In re*, 7 L. R., Ch. 20; 41 L. J., Bk. 17; 25 L. T. 473; 20 W. R. 69.

A bill of sale of the whole of the mortgagor's property, given by way of renewal of a former one not registered, is, if no fresh advance is made by the mortgagee, an act of bankruptcy, and void, as against the trustee in bankruptcy of the mortgagor, notwithstanding its registration in due time. *Stevens, Ex parte, Stevens, In re*, 20 L. R., Eq. 786; 44 L. J., Bk. 136; 33 L. T. 135; 23 W. R. 908.

The forbearance of the grantee under an unregistered bill of sale of the whole of the grantor's property, given for value, to seize the property comprised in it is not, as against the trustee in bankruptcy of the grantor, good consideration for the giving of a new bill of sale in lieu of the first, but the new bill of sale given under such circumstances without any fresh advance to the grantor is an act of bankruptcy, and void as against the trustee in bankruptcy of the grantor. *Payne, Ex parte, Cross, In re*, 11 Ch. D. 539; 40 L. T. 296; 27 W. R. 368.

**Consideration wrongly stated.**—A. being indebted to several creditors, assigned to one of them, B., all his property by a bill of sale, nominally for further advances of goods, but really for the debt already due. Three days later, C., another creditor, applied to A. for payment of his debt, and was told that all the property on the premises was already assigned to B. for 90l. which he owed him. C. then accepted goods for which he gave no receipt. On the fourth day, B., who had made no further advance of goods, took possession under the bill of sale, and sold off soon afterwards. W., also a creditor, filed a petition for adjudication of bankruptcy against A., but which was not proceeded with, A. having agreed to execute a deed of assignment to trust-

tees of all his estates and effects (being the proceeds of the bill of sale and the furniture). In an action by the trustees against C. for the goods received by him:—Held, first, that the bill of sale to B. was an act of bankruptcy. *Topping v. Keynell*, 16 C. B., N. S. 258; 33 L. J., C. P. 225; 10 Jur., N. S. 774; 10 L. T. 526; 12 W. R. 756.

Held, secondly, that the statement by A. to C. was notice to C. of an act of bankruptcy. *Id.*

Held, thirdly, that the trustees under the deed were entitled to recover the goods assigned to C. *Id.*

**From Sheriff.**—A trader being in difficulties, and having five executions against him, all his goods were conveyed to the defendant by a bill of sale from the sheriff, with an understanding that they should remain in A.'s premises to enable him to repurchase them; the jury having found that the object of the transaction was not merely to relieve A. from a forced sale of his goods, but also to protect them from the demands of other creditors:—Held, that the transaction was an act of bankruptcy. *Graham v. Furber*, 14 C. B. 410; 2 C. & P. 452; 23 L. J., C. P. 51; 18 Jur. 226.

**Security for Judgment Debt.**—Execution was levied upon goods on the premises of a trader, who was in insolvent circumstances and had ceased to carry on his trade, for a debt exceeding 50l. The trader executed a bill of sale, by which he mortgaged all his stock in trade and effects to secure the judgment debt, and the sheriff withdrew:—Held, that whatever might have been the case before the passing of the Bankruptcy Act, 1861, s. 73, the bill of sale was an act of bankruptcy, for it prevented the creditors from treating the seizure and sale as an act of bankruptcy and obtaining a distribution of the property seized by means of an adjudication in bankruptcy; and that any benefit which might be expected to arise from postponing a forced sale was a benefit only to the execution creditor, and not to the rest of the creditors, who took no benefit under the security. *Woodhouse v. Murray*, 2 L. R., Q. B. 634; 36 L. J., Q. B. 289; 16 L. T. 559; 15 W. R. 1109; 8 B. & S. 464. Affirmed, 4 L. R., Q. B. 27; 38 L. J., Q. B. 28; 19 L. T. 570; 17 W. R. 206; 9 B. & S. 720—Ex. Ch.

**Partners—Assignment of all Personal Property of One Partner.**—One of two partners in trade assigned the whole of his separate assets, and gave a power of attorney to assign all his personal property as security for a previously-existing separate debt. The partnership was at this time insolvent:—Held, that the execution of the deed was an act of bankruptcy, notwithstanding the fact that none of the partnership assets were in terms included in the deed. *Trevor, Ex parte, Burghardt, In re*, 1 Ch. D. 297; 45 L. J., Bk. 27; 33 L. T. 756; 24 W. R. 301.

**Assignment of Partnership Assets—Separate Debt.**—It is a fraud upon the creditors of a firm for one of the partners, who knows that the firm is insolvent, to assign the partnership assets as security for his own private debt, or for future advances to be made to himself. Such an assignment necessarily tends to defeat the creditors of the partnership and is void as an act of bankruptcy. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

Such an assignment will be void altogether as an act of bankruptcy, notwithstanding the fact that it is made a security as well for partnership as for private debts. *Ib.*

ii. *To Secure an Existing Debt and Present Advances.*

Seventeen months before his bankruptcy a trader assigned by deed all his estate and effects by way of security for the repayment of a sum due, and a further advance of a moderate amount:—Held, that, under the circumstances, the deed was not void under 13 Eliz. c. 5, or as an act of bankruptcy. *Allen v. Bonnett*, 5 L. R., Ch. 577; 23 L. T. 437.

Semble, also, that even if there had not been a further advance, the lapse of twelve months before the bankruptcy prevented the deed from being invalidated as an act of bankruptcy. *Ib.*

**Advance to pay Costs of Assignment.]**—An assignment by a trader of all his property, book debts and stock in trade, in consideration of an old debt of 530*l.*, the only present advance being 20*l.* to pay the trader's attorney the costs of the assignment, amounts to a fraud in the eye of the law, and is an act of bankruptcy, notwithstanding that it was in fact, as between the parties to it, a perfectly fair and bona fide transaction. *Person v. Moon*, 15 L. T. 444.

Book debts due to the bankrupt paid to a third party under such an assignment belong to the assignee of the bankruptcy, and may be recovered by him in an action for money had and received. *Ib.*

**Right to Seize all after-acquired Property.]**—A trader, in consideration of a past debt of 240*l.* and a present advance of 200*l.*, conveyed by deed substantially the whole of his property, giving the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer:—Held, that inasmuch as the trader got no equivalent for any part of the stock transferred, and such transfer necessarily defeated and delayed his creditors, though without fraud in fact, it constituted an act of bankruptcy. *Graham v. Chapman*, 12 C. B. 85; 21 L. J., C. P. 173.

A bill of sale to secure an existing debt and a present advance, which assigns the whole of the grantor's property, including that which he may purchase by means of the advance, is not necessarily void as an act of bankruptcy. *Graham v. Chapman* (12 C. B. 85) on this point overruled. *Hawwell, Ex parte, Hemingway, In re*, 23 Ch. D. 626; 52 L. J., Ch. 737; 48 L. T. 742; 31 W. R. 711—C. A.

— **With an exception.]**—A bill of sale including all the existing property of a trader and containing a power to seize all after-acquired property with an exception, was made by him in favour of a creditor, in consideration partly of an existing debt and partly of a sum advanced by such creditor. This advance consisted of a sum paid to another creditor in satisfaction of a debt secured by a previous bill of sale over the same property, for the purpose of redeeming the property which he had already seized under such bill. More than twelve months after the date of the previous bill of sale proceedings were taken

for a liquidation of the debtor's affairs by arrangement, and a trustee was appointed:—Held, that the later bill of sale was not an act of bankruptcy. *Lomas v. Burton*, 6 L. R., C. P. 107; 40 L. J., C. P., 150; 24 L. T. 137; 19 W. R. 441.

**Promise to give Bill of Sale.]**—When a sum of money is advanced upon the faith of a promise by the debtor to give a bill of sale of his property, the sum so advanced is to be considered as advanced upon the security of the bill of sale; but in such a case the promise must be an absolute one. *Fisher, Ex parte, Ash, In re*, 7 L. R., Ch. 636; 41 L. J., Bk. 62; 26 L. T. 931; 20 W. R. 849.

When a doctor on the eve of bankruptcy assigns all his property to a creditor to secure a past debt as well as a fresh advance, the smallness of the fresh advance, although not necessarily making the assignment an act of bankruptcy, is strong evidence that the advance was made, not to enable the debtor to continue his trade, but to secure the past debt. *Ib.*

A trader applied to a creditor, who had previously advanced him 600*l.*, for a further advance of 100*l.*, which was accordingly made on the debtor giving a conditional promise that if he did not repay the 100*l.* within ten days he would make an assignment of all his property to the creditor to secure both the past and fresh advance. Default was made in payment, and the assignment was executed. Shortly afterwards the debtor became bankrupt, and the property was sold for about 700*l.*:—Held, that, having regard to the conditional nature of the promise and the smallness of the fresh advance, the assignment was an act of bankruptcy and void against the creditors. *Ib.*

**Bill of Exchange—Payment by Drawer.]**—Payment of bills by the drawer at the request of the acceptor, who, in consideration, assigns to the drawer all his property to secure the amount and also certain past debts, is a substantial advance, and prevents the assignment from being an act of bankruptcy. *Reed, Ex parte, Tweedell, In re*, 14 L. R., Eq. 586; 26 L. T. 558; 20 W. R. 622.

Therefore, when, at the request of T., I., M. & Co. paid the amount due on certain bills drawn by them and accepted by T., and T. assigned to them his interest in certain marine engines and machinery (which constituted his whole property), as security for the moneys due on the bills, and also for other moneys due from him to them:—Held, that the assignment was not an act of bankruptcy. *Ib.*

**Further Supply of Goods.]**—A publican being indebted to his spirit merchants in 668*l.*, ordered from them goods to the value of 92*l.* 11*s.*, part of which was for immediate delivery and the rest in bond; and at the same time paid them on account 50*l.* in cash, and a cheque for 100*l.* The merchants despatched the goods ordered for delivery, which were of the value of 52*l.*, but before they reached their destination the cheque was dishonoured. The merchants stopped the goods in transitu. Thereupon the customer paid the amount of the cheque, but was informed by the merchants that they would not release the goods in transitu, or supply him with more goods, unless he gave security for his account. He then, in consideration of their releasing the goods,



executed a bill of sale in favour of the merchants of the bulk but not the whole of his property, defeasible on payment of their debt immediately upon demand, with power of seizure and sale in default of payment. The goods were delivered, and the debtor continued his business, but in the following week the merchants discovered that he was absenting himself from home at a busy time, and they took possession under the bill of sale. One week after this the debtor filed his petition for liquidation:—Held, upon these facts, that there was a present consideration for the bill of sale, amounting to a substantial advance for the purpose of carrying on the business, and that the assignment was not an act of bankruptcy. *Thri-fall, Ex parte, Williamson, In re*, 46 L. J., Bk. 8; 35 L. T. 675; 25 W. R. 127.

**Advance to enable Trader to continue Business.**—The question whether a further advance to a trader will sustain an assignment to secure it and a previous debt is not simply a question of amount, but a question whether the advance was made to enable the trader to continue business, or merely to enable the creditor to obtain a security. *Greener, Ex parte, Vane, In re*, 46 L. J., Bk. 76; 36 L. T. 781—C. A.

A firm of traders, one of the partners in which was an infant, in consideration of one of their creditors paying out an execution for about 100*l.*, executed an assignment to him of their whole joint and separate property to secure the repayment of the 100*l.* and an existing debt of about 200*l.* on demand. The business was carried on for about three weeks by the firm, when the bill of sale holder took possession, and the firm then went into liquidation:—Held, that the payment of the execution creditor was not a present advance such as to sustain the assignment. *Ib.*

A shoemaker in a very small way of business executed to a creditor a bill of sale upon all his property except his book debts, afterwards valued at 70*l.*, to secure a past debt of 227*l.* 5*s.*, and a fresh advance of 15*l.*:—Held, that, under the circumstances, the sum of 15*l.* was a substantial further advance sufficient to enable him to continue his trade. *Etans, Ex parte, Edwards, In re*, 39 L. T. 364.

An assignment of a debtor's whole property, in consideration of an existing debt and of a further advance, is not an act of bankruptcy in a case where the further advance may be the means of enabling the debtor to continue business. *Heath v. Cochrane*, 46 L. J., Q. B. 727; 37 L. T. 280.

A farmer, knowing that he was hopelessly insolvent, but for the purpose of going on as long as he could, obtained an advance from a money-lender, to whom he was already indebted, upon the security of a bill of sale of all his effects, stock, crops, &c., both present and future. Nine months afterwards he failed to pay an instalment due, and the grantee of the bill of sale took possession of and sold the effects. Upon action brought by the trustee in bankruptcy of the grantor's estate, claiming the proceeds of the sale:—Held, that the granting of the bill of sale did not amount to an act of bankruptcy so as to defeat the title of the grantee under it. *Ib.*

A judgment creditor, who had issued execution upon the property of his insolvent debtor, agreed to make him a substantial advance for the alleged purpose of enabling him to carry

on his business, upon the understanding come to at a meeting at which all the parties to the transaction were present, that the advance should be applied in paying the bankers of the debtor, who had pressed for payment of a debt of 2,000*l.*, and threatened to make the debtor a bankrupt if they were not paid, and also in paying off two other debts due to solicitors employed in the transaction. A bill of sale over substantially the whole of the debtor's property was given by the debtor to the execution creditor, on the 9th September, 1882, to secure the execution debt and the fresh advance. The fresh advance was applied in payment of the debts to the bankers and the solicitors. On the 11th of September, possession under the bill of sale was taken by the grantee. On the 13th of September, the debtor filed a liquidation petition, and the trustees impeached the bill of sale and the above-mentioned payments:—Held, that the effect of the granting of the bill of sale being to prevent the debtor from carrying on his business, the bill of sale and also the payments to the solicitors were fraudulent and void; but that the payment to the bankers, who had acted bona fide, was protected by the saving clause of s. 92 of the act. *Clater, Ex parte, Denison, Ex parte, Wilkinson, In re*, 48 L. T. 648.

**Small further Advance.**—A trader, in a state of indebtedness, in 1872, assigned all his property, except a small portion worth 5*l.*, to one of his creditors, partly in consideration of the antecedent debt, and partly in consideration of a small further advance of money:—Held, that the transaction was necessarily and by force of law, without reference to any extrinsic circumstances shewing fraud, an act of bankruptcy. *James v. Moriarty*, 8 Ir. R., C. L. 454.

**Fair Equivalent.**—An assignment by a trader of his whole property for a fair equivalent is not an act of bankruptcy, although a past debt is included in the sum secured by the assignment. *Bew v. Bill*, 16 W. R. 760.

**Consideration wrongly stated—Absence of Fraud.**—An assignment by a bill of sale of the whole of a trader's property to a creditor in consideration partly of existing debts, and partly of a sum advanced by the creditor at the date of the assignment, and containing a power to seize after-acquired property, is not an act of bankruptcy, although the consideration for the assignment is falsely stated therein, there being no fraud in fact shewn. *Keen v. Mawson*, 24 L. T. 395; 19 W. R. 1145.

**Bill of Sale in Substitution for Unregistered Bill—Fraud.**—A trader gave a bill of sale of his stock in trade to A. in consideration of his indorsing a bill of exchange which the trader discounted, but the bill of sale was not registered. Nine months afterwards he executed an assignment of the bulk of his property to A. to secure the same debt and further advances:—Held, that the assignment, being otherwise fraudulent, could not be supported on the ground that it was a substitution for the first bill of sale. *Fozley, Ex parte, Nurse, In re*, 3 L. R., Ch. 515; 18 L. T. 862; 16 W. R. 831.

### iii. To Secure an Existing Debt and Future Advances.

**Generally.]**—A bill of sale by which all a trader's property is assigned, as a security for an antecedent debt, and also for future advances, is an act of bankruptcy. *Lacon v. Liffen*, 4 Giff. 75; 32 L. J., Ch. 25; 9 Jur., N. S. 13; 7 L. T. 411; 11 W. R. 135. Affirmed, 32 L. J., Ch. 315; 9 Jur., N. S. 477; 7 L. T. 774; 11 W. R. 474.

A trader, by a bill of sale, dated the 24th of April, 1860, reciting that he was indebted to M. in 98l. for goods already delivered, and that he was desirous of obtaining a further supply to the extent of 82l., which M. had declined to furnish without security, assigned to M. all his household furniture, stock in trade, and effects for securing the 180l. and any further advances which M. might make to him, with a proviso for redemption on payment, and a power to M. to seize and sell if the money should not be paid on demand. No further advance beyond the 82l., either in money or in goods, was made by M. At the time of the execution of this deed the trader was indebted to several other creditors in sums sufficient to constitute good petitioning creditors' debtors:—Held, that the execution of the deed was an act of bankruptcy. *Topping v. Keywell*, 16 C. B., N. S. 258; 33 L. J., C. P. 225; 10 Jur., N. S. 774; 10 L. T. 526; 12 W. R. 756.

**Parol Agreement for Future Advances—Advances Made.]**—An assignment of substantially the whole of a mortgagor's property to secure a previously-existing debt and further advances is not an act of bankruptcy, if there is a contemporaneous parol agreement on the part of the mortgagee to make further advances to a sufficient amount, and such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the mortgagee to make any further advances. *Winder, Ex parte, Winstanley, In re*, 1 Ch. D. 290; 45 L. J., Bk. 14; 33 L. T. 615. Affirmed, *nom. Sheen, Ex parte*, 1 Ch. D. 560; 45 L. J., Bk. 89; 34 L. T. 48; 24 W. R. 685—C. A. See next case.

**—Exception of Tenant Right.]**—In order that the execution of a bill of sale of substantially the whole of the grantor's property as security for a pre-existing debt and further advances may not be an act of bankruptcy, it is necessary that there should be an agreement binding the grantee to make further advances. It is not sufficient that further advances should have been in the contemplation of the parties, the deed being stamped so as to cover them, and further advances having been actually made after the execution of the deed. A farmer assigned by a bill of sale, as a security for a pre-existing debt and further advances, the whole of his property, except a part of his tenant right under his agreement of tenancy. That agreement provided that the tenant should be paid on quitting the farm for all fallows made in the last year of the tenancy (not exceeding a certain proportion), for all seeds duly sown by him, for all dung made during the last year, for all hay, fodder, and straw, the produce of the last year, &c., at a valuation. But it was also provided that, in case of any breach or non-performance of any of the stipulations on the part of the tenant, it should be lawful for the landlord to

re-enter, and that, in case no entry should be made, the landlord should on the expiration of the tenancy be entitled to an allowance from the tenant in respect of any such breach or non-performance, to be deducted from the tenant's valuation. There was no covenant or agreement binding the grantee to make further advances, though the deed was stamped so as to cover a further advance:—Held, that the tenant right did not form a substantial exception from the deed; that the execution of the deed was an act of bankruptcy by the grantor; and that it was void as against the trustee in his bankruptcy, which commenced within three months afterwards. *Winder, Ex parte* (1 Ch. D. 290) considered. *Dann or Thorpe, Ex parte, Parker, In re*, 17 Ch. D. 26; 51 L. J., Ch. 290; 44 L. T. 760; 29 W. R. 771—C. A. Affirming, 43 L. T. 704.

Some small further advances were, in fact, made by the grantee to the grantor, soon after the execution of the deed, to enable him to pay the wages of his labourers:—Held, that, inasmuch as the grantee had made those advances with notice of the act of bankruptcy committed by the execution of the deed, he could not retain them out of the proceeds of sale of the grantor's stock which he had seized under the deed. *Ib.*

**Assignment of whole of Property to Secure existing Debt—Agreement to make Further Advances.]**—In order that a deed, assigning the whole of a debtor's property as security for an existing debt, may not be fraudulent and an act of bankruptcy within sub-s. 2 of s. 6 of the Bankruptcy Act, 1869, on the ground that the assignee agreed to make further advances to the assignor, it is not necessary that the agreement should be technically binding at law or in equity; a bonâ fide promise is sufficient. *Wilkinson, Ex parte, Berry, In re*, 22 Ch. D. 788; 52 L. J., Ch. 657; 48 L. T. 495; 31 W. R. 649—C. A.

The question in all such cases is whether the arrangement was made bonâ fide with the view of enabling the debtor to continue his business, or whether it was a mere scheme to obtain payment of the existing debt. *Dann, Ex parte, supra*, commented on. *Ib.*

### iv. For a New Consideration.

**Consideration—Present Advance.]**—An assignment, by a trader, of all his property and effects for a present advance of part of their value is not necessarily an act of bankruptcy. *Pennell v. Reynolds*, 11 C. B., N. S. 709; 5 L. T. 286.

It is for the jury to say whether, under the circumstances, the effect of the assignment is to defeat and delay creditors. *Ib.*

An assignment by a trader of all his property to secure a present advance is not necessarily fraudulent, and an act of bankruptcy, unless the lender knew that the object of the loan was to defeat and delay creditors; and the law does not impose on the lender the obligation of shewing the bona fides of the loan. *Colemere, In re*, 1 L. R., Ch. 128; 35 L. J., Bk. 8; 12 Jur., N. S. 38; 13 L. T. 621.

If such an assignment is an act of bankruptcy as being fraudulent against the creditors, it is also void as between the parties thereto. *Ib.*

C. executed a bill of sale of goods to the amount of 60l. to secure advances, and three days

after its execution made an assignment of all his property for the benefit of his creditors :—Held, that the giving of the bill of sale was not a fraudulent preference on the part of C., and that the bill of sale was valid, although C. knew, at the time he gave it, that he was in difficulties. *Curties v. Jacobs*, 16 L. T. 574.

An assignment of a person's whole property for a bonâ fide present advance is not an act of bankruptcy, although exorbitant interest is charged and stringent conditions imposed. *Harrison v. Cohen*, 32 L. T. 717.

E. by deed assigned all his farming stock to the defendant to secure payment of 175*l.* by instalments at two and three months. Only 135*l.* was advanced. Afterwards 85*l.* more was advanced, and a receipt for 100*l.* payable in one month indorsed on the deed. The deed contained, among other stringent conditions, a power to seize and sell after-acquired property, and a clause prohibiting E. from selling any of the stock. The defendant sold under the deed, and the property realized 608*l.* :—Held, that the assignment was not an act of bankruptcy, and that E.'s trustee could not recover in trover, but could recover the overcharges on the sale as money received. *Id.*

— **Advance to Pay Debts.**—A trader, Y., being indebted to L., agreed with the defendant, upon his paying 200*l.* to L. in liquidation of the debt, to assign all her goods to him as security for the repayment of the 200*l.* The assignment contained a power for the defendant to take all the goods which then were, or at any time during the continuance of the security might be, upon the premises, and to sell the same, and repay himself the 200*l.* and interest. There were covenants to pay the 200*l.* by instalments, and that the traders should remain in possession until default in payment. Y., who had remained in possession, sold the goods, and paid 207*l.* to the defendant for principal and interest. Afterwards Y. became bankrupt. In an action by her assignees against the defendant to recover the 207*l.*, the jury having found that the deed was not fraudulent, nor executed in contemplation of bankruptcy :—Held, that the deed was not an act of bankruptcy, inasmuch as the payment of the 200*l.* by the defendant to L. was an advance to Y., to enable her to carry on her business, and she derived the full benefit of the whole sum advanced. *Hutton v. Critwell*, 1 El. & Bl. 15; 22 L. J., Q. B. 98; 17 Jur. 392.

A trader, being pressed by two creditors, one of whom had a bill of sale on part of his property, and the other creditor an execution on the residue of his goods, applied to C. to assist him, and in consideration of his agreeing to pay off the two creditors, assigned to C., by a bill of sale, all his estate and effects. C. paid off the creditors :—Held, that the assignment was not an act of bankruptcy, as it was not an assignment in consideration of a past debt only, but an assignment in consideration of the assignee releasing the trader's property from a charge already laid upon it. *Whitmore v. Claridge*, 33 L. J., Q. B. 87; 9 L. T. 451; 12 W. R. 214—Ex. Ch.

The Court of Bankruptcy will not infer fraud from the mere suspicion that it may exist. Where, therefore, C., being in difficulties, in consideration of a sum of 900*l.*, gave a bill of sale over all his property to his brother W. to enable him to pay off two pressing creditors, for the payment of

whose debts W. was surety, and W. immediately afterwards borrowed from the two creditors the exact sum so paid to them, whereby W. was relieved from his liability as surety :—Held, that the bill of sale, being for value for the purpose of paying debts, could not be impeached as an act of bankruptcy. *Jay, Ex parte, Morris, In re*, 45 L. T. 797.

— **Surety to Composition Deed.**—A transaction whereby the property of a trader is conveyed to secure a surety to a composition deed against liabilities which he has incurred to the particular creditors who may come in, and which surety can stop the trade at any moment, is not a case where the trader receives an equivalent. *Leake v. Young*, 5 El. & Bl. 955; 25 L. J., Q. B. 265; 2 Jur., N. S. 516.

— **Present Advance—Bill of Sale—Consideration wrongly stated.**—B., a trader, by bill of sale, conveyed all his stock, and all the stock that should during the continuance of the security become his, with a power of sale, to C., as a security for money to be advanced by C. The bill of sale was drawn up as a security for an existing debt, as well as for fresh advances; but this was a mistake, the whole consideration being fresh advances not to exceed a certain sum. C. made the advances; the property, in fact, was of about three times the value of the advances. B. was at this time in reality insolvent; but the court, which had power to draw inferences of fact, drew the inference that the advances were bonâ fide asked for and made with a view to keep the business going, and in the belief that they would enable B. to get over his difficulties. Afterwards C. took possession of the goods. B. being declared a bankrupt, his assignees brought trover against C., contending that the transaction in question was itself an act of bankruptcy :—Held, that the transaction must be viewed as if the bill of sale had been drawn as it was intended to be, entirely as a security for fresh advances. *Bittlestone v. Cook*, 6 El. & Bl. 296; 25 L. J., Q. B. 281; 2 Jur., N. S. 758.

Held, also, that the effect of pledging the whole of the trader's property for such advances was not necessarily to delay his creditors, as the advances, even if bearing a small proportion to the value of the property pledged, might be of more advantage to the trader and his creditors than the property itself; and, consequently, that the bill of sale, being in fact bonâ fide, was not, in point of law, fraudulent, nor an act of bankruptcy. *Id.*

— **Promissory Notes to Creditors.**—An assignment of all the property of traders, in consideration of the assignees giving promissory notes to the traders' creditors, is an act of bankruptcy. *Zwischenbart, Ex parte*, 3 Mont., D. & D. 671. Affirmed, *De Gex*, 273; 13 L. J., Bk. 19; 8 Jur. 10, 81.

#### v. In Performance of a Previous Contract.

A deed was made between L., a trader, B., his surety, and his creditors, reciting that the creditors had agreed to accept a composition in the pound on the amount of their debts, to be paid by instalments, and secured by bills drawn by L. on B. and accepted by him and by L.'s promissory note. Before executing the deed, B. stipulated with L. for security to himself over all L.'s

property. On non-payment of the first of the instalments one of the creditors commenced an action against L. for his whole debt, in which he ultimately obtained judgment. L., under pressure from B., after the commencement of the action, and before judgment was obtained on it, assigned all his property to B. This was *bonâ fide* in fulfilment of his promise to give B. security. L. was afterwards declared a bankrupt:—Held, that the assignment to B. was an act of bankruptcy, it being an assignment of all the trader's property, and not being for such an equivalent as to make it not necessarily delay his creditors. *Leake v. Young*, 5 El. & Bl. 955; 25 L. J., Q. B. 265; 2 Jur., N. S. 516.

But where a trader, being indebted to various persons, procured from A. an advance of 200*l.*, for which he verbally agreed to give a bill of sale of all his property if called upon to do so; and on receiving the money he gave to A. a promissory note for 200*l.*, a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance, and also another memorandum of agreement to pay 10*l.* yearly as bonus; and at a later period, on being requested, he executed a bill of sale of all his property to A.:—Held, that such bill of sale, having been executed in pursuance of the original agreement, was not an act of bankruptcy. *Harris v. Rickett*, 4 H. & N. 1; 28 L. J., Ex. 47.

A trader who owed his brother 800*l.* applied to him for a further advance, which he declined to make without security; and ultimately, by letters of the 30th of June and the 1st of July, it was agreed that the brother should advance 150*l.*, and that on his doing so the debtor should give him a bill of sale of his plant, furniture and book debts, which comprised substantially his whole property. The brother advanced 50*l.* in August, 50*l.* in September, and 50*l.* on the 6th of October. On the last-named day, being the expiration of the time allowed by another large creditor, who was known by the brother to be pressing for payment of his debt, the debtor gave the brother the bill of sale, which was expressed to be to secure 900*l.* then due, 50*l.* then advanced, and any future advances. In the course of October the brother advanced 100*l.* more. In November the above-mentioned creditor took proceedings in bankruptcy, relying on the bill of sale as an act of bankruptcy:—Held, that the giving the bill of sale was not an act of bankruptcy, as it was given in pursuance of an agreement by which a substantial further advance was obtained; and that the circumstances negatived the conclusion that the giving it was purposely postponed till the debtor's circumstances were desperate. *King, Ex parte*, 2 Ch. D. 250; 45 L. J., Bk. 109; 34 L. T. 466; 24 W. R. 559—C. A.

In August, 1874, a shipbuilder having overdrawn his account with his bankers, offered to give them a security over a ship, which he was then building. This offer was declined in the first instance, with the intimation, however, that circumstances might arise which might render it desirable for the bank to have the security offered, whereupon he promised that whenever he was required to give it he would do so. Two months later, his account being still largely overdrawn, the bankers requested him to give them the promised security. Accordingly he deposited with them the builder's certificate of the ship, which was still unfinished, and the

following day they put a man in possession. At the same time he, in consideration of 770*l.* then advanced to him, assigned to the bankers a trade debt of 2,384*l.* 2*s.* 8*d.*, as a further security for the general balance of his account. Two days afterwards he filed a petition for liquidation:—Held, that the transaction between him and his bankers was neither a fraudulent preference nor an act of bankruptcy. *Winter, Ex parte, Softley, In re*, 20 L. R., Eq. 746; 44 L. J., Bk. 107; 33 L. T. 62; 24 W. R. 68.

On the 9th of December, 1865, in consideration of the defendant having agreed to lend to J. 107*l.* to pay an acceptance then about to fall due, J. agreed to give him a mortgage of all his goods and chattels as security for that sum, and also for any further money the defendant might lend him. On the 6th of January, 1866, the defendant made a further advance of 64*l.* to J., who on the 27th of January executed a bill of sale in pursuance of the agreement, reciting the total amount then due, and assigning all his personal property to the defendant as security for it. On the 31st of December, 1866, J. was adjudicated a bankrupt:—Held, that the bill of sale, being given partly in respect of the original agreement and partly in respect of the subsequent advance, which was actually made to such an amount as to constitute a substantial equivalent for the assignment, was a valid bill of sale as against the assignee in bankruptcy. *Mercer v. Peterson*, 3 L. R., Ex. 104; 37 L. J., Ex. 54; 18 L. T., 30; 16 W. R. 486—Ex. Ch.

M., a foreigner, who carried on business in Paris as a circus proprietor, was under a contract to bring over his animals and plant to England for exhibition, and being prevented from removing them by an attachment levied in Paris, he procured D. to become surety for the return of the animals and plant to Paris, and thereupon he removed them to England for the purpose of fulfilling his engagement, and gave D. a bill of sale of the animals and plant, which were of the value of 80,000*l.*, to secure 5,000*l.*, in which sum the bill of sale recited that M. was indebted to D. for moneys lent and advanced, no moneys having in reality been advanced, but the bill of sale being intended to be a counter security to D. M. had no other property in England, but had other property in Paris and other foreign places:—Held, that the execution of the bill of sale was not an act of bankruptcy. *Defries, Ex parte, Myers, In re*, 35 L. T. 392—C. A.

#### g. Assignment of part of Debtor's Property to Secure Existing Debt.

A., a soap and alkali manufacturer, being indebted to a banking company, assigned to them, to secure past and future advances, his leasehold property, with all the stock in trade, utensils, and effects thereon, and also a policy of insurance, as a security for moneys advanced or to be advanced. The deed contained a power of sale, and a proviso that the trader should remain in possession until default. The assignment did not include another part of A.'s property, equal in amount to the debt covered by the security. In an action by A.'s assignees, to recover part of the property assigned, the jury found that the deed was not executed in contemplation of bankruptcy:—Held, that it was a valid deed, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 1 C., M. & R. 443; 5 Tyr. 136.

his goods and chattels to A., his landlord, but no attempt was made by any creditor to obtain an adjudication upon it, nor was there any creditor who could have done so. On the 11th of October, the day from and after which the 24 & 25 Vict. c. 134 came into operation, A. made a distress on the goods of P., who was not a trader. P. was adjudicated bankrupt on his own petition, and assignees appointed:—Held, that the title of the assignees could not relate back to the act of bankruptcy in the preceding March, and consequently the 129th section of the first-mentioned statute did not apply. *Paul v. Best*, 3 B. & S. 537; 32 L. J., Q. B. 96; 9 Jur., N. S. 519; 7 L. T. 738; 11 W. R. 280.

Under 7 & 8 Vict. c. 96, s. 41, the title of the assignees related back only to the act of bankruptcy on which the fiat proceeded. *Stenson v. Newham*, 13 C. B. 285; 22 L. J., C. P. 110; 17 Jur. 600—Ex. Ch.

A trader had under pressure assigned all his property to one of his creditors, there being no such fraud as would have made the assignment void against creditors if bankruptcy had not ensued, nor any intention to prefer that creditor to other creditors under a bankruptcy then in contemplation, so as to amount to a fraudulent preference; but the assignment was such as must necessarily have prevented the trader from paying any others of his creditors, as the creditor must have known. The trader soon after became bankrupt on his own petition:—Held, that the assignment was an act of bankruptcy; and if the bankruptcy had been on the petition of a creditor, so that the title of the assignees could have related back to the act of bankruptcy, the property assigned would have belonged to them; but the bankruptcy being on the trader's own petition, there was no relation back, and therefore the property assigned belonged to the creditor. *Jones v. Harber*, 6 L. R., Q. B. 77; 40 L. J., Q. B. 59; 23 L. T. 606; 19 W. R. 248.

On the 22nd October, 1862, by deed between S. and the defendant, S., in consideration of 50*l.* advanced by the defendant, assigned all his household furniture and effects to the defendant, with a proviso for making the deed void, if S. should, on demand in writing given to him, or left at his last place of abode, pay the 50*l.* with interest; and in default of payment contrary to the proviso, then at any time thereafter the defendant was empowered to take possession of, and sell the goods; and until default, S. was to retain possession of them. At the same time S. gave the defendant his acceptance at four months for 50*l.* as collateral security, which the defendant indorsed over for value. On the 12th of February, S. was taken in execution, and committed to the county gaol. On the 16th the defendant, knowing S. to be in gaol, left a demand in writing at his house, and took possession of the goods the same evening, and, continuing in possession, sold them on the 13th of March. On the 18th of February, S. having made the affidavit required by 24 & 25 Vict. c. 134, s. 98, petitioned in form *pauperis*, and on the 23rd was brought up to the county court and adjudicated a bankrupt. In trover by the official assignee against the defendant:—Held, first, that if the taking the possession on the 16th of February, the day of the demand, was premature, that did not prevent the defendant from taking possession afterwards in due time. *Bramwell v. Eglinton*, 5 B. & S. 39; 33 L. J.,

Q. B. 130; 10 Jur., N. S. 583; 10 L. T. 295; 13 W. R. 551.

Held, secondly, that the taking of the acceptance and indorsing it over for value, did not suspend the right of the defendant to take possession under the bill of sale. *Ib.*

Held, thirdly, that by 24 & 25 Vict. c. 134, s. 103, the adjudication related back to the date of the commitment of S. to prison, and therefore the goods, which were then in his order and disposition by the consent of the defendant, passed to the official assignee, and the transaction was not protected by sect. 133. *Ib.*

Where a trader was adjudicated bankrupt under 12 & 13 Vict. c. 106, s. 223, without the filing of a petition by a creditor, the bankruptcy had no relation back to any act done by the bankrupt prior to the adjudication. *Monk v. Sharp*, 2 H. & N. 540; 27 L. J., Ex. 29; 3 Jur., N. S. 1327; *S. P., Harrison, Ex parte*, 26 L. J., Bk. 30; 3 Jur., N. S. 228; *Southern v. Sidney*, 3 Jur., N. S. 1239.

**Debtor Summons—Act annulled by Satisfaction of Debt.**—When an execution creditor was paid out, the debtor had already committed an act of bankruptcy by non-compliance with a debtor summons in respect of the execution creditor's debt:—Held, that the trustee in the liquidation could not avail himself of that act of bankruptcy, it having been annulled when the debt in respect of which it arose was satisfied. *Greener, Ex parte, Vane, In re*, 46 L. J., Bk. 76; 36 L. T. 781.

## 6. PROOF OF ACT OF BANKRUPTCY.

**Trover by Assignees—Act of Bankruptcy subsequent to Conversion.**—If in trover by assignees of a bankrupt the defendant plead that the plaintiffs are not assignees, they may, on that issue, give evidence of any act of bankruptcy committed before the date of the fiat, although such act of bankruptcy is later in date than the transaction which is relied on as the conversion by the defendant. *Gibson v. King*, Car. & M. 468.

**Declaration by Bankrupt.**—In order to make the declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and act should be contemporaneous. *Crouch v. Great Western Railway Company*, 4 P. & D. 686; 1 Q. B. 51; 2 Railw. Cas. 505; 5 Jur. 826.

**Unstamped Deed.**—A deed of assignment under the Bankruptcy Act, 1861, Schedule D., may be given in evidence as proof of an act of bankruptcy, though neither stamped nor registered; and notice of the execution of the deed is notice of an act of bankruptcy. *Ponsford v. Walton*, 3 L. R., C. P. 167; 37 L. J., C. P. 113; 17 L. T. 511; 16 W. R. 363.

A deed of assignment for the benefit of creditors not registered through want of the necessary assents, may be used, though unstamped, as evidence of an act of bankruptcy. *Gouldwell, Ex parte*, 4 L. R., Ch. 47; 38 L. J., Bk. 13; 19 L. T. 272; 17 W. R. 40; overruling *Potter, Ex parte*, 3 De G., J. & S. 240; 34 L. J., Bk. 46; 11 Jur., N. S. 49; 11 L. T. 435; 13 W. R. 189.

**Onus of Proof.**—If a petitioning creditor alleges that the debtor has committed an act of

bankruptcy which can be committed only by a trader, the onus is on him to prove that the debtor was, within the meaning of the Bankruptcy Act, a trader at the time when the act was committed. *Salaman, Ex parte, Taylor, In re*, 21 Ch. D. 394; 47 L. T. 495; 31 W. R. 282—C. A.

A petitioning creditor, who alleges that his debtor has committed an act of bankruptcy, by departing from his dwelling-house with intent to defeat and delay his creditors, is bound to shew that the debtor is alive and in some other place. *Geisel, Ex parte, Stanger, In re*, 22 Ch. D. 436; 48 L. T. 405; 31 W. R. 264—C. A.

## 7. NOTICE TO DISPUTE.

**Amendment of Notice and Costs.**—In an action by assignees of a bankrupt, the defendant gave notice to dispute the trading and act of bankruptcy. At the trial, the judge nonsuited them on the ground that the petitioning creditor's debt upon the proceedings was contracted at a period when the bankrupt had ceased to be a trader. The court set aside the nonsuit, holding that the objection was not open to the defendant under the notice to dispute the trading and act of bankruptcy. A judge at chambers having allowed the defendant to amend his notice, by adding thereto that he intended at the trial to dispute the petitioning creditor's debt, the court refused to allow the assignees to discontinue without payment of costs. *Hernemann v. Barber*, 15 C. B. 774; 3 C. L. R. 239, 241.

**Feigned Issue.**—Feigned issue, on an allegation, that at the time of the seizing of goods in execution, the plaintiffs in the issue were entitled to the same, as against and free from the execution, and that the goods were not liable to be so seized as against such plaintiffs:—Held, that the plaintiffs who claimed as assignees under the bankruptcy (of the judgment debtor) were bound to prove the trading, petitioning creditor's debt and act of bankruptcy, though no notice had been given to dispute those matters. *Lott v. Melville*, 3 M. & G. 40; 3 Scott, N. R. 346; 9 D. P. C. 882; 5 Jur. 436.

## V. DEBTOR SUMMONS.

### 1. TRADER DEBTOR SUMMONS UNDER 12 & 13 VICT. C. 106 AND PREVIOUS STATUTES.

#### a. Proceedings by Creditor.

**Nature of Debt.**—Where two firms had one partner common to both, a debt from one firm to the other cannot be made the subject of a notice for the purpose of creating an act of bankruptcy, the statute requiring such debt to be recoverable at law. *Johnson, Ex parte*, 2 Mont. D. & D. 678.

**By Assignor of Debt.**—An assignor of a debt cannot, without the assignee, proceed against the debtor by trader debtor summons. *Taylor, Ex parte*, 3 De G. & J. 480; 28 L. J., Bk. 9; 5 Jur., N. S., 527; 7 W. R. 273.

**By Public Company.**—Where a public company proceeds, it must be proved that some person was duly authorized to demand payment of the debt. *Gratton, Ex parte*, 2 Mont. D. & D. 401. See 24 & 25 Vict., c. 134, s. 92.

**By Creditor with Notice of Petition.**—A creditor after notice of a petition for arrangement may proceed by trader debtor summons, but does so at his peril, and may have to pay the costs of annulling an adjudication obtained by him. *Arnold, Ex parte*, 8 De G. & J. 473; 28 L. J., Bk. 11; 5 Jur., N. S. 398; 32 L. T., O. S. 268; 7 W. R. 174.

**Affidavit—Set-off.**—In making the affidavit of debt, the creditor ought to deduct any sum due to his debtor arising out of the transaction on which his demand is founded; and where there are mutual accounts, any clear set-off which he knows must be deducted from the amount of his demand. *Marshall v. Sharland*, 15 Q. B. 1051; 20 L. J., Q. B. 3; 15 Jur. 168.

**Particulars.**—In particulars served by a fruit merchant on a grocer, together with a summons under 12 & 13 Vict. c. 106, s. 78, the word "goods" describes the wares supplied sufficiently to prevent an adjudication from being annulled on the ground of uncertainty in the particulars. *Bower, Ex parte*, 1 De G., Mac. & G. 468; 21 L. J., Bk. 61; 16 Jur. 734.

A partner of a firm in liquidation who signed for himself and late partners was entitled to sue out a trader debtor summons, and the court was not required to ascertain his individual interest in the sum claimed. *Atwood, Ex parte*, 19 L. T. 42.

Particulars of demand and affidavits of debt are to be read together, and any information with respect to the debt which is omitted from the one, but disclosed in the other, is sufficient. *Id.*

Dates of bills of exchange comprised in the claim are not material. *Id.*

A creditor's usual signature to particulars of demand was sufficient. *Roche, Ex parte*, 37 L. J., Bk. 16.

**Affidavit and Particulars inconsistent.**—An affidavit filed as the foundation of an act of bankruptcy stated the demand to be for goods sold and delivered, but, by the particulars, the greater portion of the debt was stated merely as due on bills of exchange, which, however, it afterwards turned out were given in respect of goods sold and delivered:—Held, that the proceeding was irregular, and an insufficient foundation for an act of bankruptcy. *Greenstock, Ex parte*, 1 De Gex, 230; 15 L. J., Bk. 5; 10 Jur. 122.

**Waiver of Irregularity.**—A debtor, on being served with the summons, called on the creditor's solicitor, and saw his clerk, at whose instance the debtor signed a memorandum, promising to pay at a certain time, or that, if he did not, the creditor might proceed on the summons. The debtor was attended by no solicitor on his behalf, and was not aware of the irregularity in the proceedings:—Held, that neither the signature of the memorandum nor his failure to attend the summons prevented his impeaching the regularity of the proceedings, but that the fiat ought to be annulled with costs. *Id.*

**In Amount of Debt.**—A plaintiff filed an affidavit under 5 & 6 Vict. c. 122, s. 11, and in the form specified, that the defendant was indebted to him in 99l. 19s. 7d., and that an account of particulars of demand, amounting to that sum, was thereunto annexed. The particulars pur-

ported to be for 99*l.* 19*s.* 7*d.*, and, after setting out the items, exhibited the following figures:—

"Total. . . . .	£100 14 7
"Cr. Balance for coals supplied . . . . .	10 15 0
	£89 19 7"

The defendant appeared to the summons issued thereupon, and deposed that he had a good defence to the amount of 54*l.* 15*s.* 10*d.* The plaintiff subsequently brought an action for 100*l.* 14*s.* 7*d.*, to which the defendant pleaded a set-off, and the plaintiff recovered 86*l.*:—Held, that the defendant was not entitled to costs, inasmuch as by reference to the account of the particulars, the affidavit was in substance for 89*l.* 19*s.* 7*d.*, and not for 99*l.* 19*s.* 7*d.* *Wilding v. Temperley*, 11 Q. B. 987; 17 L. J., Q. B. 184; 12 Jur. 417.

**Summons—Service of Imperfect Copy.**—Where the signature of the commissioner to an original summons shewn to a trader on serving him with the summons was omitted in the copy of such summons left with him:—Held, that this was not a personal service of the summons upon the trader, and that his not appearing before the commissioner after such service did not constitute an act of bankruptcy upon which an adjudication against him could be founded. *Tindall, Ex parte*, 24 L. J., Bk. 18; 1 Jur., N. S. 857.

**Proceeding under Statute and by Action.**—A. filed an affidavit of debt in the Bankruptcy Court against B., under 5 & 6 Vict. c. 122, s. 11, and filed a notice requiring immediate payment of the same. On the same day he also served a copy of the writ of summons upon B., indorsed with the amount of the debt, and 2*l.* 2*s.* costs. B., having afterwards signed an admission of the debt, paid the same. The court refused to stay the proceedings in the action, holding that A. might proceed by action and under the statute at the same time, and that the proceedings in the former could only be stayed upon payment of costs. *Covington v. Hogarth*, 2 D. & L. 619; 8 Scott, N. R. 725; 7 M. & G. 1013; 9 Jur. 88.

**Filing Affidavit for Amount greater than Debt without probable Cause—Omitting to give Credit for Counterclaim.**—A plaintiff who has made an affidavit of debt against a trader, and recovered less than the amount sworn to, will be ordered to pay the costs to the defendant as having made the affidavit without reasonable or probable cause, if he has sworn to his own claim, without allowing for a counterclaim of the defendant, arising on the same transaction. *Marshall v. Sharland*, 15 Q. B. 1051; 20 L. J., Q. B. 3; 15 Jur. 168.

**Including Debt barred by Statute of Limitations.**—A plaintiff filed an affidavit of debt, in which he swore that the defendant was indebted to him in 4,263*l.* 16*s.* 3*d.* This sum included an item of 1,291*l.* 13*s.* 4*d.* for salary, at the rate of 500*l.* a year. Of this sum, 1,000*l.* was barred by the Statute of Limitations. No acknowledgment or promise to bar the statute, or payment on account, had been made, and in fact the plaintiff had never claimed any part of this sum of 1,291*l.* 13*s.* 4*d.* before commencing the proceedings in bankruptcy. An action having been brought, the defendant denied his liability to pay the sum, but did not plead the

Statute of Limitations. The cause having come on for trial, a verdict was taken, subject to a reference. The arbitrator awarded to the plaintiff 3,176*l.* 2*s.* 2*d.*, which included 203*l.* 19*s.* 3*d.*, which, when before the arbitrator, the parties agreed should be paid in respect of the claim for 1,291*l.* 13*s.* 4*d.* The plaintiff alleged that this was a compromise; the defendant, that he agreed to pay it as the price of peace, having always denied his liability to pay any part of that sum:—Held, that the case must be judged of by the state of things existing when the affidavit was made, and that, as there had been no payment on account, or acknowledgment, written or verbal, to bar the statute or lead to the inference that the defendant would waive it, there was no reasonable or probable cause for making an affidavit that the sum of 1,000*l.*, barred by the statute, was due, and that the defendant was therefore entitled to his costs of the action. *Hill v. Merritt*, 1 H. & N. 758; 26 L. J., Ex. 126.

**Mistake of Law.**—In order to determine whether or not a creditor is liable to costs for having, without reasonable or probable cause, made an affidavit of debt, regard must be had to the surrounding circumstances and to the law, and not merely to the belief operating on his mind at the time. *Hope v. Fenner*, 2 C. B., N. S. 887; 26 L. J., C. P. 207; 3 Jur., N. S. 565.

Therefore, where a plaintiff had contracted to do works for the defendant at a fixed price, and did execute part, but the defendant, being dissatisfied, lawfully discharged him from continuing the works and finished them himself, and the plaintiff bona fide believed that under the circumstances he was entitled to charge measure and value prices for what had been done, and made such affidavit in bankruptcy of a debt greater than the contract price for the whole works, the court held the defendant entitled to his costs. *Id.*

**Unliquidated Damages.**—The plaintiff, a builder's piecemaster, was employed to do the carpenter's and joiner's work to certain houses for the defendant, for a given sum. Before the whole work was completed, the defendant discharged the plaintiff, who thereupon sued him for an alleged balance of 178*l.* 7*s.* 7*d.* for work and labour and money paid; and he also filed an affidavit in bankruptcy, in which he alleged that the defendant was indebted to him in that sum for work and labour and money paid. The jury found a verdict for the plaintiff for 100*l.* only:—Held, that the defendant was entitled to costs, there being no reasonable or probable cause for swearing to that as a debt, which, as to a part at least, was only a claim for unliquidated damages. *Pratt v. Goswell*, 9 C. B., N. S. 710.

**Verdict not Conclusive Evidence.**—Where a creditor who has made an affidavit of debt obtains a verdict for a less amount than that sworn to, the verdict (especially if the debt claimed is on a quantum meruit) is not conclusive evidence of the absence of reasonable or probable cause for making the affidavit in the larger amount, so as to entitle the defendant to his costs. *Gilbert v. Crozier*, 1 C. B., N. S. 632; 26 L. J., C. P. 110; 3 Jur., N. S. 295.

**Action removed by Defendant.**—The section does not apply where the action has been

removed by a defendant from an inferior court. *Woodall v. Voight*, 6 H. & N. 153; 30 L. J., Ex. 31; 6 Jur., N. S. 1162; 9 W. R. 67.

— **Action referred before Trial.**—A plaintiff who has filed an affidavit of debt against a defendant without reasonable or any probable cause, cannot be deprived of his costs when, before trial, the action is referred to an arbitrator. *Stercens v. Russell*, 1 H. & N. 752.

— **Verdict subject to Award of Arbitrator—Agreement as to Costs.**—A creditor having filed an affidavit of debt, and the amount having been disputed, an order was made that the defendant should enter into a bond with two sureties. An action was brought to recover the amount claimed. An agreement was then entered into between the plaintiff, the defendant, and K., in pursuance of which the order for the bond was discharged, and the bankruptcy proceedings were terminated; K., depositing cheques for the debt and costs, if any, recovered in the action; in case of a verdict for the defendant the cheques to be returned to K., upon his paying 6l. for the costs of the trader debtor summons, and also the costs of any issue found for the plaintiff. At the trial of the cause it was agreed that a verdict should be entered for the plaintiff, subject to the award of an arbitrator; the costs of the cause to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded that the verdict should be reduced, so that the creditor recovered a sum less than that sworn to:—Held, first, that the defendant's right to costs was not affected by the agreement, or the termination of the bankruptcy proceedings in pursuance of it. *Foster v. Hanson*, 1 H. & N. 755.

Held, secondly, that as the verdict was to be operative the statute applied, notwithstanding that the cause had been referred to the award of an arbitrator. *Ib.*

— **Defendant's Costs to be Deducted from Amount Recovered.**—A defendant's costs are to be deducted from the debt or damages recovered by the plaintiff, and not from the debt or damages and the plaintiff's costs added together. *Deere v. Kirkhouse*, 1 L. M. & P. 783; 20 L. J., Q. B. 195.

— **Proof of Commencement of Action.**—Upon an application by a defendant for his costs the commencement of the action is sufficiently shewn by the statement of the writ of summons in the issue delivered by the plaintiff, without any express averment to that effect upon the affidavits. *Ib.*

— **Execution levied by Creditor for Verdict and Costs—Application for Defendant's Costs too late.**—In an action, the defendant pleaded the general issue to the whole, and a set-off as to part. After action the plaintiff obtained a summons in bankruptcy, on an affidavit made by him, under 5 & 6 Vict. c. 122, s. 11, that the defendant was indebted to him in the full amount for which the action was brought, and allowing no credit for the sum sought to be set off. The defendant having deposed on oath that he had a good defence to the whole of the demand, the summons in bankruptcy was dismissed with costs. The cause was afterwards tried in Trinity Vaca-

tion, when, the plaintiff having admitted the set-off, a verdict was entered for him for the difference between it and his whole demand. The judge certified for immediate execution, which was issued on the 7th of August, and the amount levied paid under protest. The defendant, on the 20th of November, obtained a rule, calling on the plaintiff to shew cause on the last day of the term, why he should not refund the difference between the sum paid and the amount of the verdict, and to pay the defendant his costs in the action:—Held, that the application was made too late. *Smith v. Temperley*, 16 M. & W. 273; 4 D. & L. 510; 16 L. J., Ex. 105; 11 Jur. 244.

— **Action Stayed—Judgment for Debt and Costs—Costs of Bankruptcy Summons.**—A writ of summons having been issued out of the Exchequer against a defendant, a summons in bankruptcy was afterwards taken out against him returnable on the 17th, on which day an order was made by a commissioner under 12 & 13 Vict. c. 106, s. 85, that the costs of the summons should abide the event of the action. On the 15th of October a summons was taken out before a judge, returnable on the 17th, for staying proceedings on payment of the debt and costs, and an order for that purpose was made on the 18th. One bill having been taxed in bankruptcy and the other in the Exchequer, the master added them together, and judgment was signed for the amount:—Held, that the judgment was regular. *Webb v. Hewlett*, 2 L. M. & P. 4; 6 Ex. 107; 20 L. J., Ex. 144.

— **When Proceedings Actionable—Adjudication on defective Affidavit—Mistake of Commissioners.**—A declaration alleged that the defendant falsely and maliciously caused and procured the plaintiff to be adjudged a bankrupt. The defendant presented a petition to the Court of Bankruptcy, and made an affidavit that the plaintiff had upon summons admitted part of the debt, but swore that he had a good defence as to the residue, and the plaintiff had not within seven days after filing the admission paid or tendered to him the sum admitted to be due; and thereupon the plaintiff was adjudged a bankrupt:—Held, that the declaration was proved, and that the defendant was liable to an action, although the affidavit did not shew that an act of bankruptcy had been committed under 12 & 13 Vict. c. 106, s. 82, and the commissioners made a mistake in point of law in adjudging the plaintiff bankrupt. *Farley or Farlie v. Danks*, 4 El. & Bl. 493; 24 L. J., Q. B. 244; 1 Jur., N. S. 331.

— **Costs.**—Where a creditor had taken out a summons against his debtor, under 12 & 13 Vict. c. 106, s. 78, and filed an affidavit stating the debt to be of an amount which was greater than the amount he subsequently recovered by action, and the debtor made it appear to the court that the creditor had no reasonable or probable cause for stating the amount at that mentioned in the affidavit, the debtor was entitled to the costs of the action, and the court had no discretion in the matter. *Falconar v. Mackenzie*, 2 L. R., Ex. 248; 36 L. J., Ex. 222; 16 L. T. 630.

A promise not to apply for costs under 12 & 13 Vict. c. 106, s. 85, was a sufficient consideration to support a contract to pay the amount of such



costs. *Bracewell v. Williams*, 2 L. R., C. P. 196; 12 Jur., N. S. 1004; 15 L. T. 215; 15 W. R. 180.

**b. Debtor failing to Pay, Secure, or Compound for, Debt.**

**Lunatic Debtor.]**—Semble, that a lunatic cannot commit an act of bankruptcy, by omitting to pay or give security. *Stamp, Ex parte*, 1 De Gex, 345.

**Tender of Debt.]**—A trader, who had signed an admission of a debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come for the purpose of paying that amount. The creditor said it was of no use, as it was too late, and that the debtor must see the creditor's attorney:—Held, that the production of the money was dispensed with, and that there was a good tender. *Danks, Ex parte*, 2 De G., Mac. & G. 936; 22 L. J., Bk. 73.

**Execution of Inspectorship Deed.]**—After a valid inspectorship deed had been executed and registered, the court ought not, at the instance of a non-assenting creditor taking out a trader debtor summons, to require the debtor to enter into a bond for payment of the amount of the debt. *Watson, Ex parte*, 35 L. J., Bk. 41; 14 L. T. 243.

**Effect of Protection Order under 12 & 13 Vict. c. 106, s. 211.]**—A trader debtor, after hearing on a summons under 12 & 13 Vict. c. 106, s. 78, admitted the demand of a creditor, petitioned under the 211th section for an arrangement, and obtained, *ex parte*, an order for protection to his person and property from all process:—Held, that the order did not protect him from a petition for adjudication of bankruptcy, or from adjudication thereon. *Walker, Ex parte*, 6 De G., Mac. & G. 752; 24 L. J., Bk. 26.

**Admission of Debt—Presumption of Error.]**—Under 5 & 6 Vict. c. 122, if a trader, summoned by his creditor, and being indebted to him in 149l. 4s. signed an admission that he was indebted to such creditor in 149l., and therefore had nothing to shew that the 4s. was intentionally omitted, such trader did not commit an act of bankruptcy if he omitted to perform anything required by s. 13, or s. 15, from parties refusing to admit debts on summons, or admitting them in part. *Pennell v. Rhodes*, 9 Q. B. 114; 15 L. J., Q. B. 352; 10 Jur. 825.

**Admission of Part—Failure to Pay—Act of Bankruptcy.]**—Where a trader, who, upon summons to the Court of Bankruptcy, appears and signs an admission for part only of the demand of the creditor, and also makes a deposition that he believes he has a good defence upon the merits to the residue of the demand, and does not pay the sum so admitted, a petition for adjudication of bankruptcy being filed against him within two months, &c., he does not commit an act of bankruptcy within the meaning of the 12 & 13 Vict. c. 106, s. 82. The act of bankruptcy is committed by failing to pay the part admitted and making no deposition as to the residue. *Oldfield v. Dodd*, 8 Ex. 578; 22 L. J., Ex. 144; 17 Jur. 261—Ex. Ch.

**Discretion of Commissioner to require a Bond.]**

—It is not imperative upon the commissioner to require a bond, but is a matter within his discretion, having regard not only to the solvency of the alleged debtor, but to all circumstances of the case, including the probability of success in an action for the demand. *Wood, Ex parte*, 4 De G., Mac. & G. 876; 23 L. J., Bk. 3; 18 Jur. 229.

Where, therefore, a demand was made in respect of differences in purchases and sales of a commodity arising from the mere turn of the market, neither party having or intending to buy or sell the commodity itself:—Held, not a case requiring a bond. *Id.*

An action was brought, under the Bills of Exchange Act, by indorsee against an acceptor. The defendant obtained leave to defend the action, on the ground that he had accepted the bill as agent, and not as principal. The debtor was then served with a trader debtor summons, and desiring to contest the claim, was ordered by the commissioner to give security by bond, with two sureties:—Held, that the commissioner had exercised a proper discretion, with which the court would not interfere. *Ruck, Ex parte*, 9 Jur., N. S. 683; 8 L. T. 102.

**Approval of Security—Power to Revoke.]**—A commissioner who has approved of the security offered by a debtor under 1 & 2 Vict. c. 110, s. 8, is functus officio, and cannot revoke his approval. *Neal, Ex parte*, 2 Mont., D. & D. 620; 6 Jur. 876.

**Right of Sureties to have Bond cancelled.]**—Where a party, under 1 & 2 Vict. c. 110, s. 8, had made an affidavit of debt against A. in the Bankruptcy Court, and A. had entered into a bond, with sureties, conditioned to pay such sum as should be recovered against him in an action, or to render himself:—Held, that the court had no power, on application by the sureties, suggesting that A. had rendered, to order the bond to be delivered up to be cancelled. *Hayward v. Heffer*, 5 Q. B. 398.

**Second Fiat on same Act of Bankruptcy.]**—A fiat was sued out, founded on an omission to pay or secure a debt according to 1 & 2 Vict. c. 110, s. 8. The fiat was not sued out by the creditor who made the affidavit of debt, and was afterwards annulled for want of prosecution. A second fiat issued after the expiration of the two months:—Held, that the failure to pay or secure the debt constituted a sufficient act of bankruptcy to support the second fiat. *Parker, Ex parte*, 3 De G. & S. 575.

**2. JUDGMENT DEBTOR SUMMONS UNDER 12 & 13 VICT. c. 106, s. 76.**

**Members of Parliament.]**—A judgment debtor summons under s. 76 cannot properly be issued against a member of the House of Commons. *Nesbitt, Ex parte*, 8 L. T. 212; 11 W. R. 552. *S. P., Wright, Ex parte*, 9 L. T. 349; 12 W. R. 59; *Gibbon, Ex parte*, 8 L. T. 552; *The European, &c., Corporation v. —, M. P.*, 13 L. T. 447; 14 W. R. 185.

**3. DEBTOR SUMMONS UNDER 32 & 33 VICT. c. 71.**

**a. Who may obtain.**

**Infant.]**—An infant creditor may issue a

debtor summons in his own name. *Brocklebank, Ex parte*, 6 Ch. D. 358; 45 L. J., Bk. 113; 37 L. T. 282; 25 W. R. 859.

Semble, that in such case the debtor would be entitled, if he asked for it, to have some adult person named as security for the costs of the summons. *Ib.*

But if he makes no such application, but allows the summons to proceed in the ordinary way, an adjudication, founded upon non-compliance with it, is valid. *Ib.*

**Receiver.**—A receiver in chancery can issue a debtor summons in respect of a sum due to him in that character. *Harris, Ex parte, Lewis, In re*, 2 Ch. D. 423; 45 L. J., Bk. 71; 34 L. T. 261; 24 W. R. 851.

**Undischarged Bankrupt cannot.**—A bankrupt whose creditors had agreed to a resolution suspending his bankruptcy, but who had never obtained his discharge, recovered judgment in an action against C. for 500*l.* The assignee gave notice to C. of the bankruptcy, and claimed the money recovered. Afterwards, an arrangement having been come to between the assignee and the bankrupt, the bankrupt, without any interference by the assignee, sued out a debtor summons against C. for the judgment debt:—Held, that the summons could not be supported. *Carter, Ex parte*, 2 Ch. D. 806; 45 L. J., Bk. 145; 35 L. T. 388—C. A.

**Creditor holding Garnishee Order.**—A creditor who holds garnishee orders covering sums due to the debtor to an amount exceeding the debt due to the creditor, can nevertheless obtain a debtor summons against the debtor, and proceed thereon to have him adjudged a bankrupt. *Tepper, In re*, 9 L. R., Ch. 312; 30 L. T. 102; 22 W. R. 381.

**Creditor holding Security for Debt.**—A creditor for a sum not less than 50*l.* is entitled to take out a debtor summons, notwithstanding that he has sued out a writ of attachment in the Lord Mayor's Court, and served it on persons holding property of the debtor of a larger amount than the debt. *Giles, In re, Mauritz, Ex parte*, 5 L. R., Ch. 779; 39 L. J., Bk. 56; 23 L. T. 293; 18 W. R. 1097.

**Foreign Creditor against Foreign Debtor residing in England.**—A debtor summons may be taken out by a foreign creditor against a foreign debtor who is at the time in England, in respect of a debt contracted abroad. *Pascal, Ex parte, Myer, In re*, 1 Ch. D. 509; 45 L. J., Bk. 81; 34 L. T. 10; 24 W. R. 263—C. A.

**Several Creditors.**—If several creditors issue one debtor summons, they must continue the subsequent proceedings together. There can be but one act of bankruptcy upon the summons, and the summoning creditors cannot present separate petitions founded upon the failure of the debtor to comply with the summons as to each creditor separately. *Kibble, Ex parte, Onslow, In re*, 10 L. R., Ch. 373; 44 L. J., Bk. 63; 32 L. T. 138; 23 W. R. 433.

Two creditors whose debts together amount to more than 50*l.*, though each debt is less, can issue a debtor summons on which the debtor may be adjudicated bankrupt. *Andrew, In re*, 1 Ch.

D. 358; 45 L. J., Bk. 57; 33 L. T. 556; 24 W. R. 197—C. A.

A tender of the amount of his debt to one of the creditors in such a case does not prevent the adjudication. *Ib.*

**Secretary of Company.**—A debtor summons taken out in the name of the secretary of a company for a debt due to the company is irregular. *Leathley, Ex parte, Hodges, In re*, 8 L. R., Ch. 204; 42 L. J., Bk. 56; 28 L. T. 323; 21 W. R. 301.

#### b. Against whom.

**Trader.**—In order to constitute a debtor a trader within the Bankruptcy Act, 1869, s. 6, sub-s. 6, he must be a trader at the time when the debtor summons is served. *Schomberg, Ex parte*, 10 L. R., Ch. 172; 31 L. T. 665; 23 W. R. 204.

Semble, that the words "being a trader," in the 6th sub-section of the 6th section of the Bankruptcy Act, 1869, apply to a man who had ceased to be a trader at the date of the issuing of the summons, if he was a trader when he contracted the debt. *Lowenthal, Ex parte*, 9 L. R., Ch. 591; 43 L. J., Bk. 83; 30 L. T. 668.

**Husband for Debt of Wife trading separately.**—A married woman carried on in her maiden name a millinery business separately from her husband. A debtor summons was issued against the husband and wife, claiming the payment of a sum due upon some bills of exchange drawn by the summoning creditor upon and accepted by the wife in her maiden name, and dishonoured. The husband applied to the court to dismiss the summons. He deposed that he never authorized his wife to pledge his credit, and that five years previously he had given notice to the summoning creditor that he had nothing to do with his wife's business:—Held, on this evidence, which was uncontradicted, that the husband was not liable for the debt; that the issuing of the summons was an abuse of the procedure; and that the summons must be dismissed with costs. *Shepherd, Ex parte, Shepherd, In re*, 10 Ch. D. 573; 48 L. J., Bk. 35; 39 L. T. 652; 27 W. R. 310—C. A.

**Felon.**—Notwithstanding the provision contained in s. 8 of the act 33 & 34 Vict. c. 23, that every convicted felon shall, during the time while he shall be subject to the operation of the act, be incapable of alienating or charging any property, such a convict can pay a debt which is claimed by a debtor's summons issued and served on him after his conviction, and if he fails to pay the debt within the time limited by the summons, he will commit an act of bankruptcy, upon which an adjudication can be made against him. *Graves, Ex parte, Harris, In re*, 19 Ch. D. 1; 51 L. J., Ch. 1; 45 L. T. 397; 30 W. R. 51; 46 J. P. 70; 14 Cox, C. C. 629—C. A.

**Foreigner.**—A debtor summons may be served in this country in respect of a debt contracted abroad by a foreigner with a foreigner. *Pascal, Ex parte, Myer, In re*, 1 Ch. D. 509; 45 L. J., Bk. 81; 34 L. T. 10; 24 W. R. 263—C. A.

There was a question whether the debtor was "residing" in England:—Held, that this was immaterial, the provisions of r. 17 for the issue of the summons by the court of the district where the debtor resides or carries on business

being merely directory, and not intended to determine any question of jurisdiction. *Ib.*

**Partner retired before Writ issued.]**—Previously to December 8th, 1880, W. did work for a firm in which Y. was a partner. On that date Y. retired, the other partners continuing the business in the firm's name. The dissolution was duly advertised on December 15th, and on the 18th W. issued a writ against the firm in the firm's name. On the 21st the writ was personally served on one of the continuing partners at the firm's place of business. Y. was not served. No appearance was entered for any of the partners, and on December 29th W. signed judgment for default. In June, 1881, W. took out a debtor summons, founded on the judgment against Y. Y. applied to the court to dismiss the summons and his application was refused:—Held (dissentiente Brett, L. J.), that the summons should have been dismissed. Per Selborne, L. C., on the ground that Ord. XLII. r. 8 shews that even if a partner retired at the date of the writ he could be sued under the firm's name; judgment in the firm's name could not be held conclusive of his liability, and is therefore, without more, not a good foundation for a debtor summons. Per Cotton, L. J., that Ord. XVI. r. 10 applies only to persons who are partners at the date of the issue of the writ. Per Brett, L. J., that Ord. XVI. r. 10 applies to all persons liable for the debt for which the action is brought, and judgment obtained against the firm can be enforced against them in any valid way except by issuing execution which is restrained by Ord. XLII. r. 8. *Young, Ex parte, Young, In re*, 19 Ch. D. 124; 51 L. J., Ch. 141; 45 L. T. 493; 30 W. R. 330—C. A.

**Non-Trader Debt, when contracted.]**—A partner not a trader was indebted to the partnership and also to some of the partners separately. By deeds, executed by the debtor after the Bankruptcy Act, 1861, had received the royal assent, but supposed to have been executed before it came into operation, he covenanted to pay to trustees for the other partners a sum fixed upon as principal, and to pay interest thereon, and he gave a mortgage as security. A debtor summons was issued for the money covenanted to be paid:—Held, that the debt was not contracted within the meaning of the Bankruptcy Act, 1869, s. 118, until the execution of the deed of covenant. *Rashleigh, Ex parte, Dalzell, In re*, 2 Ch. D. 9; 45 L. J., Bk. 29; 34 L. T. 193; 24 W. R. 495—C. A. Affirming, 20 L. R., Eq. 782; 32 L. T. 133; 23 W. R. 951.

Held, that the time defined by the words "passing of the Bankruptcy Act, 1861," in the same section is the time when the act of 1861 received the royal assent, and not the time when it came into operation; and that, therefore, the non-trader might be adjudicated bankrupt on a debtor summons issued for payment of the debt so contracted. *Ib.*

#### c. In what Cases.

**Not to be used when bonâ fide Dispute as to Debt.]**—The process of debtor summons was not intended to be used where there is a solvent debtor and a bonâ fide dispute as to the debt. *Sewell, Ex parte, Sewell, In re*, 13 Ch. D. 266; 49 L. J., Bk. 15; 42 L. T. 3; 28 W. R. 286—C. A.

If there is really no defence to the claim, the

creditor ought to proceed by a specially-indorsed writ under the Judicature Act. *Ib.*

Proceedings by way of debtor summons ought to be taken only under such circumstances as must necessarily lead to bankruptcy proceedings. *Ib.*

**Amount of Debt.]**—In an action upon a bill of exchange for 40*l.* an order was made staying the proceedings on the defendant's undertaking to pay to the plaintiffs (in addition to 20*l.* which had been paid into court) 20*l.* 10*s.* and the costs of the action. In default of payment the plaintiffs were to be at liberty to sign judgment and issue execution. The costs having been taxed at 9*l.* 2*s.*, the defendant tendered 29*l.* 14*s.* 6*d.* to the plaintiffs, but they refused to accept it unless the defendant would also pay another overdue acceptance of his for 30*l.* which the plaintiffs held. He refused to pay the 30*l.*, alleging that that acceptance had been obtained from him by fraud, with notice of which the plaintiffs had taken it. The plaintiffs then issued a debtor summons against the defendant for 59*l.* 14*s.* 6*d.* The defendant applied to dismiss it, and he was ordered to give security for the amount claimed. The security not having been given, the plaintiffs presented a bankruptcy petition against him:—Held, that, until judgment had been signed in the action, the 29*l.* 14*s.* 6*d.* could not be used to support a debtor summons, and consequently that there was not a debt sufficient to support a bankruptcy petition. *Astrup, Ex parte, Le Ferre, In re*, 11 Ch. D. 303—C. A.

#### Nature of Debt—Legal or equitable Defence.]

—In order to justify the issuing of a debtor summons under s. 7 of the Bankruptcy Act, 1869, the alleged debt must be an exigible debt: if the debtor would have any defence, legal or equitable, to an action for the debt, the summons ought to be dismissed. *Foster, Ex parte, or Hilbert, Ex parte, Foster, In re*, 23 Ch. D. 797; 52 L. J., Ch. 577; 48 L. T. 497; 31 W. R. 774—C. A. Affirming, 47 L. T. 738.

#### Inchoate Agreement between Debtor and Creditor.]

—Two partners in trade whose affairs were embarrassed, without filing a liquidation petition, summoned a meeting of their creditors. Nineteen out of twenty-seven creditors attended the meeting, their debts amounting to 2,400*l.* out of a total of 2,628*l.*, and a resolution was passed that a deed of assignment of the debtors' estate and effects should be made to three persons named, as trustees for the benefit of the creditors, with power for them to carry on the business for such time as they should think fit, and to sell the concern as a going concern, or otherwise. One of the debtors was to have his discharge on payment of 200*l.*, or otherwise, as the creditors might direct. The resolution was signed by the chairman of the meeting, but by no one else. The day after the meeting the debtors gave up possession of their assets to the persons named in the resolution as trustees, and those persons carried on the business for a few weeks, and proceeded to collect the book debts. A draft deed of assignment was prepared in accordance with the resolution, but it was never executed, the other creditors not having assented to the arrangement embodied in the resolution:—Held, that, inasmuch as all the creditors did not come in and assent to the arrangement, there was no binding agreement between the debtors

and their creditors, and that, consequently, a creditor who was present at the meeting, even if he had assented to the resolution, which appeared to be doubtful, was entitled to issue a debtor summons for his debt. *Ib.*

#### d. Form of Summons and Affidavit in Support.

**Form—Consideration.]**—When a debtor summons is founded on a judgment debt it is not necessary to state the consideration for the judgment in the summons, and a misstatement of the consideration will not vitiate the summons. *Ritso, Ex parte, Ritso, In re*, 22 Ch. D. 529; 52 L. J., Ch. 535; 48 L. T. 376; 31 W. R. 373—C. A.

**— Formal Defect not invalidating Proceedings—Services.]**—A debtor summons and the proceedings upon it are proceedings in bankruptcy within s. 82 of the Bankruptcy Act, 1869, and therefore will not be invalidated by any mere formal defect or irregularity where no injustice is done thereby. A debtor was served with a debtor summons, on the face of which the amount of the debt was stated as 24*l.*, but the cause of debt was stated, and the annexed particulars were referred to which showed the debt to be 74*l.* The creditor took out the summons in person and not by a solicitor, but it was served not by himself but by his clerk:—Held, that as the debtor in the circumstances must have known the amount of the debt and could not have been deceived or misled, the defect in the summons and also that in the mode of service was cured by the 82nd section of the Bankruptcy Act, 1869. *Johnson, Ex parte, Johnson, In re*, 32 W. R. 175—C. A.

**By Public Officer of Company.]**—In an affidavit by the public officer of a company in support of a debtor summons he was described as the registered public officer of the company, but the affidavit did not contain an express statement that he was such public officer, or that he was authorized to sue out the summons:—Held, that the affidavit did not sufficiently comply with r. 15 of the Bankruptcy Rules, 1870, and the summons was dismissed for irregularity. *Torkington, Ex parte, Torkington, In re*, 9 L. R., Ch. 298; 22 W. R. 602.

In an affidavit by the public officer of a company in support of a debtor summons he was described as the registered public officer of the company, but the affidavit did not contain an express statement that he was such public officer, and it contained a statement that he was authorized to make the affidavit, but no statement that he was authorized to sue out the debtor summons:—Held, that the affidavit sufficiently complied with r. 15 of the Bankruptcy Rules, 1870. *Lowenthal, Ex parte, Lowenthal, In re*, 9 L. R., Ch. 324; 43 L. J., Bk. 132; 30 L. T. 282; 22 W. R. 459—C. A., affirming, 43 L. J., Bk. 81; 22 W. R. 350.

Where a debtor summons is sued out upon a dishonoured bill of exchange it is not necessary to state or to prove the debt with the same strictness as in an action; it is sufficient to state it so that the debtor shall not be misled. *Ib.*

**By Agent.]**—It is not imperative that the affidavit prescribed should be made by a creditor suing out a debtor summons, where the creditor carries on business through an authorized agent.

The agent, if properly authorized, can make a sufficient affidavit in support. *Anon.*, 21 L. T. 802.

It is necessary that the demand mentioned in the affidavit should be made, and the particulars of demand also there mentioned should be served. *Ib.*

#### e. Service of Summons.

**By whom.]**—When a debtor summons is served by the creditor's solicitor, the solicitor need not effect the service with his own hand. It may be effected by his clerk, or by the clerk of the country agent of a London solicitor. *Lancaster, Ex parte*, 3 Ch. D. 498; 35 L. T. 649; 24 W. R. 1010—C. A., affirming, 45 L. J., Bk. 147; 34 L. T. 951.

A debtor summons may be served by any person authorized by the creditor. Service by an accountant who had been in the habit of serving summonses for the creditor's solicitor, held to be good service. *Denman, Ex parte, Denman, In re*, 29 W. R. 616.

**Service out of England.]**—The personal service of a debtor summons on a debtor out of England is a nullity, and where such a service has been effected and the debtor has been adjudicated a bankrupt in England, because not being a trader he has for three weeks succeeding the service of the summons neglected to pay or secure or compound for the debt, the adjudication will be annulled. *O'Loughlen, Ex parte*, 6 L. R., Ch. 406; 40 L. J., Bk. 28; 23 L. T. 878; 19 W. R. 459.

After the expiration of the three weeks from the service of the summons, the debtor applied to the registrar to rescind the order for service; the application was refused; no appeal was brought against that order. Subsequently the debtor was adjudicated bankrupt, and appealed against the adjudication:—Held, that the question of the validity of the service was not res judicata, for that as the question before the court was whether an act of bankruptcy had been committed, and that depended on the validity of the service of the summons, that point was then properly brought before the court and could be decided. *Ib.*

The order for personal service out of the jurisdiction was made on an affidavit stating that the debtor was keeping out of the way to avoid personal service. The court was of opinion that the facts did not justify any such affidavit, and that therefore the creditor must pay all costs, including the costs of the appeal. *Ib.*

#### Service of Summons issued by wrong Court.]

—A debtor summons was issued out of the county court of Newcastle, within which the debtor was supposed to reside. It was served on the debtor in London, who then stated that he resided in the latter place. Default having been made, a petition in bankruptcy was presented in the London Bankruptcy Court:—Held, that no act of bankruptcy had been committed. *Boyle v. Plummer*, 22 W. R. 241; S. C., nom. *Boyle, Ex parte, Plummer, In re*, 30 L. T. 2—C. A.

**Substituted Service—Jurisdiction of County Court.]**—When a debtor absconds from his usual place of abode, and a creditor cannot effect personal service of a debtor summons upon him, and cannot discover that he has any residence other than the old one from which he has absconded, the county court of the district within which he last resided has jurisdiction to order substituted

service of the summons. *North Kent Bank, Ex parte, Holdsworth, In re*, 9 Ch. D. 333; 39 L. T. 379; 27 W. R. 158—C. A., reversing 47 L. J., Bk. 119; 38 L. T. 536; 26 W. R. 637.

A debtor, who had resided in the district of the Greenwich county court, absconded, and a creditor was unable to effect personal service of a debtor summons upon him, or to discover that he had any residence other than his old one, at which he was not to be found:—Held, that the Greenwich court had jurisdiction to order substituted service of the summons. *Ib.*

A debtor left the county court district in which he had carried on business; he afterwards returned, and was then served with a notice requiring him to pay a debt. He again left the district, and could not be found, remaining away in order to avoid service. An order was made for service on him of a debtors summons by delivery at a house in the district, and he was afterwards adjudicated bankrupt by the county court of that district:—Held, that the debtor, by leaving the district for the purpose of avoiding service, did not deprive the county court of jurisdiction; and that, though the evidence on which the order for service by delivery was obtained was not satisfactory, yet, as the debtor was staying away in order to avoid service, the bankruptcy would not, on that ground, be annulled. *Williams, In re*, 8 L. R., Ch. 690; 42 L. J., Bk. 28; 28 L. T. 488; 21 W. R. 451.

— **At Address registered in Books of Company.**—The liquidators of a company which was being wound up issued a debtor summons against a shareholder for unpaid calls, and obtained an order for substituted service at his registered address in the books of the company. The affidavit on which this order was obtained shewed no grounds for choosing that place except that it was his registered address, and that the articles contained a provision that notices required to be served by the company on shareholders might be served by leaving them at their registered addresses. For some years this had not been the shareholder's place of residence or business, and he had a few weeks previously, on an application in the winding-up, made an affidavit in which he gave a different address. Service having been made pursuant to the order, and the debtor having failed to comply with it, the liquidators applied for an adjudication in bankruptcy:—Held, that the rule in the articles as to service of notices at the registered address did not give validity to the service of legal proceedings there, and that the question as to the validity of the order for substituted service and of the service under it was open on a petition for adjudication in bankruptcy, and that adjudication had rightly been refused. *Chatteris, Ex parte, Studer, In re*, 10 L. R., Ch. 227; 44 L. J., Bk. 90; 32 L. T. 290; 23 W. R. 760.

**Service of Particulars of Demand.**—A debtor summons was duly served with particulars of demand. This summons was dismissed on the ground that the debtor was a non-trader, and as such entitled to three weeks' notice instead of seven days. A second debtor summons was afterwards issued and served without the particulars of demand. The sum claimed on the second summons was different from that claimed on the first, as one item demanded in the particulars served with the first summons had been paid in

the interval:—Held, that as the debtor had been served with the particulars with the first summons, and thus knew the particulars of the claim against him, the omission to serve particulars with the second summons did not render it invalid. *Javal, Ex parte*, 34 L. T. 47—C. A.

**Affidavit of Service Proof of Act of Bankruptcy.**—A non-trader was adjudicated bankrupt, the act of bankruptcy being his failure to comply with the requisitions of a debtor summons. When the copies of the petition for adjudication were sealed by the registrar, an affidavit of service of the debtor summons was shewn to him, but it had not been filed as required by the r. 63 of the Bankruptcy Rules, 1870. The affidavit was filed a few days afterwards, and the adjudication was then made:—Held, that although the registrar ought to have refused to seal the copies of the petition till the affidavit had been filed, yet, the rules being merely directory, the adjudication was not invalidated by his omission to do so. *Hunt, Ex parte*, 8 L. R., Ch. 234; 28 L. T. 3; 21 W. R. 164.

An affidavit stating that the service was made on the "19th August instant," but not sworn till September, is sufficient. *Ib.*

A debtor summons and a bankruptcy petition founded upon the non-compliance with it, are entirely distinct litigations, and the evidence taken upon the one cannot be used upon the other unless previous notice has been given of the intention to use it. *Rogers, Ex parte, Rogers, In re*, 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29—C. A.

Therefore, upon the hearing of a bankruptcy petition founded upon the debtor's non-compliance with a debtor summons, the service of the summons must be strictly proved, even though the debtor has, in an affidavit previously made by him upon an application to dismiss the summons, admitted that the summons had been served upon him. *Ib.*

Such an affidavit cannot be used upon the hearing of the petition, unless previous notice has been given of the intention to use it. *Ib.*

#### f. Proceedings when Debt disputed.

**Dismissal — Irregularity.**—A debtor may sustain an application to have a debtor summons dismissed for irregularity, although he has not distinctly denied the debt in his affidavit. *Torkington, Ex parte, Torkington, In re*, 9 L. R., Ch. 298; 22 W. R. 602.

— **Secured Creditor.**—A debtor summons by a secured creditor cannot be dismissed on the ground that he does not offer to give up his security or have it valued, though he must do so in order to obtain an adjudication against the debtor. *Mauritz, Ex parte, Giles, In re*, 5 L. R., Ch. 779; 39 L. J., Bk. 56; 23 L. T. 293; 18 W. R. 1097.

— **On Ground of Counterclaim.**—Under a building contract, K. had possession of E.'s land, and E. made advances to him upon the security of the buildings. In January, 1870, K. brought an action against E. for breach of the contract. In July E. brought ejectment against K., and in January, 1871, recovered judgment with costs, which were taxed at 59%. In February he took

out a debtor summons against K., in respect of these costs. K. applied to dismiss the summons and stay proceedings pending his action, upon the ground that his claim in the action greatly exceeded the 59l. :—Held, that no order to stay proceedings ought to be made, there being no case for such stay of proceedings within the Bankruptcy Act, 1869, s. 7. *Ellis, Ex parte, Kain, In re*, 6 L. R., Ch. 602; 40 L. J., Bk. 77; 24 L. T. 819; 19 W. R. 913.

— **Notice of Application for.**—Three clear days' notice of an application by the debtor for the dismissal of the summons, upon the ground that the debt is not due, is sufficient. *Anon.*, 21 L. T. 625.

It is of importance that no unnecessary delay should be placed in the way of the hearing of a debtor summons. *Id.*

— **Attendance of Summoning Creditor.**—When a debtor summons has been issued and the debtor denies the debt, he has no absolute right to require the attendance of the summoning creditor for the purpose of examination. *Barron, Ex parte, Irving, In re*, 10 L. R., Ch. 269; 44 L. J., Bk. 66; 32 L. T. 139; 23 W. R. 432.

**Staying Proceedings—Security required.**—The court will not direct a trial of the question of indebtedness by a jury unless the debtor is prepared on the hearing of the summons to give security. *Roubotham, Ex parte*, 25 L. T. 921.

When a debtor summons is ordered to stand over for an action to be brought, and the court is of opinion that the probability is as much in favour of the success of the alleged debtor as of the creditor, the court will not order security to be given. *Turner, Ex parte, Turner, In re*, 10 L. R., Ch. 175; 44 L. J., Bk. 112; 31 L. T. 532; 23 W. R. 124.

A debtor summons was taken out against a debtor for an amount which purported to be a true debt, and sufficient to support an adjudication. The debtor subsequently moving to dismiss the summons, the allegations of the debtor and of the creditor being in the judge's opinion equally unsatisfactory, it lies within the discretion of the judge to direct that the matter shall be determined in an action, and that the alleged debtor shall give security in the meanwhile. *Shorey, Ex parte*, 21 W. R. 105.

The discretion which the court has, upon staying proceedings on a debtor summons, to order security to be given by the debtor must not be exercised adversely to a solvent debtor where there is a bonâ fide question in course of litigation between him and the creditor, upon the result of which will depend the validity or amount of the debt in question. *Brown, Ex parte, Brown, In re*, 37 L. T. 834; 26 W. R. 284. Affirmed, 26 W. R. 573—C. A.

The vendor to a company by the articles of agreement guaranteed a dividend of 10l. per cent. for five years upon the paid-up capital of the company for the time being. The business resulted in a loss for the first two years, whereupon he paid the dividends for that period so guaranteed by him, but refused to pay the guaranteed dividends for the third year, which also resulted in a loss. The company having gone into liquidation, the liquidator issued a debtor summons against him for the unpaid dividend, which he opposed upon the ground

that the accounts between him and the company had not been fully taken, and that it would appear upon taking such accounts that by reason of a set-off and other bonâ fide defences, the company was indebted to him, not he to the company. There was no suggestion of the debtor's insolvency :—Held, that, under the circumstances, the proceedings should be stayed without security. *Id.*

Where the proceedings under a debtor summons are stayed pending an action to try the validity of an alleged debt, and in the opinion of the court there is more than a reasonable probability that the alleged debtor has a good defence to the action, the court will not require the debtor to give security. *Smith, Ex parte, Smith, In re*, 48 L. T. 320.

Proceedings on a debtor summons, pending the trial of an action for the debt, will not necessarily be stayed without security, though the alleged debtor is solvent and there is a bonâ fide dispute as to the debt. The probability of success in the action is one element to be considered. *Jacobson, Ex parte, Pincoffs, In re*, 22 Ch. D. 312; 52 L. J., Ch. 561; 48 L. T. 197; 31 W. R. 554—C. A.

A debtor summons was founded upon a bill of exchange. The creditor had, before the hearing of the summons, commenced an action against the debtor upon the bill, which he had obtained leave to defend without giving any security. He had then pleaded want of consideration. He also alleged that the holder had notice of the want of consideration :—Held, that, having regard to these facts, the proceedings upon the summons ought to be stayed pending the trial of the action, without security being required from the debtor. *Latham, Ex parte*, 4 Ch. D. 105; 35 L. T. 674; 25 W. R. 231.

— **Solvency of Debtor.**—In determining whether security ought to be given upon an application to dismiss a debtor summons, regard must be had to the question of the debtor's solvency, as well as to the possibility of his establishing his defence. *Marshall, Ex parte*, 5 Ch. D. 873; 37 L. T. 42; 25 W. R. 762—C. A.

The requiring of security being, however, a matter of judicial discretion, the Court of Appeal will not interfere with the exercise of the primary judge's discretion unless it can see clearly that the discretion has been improperly exercised. *Id.*

When a person served with a debtor summons disputes the debt, the court, in determining whether the alleged debtor must give security, will have regard not only to the state of the debtor's pecuniary circumstances, but to the probability of the claimant being able to establish the debt. *Wier, Ex parte, Wier, In re*, 7 L. R., Ch. 319; 26 L. T. 335; 20 W. R. 457.

Where it appeared extremely doubtful whether the claim could be substantiated at law, the Court of Appeal discharged an order directing the debtor to give security, though it was admitted that he was in very poor circumstances. *Id.*

— **No reasonable Defence.**—When the proceedings on a debtor summons are stayed, pending an action to try the validity of the alleged debt, in determining whether the alleged debtor should be required to give security, regard ought to be had not only to his solvency or insolvency, but to the probability of his success in the action.

service of the summons. *North Kent Bank, Ex parte, Holdsworth, In re*, 9 Ch. D. 333; 39 L. T. 379; 27 W. R. 158—C. A., reversing 47 L. J., Bk. 119; 38 L. T. 536; 26 W. R. 637.

A debtor, who had resided in the district of the Greenwich county court, absconded, and a creditor was unable to effect personal service of a debtor summons upon him, or to discover that he had any residence other than his old one, at which he was not to be found:—Held, that the Greenwich court had jurisdiction to order substituted service of the summons. *Ib.*

A debtor left the county court district in which he had carried on business; he afterwards returned, and was then served with a notice requiring him to pay a debt. He again left the district, and could not be found, remaining away in order to avoid service. An order was made for service on him of a debtor summons by delivery at a house in the district, and he was afterwards adjudicated bankrupt by the county court of that district:—Held, that the debtor, by leaving the district for the purpose of avoiding service, did not deprive the county court of jurisdiction; and that, though the evidence on which the order for service by delivery was obtained was not satisfactory, yet, as the debtor was staying away in order to avoid service, the bankruptcy would not, on that ground, be annulled. *Williams, In re*, 8 L. R., Ch. 690; 42 L. J., Bk. 28; 28 L. T. 488; 21 W. R. 451.

— **At Address registered in Books of Company.**—The liquidators of a company which was being wound up issued a debtor summons against a shareholder for unpaid calls, and obtained an order for substituted service at his registered address in the books of the company. The affidavit on which this order was obtained shewed no grounds for choosing that place except that it was his registered address, and that the articles contained a provision that notices required to be served by the company on shareholders might be served by leaving them at their registered addresses. For some years this had not been the shareholder's place of residence or business, and he had a few weeks previously, on an application in the winding-up, made an affidavit in which he gave a different address. Service having been made pursuant to the order, and the debtor having failed to comply with it, the liquidators applied for an adjudication in bankruptcy:—Held, that the rule in the articles as to service of notices at the registered address did not give validity to the service of legal proceedings there, and that the question as to the validity of the order for substituted service and of the service under it was open on a petition for adjudication in bankruptcy, and that adjudication had rightly been refused. *Chatteris, Ex parte, Studder, In re*, 10 L. R., Ch. 227; 44 L. J., Bk. 90; 32 L. T. 290; 23 W. R. 760.

**Service of Particulars of Demand.**—A debtor summons was duly served with particulars of demand. This summons was dismissed on the ground that the debtor was a non-trader, and as such entitled to three weeks' notice instead of seven days. A second debtor summons was afterwards issued and served without the particulars of demand. The sum claimed on the second summons was different from that claimed on the first, as one item demanded in the particulars served with the first summons had been paid in

the interval:—Held, that as the debtor had been served with the particulars with the first summons, and thus knew the particulars of the claim against him, the omission to serve particulars with the second summons did not render it invalid. *Jaral, Ex parte*, 34 L. T. 47—C. A.

**Affidavit of Service Proof of Act of Bankruptcy.**—A non-trader was adjudicated bankrupt, the act of bankruptcy being his failure to comply with the requisitions of a debtor summons. When the copies of the petition for adjudication were sealed by the registrar, an affidavit of service of the debtor summons was shewn to him, but it had not been filed as required by the r. 63 of the Bankruptcy Rules, 1870. The affidavit was filed a few days afterwards, and the adjudication was then made:—Held, that although the registrar ought to have refused to seal the copies of the petition till the affidavit had been filed, yet, the rules being merely directory, the adjudication was not invalidated by his omission to do so. *Hunt, Ex parte*, 8 L. R., Ch. 234; 28 L. T. 3; 21 W. R. 164.

An affidavit stating that the service was made on the "19th August instant," but not sworn till September, is sufficient. *Ib.*

A debtor summons and a bankruptcy petition founded upon the non-compliance with it, are entirely distinct litigations, and the evidence taken upon the one cannot be used upon the other unless previous notice has been given of the intention to use it. *Rogers, Ex parte, Rogers, In re*, 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29—C. A.

Therefore, upon the hearing of a bankruptcy petition founded upon the debtor's non-compliance with a debtor summons, the service of the summons must be strictly proved, even though the debtor has, in an affidavit previously made by him upon an application to dismiss the summons, admitted that the summons had been served upon him. *Ib.*

Such an affidavit cannot be used upon the hearing of the petition, unless previous notice has been given of the intention to use it. *Ib.*

#### f. Proceedings when Debt disputed.

**Dismissal—Irregularity.**—A debtor may sustain an application to have a debtor summons dismissed for irregularity, although he has not distinctly denied the debt in his affidavit. *Torkington, Ex parte, Torkington, In re*, 9 L. R., Ch. 298; 22 W. R. 602.

— **Secured Creditor.**—A debtor summons by a secured creditor cannot be dismissed on the ground that he does not offer to give up his security or have it valued, though he must do so in order to obtain an adjudication against the debtor. *Mauritz, Ex parte, Giles, In re*, 5 L. R., Ch. 779; 39 L. J., Bk. 56; 23 L. T. 293; 18 W. R. 1097.

— **On Ground of Counterclaim.**—Under a building contract, K. had possession of E.'s land, and E. made advances to him upon the security of the buildings. In January, 1870, K. brought an action against E. for breach of the contract. In July E. brought ejectment against K., and in January, 1871, recovered judgment with costs, which were taxed at 59%. In February he took

out a debtor summons against K., in respect of these costs. K. applied to dismiss the summons and stay proceedings pending his action, upon the ground that his claim in the action greatly exceeded the 59l. :—Held, that no order to stay proceedings ought to be made, there being no case for such stay of proceedings within the Bankruptcy Act, 1869, s. 7. *Ellis, Ex parte, Kain, In re*, 6 L. R., Ch. 602; 40 L. J., Bk. 77; 24 L. T. 819; 19 W. R. 913.

— **Notice of Application for.**—Three clear days' notice of an application by the debtor for the dismissal of the summons, upon the ground that the debt is not due, is sufficient. *Anon.*, 21 L. T. 625.

It is of importance that no unnecessary delay should be placed in the way of the hearing of a debtor summons. *Id.*

— **Attendance of Summoning Creditor.**—When a debtor summons has been issued and the debtor denies the debt, he has no absolute right to require the attendance of the summoning creditor for the purpose of examination. *Barron, Ex parte, Irving, In re*, 10 L. R., Ch. 269; 44 L. J., Bk. 66; 32 L. T. 139; 23 W. R. 432.

**Staying Proceedings—Security required.**—The court will not direct a trial of the question of indebtedness by a jury unless the debtor is prepared on the hearing of the summons to give security. *Roubootham, Ex parte*, 25 L. T. 921.

When a debtor summons is ordered to stand over for an action to be brought, and the court is of opinion that the probability is as much in favour of the success of the alleged debtor as of the creditor, the court will not order security to be given. *Turner, Ex parte, Turner, In re*, 10 L. R., Ch. 175; 44 L. J., Bk. 112; 31 L. T. 532; 23 W. R. 124.

A debtor summons was taken out against a debtor for an amount which purported to be a true debt, and sufficient to support an adjudication. The debtor subsequently moving to dismiss the summons, the allegations of the debtor and of the creditor being in the judge's opinion equally unsatisfactory, it lies within the discretion of the judge to direct that the matter shall be determined in an action, and that the alleged debtor shall give security in the meanwhile. *Shorey, Ex parte*, 21 W. R. 105.

The discretion which the court has, upon staying proceedings on a debtor summons, to order security to be given by the debtor must not be exercised adversely to a solvent debtor where there is a bona fide question in course of litigation between him and the creditor, upon the result of which will depend the validity or amount of the debt in question. *Brown, Ex parte, Brown, In re*, 37 L. T. 834; 26 W. R. 284. Affirmed, 26 W. R. 573—C. A.

The vendor to a company by the articles of agreement guaranteed a dividend of 10l. per cent. for five years upon the paid-up capital of the company for the time being. The business resulted in a loss for the first two years, whereupon he paid the dividends for that period so guaranteed by him, but refused to pay the guaranteed dividends for the third year, which also resulted in a loss. The company having gone into liquidation, the liquidator issued a debtor summons against him for the unpaid dividend, which he opposed upon the ground

that the accounts between him and the company had not been fully taken, and that it would appear upon taking such accounts that by reason of a set-off and other bona fide defences, the company was indebted to him, not he to the company. There was no suggestion of the debtor's insolvency :—Held, that, under the circumstances, the proceedings should be stayed without security. *Id.*

Where the proceedings under a debtor summons are stayed pending an action to try the validity of an alleged debt, and in the opinion of the court there is more than a reasonable probability that the alleged debtor has a good defence to the action, the court will not require the debtor to give security. *Smith, Ex parte, Smith, In re*, 48 L. T. 320.

Proceedings on a debtor summons, pending the trial of an action for the debt, will not necessarily be stayed without security, though the alleged debtor is solvent and there is a bona fide dispute as to the debt. The probability of success in the action is one element to be considered. *Jacobson, Ex parte, Pincoffs, In re*, 22 Ch. D. 312; 52 L. J., Ch. 561; 48 L. T. 197; 31 W. R. 554—C. A.

A debtor summons was founded upon a bill of exchange. The creditor had, before the hearing of the summons, commenced an action against the debtor upon the bill, which he had obtained leave to defend without giving any security. He had then pleaded want of consideration. He also alleged that the holder had notice of the want of consideration :—Held, that, having regard to these facts, the proceedings upon the summons ought to be stayed pending the trial of the action, without security being required from the debtor. *Latham, Ex parte*, 4 Ch. D. 105; 35 L. T. 674; 25 W. R. 231.

— **Solvency of Debtor.**—In determining whether security ought to be given upon an application to dismiss a debtor summons, regard must be had to the question of the debtor's solvency, as well as to the possibility of his establishing his defence. *Marshall, Ex parte*, 5 Ch. D. 873; 37 L. T. 42; 25 W. R. 762—C. A.

The requiring of security being, however, a matter of judicial discretion, the Court of Appeal will not interfere with the exercise of the primary judge's discretion unless it can see clearly that the discretion has been improperly exercised. *Id.*

When a person served with a debtor summons disputes the debt, the court, in determining whether the alleged debtor must give security, will have regard not only to the state of the debtor's pecuniary circumstances, but to the probability of the claimant being able to establish the debt. *Wier, Ex parte, Wier, In re*, 7 L. R., Ch. 319; 26 L. T. 338; 20 W. R. 457.

Where it appeared extremely doubtful whether the claim could be substantiated at law, the Court of Appeal discharged an order directing the debtor to give security, though it was admitted that he was in very poor circumstances. *Id.*

— **No reasonable Defence.**—When the proceedings on a debtor summons are stayed, pending an action to try the validity of the alleged debt, in determining whether the alleged debtor should be required to give security, regard ought to be had not only to his solvency or insolvency, but to the probability of his success in the action.



not a disability to take out a commission. *Baglehole, Ex parte*, 18 Ves. 525; 1 Rose, 271.

The debt of such a person would be good to support the commission, if the residence is not shewn to be an adhering to the enemy. *Roberts v. Hardy*, 3 M. & S. 533; 2 Rose, 457.

**Creditors who are Parties to Composition Deeds.**—If a trader commits an act of bankruptcy by assigning all his stock-in-trade to A., who is a party to the deed of assignment, A. cannot be a petitioning creditor grounded on that act of bankruptcy. *Jackson v. Irwin*, 2 Camp. 49.

Nor a creditor, who, without executing, has assented to the deed, by approving of acts done under it by the trustees. *Back v. Gooch*, 4 Camp. 232; Holt, 13; *S. P., Hicks v. Burfitt*, 4 Camp. 235, n. And see *Tuppenden v. Burgess*, 4 East, 230; 1 Smith, 33.

Where a creditor, being ignorant that an act of bankruptcy had been committed by his debtor, executed a composition deed for the amount of his debt, and received a dividend under it:—Held, that he might still become a petitioning creditor in respect of the original debt. *Doe d. Pitcher v. Anderson*, 5 M. & S. 161; 1 Stark. 262.

A person who has agreed to come in under a trust-deed may, nevertheless, issue a fiat on discovering that the deed gave an unfair preference to a particular creditor. *Hallowell, Ex parte*, 3 Mont. & Ayr. 538.

It is not because the name of a creditor is inserted as one of the trustees in a trust-deed that the firm of which he is a partner cannot sue out a fiat as petitioning creditors, if the deed was not executed by himself or any member of the firm. *Wood, In re*, 3 Deac. 514.

If, by a composition deed, an insolvent assigns to four trustees all his goods, for the benefit of his creditors, provided the trustees and the creditors on or before a given day prove their debts, if required, and execute the deed, and there is a covenant by the trustees and creditors that they will not arrest, plead, or prosecute the debtor, or any of his goods, chattels, lands, or tenements, on account of their debts, and on such suing or prosecution the deed shall be a discharge; and the deed is executed by two only of the trustees; the debt of a trustee who has executed it is extinguished, and he cannot sue out a commission on it. *Small v. Marwood*, 9 B. & C. 300; 4 M. & R. 181.

L., being in embarrassed circumstances, it was agreed, at a meeting of his creditors, to accept a composition of 12s. in the pound, 10s. to be secured by bills of exchange accepted by B., and the remaining 2s. to be secured by L.'s promissory note. L. agreed to give B. a counter-security, by assignment of his property and effects. On the 10th October, 1854, a composition deed accordingly was made between L. of the first part, B. of the second part, and the creditors of L. who should sign within a certain time of the third part, subject to a condition for rendering it void, unless it should be executed by six-sevenths of the creditors, with a covenant not to sue L. until default should have been made in payment of the bills of exchange and note, or any of them. The bill for payment of the first instalment having been dishonoured, W., one of the creditors, sued L. for the original debt, and B. on the dishonoured bill. L. with-

drew his pleas, and let W. have judgment for the amount of his claim, less the first instalment, which B. paid. By deed of the 3rd of March, 1855, L. assigned the whole of his stock and property to B. as security for the sums which he had paid, or might pay, to the creditors of L. in respect of the composition bills. In trover by L. against his assignees:—Held, that there was a good petitioning creditor's debt; for, first, though the composition deed was not void by reason of any concealment from the creditors of the fact that the whole of L.'s property was to be assigned to B., and therefore the debt was suspended, it remained, and, upon default in payment of the instalment, the right of suing for it revived; and secondly, the judgment obtained by W. was conclusive, and was an acknowledgment by L. that he still owed the debt. *Leake v. Young*, 5 El. & Bl. 955; 25 L. J., Q. B. 266; 2 Jur., N. S. 516.

**Equitable Assignee.**—The equitable assignee of a debt can present a petition against the debtor without joining the assignor as a co-petitioner. *Cooper, Ex parte, Baillie, In re*, 20 L. R., Eq. 762; 44 L. J., Bk. 125; 32 L. T. 780; 23 W. R. 950.

**Executors.**—One of three executors may by himself be a good petitioning creditor on a debt due to the testator. *Treasure v. Jones*, 1 Selw. N. P. 265.

A commission may be taken out by an executor before probate. *Paddy, Ex parte*, 3 Madd. 241; Buck, 235.

So, a commission may be supported on a debt due to a petitioning creditor in the character of executor, although he had not obtained a probate on a sufficient stamp at the time when the commission issued, if he afterwards, before adjudication, obtain a valid probate, for that has relation back to the testator's death. *Rogers v. James*, 7 Taunt. 147; 2 March, 425.

**Husband and Wife.**—A husband alone cannot be a petitioning creditor to support a commission in respect of a debt composed partly of a sum of money due to him in his own right, and partly of a sum due to his wife dum sola. *Ramsay v. George*, 1 M. & S. 176; 1 Rose, 108.

But a husband alone may sue out a commission upon a note given to the wife dum sola. *Barber, Ex parte*, 1 Glyn. & J. 1.

**Infants.**—An infant could not be, before 12 & 13 Vict. c. 106, s. 89, and 24 & 25 Vict. c. 134, s. 87, a petitioning creditor, because he could not enter into the necessary bond. *Barrow, Ex parte*, 3 Ves. jun. 554.

Nor could a commission be supported upon a petitioning creditor's debt, made up of debts due to several persons, if one of them was an infant and a separate creditor of the trader. *Morton, Ex parte*, Buck, 42.

**Partners.**—One partner cannot be a petitioning creditor against another, unless the debt is such as he might maintain an action upon. *Windham v. Patterson*, 1 Stark. 144; 2 Rose, 466. And see *Marson v. Barber*, Gow, 17.

But it is no objection that the petitioning creditor was in partnership with the bankrupt in a particular transaction, provided the debt

does not arise out of that particular transaction. *Ib.*

The petitioning creditors were, in pleading, stated to be A. & B., C. & D., and E. & F., without distinctly alleging them to constitute firms:—Held, no ground for holding the fiat void. *Byers v. Southwell*, 8 Scott, 258.

If one of three partners undertakes to provide for two bills drawn by the three, and accepted by a fourth person, such three partners cannot be petitioning creditors on a commission against the acceptor, although the conduct of the partner may, as against his co-partners, have been fraudulent. *Richmond v. Heapy*, 1 Stark. 202.

A commission cannot be supported on the petition of one only of two partners, to whom a joint debt is due. *Buckland v. Newsome*, 1 Taunt. 477; 1 Camp. 474.

A shareholder in a banking co-partnership established under 7 Geo. 4, c. 46, cannot be proceeded against in bankruptcy upon a debt due from the co-partnership where no judgment has been obtained against the public officer, although the business has been relinquished and an order to wind up the affairs of the company has been obtained prior to the proceedings in bankruptcy. The rule is the same although there is not any public officer of the company. *Davison v. Furmer*, 6 Ex. 242; 20 L. J., Ex. 177.

The 7 Geo. 4, c. 46, which authorizes the establishment of joint-stock banking companies, by s. 9 enables one of the public officers of any such company, nominated pursuant to the provisions of the act, to sue and be sued, and to prosecute commissions of bankrupt on behalf of the company against any person, whether member of the co-partnership or otherwise. The 1 & 2 Vict. c. 96, which professes to amend this enactment, declares that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding at law or in equity against any member of the co-partnership, and that such member shall be liable to be proceeded against by such public officer, by such proceedings and with the same legal consequences as if such person had not been a member of the co-partnership; but the last act omits to specify commissions or fiats of bankruptcy eo nomine:—Held, that the two acts were to be taken together, and that the public officer was authorized to sue out a fiat in bankruptcy against one of the members of the company. *Hall, Ex parte*, 3 Deac. 405; 1 Mont. & Chit. 467.

**Limited Company.]**—A limited company could maintain a petition for adjudication under s. 87 of the Bankruptcy Act, 1861, and the secretary could make the necessary oath. In such a case the practice is for the petition to be sealed with the corporate seal, and signed by two directors and the secretary. *Calthorp, In re*, 3 L. R., Ch. 252; 37 L. J., Bk. 17; 18 L. T. 166; 16 W. R. 416.

**Company with Private Act.]**—By a private act of parliament, intituled "An Act to enable the Norwich Union Society to sue in the name of their secretary, and to be sued in the names of their directors, treasurer, and secretary," that society was empowered to commence and prosecute all actions and suits in the name of their secretary, as the nominal plaintiff:—Held, that

it did not empower the secretary to sue out a commission of bankruptcy on behalf of the society against a person indebted to them as a society. *Guthrie v. Fisk*, 5 D. & R. 24; 3 B. & C. 178; 3 Stark. 153.

**Party to Act of Bankruptcy.]**—A party to a deed creating the act of bankruptcy cannot be petitioning creditor. *Cook, In re*, 1 Mont. & Chit. 349.

**Trustee.]**—Notwithstanding the provisions of s. 6 of the Bankruptcy Act, 1869, that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity," the old rule in bankruptcy remains in force, that where a debt is vested in a mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee cannot alone sustain a petition for adjudication against the debtor, but the beneficial owner must join in the petition. *Culley, Ex parte, Adams, In re*, 9 Ch. D. 307; 47 L. J., Bk. 97; 38 L. T. 858; 27 W. R. 28—C. A.

The rule, however, does not apply to a trustee for persons under disability. *Ib.*

## 2. LIABILITIES OF PETITIONING CREDITOR.

A petitioning creditor is personally liable, under 12 & 13 Vict. c. 106, s. 114, for the fees of the messenger down to the choice of assignees. *Stubbs v. Horn*, 1 L. R., C. P. 56; 12 Jur., N. S. 310.

A solicitor was the petitioning creditor for a fiat, and acted on his own behalf as solicitor. The commissioner having only allowed him costs so far as he had disbursed; the court, on appeal, varied the order, and allowed his full costs out of the estate. *Chamberlayne, Ex parte*, 4 De G. & S. 17; 19 L. J., Bk. 10; 14 Jur. 997.

In taxing the costs of a petitioning creditor who acts as his own solicitor, the analogy of an attorney suing in his own right is to be followed rather than that of a trustee. *Ib.*

## 3. AMOUNT OF THE DEBT.

A debt of 150*l.* or upwards, of which a part was due to several persons as partners, was sufficient, under 6 Geo. 4, c. 16, s. 15, to support a fiat in bankruptcy. *Doe d. Lloyd v. Ingleby*, 14 M. & W. 19; 14 L. J., Ex. 246.

**Interest.]**—Interest cannot be added to the principal due on a bill, so as to constitute a good petitioning creditor's debt, unless specially made payable on the face of the bill. *Cameron v. Smith*, 2 B. & A. 305; *S. P., Burgess, In re*, 2 Moore, 745; 8 Taunt. 660.

Even though the bill is noted and protested according to 9 & 10 Will. 3, c. 17. *Greenway, Ex parte*, Buck, 412.

**Costs.]**—At the date of the act of bankruptcy the debtor had appeared to a writ of summons issued by a creditor to recover 49*l.* 11*s.* 7*d.* and 3*l.* costs. The costs were, after the act of bankruptcy and judgment signed, taxed at 8*l.* 9*s.* 6*d.*:—Held, that the amount of the costs could not be added to the 49*l.* 11*s.* 7*d.* in order to constitute a good petitioning creditor's debt of

50l. and over. *Sadler, Ex parte, Whelan, In re*, 48 L. J., Bk. 43; 39 L. T. 361; 27 W. R. 156.

#### 4. NATURE OF THE DEBT.

**Generally.**—The debt must be due from the bankrupt in his own right, and not in autre droit, as executor or otherwise. *Pattison v. Banks*, Cowp. 540.

**Illegal Consideration.**—A debt founded on an illegal consideration is not a good petitioning creditor's debt. *Wells v. Girling*, 1 B. & B. 447; 4 Moore, 78.

**Debt proved under former Adjudication.**—A debt which has been proved under a former adjudication may be used as a petitioning creditor's debt in support of a petition for a second adjudication, under which it is sought to impeach the first. *Wieland, Ex parte*, 5 L. R., Ch. 486; 39 L. J., Bk. 46; 22 L. T. 324.

**Covenant not to Sue.**—A debt which the creditor has covenanted with the debtor not to sue him for, is not a good petitioning creditor's debt. *Small v. Marwood*, 4 M. & R. 181; 9 B. & C. 300.

**Accord and Satisfaction after Act of Bankruptcy.**—If a bill of sale of goods is given in satisfaction of a bond debt, and it is afterwards discovered that the obligor had previously committed an act of bankruptcy, the obligee may abandon the bill of sale, and sue out a commission against the obligor, and co-obligor cannot plead this bill as an accord and satisfaction. *Hall v. Smallwood*, Peake's Add. Cas. 13.

**Secured Debt—Bills of Lading—Stoppage in transitu.**—Where a consignee transfers bills of lading to a creditor, as a security for his debt, and the consignor stops the goods in transitu, the consignor may issue a fiat against the consignee on his original debt. *Ashton, Ex parte*, 2 Deac. & Chit. 5.

**Release of Debt—Secret Security.**—A creditor, in consideration of bills for 10s. in the pound on his debt, executed a composition deed, whereby it was expressed that the creditors who executed it released the debtor from all demands. At the same time he secretly obtained security for the balance:—Held, that he ceased to be a creditor, and could not sue out a fiat against the debtor, the original debt being released, and the claim under the composition bills being invalidated by the fraud. *Cross, In re*, 4 De G. & S. 364.

**Part Payment after Notice of Act of Bankruptcy.**—A creditor to the amount of 112l., previously to the bankruptcy receiving 50l. after notice of an act of bankruptcy, is not thereby precluded from suing out a commission, for by that act he waives his claim to the payment; and he may still retain the money in his hands for the credit of the estate. *Mann v. Shepherd*, 6 T. R. 79.

**Statute of Limitations.**—A judgment creditor is not entitled, after the expiration of twelve years, without payment of interest, or acknowledgment of his right, to obtain an adjudication

in bankruptcy against the debtor, though within the twelve years a suggestion has been entered on the roll under the Common Law Procedure Act, 1852, s. 129. *Tynte, Ex parte, Tynte, In re*, 15 Ch. D. 125; 42 L. T. 598; 28 W. R. 767.

— **Cannot be pleaded by a third Party.**—A debtor to a bankrupt, when sued by his assignee, cannot set up the Statute of Limitations as an objection to the petitioning creditor's debt. *Gregory v. Hurfill*, 8 Moore, 189; 1 Bing. 324.

An objection, that the petitioning creditor's debt was of more than ten years' standing, cannot be taken advantage of by a third person, where the bankrupt has submitted to the commission. *Quantock v. England*, 5 Burr. 2628; 2 W. Bl. 702.

**Debts arising out of equitable Rights.**—A commission cannot be taken out upon an equitable debt. *Sutton, Ex parte*, 11 Ves. 163; *S. P.*, *Hawthorn, Ex parte*, 1 Mont. 133.

Nor is a claim arising out of an equitable mortgage a good debt. *Yonge, Ex parte*, 3 Ves. & B. 31; 2 Rose, 40.

**Debt due to former Partner.**—A bankrupt, who was in partnership with P., borrowed money of him by way of personal loan, and upon the dissolution of the partnership purchased the stock in trade for a stipulated sum. P. made out an account, entitled "Mr. H. P. (the bankrupt) in account with H. & P.:"—Held, that P. had a good petitioning creditor's debt, notwithstanding this mode of entitling the account. *Richardson, Ex parte*, 3 Deac. & Chit. 244.

**In Case of Non-Traders.**—No debt incurred by a non-trader is sufficient to found an adjudication against him, unless it was contracted by him after the period at which the contracting of debts by a non-trader made him liable to the bankrupt laws—namely, after the passing of the act. *Williams v. Harding*, 1 L. R., H. L. 9; 12 Jur., N. S. 457.

B., a non-trader, executed a deed of settlement in 1849, whereby he became a shareholder in a company. In 1861 an order was made for winding up the company, and a call was made on B. in June, 1863, to be paid in July. The official manager presented a petition for adjudication against him:—Held, that the call was not a debt contracted within the meaning of the 24 & 25 Vict. c. 134, and that B. was therefore not liable to be adjudicated a bankrupt. *Id.*

A party must have been a trader at the time of the petitioning creditor's debt; but if that was contracted while he was a trader, and he has left off trade, he may still become a bankrupt. *Doe d. Barnard v. Lawrence*, 2 C. & P. 134; *S. P.*, *Dawe v. Holdsworth*, Peake, 64.

But if the debt is contracted whilst he is in trade, and a bond is given for it afterwards, it is sufficient. *Id.*

And a debt contracted before a man entered into trade is sufficient. *Butcher v. Easto*, 1 Dougl. 293.

A commission may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he has ceased to be a trader. *Baillie v. Grant*, 9 Bing. 121; 2 M. & Scott, 193.

Part of a petitioning creditor's debt contracted

during trading, and part since, is not sufficient to support fiat. *Secus*, if part before trading and remainder during its continuance. *Dolby, In re*, 1 Mont. & Chit. 636.

An obligee in a bond by a trader recovered judgment upon it after the obligor had ceased trading:—Held, that the bond debt was not so merged in the judgment as to preclude the obligee from petitioning for adjudication against the obligor. *Griffiths, Ex parte*, 3 De G., Mac. & G. 174; 22 L. J., Bk. 50; 17 Jur. 655.

The 90th section of the Bankruptcy Act of 1861, which enacted that the debt of the petitioning creditor of a non-trader must be a debt contracted after the passing of the act, is to be construed as a remedial enactment; and no debt will support an adjudication against a non-trader, unless contracted at a time when he might have known that he thereby subjected himself to the bankruptcy laws; i.e., after the passing of the act. *Williams v. Harding*, 1 L. R., H. L. 9; 35 L. J., Bk. 25; 12 Jur., N. S. 657; 14 L. T. 139; 14 W. R. 503.

**Debt contracted before the Bankruptcy Act, 1861.**—The words of the Bankruptcy Act, 1869, s. 118, enacting that no person not being a trader shall be adjudged a bankrupt in respect of a debt contracted before the date of the passing of the Bankruptcy Act, 1861, are to be construed as meaning what they say, and they do not apply to a debt contracted after the passing of the act but before the date fixed for its commencement. *Rashleigh, Ex parte, Dazell, In re*, 2 Ch. D. 9; 45 L. J., Bk. 29; 34 L. T. 193; 24 W. R. 495; *C. A.*, reversing, 20 L. R., Eq. 782; 32 L. T. 133; 23 W. R. 951.

The debt of a partner who covenants with his co-partners for payment of a sum of money found due in respect of the partnership transactions is a debt incurred at the time of executing the covenant and not at the date of those transactions. *Id.*

By a deed dated the 10th of September, 1861, but not executed till the 14th of October, 1861, a non-trader covenanted to pay certain persons a sum of money which had become due from him to them during his management of a colliery in which he and they were interested, together with any further sums that might be advanced by them to him. In 1874 the representative of the covenantees recovered judgment against him in respect of what was then due under his covenant, and shortly afterwards issued a debtor summons in respect of such judgment debt:—Held, that, for the purpose of making the judgment debtor a bankrupt, the judgment debt must be deemed to have been contracted on the day on which the deed was executed. *Id.*

**Where Credit not expired.**—Goods sold, payable for, by the custom of the trade, two months after the sale, did not create a debt to support a commission, until the time of credit had elapsed. *Roberts, Ex parte*, 1 Madd. 72; 2 Rose, 378.

Nor was a debt for goods sold upon an agreement to be paid for by a present bill, payable at a future day. *Hoskins v. Duperoy*, 9 East, 498; 6 Esp. 58. But see *Henbest v. Brown*, Peake, 54.

Where goods were sold, to be paid for by a bill at four months, and no bill was given, there was not a good petitioning creditor's debt arising

from this sale for the seller to support a commission against the purchaser, till the four months had expired. *Cothay v. Murray*, 1 Camp. 235.

Upon a sale of goods at six or nine months' credit, the purchaser, by not paying at the end of six months, made his election to take credit for the nine months, and there was no debt to support a commission till the nine months were expired. *Price v. Nixon*, 5 Taunt. 338; 2 Rose, 438.

If a party agrees to take a work which is to be published in eighteen months, at intervals of two months, the debt due for the numbers delivered is sufficient. *Mavor v. Pyne*, 3 Bing. 285; 11 Moore, 2; 2 C. & P. 91.

A plaintiff, in an action for a breach of promise of marriage, having recovered above 100*l.* damages against a trader, who, between verdict and judgment, committed an act of bankruptcy:—Held, that the debt due upon the judgment after it was entered up, was not a good petitioning creditor's debt. *Charles, Ex parte*, 14 East, 197; 1 Rose, 372; 16 Ves. 256. And see *Buss v. Gilbert*, 2 M. & S. 70.

A debt for money lent on mortgage, payable after six months' notice, such notice not to expire before a certain day, is a good petitioning creditor's debt, without any notice given, and more than six months before that day. *Hill v. Harris*, M. & M. 448.

#### **Must be due at Time of Act of Bankruptcy.]**

—The rule that the debt in which an adjudication of bankruptcy is founded must be a debt which existed at the time of the act of bankruptcy, is not altered by the Bankruptcy Act, 1869. *Hayward, Ex parte*, 6 L. R., Ch. 546; 40 L. J., Bk. 49; 24 L. T. 782; 19 W. R. 833. *S. P.*, *Sadler, Ex parte, Whelan, In re*, 48 L. J., Bk. 43; 39 L. T. 361; 27 W. R. 156.

An acceptance was written on an incomplete bill of exchange, to which no drawer's name was affixed. The acceptor soon afterwards assigned all his property for the benefit of his creditors. Some weeks after this the bill, which had remained in the hands of the acceptor's agent, was completed and indorsed to a bona fide holder for value, who, on its being dishonoured, obtained an adjudication against the acceptor, grounded on the assignment as an act of bankruptcy:—Held, that the adjudication must be annulled, as no debt existed on the bill till it was issued, which was after the act of bankruptcy. *Id.*

The debt necessary to sustain a petition for an adjudication under 32 & 33 Vict. c. 71, s. 6, sub-s. 6, is a debt presently recoverable. *Sturt, Ex parte, Pearcey, In re*, 13 L. R., Eq. 309; 41 L. J., Bk. 12; 20 W. R. 200.

When, therefore, the debt of a petitioning creditor was for goods sold to the debtor on credit, and the credit had not expired at the date of the petition being filed:—Held, that there was no debt upon which to found a petition for adjudication. *Id.*

**Unliquidated Damages.**—The father of a continuing partner covenanted with an incoming partner that the debts of the old firm did not exceed a certain sum, and that if they did, he would on demand pay the new firm or the creditors of the old firm the amount of the excess. The debts exceeded the stipulated amount:—

Held, that the excess did not constitute a good petitioning creditor's debt against the father, or more than a claim for unliquidated damages. *Broadhurst, Ex parte*, 2 De G., Mac. & G. 953; 22 L. J., Bk. 21; 17 Jur. 964.

#### 5. PARTICULAR CASES.

**Solicitor's Bills.**—A solicitor may sue out a commission upon his debt for costs, without, as in the case of an action, having delivered his bill one month previous thereto. *Sutton, Ex parte*, 11 Ves. 163.

But it is quite of course after the commission to refer such bill to the master to be taxed. *Howell, Ex parte*, 1 Rose, 312; *S. P., Steele, Ex parte* 16 Ves. 166.

**Liability to Taxation.**—Where a commission is taken out upon a debt due to a solicitor for costs, any creditor may have the bill taxed, if the bankrupt at the time of his bankruptcy was not concluded. *Prideaux, Ex parte*, 1 Glyn. & J. 28.

Where solicitors had delivered their bill of costs in September, 1850, and, after a reduction had been agreed upon, the client accepted a bill of exchange for the amount so reduced:—Held, on the bill being dishonoured, and the client becoming bankrupt in May, 1851, that the bill of exchange constituted a provable debt without the bill of costs being taxed. *Webb, Ex parte*, 4 De G. & S. 366.

**Cross Claim for Negligence.**—Upon a petition by a bankrupt to annul a fiat issued by an attorney for the amount of his bill of costs, on the ground that the chief part of the bill consisted of charges for the prosecution of an action on the part of the bankrupt, in which he was nonsuited by reason of the gross negligence of the attorney, the court referred it to the registrar to inquire and report as to the quantum of negligence. *Southall, Ex parte*, 4 Deac. 91; 1 Mont. & Chit. 346.

**Awards.**—A sum awarded by arbitrators may constitute a good petitioning creditor's debt. *Dauce v. Holdsworth*, Peake, 64.

If the award is not bad on the face of it. *Lowndes, Ex parte*, 1 Mont. 24.

Or the submission void. *Antram v. Chace*, 15 East, 209; 1 Rose, 344.

The court, upon the hearing of a petition for adjudication based on an award, whereby the arbitrator found that a certain sum was due from the bankrupt to the petitioning creditor, will not entertain a question as to the validity of the award, for it is incumbent on the bankrupt, if he questions its validity, to take steps to set it aside. *Kirkland, Ex parte*, 18 W. R. 804.

The non-production of the agreement of reference does not, in the absence of proof of notice to produce, constitute an objection to the petition. *Id.*

**Bill of Exchange.**—Where a party accepted a bill in a bankrupt's name without his authority, an acknowledgment by the bankrupt to the holder of the bill after it became due, that he was responsible for the payment of the bill, does not constitute a good petitioning creditor's debt, so as to enable the holder to sustain a fiat

against the bankrupt. *Edwards, Ex parte*, 2 Mont., D. & D. 241; 5 Jur. 706.

**Partners.**—One of two partners giving an acceptance in the name of the firm, for a pre-existing debt of his own, without the authority of the other partner, is not a good petitioning creditor's debt, to support a joint fiat against the two partners. *Austen, Ex parte*, 1 Mont., D. & D. 247.

**Accommodation Bills.**—If two persons exchange acceptances, and, before the bills are mature, one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission before the other has paid his own acceptance. *Sarratt v. Austin*, 4 Taunt. 200; 2 Rose, 112.

**Drawer against Acceptor.**—The drawer of a bill of exchange who has taken it up after an act of bankruptcy committed by the acceptor, but before an adjudication, has a debt making him a good petitioning creditor for adjudication against the acceptor on the footing of that act of bankruptcy. *Cyrus, Ex parte, Broadridge, In re*, 5 L. R., Ch. 176; 21 L. T. 664; *S. P., Bingley v. Malleon*, 3 Dougl. 333.

**Not yet Due.**—Where A., having drawn a bill for 148l. in favour of B., to whom he was previously indebted to that amount, committed an act of bankruptcy before the bill became due, or had been presented for acceptance:—Held, that such bill was a good petitioning creditor's debt, although it appeared that it had been duly presented and paid by the acceptors subsequently to the commission. *Douthat, Ex parte*, 4 B. & A. 67.

**Holder against Drawer—Notice of Dishonour excused.**—A., a creditor of B. to the amount of 115l. 3s. 8d., took his bill for 20l. on C., who had not then, nor afterwards, any effects of B. in his hands: the bill, when due, was dishonoured, and no notice thereof was given by A. to B.:—Held, that A.'s demand was not discharged; but that his debt would support a commission against B. *Bickerdiike v. Boltman*, 1 T. R. 405.

**Dishonour of Bill given under Composition Deed.—Revival of old Debt.**—A composition deed was made between L., a trader, B. his surety, and his creditors, reciting that the creditors had agreed to accept a composition of 12s. in the pound, to be paid by four instalments at the end of four, six, nine, and twelve months, in full satisfaction and payment of their several debts; the first three instalments to be secured by bills drawn by L. on B., and accepted by him, the last by L.'s promissory note. The deed contained a covenant by the creditors not to sue L. until default should be made in payment of the bills and note, or some of them, and upon payment of the bills and note at maturity, to grant a release. Before executing the deed, B. stipulated with L. for a security to himself over all L.'s property. W., one of L.'s creditors, executed the deed and received the bills and note. On its maturity the first was dishonoured. W. immediately commenced an action against L. for his old debt, in which he ultimately obtained judgment. L., under pressure from B., after the commencement of W.'s action, and before W. obtained

judgment, assigned all his property to B. This was bona fide in fulfilment of his promise to give B. security. L. was declared a bankrupt on W.'s petition: Held, that the bills were only conditional payment, and therefore that W. had, on the dishonour of the bill a right to elect to recover his old debt, and had, therefore, a sufficient petitioning creditor's debt. *Leake v. Young*, 5 El. & Bl. 955; 25 L. J., Q. B. 266; 2 Jur., N. S. 516.

— **Notes of Country Bank.**—It has been doubted whether a debt founded upon notes of a country banker, payable on demand, where no demand had been made, is sufficient to support a commission. *Simpson v. Sykes*, 6 M. & S. 295.

**Costs.**—Taxed costs upon a judgment, as in case of a nonsuit under a rule of court, do not constitute a good petitioning creditor's debt, such costs being recoverable only by attachment, in the nature of execution. *Stevenson, Ex parte*, 1 M. & M. 262.

An order of the Divorce Court, for the payment of costs, does not constitute a petitioning creditor's debt sufficient for the purpose of sustaining a bankruptcy of the person against whom such order is made. *Miller, In re*, 11 W. R. 374.

The taxed costs of the Queen's proctor intervening in a suit in the Divorce Court, which was dismissed with costs to be paid to that officer, form a good petitioning creditor's debt to support a petition in bankruptcy against the person ordered to pay them; and the Queen's proctor for the time being can sue for them, although he was not the Queen's proctor during the time that such costs were incurred. *Rayner, Ex parte*, 37 L. T. 38; 25 W. R. 851.

**Judgment Debts.**—It is no objection to a commission when the petitioning creditor's debt is on a judgment, that, prior to presenting a petition for a commission, the petitioning creditor had not relinquished his judgment. *Bryant v. Withers*, 2 Rose, 8; 2 M. & S. 123.

A debt for money lent, due to a creditor at the time when an act of bankruptcy is committed by the debtor, is sufficient to support a commission against him, though afterwards, and before petitioning for such commission, the creditor obtains judgment against him for a sum of money including such debt. *Id.*

A judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission against him upon the same debt. *Cohen v. Cunningham*, 8 T. R. 123.

A judgment debt is a good debt on which to found a petition in bankruptcy, although the debtor has been taken in execution under a ca. sa., and subsequently and before the date of the petition discharged from custody under the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, and the debt duly inserted in the schedule. *Watson v. Humphrey*, 10 Ex. 784; 3 C. L. R. 1048; 24 L. J., Ex. 190; *S. P. & S. C., Watson, In re*, 2 Bk. & Ins. R. 51.

— **Decree of Court of Equity.**—A claim founded on a decree of a court of equity, for interest in a suit for a specific performance of an agreement, is not sufficient. *Carpenter v. Thornton*, 3 B. & A. 52.

Before 32 & 33 Vict. c. 71, s. 6, a decree of a court of equity for the payment of a sum of money, was not a debt upon which an adjudication could be supported. *Blencowe, Ex parte*, 1 L. R., Ch. 393; 35 L. J., Bk. 18; 12 Jur., N. S. 366; 14 L. T. 889; 14 W. R. 623.

— **Damages against Co-respondent.**—In a divorce suit a decree for a divorce was made, and the co-respondent was ordered to pay into the registry 5,000*l.*, the amount of damages assessed by the jury. This decree was made absolute. The co-respondent being resident abroad, the order for payment could not be enforced against him, and an order was obtained rescinding so much of the decree as ordered payment into the registry, and ordering the 5,000*l.* to be paid to the husband, he undertaking to pay it into the registry to abide the further order of the court. The husband then commenced proceedings in bankruptcy against the co-respondent:—Held, that the 5,000*l.* did not constitute a good petitioning creditor's debt. *Muirhead, Ex parte*, 2 Ch. D. 22; 45 L. J., Bk. 65; 33 L. T. 303; 24 W. R. 351—C. A.

**Debt Due on Failure of Condition.**—A petitioning creditor was the president of a money club, and the preceding president had, in accordance with the rules of the club, in June, 1851, indorsed to him two notes for 50*l.* each, payable on demand, which were part of the property and securities of the club. The shares of the club were 50*l.* shares, and the bankrupt, who had been a subscriber for two shares previously to May, became the purchaser of two shares, and had with two sureties executed the notes on his becoming such purchaser. According to the rules of the club, he was to pay 10*s.* per month on each share, and interest at 5*l.* per month upon the amount; and in case either of the sureties should die before the subscriber's share be paid up, such subscriber should have immediate notice in writing, to provide a fresh surety, to the satisfaction of the committee, within a reasonable time, as the necessity of the case might require; and in case of neglect, the committee should have power to recover the whole amount of such subscriber's share or shares then unpaid by an action. The bankrupt had paid all the monthly payments, and the interest due up to the time of his bankruptcy; but in May, 1851, one of the sureties died, and a notice was sent to the bankrupt to provide a fresh surety, which he had neglected to do; and at the time of committing the act of bankruptcy, in November, 1851, more than 50*l.* remained unpaid to the clerk. The sum due upon the two notes was relied on as the petitioning creditor's debt:—Held, that the debt was valid. *Hope v. Meek*, 10 Ex. 829; 25 L. J., Ex. 11.

**Partners—Agreement to Share Profits.**—Where A. deposits with B. goods to be sold, and on a sale being effected, the profits, after deducting the cost price, are to be equally divided between them; but the loss, if any, is to be borne exclusively by A.; if B. effects a sale and receives the money, the debt due from him to A. is sufficient to support a commission against B. *Marson v. Barber*, Gow, 17.

If money is advanced to a trader, to enable him to commence a trade, of which the lender is to share the profits, it is a good petitioning

creditor's debt. *Notley, Ex parte*, 1 Mont. & Ayr. 46.

**Landlord & Tenant.**—*Scoble*, that pending a replevin on a distress for rent, the landlord cannot sue out a commission of bankruptcy against the tenant, founded on his demand for rent. *Emery v. Mucklow*, 4 M. & Scott, 263.

Landlords who had distrained, and to whom, in addition to arrears of rent, a sum was due from the tenant exceeding 50*l.*, for goods sold and delivered, petitioned for an adjudication against him:—Held, that they were not bound to forego their distress. *Bell, Ex parte*, 4 De G. & S. 597.

**Stock Exchange Differences.**—The amount of the differences due by a defaulter on the London Stock Exchange (as fixed by the official assignee of that body under its rules) to a Stock Exchange creditor, is a "liquidated sum" within the meaning of s. 6 of the Bankruptcy Act, 1869, and will support a bankruptcy petition by the creditor against the defaulter. *Ward, Ex parte, Ward, In re*, 22 Ch. D. 132; 52 L. J., Ch. 73; 48 L. T. 332; 31 W. R. 112—C. A.

#### 6. SUBSTITUTION.

**Creditor negotiating Bill of Exchange**—A petitioning creditor had sold a bankrupt's goods, in payment for which he took three bills of exchange, accepted by the bankrupt, which the creditor negotiated, and which were not in his hands, nor due, at the time he issued the fiat. The commissioner expunged the proof of his debt, on the ground that the bills were not in his possession at the time of the bankruptcy:—Held, that an order might be made, under 6 Geo. 4, c. 16, s. 18, for the substitution of the debt of another creditor. *Smith, Ex parte*, 3 Mont., D. & D. 341; 7 Jur. 864.

**Creditor failing to Prove his Debt.**—The Court of Bankruptcy might, under 5 & 6 Vict. c. 122, s. 4, admit another creditor to prosecute the fiat, after an unsuccessful attempt to prove his debt by the original petitioning creditor. *Kynaston v. Davis*, 15 M. & W. 705; 15 L. J., Ex. 336; 10 Jur. 620.

**Creditor not Proceeding.**—Where, after admitting a debt under a trader debtor summons, the debtor obtained protection under the arrangement clauses of the Bankruptcy Act of 1849, and the creditor petitioned for adjudication in bankruptcy, but did not proceed to obtain adjudication, and adjudication was obtained on the petition by another creditor:—Held, that the adjudication was valid. *Dales, Ex parte*, 2 De G. & J. 206; 27 L. J., Bk. 13.

— **In case of Non-Trader.**—Before 32 & 33 Vict. c. 71, when a petitioning creditor failed to proceed and to obtain an adjudication on a petition against a non-trader, it was not competent to another creditor to apply for an adjudication upon that petition. *Bristow, In re*, 3 L. R., Ch. 247; 37 L. J., Bk. 9; 18 L. T. 222; 16 W. R. 385.

**Debt insufficient—Addition of Debt due to another Creditor.**—Where a petitioning creditor's debt is insufficient, and the court orders the

commission to be proceeded with on proof of a sufficient debt by any other creditor, the debt of the second may be added to that of the first to make up the requisite amount. *Byers v. Southwell*, 6 Bing. N. C. 39; 8 Scott, 238.

**Adjudication refused.**—The 101st section of the Bankruptcy Act of 1848 was not repealed by s. 96 of the Act of 1861; and where an adjudication had been refused upon the petition of a creditor, another creditor might obtain an adjudication upon the same petition. *Harris, Ex parte*, 1 L. R., Ch. 469; 35 L. J., Bk. 21; 12 Jur., N. S. 618; 14 L. T. 611; 14 W. R. 750.

**Death of Petitioning Creditor.**—Where a petitioning creditor died after issuing the commission and before adjudication, it was ordered that the commissioner should be at liberty to adjudicate upon the deposition of his executors. *Tanner, Ex parte*, 1 Mont. & Mac. 292; S. P., *Winwood, Ex parte*, 1 Glyn & J. 252.

**Order for Substitution—Evidence.**—The petition on which the order is made cannot be used to explain any ambiguity in the order. *Christie v. Unwin*, 3 P. & D. 204; 11 A. & E. 373; 4 Jur. 363.

**Costs on.**—On a petition for substitution of a debt, in lieu of the petitioning creditor's debt, the costs of the proceeding must be paid by the petitioning creditor, and not out of the bankrupt's estate. *Hayne, Ex parte*, 4 Deac. & Chit. 403; S. P., *Lloyd, Ex parte*, *Ib.* 306.

Where the petitioning creditor's debt was on a bill of exchange, which was not in his hands when the fiat issued, the debt of another creditor was substituted at the costs of the petitioning creditor. *Cattley, Ex parte*, 4 Deac. 138; 1 Mont. & Chit. 360.

#### 7. FORFEITURE OF PETITIONING CREDITOR'S DEBT.

**For whose Benefit.**—The forfeiture takes effect for the benefit of the creditors under the commission, and cannot be in force if there is no longer any commission subsisting. *Davis v. Holding*, 11 A. & E. 710; 3 P. & D. 413.

Bills of exchange given to a petitioning creditor, by way of illegal composition, cannot be enforced by him; but if, since the agreement was made, no further proceedings have been taken in the bankruptcy, he may sue the bankrupt on the original consideration. *Ib.*

**Who can Claim.**—A defendant being a creditor of C. struck a docket against him and issued a fiat, but did not file it under 2 & 3 Will. 3, c. 114, s. 5, nor otherwise proceed in the bankruptcy. Afterwards, he was requested by C. to sign a composition deed, together with C.'s other creditors, accepting 10*s.* in the pound. He refused to do this, except on receiving security for his whole debt, which C. gave him by promissory notes, and the defendant thereupon signed the deed. C. afterwards committed an act of bankruptcy, and a fiat was prosecuted, under which assignees were appointed. Before this act of bankruptcy the defendant received money on one of the notes which had fallen due. The assignees brought an action for the amount:—Held, that they could not recover, for that, although the

case was within 6 Geo. 4, c. 16, s. 8, and defendant's debt was forfeited, the money was to be paid only to persons appointed by commissioners under some commission founded on the defendant's docket, or under some later commission, and no appointment for this purpose had been made; and that, as C. himself could not recover the money, being a party to the transaction, the assignees who succeeded only to C.'s right, could not. *Belcher v. Sambourne*, 6 Q. B. 414; 8 Jur. 853.

**Composition with other Creditors—Petitioning Creditor's Debt not compounded.**—[A., being indebted to B. in 500*l.*, and to other creditors in a large amount, a docket was struck against him by B., but no commission of bankruptcy was opened upon it. It was then arranged between A. and B., that A. should pay a composition of 10*s.* in the pound to his creditors, if they would take the same, but that B.'s debt should stand over. The creditors agreed to take the composition, and, on their receiving that amount on their respective debt, signed a release to A. of the remainder. B. did not receive any money under the composition, nor did he sign the release, but shortly after the same had been executed, he sued A. for the 500*l.*, who thereupon gave him a cognovit for that amount. Judgment was signed by B. on this cognovit within twenty-one days of its execution, but it was not left with the master to be filed. Six years afterwards, B. issued a *fi. fa.* on this judgment, and levied the amount on the goods of A., who within two months of that time became bankrupt, and a fiat was issued against him:—Held, on an application by his assignees, to set aside this judgment and execution, that the debt of B. was not forfeited under 6 Geo. 4, c. 16, s. 8. *Bushell v. Boord*, 1 B. C. Rep. 260; 4 D. & L. 359; 16 L. J., Q. B. 57; 11 Jur. 268.

**Partners.**—[R., G., & H. carried on business as partners. They subsequently dissolved partnership, and the business was carried on by R. and G. R. was also engaged in other partnership transactions, with which neither G. nor H. was connected; on the 3rd August, 1842, R. committed an act of bankruptcy. On the 4th, a docket was struck against him by the bank of M., and on the 5th a separate fiat was issued against him on such docket; on the 15th August, G. committed an act of bankruptcy, and on the 18th, a separate fiat was issued against him; on the 17th of August a joint fiat was issued against R. and G., and on the 18th a joint fiat was issued against R., G. and H.; on the 1st and 3rd October, the separate fiats and joint fiat against R. and G. were annulled. The bank of M. had not struck or joined in striking either of the dockets, except that against R. On the 5th August and the 1st September, and in the intervening time between those days, certain bills and moneys, forming part of the joint estate of R. and G., were delivered and paid by them to the bank of M., in payment pro tanto of a debt due to the bank from them jointly. The bank was a joint creditor of R. and G. to a large amount over and above the bills and money so paid. There were also other joint creditors of R. and G.:—Held, that such payment did not raise a case of forfeiture under 6 Geo. 4, c. 16, s. 8, against the bank of M. *Smith, Ex parte*, 3 Mont. D. & D. 144; 12 L. J., Bk. 34; 7 Jur. 183.

## 8. PROOF IN ACTIONS OF PETITIONING CREDITOR'S DEBT.

In the absence of a notice to dispute the petitioning creditor's debt, the debt upon the proceedings must be taken to be admitted for all the purposes of the action. *Hernemann v. Barber*, 14 C. B. 583; 2 C. L. R. 825; 23 L. J., C. P. 145; 18 Jur. 790.

In an action for conversion of goods which the defendants had seized upon the issuing of a fiat, as part of the bankrupt's estate, the counsel for the plaintiff opened the bankruptcy, and that some of the defendants were assignees of the bankrupt:—Held, that proof of the petitioning creditor's debt was not necessary. *Fauccett v. Fearn*, 6 Q. B. 25, n.; 8 Jur. 646.

An I O U bearing date before the bankruptcy of a trader, constitutes no evidence of a petitioning creditor's debt, without some proof that it was in existence before the bankruptcy. *Wright v. Lainson*, 2 M. & W. 739; M. & H. 202.

An affidavit to procure a commission of bankruptcy, in which the deponent swears that the party is indebted to the deponent in 100*l.* and upwards, and is become bankrupt, is, as against the deponent, conclusive evidence of the bankruptcy in any ulterior proceedings. *Ledbetter v. Sutt*, 4 Bing. 623; 1 M. & P. 597; *S. P.*, *Harmer v. Davis*, 1 Moore, 300; 7 Taunt. 577; *Gervis v. Wootton Canal Company*, 5 M. & S. 76; *Gibbons v. Phillips*, 7 B. & C. 529; 2 M. & R. 238.

## VII. PROCEEDINGS AFTER ACT OF BANKRUPTCY AND BEFORE ADJUDICATION.

### 1. PETITION, FIAT AND COMMISSION.

**Fiat, when issued.**—[The time of delivering out a fiat as an operative instrument was, "the date and issuing," within 2 & 3 Vict. c. 29, and, *prima facie*, the time of delivering it out of the Bankrupt Office was that time. *Pewtress v. Annan*, 9 D. P. C. 828.

A fiat granted by the Lord Chancellor was delivered by him to his secretary of bankrupts, to be transmitted by post to the commissioners of bankruptcy in the country. The secretary, accordingly, put the fiat into the post-office, in pursuance of the order given:—Held, that the delivery of the fiat by the Lord Chancellor to the secretary was not the true "date and issuing of the fiat," within the 2 & 3 Vict. c. 29, so as to protect an execution levied after such delivery. *Freeman v. Whitaker*, 4 Ex. 834; 19 L. J., Ex. 351.

By 5 & 6 Vict. c. 122, s. 4, fiats in bankruptcy shall be issued and transmitted by the Lord Chancellor's secretary of bankrupts, in such manner as the Lord Chancellor shall by any order direct. The Lord Chancellor by an order directed that every fiat directed to any district court of bankruptcy should forthwith be sent through the General Post-Office to the deputy registrar or registrar of such district court. A fiat having been signed by the Lord Chancellor, and sent to the office of the secretary of bankrupts, was by him duly put into the post, and arrived at the district court on the following day:—Held, that the fiat issued at the moment it was put into the post. *Hernaman v. Coryton*, 5 Ex. 453; 19 L. J., Ex. 353.



**Form of Petition.**—The court refused to annul an adjudication, on the ground of the objection that the bankrupt, having gone abroad, had not, within six months before the petition for adjudication was presented, either resided or traded within the district of the court in which it was filed, so that the petition could not be in the form prescribed by 12 & 13 Vict. c. 106, s. 89. *Bunny, Ex parte*, 1 De G. & J. 119; 26 L. J., Bk. 83; 3 Jur., N. S. 1141.

— **Need not state Consideration for Debt.**—A petition must shew clearly the case which the debtor is called upon to answer, but it need not state the consideration for the debt on which the petition is founded. *Barnett, Ex parte, Barnett, In re*, 31 L. T. 664; 23 W. R. 101—L. J.

— **Description of Debtor.**—The court refused, on the petition of a bankrupt, to annul a fiat, on the ground that he was described in it as "John G.," instead of "John Christian G.," his right name, when he had been examined before the commissioner, and never mentioned that he was wrongly named in the fiat. *Galligan, Ex parte*, 1 Mont., D. & D. 144.

"Westcott" for "Wescott" is not a material variance of a bankrupt's name. *Austin, Ex parte*, 1 Mont., D. & D. 247.

In a petition for adjudication the party against whom the adjudication is sought must be described at length, as of, &c., adding his occupation. *Bennock, Ex parte*, 21 L. T. 625.

— **When Objection to be taken.**—A. was the son of a small manufacturer, who had a residence at Golcar, near Huddersfield, and a mill situate about four miles from Golcar. He was in the employ of his father, and worked at the mill, where he also carried on a small business upon his own account. During the week he generally slept at the mill, but was accustomed to go to his father's house every Saturday, and remain until Monday. On an application by himself for an adjudication, he described himself as of Golcar only:—Held, that the objection to the description, if insufficient, could not be taken upon an application for an order of discharge. *Crabtree, Ex parte*, 83 L. J., Bk. 33; 10 Jur., N. S. 529; 10 L. T. 361; 12 W. R. 768.

— **Description of Trader—Error in Sealed Copy.**—On the 26th April, 1880, a bankruptcy petition was presented against P., in which it was alleged that "he carried on business as a licensed victualler," and "that the act of bankruptcy committed by him was that he has, with intent to defeat or delay his creditors, departed from his dwelling-house and place of business, or otherwise absented himself." On the presentation of the petition an order was made under rule 65 of the Bankruptcy Rules, 1870, that the petition should be heard on the 27th April. A sealed copy of the petition was the same day left at the last known place of business of the debtor. At the foot of the sealed copy there was a note stating that the petition had been ordered to be heard on the 27th April, and that if P. intended to dispute the truth of the statements of the petition, he must file a notice of the grounds on which he intended to dispute the same, and send by post a copy of the affidavit to the petitioner three days before the

day fixed for the hearing. On the 27th April the debtor did not appear, and was adjudicated bankrupt. The bankrupt appealed from the adjudication on the grounds that the words "being a trader" were omitted from the description of the act of bankruptcy in the petition, and that the notice to the bankrupt was insufficient, inasmuch as the note to the sealed copy shewed that it was not intended to hear the petition for three days from the 26th April:—Held, that the allegations in the petition that the debtor was a licensed victualler, and that he had departed from his dwelling-house with intent to defeat or delay his creditors, were sufficient to describe the act of bankruptcy, and that the other objection must fail, as it did not appear that the debtor had been misled by the note to the sealed copy. *Palmer, Ex parte, Palmer, In re*, 45 L. T. 93—C. A.

— **By Secured Creditor—Statement of readiness to give up Security—Amendment of formal Defect.**—If a petitioning creditor who holds security for his debt is willing to give an estimate of the value of his security, s. 6 of the Bankruptcy Act, 1869, does not require this fact to be stated in the petition, but it is sufficient for the petitioner to give notice of it to the respondent, before the hearing of the petition. It is, however, proper as a matter of convenience, that the petitioner's willingness to estimate the value of his security should, in accordance with Form No. 10, be stated in the petition. A petitioning creditor stated in his petition that he held no security for his debt. He, in fact, held a charge on some property of the debtor, and before the hearing of the petition his solicitors, in a letter to the debtor's solicitors, said that the security was not valued at anything, and at the hearing it was stated that the petitioner was ready to give up his security for the benefit of the creditors. The registrar dismissed the petition, on the ground that the petitioner's readiness to give up his security ought, in conformity with s. 6, to have been stated in the petition:—Held, that the defect was a merely formal one, and that the registrar ought to have amended the petition by adding a statement of the security and that the petitioner was ready to give it up, and then to have made an adjudication. And the Court of Appeal made the amendment and the adjudication, but gave no costs of the appeal. *Vanderlinde, Ex parte, Pogose, In re*, 20 Ch. D. 289; 51 L. J., Ch. 760; 47 L. T. 138; 30 W. R. 930—C. A.

**Fiat, Joint or Separate.**—Where a joint fiat issues against A. & B., and the debt is separate, it is void, and the subsequent superseding it as to A. cannot make it good as a separate fiat against B. *Clarke, Ex parte*, 1 Deac. & Chit. 544.

A separate fiat was annulled in favour of a subsequent joint one, notwithstanding the separate estate was more important than the joint estate, and one of the bankrupts intended to dispute his bankruptcy. *Burdikin, Ex parte*, 2 Mont., D. & D. 187.

A separate fiat was issued against one of a firm of four, trading abroad. Subsequently a fiat was issued against two of the four, who were resident in this country. A petition was presented to annul the separate, in favour of the joint fiat; but an affidavit being filed, that there were no joint assets in this country, except such as were subject

to liens for more than they were worth, the court declined to interfere. *Rennick, Ex parte*, 12 Jur. 996.

The order to annul a separate fiat, in favour of a joint one, is quite of course. *Pemberton, Ex parte*, 1 Mont., D. & D. 190.

Where separate fiats are annulled to give effect to a joint one, the petitioning creditor will not be made to pay the costs of issuing them, merely because he ought to have given a fuller description of the bankrupt, if it was one not likely to mislead, and no improper motives are attributed to him. *Burdikin, Ex parte*, 1 Mont., D. & D. 156.

Formerly, if a joint commission was invalid as to one partner, it was bad as to all. *Martin, Ex parte*, 15 Ves. 114.

Even where one partner is an infant or a lunatic, there cannot be a joint commission against the others; separate commissions must be taken out. *Layton, Ex parte*, 6 Ves. 440; *S. P., Henderson, Ex parte*, 4 Ves. 163.

Quære, whether a fiat issued against an infant and another could be annulled as to the infant, and stand good as to the other under 6 Geo. 4, c. 16, s. 16. *Watson, Ex parte*, 3 Mont. & Ayr. 682; 3 Deac. 277.

Where there was a separate commission against one of three partners, and afterwards a commission against two of the firm, the first commission was ordered to be superseded, and the costs paid out of the joint estate. *Smith, Ex parte*, 1 Glyn & J. 256.

Quære, as to the validity of a joint fiat where one of the bankrupts is attained. *Addison, Ex parte*, 3 Mont. & Ayr. 434; 3 Deac. 54.

**Fiat Conclusive until set Aside.**—The fiat is, until set aside, proof of the bankruptcy against all parties. *Colombine v. Penhall*, 1 Sm. & G. 228.

**Affidavit in Support.**—J. W., in support of a petition, deposed that the alleged bankrupt was indebted to him, J. M., his co-partner (omitting the word "and"), for goods sold and delivered by the deponent and his co-partner.—Held, that the omission rendered the affidavit unavailable for the purpose of striking a docket. *Hill, Ex parte*, 3 Mont., D. & D. 51.

The fact of affidavits in support of a petitioning creditor's debt having been sworn before the solicitor to the fiat, is not necessarily a fatal objection to the fiat, but one on which the court will act on its own discretion. *Wright, Ex parte*, 3 Mont., D. & D. 307; 7 Jur. 522.

It is no objection to the validity of a petition that the affidavit filed with the petition is not made by a person who can depose to the facts as within his own knowledge, but it is sufficient if it is made by the petitioning creditor. *Bennoch, Ex parte*, 21 L. T. 625.

**Petition with Improper Motive.**—When the court sees that a bankruptcy petition has been made use of for an inequitable purpose, as, for instance, to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed. *Davies, In re, King, Ex parte*, 3 Ch. D. 461; 45 L. J., Bk. 169; 25 W. R. 239—C. A.

When the court sees that a bankruptcy petition is presented, not with the bona fide view of

obtaining an adjudication, but for a collateral purpose and with the view of putting pressure on the debtor, it will refuse to make an adjudication, even though there be a good petitioning creditor's debt, and an act of bankruptcy has been committed. *Griffin, Ex parte, Adams, In re*, 12 Ch. D. 480; 48 L. J., Bk. 107; 41 L. T. 515; 28 W. R. 208—C. A.

#### **Second Petition founded on same Act.**—

Under Rule 39, a petitioning creditor who has been induced by the fraud of his debtor to permit his petition to be dismissed for want of prosecution can, if he obtain special leave of the court, present a second petition alleging the same act of bankruptcy as that on which the first petition was founded. *Love, Ex parte, Jagger, In re*, 17 L. R., Eq. 454; 43 L. J., Bk. 37; 30 L. T. 71; 22 W. R. 366.

**Petition by Debtor.**—Quære, whether an outlaw can petition for an adjudication against himself. *Adams, Ex parte*, 27 L. J., Bk. 37; 4 Jur., N. S. 1089—L. J.

Where a bankrupt presented a petition for adjudication against himself, and he thereby sought his own benefit alone, and to be relieved against one particular debt and interest, the petition was not dismissed, but his future property was declared liable for the debts proved and to be proved under the bankruptcy. *Hewitt, Ex parte*, 31 L. J., Bk. 83; 8 Jur., N. S. 757; 6 L. T. 730.

By 17 & 18 Vict. c. 119, s. 20, a trader petitioning for an adjudication of bankruptcy shall forthwith, after filing his petition, and before adjudication, make it appear to the satisfaction of the court that his available estate was sufficient to produce 150l. at the least: the decision of the Court of Bankruptcy as to value was conclusive. *Pennell v. Butler*, 18 C. B. 209.

Before the Bankruptcy Act, 1869, A. became indebted to B. upon a judgment in 59l.; he owed no other debts, except some of very trifling amount, and one to his own attorney, for defending him in an action brought by B. The only assets which he had possessed he had sold, in order to raise money to defend the action.—Held, that he might petition against himself. *Enshy, In re*, 35 L. J., Bk. 23; 12 Jur., N. S. 579; 14 L. T., 692.

**In Custody for Debt.**—A person in custody upon a capias to hold to bail is in custody for a debt, claim or demand within the meaning of 24 & 25 Vict. c. 134, s. 19, and may, as such, be adjudicated bankrupt by the registrar, and is entitled to his release upon obtaining his order of discharge. *Gaskell, Ex parte*, 11 L. T. 685.

**Hearing—Non-attendance of Petitioning Creditor.**—When, upon the day appointed for the hearing of a petition for adjudication, neither the petitioning creditor, nor his solicitor, nor anyone on his behalf, attends to support it, the court will, upon the application of the alleged debtor, dismiss the petition with costs. *Anon.*, 22 L. T. 179.

The chief judge will not upon appeal interfere with the discretion of the court below in dispensing with the attendance of the petitioning creditor upon the hearing of a bankruptcy peti-

tion, without good cause. *Rayner, Ex parte*, 37 L. T. 38; 25 W. R. 851.

— **Non-attendance of Debtor.**—A debtor having given notice to dispute the petitioning creditor's debt under a petition filed against him, did not attend at the time appointed for the hearing, but a few minutes afterwards the registrar received a telegram stating that counsel was on the way to the court, and would shortly arrive to appear for the debtor. The registrar waited ten minutes, and then, no one being present on behalf of the debtor, adjudicated him a bankrupt. Ten minutes afterwards, the debtor, attended by his solicitor and counsel, arrived, but the registrar refused to re-open the matter:—Held, that there had been undue haste in the proceedings, and that the petition must be re-mitted to be heard on its merits. *Phillips, Ex parte, Phillips, In re*, 44 L. J., Bk. 11; 31 L. T. 416; 23 W. R. 24.

— **Two Petitions against same Debtor—Second Petition first heard—Adjudication—Collusion between Debtor and second Petitioner.**—When two bankruptcy petitions are presented against the same debtor, and he consents under r. 42 to an immediate adjudication being made against him on the second petition, the first petition not having been served, the court has power to hear the second petition first, and make an immediate adjudication on it without requiring any notice to be given to the first petitioner. But, if in such a case the adjudication on the second petition has been obtained by collusion between the debtor and the second petitioner, the court has power to give the conduct of the proceedings under the adjudication, up to the appointment of a trustee, to the first petitioner. *Mason, Ex parte, White, In re*, 14 Ch. D. 71; 49 L. J., Bk. 56; 42 L. T. 884; 28 W. R. 749—C. A. Reversing 42 L. T. 192; sub nom. *Nicholson, Ex parte*.

— **Omission to give Notice to dispute Debt.**—A debtor against whom a bankruptcy petition had been presented instructed his solicitor to oppose it. The solicitor inadvertently omitted to give the notice required by R. 36 of the Bankruptcy Rules, 1870, but he appeared at the hearing of the petition, and asked to be allowed to dispute the validity of the petitioning creditor's debt. The registrar refused to permit this, and made an adjudication:—Held, that the debtor ought to have been allowed to adduce his evidence, and that the adjudication must be annulled, but that the debtor must pay the costs occasioned by the omission to give the notice. *Dale, Ex parte*, 3 Ch. D. 322; 45 L. J., Bk. 129; 34 L. T. 745; 24 W. R. 852.

— **Withdrawal of Notice to dispute Debt.**—A debtor against whom a bankruptcy petition has been presented, gave notice, under Rule 36 of the Bankruptcy Rules, 1870, of his intention to dispute the petitioning creditor's debt. He afterwards withdrew the notice, but on the hearing of the petition, without having given a fresh notice, he claimed the right to dispute the amount of the debt, on the ground that, since the withdrawal of the notice, he had made a payment to the creditor which reduced the debt below 50l. The creditor was not present, and the registrar dismissed the petition:—Held, that the debtor was

not precluded from disputing the amount of the debt, but that the creditor ought to have an opportunity of giving evidence to contradict the debtor; and the petition was referred back to the registrar for this purpose. *Leary, Ex parte, Lattman, In re*, 13 Ch. D. 321—C. A.

— **Verifying Allegations in Petition.**—At the hearing of a petition, even though the respondent has given no notice of his intention to shew cause against the petition, and does not appear, the allegations contained in the petition must be supported by further evidence than the common affidavit (No. 11). *Lindsay, Ex parte, Lindsay, In re*, 19 L. R., Eq. 52; 44 L. J., Bk. 5; 31 L. T. 415; 23 W. R. 44.

That affidavit is made only for the purpose of justifying the sealing of the petition. *Ib.*

A creditor filed a petition for adjudication, with the usual affidavit verifying the statements of the petition. The debtor gave notice of his intention to dispute the statements in the petition, and attended at the hearing, but did not tender any evidence. The registrar accordingly made an order of adjudication without further evidence on behalf of the creditor than the affidavit filed with the petition:—Held, that the statements in the petition ought to have been proved afresh; and that the adjudication must be annulled. *Dodd, Ex parte, Ormston, In re*, 3 Ch. D. 452; 25 W. R. 185—C. A.

— **Proof of Act of Bankruptcy.**—The court cannot make an order of adjudication without definite proof of an act of bankruptcy. *Lindsay, Ex parte, Lindsay, In re, supra*.

A creditor presented a petition for adjudication. The debtor raised no objection and did not appear on the hearing. The petition did not allege any specific act of bankruptcy, but only that the debtor had made a fraudulent conveyance of his property or some part thereof. The only evidence was an affidavit that the statements in the petition were true. The deputy registrar adjudicated the debtor bankrupt:—Held, that the terms registrar and deputy registrar are convertible terms, and that there would have been no reason to annul the adjudication because it was made by the deputy registrar; but that the evidence of the act of bankruptcy was insufficient to justify an adjudication. *Ib.*

— **Proof of Act of Bankruptcy—Service of Debtor Summons.**—A debtor summons and a bankruptcy petition founded upon the non-compliance with it, are entirely distinct litigations, and the evidence taken upon the one cannot be used upon the other unless previous notice has been given of the intention to use it. *Rogers, Ex parte, Rogers, In re*, 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29—C. A.

Therefore, upon the hearing of a bankruptcy petition founded upon the debtor's non-compliance with a debtor summons, the service of the summons must be strictly proved, even though the debtor has, in an affidavit previously made by him upon an application to dismiss the summons, admitted that the summons has been served upon him. *Ib.*

Such an affidavit cannot be used upon the hearing of the petition, unless previous notice has been given of the intention to use it. *Ib.*

— **Proof of Debt.**—A petition for adjudication

was filed, based on non-compliance with a debtor summons, and supported by an affidavit in the common form verifying the statements in the petition. The debtor gave notice to dispute the petitioning creditor's claim, and filed an affidavit admitting the debt, but claiming a set-off. At the hearing the debtor and his witnesses were present, but, owing to the absence of his solicitors, he did not tender any evidence, and the registrar thereupon made an order for adjudication:—Held, that the petitioning creditor's debt had not been sufficiently proved, and that a new sitting for adjudication must be held. *Ormsdon, In re, Dodd, Ex parte*, 2 Ch. D. 452; 25 W. R. 185—C. A.

**Staying Petition.**—A creditor, having presented a petition for an adjudication against his debtor, ought not to have his proceedings stayed by injunction merely because before the adjudication is actually made the debtor himself presents a petition for liquidation by arrangement or composition. *Diamond, Ex parte, Williams, In re*, 5 L. R., Ch. 743; 39 L. J., Bk. 47; 23 L. T. 292; 18 W. R. 1123.

— **Pending Trial of Validity of Debt—Discretion of Registrar.**—When the proceedings on a bankruptcy petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and the validity of the debt has been established by the judgment of a court of first instance, the registrar has a judicial discretion to proceed with the hearing of the petition and to make an adjudication of bankruptcy upon it, and is not bound to wait for a final decision of a court of appeal on the validity of the debt. *Yeatman, Ex parte, Yeatman, In re*, 16 Ch. D. 283; 44 L. T. 260; 29 W. R. 457—C. A.

If, however, he is satisfied that a *bonâ fide* appeal is pending from the judgment of the court of first instance, he ought to adjourn the further hearing of the petition until after the appeal is disposed of. *Id.*

— **Continuing Proceedings.**—Before fixing a day for continuing the proceedings on the petition, the registrar is bound to require the production of the judgment establishing the debt, or an office copy of it. *Id.*

— **Waiver of Irregularity.**—But if the day is fixed irregularly, without the production of the judgment, the irregularity will be waived by the appearance of the debtor or his solicitor on the day fixed without taking the objection, which cannot then be raised at any subsequent stage of the proceedings. *Id.*

**Tender of Amount of Debt.**—A debtor made default in complying with a debtor summons, but at the hearing of the petition for an adjudication the petition was adjourned for an arrangement to be made by the debtor with the creditor's solicitor, who was also acting for other creditors. On the petition again coming on, the debtor tendered the amount of the petitioning creditor's debt (alone), but the tender was refused, and an order of adjudication was made:—Held, that without saying that there might not be cases in which the court might compel a tender to be accepted at the hearing of the petition, yet that in the present case an adjudication was properly made. *Brigstocke, Ex parte, Brig-*

VOL. I.

*stocke, In re*, 4 Ch. D. 348; 46 L. J., Bk. 50; 35 L. T. 831; 20 W. R. 262—C. A.

When an act of bankruptcy has been proved, and a petition for adjudication presented, the creditor is not bound to accept an offer of payment of the debt, but is entitled to an order for adjudication. *Boss, Ex parte, Whalley, In re*, 18 L. R., Eq. 375; 43 L. J., Bk. 110; 30 L. T. 474; 22 W. R. 702.

Under such circumstances an adjournment of the petition, in order to give the debtor time for payment, was held not to be warranted by the Bankruptcy Act, 1869, s. 8. *Id.*

**Costs of Petition.**—If two present separate petitions the costs of the creditor upon whose petition the adjudication is founded will be paid in priority to the costs of the other creditors. *Page, Ex parte, Springall, In re*, 25 L. T. 716.

## 2. CONSOLIDATION OF PROCEEDINGS.

Two separate fiats against two partners were allowed to be consolidated and prosecuted as one joint fiat, under 6 Geo. 4, c. 16, s. 17. *Gowar, In re*, 1 Mont., D. & D. 1.

The 12 & 13 Vict. c. 106, s. 98, providing that after a petition for adjudication is filed against one or more member or members of a firm, any petition for adjudication filed against any other member or members shall be prosecuted in the same court as the first, and that the estate of the bankrupt or bankrupts shall vest in the assignees under the first, applies to a case where the second petition is against all the members of the firm. *Green, Ex parte*, 3 De G. & J. 50; 27 L. J., Bk. 32.

Where under 12 & 13 Vict. c. 106, s. 98, an order of annexation had been made of a joint to a prior separate petition for adjudication, and assignees had been chosen under the separate adjudication, joint creditors as well as separate creditors voting in the choice, the court refused to discharge the annexing order, or to annul the separate in favour of the joint adjudication. *Id.*

After two separate adjudications had been made against two partners on their own petitions, a joint adjudication was obtained against both on the petition of a joint creditor. An order of a district court, consolidating the separate petitions with the joint petition, was irregular, and was discharged, and the choice of assignees under it vacated. *Haines, Ex parte*, 3 De G. & J. 58; 27 L. J., Bk. 33; 4 Jur., N. S. 1256.

Where an order directed that all the proceedings had and taken under a separate fiat should be transferred to and incorporated with the proceedings under a joint one, the commissioners were bound to admit the proofs as they stood under the separate fiat, and could not insist on a creditor deducting the amount of a dividend received by him under the separate fiat, and proving only for the balance of his debt under the joint fiat. *Bateson, Ex parte*, 1 Mont., D. & D. 500.

## 3. EFFECT OF DEATH OF DEBTOR.

**Joint Fiat—Amendment.**—Where one of the bankrupts died before the adjudication under a joint fiat, the fiat was ordered to be amended by omitting his name. *Hall, Ex parte*, De Gex, 332.

**Commission Null and Void.**—But where

D D

bankrupt died before adjudication, the commission was held null and void, without any writ of supersedeas. *Green, Ex parte*, 1 Deac. & Chit. 230.

Though a bankrupt dies, not having surrendered, the commission may proceed. *Dewdney, Ex parte*, 15 Ves. 494.

An assignment of the commissioners after the death of a bankrupt was good. *Troughton v. Gitley*, Amb. 630.

A separate commission established, though the other partner died before the assignment. *Smith, Ex parte*, 5 Ves. 295.

A petition to supersede, presented in the lifetime of the bankrupt, ordered to stand over, on his death, until his personal representatives, or those entitled to take out administration, were served. *Lenworthy, Ex parte*, 1 Mont. 54.

**Debtor petitioning against Himself.**—Where a petitioner for an adjudication against himself had the petition granted and afterwards dismissed, and having given notice of appeal against such dismissal, dies, the property meanwhile remaining in the custody of the official assignee, the court has no jurisdiction to make an order for the disposition of the property, or a declaration as to the rights of the parties. *Bianconi, Ex parte*, 10 L. T. 283.

#### 4. SUSPENDING PROCEEDINGS IN BANKRUPTCY.

**Under 24 & 25 Vict. c. 134, s. 110.**—It is not necessary to the validity of a resolution to suspend proceedings in bankruptcy, passed by a meeting of creditors under the above section, that previous notice of the holding of the meeting should be advertised in the London Gazette. *Boldero, Ex parte*, 34 L. J., Bk. 34; 12 L. T. 750; 13 W. R. 1088.

It is competent to the creditors to pass such a resolution, notwithstanding the bankrupt has already obtained his order of discharge. *Id.*

Where proceedings have been suspended by a resolution of the creditors, upon an application by a bankrupt for his order of discharge under the above section, the commissioner is bound to entertain an application by a creditor for leave to examine the bankrupt upon the accounts filed by him, although these accounts may, at a previous meeting, have been unquestioned. *Jones, Ex parte*, 33 L. J., Bk. 11; 9 L. T. 498; 12 W. R. 221.

It is the duty of the commissioner, before granting an order of discharge under the above section, to satisfy himself judicially that the bankrupt has made a full discovery of his estate. *Id.*

**—Effect on Property.**—A bankrupt proposed at a meeting of his creditors that the bankruptcy should be suspended under 24 & 25 Vict. c. 134, s. 110, and that he should receive back his estate and pay a composition of 2s. 6d. in the pound. The creditors, by a resolution duly confirmed, accepted the proposal. The resolution did not purport to re-vest the estate in the bankrupt until after the payment of the composition. The messenger of the Court of Bankruptcy then went out of possession, but the creditor's assignee who had guaranteed the messenger his fees, retained the keys of the premises. Subsequently and before payment of the composition, a judg-

ment creditor, who was not present at the meeting and had not assented to the resolution, issued execution and seized goods belonging to the bankrupt's estate:—Held, that the fact of the bankruptcy being suspended under s. 110 did not re-vest the estate in the bankrupt, and that the assignee was therefore entitled to the goods. *Macdonald v. Thompson*, 4 L. R., C. P. 747; 38 L. J., C. P. 364; 20 L. T. 666; 17 W. R. 919.

**—Effect on Jurisdiction of Court.**—Where the creditors of a bankrupt have passed a resolution, under the Bankruptcy Act of 1861, s. 110, that the proceedings in bankruptcy shall be suspended, the jurisdiction of the Court of Bankruptcy to order a sale of the bankrupt's property on the petition of his equitable mortgagee is at an end, unless preserved by the resolutions themselves. *Wood, Ex parte*, 1 L. R., Ch. 170; 35 L. J., Bk. 34; 12 Jur., N. S. 304; 14 L. T. 38; 14 W. R. 320.

### VIII. ADJUDICATION.

#### 1. WHEN AND HOW MADE.

**County Court.**—When a petition in bankruptcy is preferred under 32 & 33 Vict. c. 71, in a county court, against a person as residing within its district, and he is adjudicated bankrupt thereon, such adjudication not being rescinded or appealed against is final and conclusive, though it turns out that he traded within the London district; and the trustee in bankruptcy is entitled to the proceeds of an execution on such trader's goods which are retained in the sheriff's hands under s. 87, due notice of the petition having been given under that section, as it is not necessary that the adjudication should be against such person as a trader, and it is sufficient if there is an adjudication against him and he is in fact a trader. *Revell v. Blake*, 8 L. R., C. P. 533; 42 L. J., C. P. 165; 29 L. T. 67; 22 W. R. 96—*Ex. Ch.*, affirming, 7 L. R., C. P. 300; 41 L. J., C. P. 129; 26 L. T. 578; 20 W. R. 675.

**On Failure of Resolution for Liquidation or Composition.**—Proceedings under r. 267 of the Bankruptcy Rules, 1870, for adjudication of bankruptcy based upon the neglect of the first meeting of creditors to pass a resolution for liquidation or composition, must be commenced by petition. *James, Ex parte, Condon, In re*, 9 L. R., Ch. 609; 43 L. J., Bk. 107; 30 L. T. 773; 22 W. R. 937.

An adjudication made under the provisions of r. 266 of the Bankruptcy Rules, 1870, must, like any other adjudication, be made upon a petition presented by a creditor, and after service of the petition upon the debtor in the ordinary way. *Stebbing, Ex parte, Stebbing, In re*, 19 L. R., Eq. 441; 44 L. J., Bk. 76; 32 L. T. 208; 23 W. R. 680.

Under the Bankruptcy Act, 1869, s. 125, sub-s. 12, the court has power to adjudge a liquidating debtor a bankrupt *mero motu*, acting on the knowledge it has acquired in the course of the liquidation proceedings. *Marland, Ex parte, Ashton, In re*, 20 L. R., Eq. 777; 44 L. J., Bk. 116; 32 L. T. 875; 23 W. R. 951.

It is not necessary that a bankruptcy petition should be presented. *Id.*

— **Failure to pay Composition.**—The creditors of a debtor passed resolutions accepting a composition of 5s. in the pound, payable in two instalments of 4s. and 1s., the first instalment to be paid in five months, and to be secured by the promissory notes of the debtor and three sureties; the second instalment to be paid in two years, and to be secured by the promissory notes of the debtor alone. The first instalment was paid by the sureties, and exceeded in amount the assets of the debtor as appearing by his statement of affairs. The debtor, having failed to pay the second instalment, was adjudicated a bankrupt on the application of a creditor under s. 126.—Held, that the adjudication could not be sustained, for that the creditor failed to shew that there were legal difficulties, or that the creditors were prejudiced; and that the remedy of the creditor was to sue for the remaining instalment of the composition. *Shiers, In re, Shiers, Ex parte*, 7 Ch. D. 416; 47 L. J., Bk. 81; 37 L. T. 724; 26 W. R. 216.

**Act of Bankruptcy committed within Six Months from Presentation of Petition but more than Twelve Months from Order of Adjudication.**—Sects. 6 and 11 of the Bankruptcy Act, 1869, are perfectly distinct, and an adjudication may be good if the act of bankruptcy on which it is founded was committed within six months from the presentation of the petition, though the same act of bankruptcy is the only one to which the title of the trustee can relate back, and was committed more than twelve months before the order of adjudication. *Grepe, In re, Grepe, Ex parte*, 50 L. J., Ch. 723; 44 L. T. 829; 29 W. R. 824.

**When Matter of Right.**—C. was plaintiff and next friend of her infant co-plaintiffs in a chancery suit. She was ordered to pay costs, and upon her failing to pay, the defendant took proceedings in bankruptcy. She defended these upon the ground that her bankruptcy would embarrass the suit and that the proceedings in bankruptcy were taken with this object.—Held, that the adjudication was *ex debito justitiæ* and could not be refused. *Claxton, In re*, 7 L. R., Ch. 532; 41 L. J., Bk. 56; 27 L. T. 257; 20 W. R. 876.

— **Offer of Payment.**—When an act of bankruptcy has been proved, and a petition for adjudication presented, the creditor is not bound to accept an offer of payment of the debt, but is entitled to an order for adjudication. *Boss, Ex parte, Whalley, In re*, 18 L. R., Eq. 875; 43 L. J., Bk. 110; 30 L. T. 474; 22 W. R. 702.

Under such circumstances an adjournment of the petition, in order to give the debtor time for payment, was held not to be warranted by the Bankruptcy Act, 1869, s. 8. *Id.*

On hearing of a petition for adjudication, founded on default in appearance to a debtor's summons, after the debt and act of bankruptcy had been proved, the hearing was adjourned till the next day with the consent of the solicitor of the petitioning creditor, in order that the debtor might make arrangements to pay not only the petitioning creditor's debt, but also the debts of other creditors who were represented by the same solicitor. At the adjourned hearing the debtor tendered the amount of the petitioner's debt only and costs, which were refused by the petitioning creditor. The registrar accordingly

made the order for adjudication.—Held, that the registrar was right in making the order. *Brigstocke, Ex parte, Brigstocke, In re*, 4 Ch. D. 348; 46 L. J., Bk. 50; 35 L. T. 831; 25 W. R. 262.—C. A.

**Liquidated Debt—Contract for Shares—Failure of Contractor before Completion—Price fixed by Official Assignee.**—A member of the Stock Exchange contracted with another member to purchase certain shares. Before completion the purchaser failed to meet his engagements, and was declared a defaulter on the Stock Exchange. By the rules of the Stock Exchange the price of shares, contracted to be bought or sold by such a defaulter, are to be fixed by the official assignee of the Stock Exchange, and the differences paid to or claimed from the assignee.—Held, that the price fixed by the assignee is substituted for the original contract, and is a liquidated sum due under the contract, and, therefore, that a bankruptcy petition may be founded upon a claim for such price. *Ward, Ex parte, Ward, In re*, 22 Ch. D. 132; 52 L. J., Ch. 73; 48 L. T. 332; 31 W. R. 112.—C. A.

— **Defaulting Trustee.**—The debt of a petitioning creditor, amounting to 2,350l., was based upon an order directing the alleged debtor, as one of the trustees of a post-nuptial settlement, to deliver up certain property comprised therein to the petitioning creditor, or to pay the value thereof; and an inquiry was directed, if necessary, for the purpose of ascertaining such value, and also for the purpose of ascertaining what portion of a sum of 10,000l., which the settlor had covenanted to pay to the trustees of the settlement, had come into the hands of the debtor. In his examination the debtor admitted having received a sum of 450l., as the value of certain furniture comprised in the settlement, and also different sums, to the amount of 1,900l., under the covenant in the settlement. The county court judge having adjudicated the debtor a bankrupt upon the alleged debt of 2,350l.—Held, on appeal, that until the inquiry had been made and an ascertained sum ordered to be paid upon a fixed day, there was no liquidated sum due at law or in equity upon which an adjudication could be founded. *Reynolds, Ex parte, Reynolds, In re* (No. 2), 52 L. J., Ch. 431; 47 L. T. 413; 31 W. R. 323.

**Against Irish Traders.**—A trader residing and carrying on business exclusively in Ireland was, while within a district of an English court of bankruptcy, adjudicated bankrupt by that court.—Held, that such adjudication was void, as against a subsequent adjudication by the Irish Court of Bankruptcy. *Rogers, In re*, 9 Ir. Ch. Rep. 150.

An adjudication in Ireland, by the operation of 20 & 21 Vict. c. 60, s. 267, vests the property of a bankrupt, situate in a foreign state, in the assignees, so far as the law of this country is concerned. *Robinson, In re*, 11 Ir. Ch. Rep. 385.

The law of New York recognizes, to a certain extent, the rights of the assignees under the adjudication. *Id.*

— **Prior Adjudication by Irish Court—Discretion of Court.**—A bankruptcy petition having been presented in an English county

court against a trader, who carried on business in England and Ireland, and had creditors and assets in both countries, he obtained an adjudication against himself on his own petition in the Irish Bankruptcy Court before the English petition could be heard. It was alleged that if an adjudication was made on the English petition the title of the trustee would relate back so as to avoid certain transactions of the bankrupt which could not be avoided under the Irish adjudication. No one but the debtor opposed the English petition:—Held, that an adjudication ought to be made on the English petition for what it was worth, leaving for future determination the question in which court the assets ought ultimately to be administered. *McCulloch, Ex parte, McCulloch, In re*, 14 Ch. D. 716; 43 L. T. 161; 28 W. R. 935—C. A., affirming, 42 L. T. 664; 28 W. R. 768.

**Prior Scotch Sequestration—Jurisdiction to make Adjudication.**—Though the court has jurisdiction to adjudge bankrupt a debtor against whom there is existing a prior unclosed Scotch sequestration in which he has not obtained a discharge, the court has a discretion in the matter, and it will decline to make an adjudication if it does not appear that the debtor has any assets in England, or any debts contracted since the commencement of the sequestration. *Robinson, Ex parte, Robinson, In re*, 22 Ch. D. 816; 48 L. T. 501; 31 W. R. 553—C. A.

Per Jessel, M.R.:—*Prima facie* the existence of a Scotch sequestration is a reason for declining to make an injunction. *Id.*

**Contingent.**—When a debtor summons was obtained for 517*l.*, but on the petition for adjudication only 110*l.* was shewn to be due, it was ordered that the adjudication should not be published for a fortnight, and that if during that time the 110*l.* was paid, all proceedings should be stayed, leaving each party to bear his own costs. *Harris, Ex parte, Harris, In re*, 10 L. R., Ch. 458; 44 L. J., Bk. 77; 32 L. T. 417; 23 W. R. 531.

## 2. JOINT AND SEPARATE.

**Against Joint Debtors.**—The trustee appointed under a liquidation by arrangement is bound to realize and distribute *pari passu* among the joint creditors the bankrupt's property in his joint estate, and therefore a joint adjudication against two debtors, one of whom has, since the debt was contracted, obtained an order of discharge under his separate liquidation, cannot, as against the latter, be supported. *Hammond, Ex parte, Hammond, In re*, 16 L. R., Eq. 614; 42 L. J., Bk. 97; 29 L. T. 72; 21 W. R. 865.

**Leave to Appeal when Time expired.**—An adjudication having been made against three partners, two of them appealed. The cases of all three were identical. The third, who had not appeared within the time fixed by the General Rules in Bankruptcy, 1870, was allowed to appeal, and the adjudication was annulled against all three. *Hayward, Ex parte, Hayward, In re*, 6 L. R., Ch. 546; 40 L. J., Bk. 49; 24 L. T. 782; 19 W. R. 833.

**Joint Adjudication in Ireland—Separate in England—English Assets.**—One of two partners

was adjudicated bankrupt in England and the other in Ireland; they were then jointly adjudicated bankrupts in Ireland. Most of the joint creditors were in England, and a considerable part of the assets was in England:—Held, that the assets in England would not be handed over to the assignees in the joint bankruptcy. *James, Ex parte, O'Reardon, In re*, 9 L. R., Ch. 74; 43 L. J., Bk. 13; 29 L. T. 761; 22 W. R. 196.

R., carrying on business in London, in partnership with M. in Dublin, committed an act of bankruptcy by executing an assignment of all his estate and effects to trustees for the benefit of his creditors. He was afterwards adjudicated bankrupt, and property belonging to the firm having been sold by order of the trustees of the deed of assignment, the purchase-money was by the London Court of Bankruptcy ordered to be placed to a deposit account in the bank in certain names. In the meantime a separate adjudication was made against M. in Ireland, and was followed by a joint adjudication in Ireland against R. and M., the assignees under M.'s separate adjudication being also assignees under the joint adjudication. Upon the application of the assignees under the Irish bankruptcies for an order directing payment to them of the money produced by the sale:—Held, that the separate adjudication in England not having been either superseded or impounded, the joint assets were vested in the English trustee under R.'s separate bankruptcy, and the Irish assignees under M.'s separate bankruptcy as tenants in common; that the Irish assignees had no better title to the joint assets by reason of the joint adjudication, and it being more convenient that the assets should be distributed in England, the order was refused. *Id.*

**Consolidating Joint and Separate Adjudications.**—An adjudication was made upon a petition presented against two partners in trade. A petition had been previously presented by the same creditor against one of the partners separately, and some proceedings had been taken under it, but no adjudication had been made:—Held, that there was power to order the proceedings under the separate petition to be consolidated with those under the joint petition. *Mackenzie, Ex parte, Helliwell, In re*, 20 L. R., Eq. 758; 44 L. J., Bk. 117.

Held, also, that the bankrupt had no *locus standi* to oppose the consolidation. *Id.*

Separate adjudications against partners in a firm were followed by an adjudication on a joint petition against the firm. On the application, under the Bankruptcy Act of 1861, s. 88, of the petitioning creditor under the joint adjudication, the commissioner impounded the proceedings under the separate adjudications:—Held, that this was within the discretion of the commissioner. *Evans, In re, Warren, Ex parte*, 36 L. J., Bk. 15; 15 W. R. 662.

**Second Adjudication without Certificate.**—An adjudication against a person who is an uncertificated bankrupt under a former bankruptcy is not void. *Morgan v. Knight*, 15 C. B., N. S. 669; 33 L. J., C. P. 168; 9 L. T. 803; 12 W. R. 428.

A second adjudication against an undischarged bankrupt, who has been allowed by the trustee to carry on business again, is not void. *Watson, Ex parte, Roberts, In re*, 12 Ch. D. 380; 41 L. T. 516; 28 W. R. 205—C. A.

## 3. APPEAL AGAINST ADJUDICATION.

**Who may dispute Adjudication—Non-Trader.]**

—Before the Bankruptcy Act, 1869, a non-trader was, equally with a trader, entitled to time within which to shew cause against an adjudication which had been made against him. *Hepburn, Ex parte, Hepburn, In re*, 36 L. J., Bk. 48; 17 L. T. 275; 15 W. R. 1068.

—**Bill of Sale Holder.]**—An adjudication was made, founded upon the execution by the debtor of a bill of sale, which was held to be an act of bankruptcy:—Held, that the bill of sale holder was entitled to appeal from the adjudication, and on his appeal the adjudication was annulled. *Thoday, Ex parte, Ellis, In re*, 2 Ch. D. 229; 45 L. J., Bk. 64; 34 L. T. 261. Affirmed, 2 Ch. D. 797; 45 L. J., Bk. 159; 34 L. T. 705—C. A.

—**Mortgagee of Chattels.]**—A party was adjudicated bankrupt, and the assignees sold chattels (alleged to have been mortgaged to A.), as being in the order and disposition of the bankrupt. The time had expired within which the bankrupt could have petitioned to annul, but A. presented such petition, and the commissioner, on the ground of want of trading, annulled the adjudication:—Held, upon appeal of the petitioning creditor, that as it appeared that the application to annul was made at the instigation of the bankrupt, the adjudication must be restored, the court declining to decide the question of trading. *Emery, Ex parte*, 1 Bk. & Ins. R. 265; 23 L. J., Bk. 33.

—**Debtor by General Agent.]**—Where A. was adjudicated bankrupt while he was abroad, the court ordered that A.'s general agent should be at liberty, on A.'s behalf, by such solicitor as he might think fit, to shew cause against the validity of the adjudication. *Frampton, Ex parte, Frampton, In re*, 28 L. J., Bk. 21; 5 Jur., N. S. 970; 7 W. R. 690—L. J.

"Such person" mentioned in s. 104 of 12 & 13 Vict. c. 106, does not apply only to the bankrupt himself. *Id.*

**Disputing in British Colony.]**—An action brought by a bankrupt in a British colony, in which action he disputes the validity of the adjudication, is a proceeding which, under 12 & 13 Vict. c. 106, s. 233, will keep alive his right to dispute the adjudication. *Bunny, Ex parte*, 1 De G. & J. 119; 11 Moore, P. C. C. 189; 26 L. J., Bk. 83; 3 Jur., N. S. 1141.

**How.]**—A person adjudicated a bankrupt under 12 & 13 Vict. c. 106, must, if he desires to annul the adjudication, proceed under s. 104. If he omits to do so, he can then only proceed by petition of appeal. *Carter v. Dimmock*, 4 H. L. Ca. 337; 1 Bk. & Ins. R. 12; 22 L. J., Bk. 55; 17 Jur. 515; affirming, 1 De G., Mac. & G. 212; 21 L. J., Bk. 23; 15 Jur. 1142.

**Debtor estopped by his Conduct.]**—A trader, who so far acquiesces in a fiat which has issued against him as to canvass in the choice of assignees, and also to act as agent in the purchase of a portion of the estate from the assignees, cannot afterwards successfully petition to annul the fiat, although the assignees do not satisfactorily establish the commission of an act of

bankruptcy by him. *Grundy, Ex parte*, 2 Mont., D. & D. 589; 6 Jur. 696.

**Within what Time.]**—In the phrase "such extended time not exceeding fourteen days in the whole," in sect. 104 of 12 & 13 Vict. c. 106, the words "such extended time" mean "such further time;" and the time is to be reckoned exclusively of the original seven days. *Castelli, Ex parte*, 1 De G., Mac. & G. 437; 21 L. J., Bk. 5.

The provisions of the section do not preclude the commissioner from adjourning the hearing on shewing cause, when it has commenced within the proper time. *Id.*

The time for appeal against an adjudication does not expire until two calendar months after the advertisement of the bankruptcy, under 12 & 13 Vict. c. 106, s. 233, varied by sect. 24 of 17 & 18 Vict. c. 119, notwithstanding that the former uses the word "commenced" proceedings. *Miller, Ex parte*, 32 L. J., Bk. 45; 7 L. T. 657—L. J.

—**Infant Debtor.]**—A petition to annul an adjudication on the ground of the infancy of the bankrupt, but which was not presented until after the expiration of the time limited for that purpose by the 12 & 13 Vict. c. 106, s. 233, dismissed as out of time, the case of an infant being no exception from the provisions of that section. *West In re*, 3 De G., Mac. & G. 198; 22 L. J., Bk. 71; 1 Bk. & Ins. R. 58.

—**Extension of Time.]**—If a bankrupt had failed to commence any action, suit, or other proceeding to annul the fiat, within the time limited for that purpose by 5 & 6 Vict. c. 122, s. 24, the Court of Review had no discretionary jurisdiction to entertain a petition presented after that time has expired, to annul the fiat, however satisfactorily the delay might be accounted for. *Thorold, In re*, 1 Ph. 239; 3 Mont., D. & D. 285; 13 L. J., Bk. 1; 17 Jur. 1003.

The commencement of the proceeding by petition is the presentation of the petition, and not the mere preparation of it by the solicitor, or a notice by the bankrupt to the commissioner disputing the validity of the fiat. *Id.*

But where a bankrupt admitted the legal requisites of the fiat, a proceeding by him to annul the fiat on the ground of fraud need not have commenced within twenty-one days after the advertisement of the bankruptcy in the London Gazette. *Phipps, Ex parte*, 3 Mont., D. & D. 488; 13 L. J., Bk. 5; 8 Jur. 48.

—**Lodged after Office Hours.]**—Where, by an accident, a petition in bankruptcy did not reach the registrar's office in office hours on the last day for entering it, but was on that day tendered to one of the clerks in the office at his residence, who declined to receive it, doubting his authority to do so, the court ordered the petition to be received as of that day, without prejudice to any objection. *Harrison, Ex parte*, 2 De G. & J. 229; *S. P., Hull Bank, In re*, 27 L. J., Bk. 16—L. J.

—**Debtor residing in the Isle of Man.]**—The Isle of Man is not within the United Kingdom, and therefore a person residing there at the time of an adjudication against him has three months within which he may contest the validity of the fiat or petition for adjudication. *Davidson v. Farmer*, 6 Ex. 242; 20 L. J., Ex. 177.



— **Adjudication on Debtor's Petition.**—A debtor was adjudged bankrupt on his own petition, and on the 22nd of January filed his statement. On the 6th February assignees were chosen, who proceeded to get in the estate. On the 21st February, a creditor who had proved her debt at the meeting of the 6th, gave notice of motion for the 5th March, to annul the adjudication, and dismiss the petition, on the ground that the statement was inaccurate, inasmuch as the bankrupt had omitted from it the names of some fully secured creditors. On the 5th March the commissioner adjourned the application, giving the bankrupt leave in the meantime to file an amended statement, which he filed on the 17th March. On the 11th April the application was finally heard, when the commissioner made an order annulling the adjudication, and dismissing the petition, from which order the assignees appealed:—Held, that whatever right the creditor might have had to set aside the adjudication if she had proceeded with more diligence, she had, by her course of conduct, debarred herself from any such right. *Sampson, Ex parte*, 1 L. R., Ch. 476.

A creditor's assignee applied for an order to annul an adjudication made on the bankrupt's own application, in order that an adjudication by a creditor might be obtained for the purpose of impeaching certain mortgages, comprising the whole of the assets, as being fraudulent preferences or acts of bankruptcy. The assignee had been aware of the existence of the mortgages and that they exceeded the value of the property comprised in them, for nearly three months before he expressed any intention of impeaching them, and for more than four months before he made his application:—Held, that the delay was fatal to the application, inasmuch as there had been enough to put the assignee on inquiry whether the mortgages did not comprise the whole assets, and he might at any time have had the bankrupt examined as to the state of his property. *Davis, Ex parte*, 2 L. R., Ch. 363; 15 W. R. 599.

In June, 1857, a trader was adjudicated bankrupt on his own petition, and in the following October he obtained his certificate. In April, 1858, a creditor, who had been all along aware of the proceedings under the adjudication, applied to annul the fiat, on the ground of its legal invalidity:—Held, that such application was too late, there being no proof of any misconduct on the part of the bankrupt. *Adams, Ex parte*, 3 De G. & J. 70; 27 L. J., Bk. 37; 4 Jur., N. S. 1089.

— **Under 32 & 33 Vict. c. 71.**—A trader having committed an act of bankruptcy, a petition was presented against him by two creditors on the 19th of May, 1880, upon which adjudication followed on the 5th of July, all the requirements of the act having been complied with. On the 4th of August the debtor moved to annul the adjudication, upon the ground of the insufficiency of the petitioning creditor's debt. At the hearing the county court judge directed an issue to be tried before a jury as to the amount of the debt. The jury, on the 16th of October, having found that there was due to the petitioning creditors an amount below the statutory limit of 50*l.*, the judge thereupon annulled the adjudication:—Held, on appeal (reversing that decision), that the debtor ought to have appealed against the order of adjudication within the twenty-one days limited for that

purpose, and that, not having done so, the publication in the Gazette was, by the 10th section of the Bankruptcy Act, 1869, conclusive evidence of the validity of the adjudication as against all the world. *French, Ex parte, Trim, In re*, 52 L. J., Ch. 48; 47 L. T. 339.

**Parties to be Served.**—Notice of an appeal from the refusal to annul an adjudication of bankruptcy must be served on the trustee in bankruptcy as well as on the petitioning creditor. And if notice of the appeal is served on the petitioning creditor in time, but is not served in time on the trustee, the appeal must be dismissed. The time for appealing will not be extended in such a case. *Ward, Ex parte, Ward, In re*, 15 Ch. D. 292; 43 L. T. 183; 29 W. R. 206—C. A.

#### **Appeal standing over pending Trial of Action.]**

—An appeal from an adjudication of bankruptcy ought to stand over pending the trial of an action, the result of which, it was alleged by the appellant, would be to render a fund available to satisfy the debt claimed by the petitioning creditor. *Yeatman, Ex parte, Yeatman, In re*, 16 Ch. D. 283; 44 L. T. 260; 29 W. R. 457—C. A.

#### **4. ANNULING ADJUDICATION.**

**Jurisdiction of Court.**—The Court of Bankruptcy has a general jurisdiction to annul an adjudication of bankruptcy in a proper case. *Ashworth, Ex parte, Hoare, In re*, 18 L. R. Eq. 705; 43 L. J., Bk. 142; 30 L. T. 906; 22 W. R. 925.

A debtor filed a liquidation petition, and his creditors resolved on a liquidation by arrangement, but before they did so an adjudication of bankruptcy had been made against the debtor on a petition presented before the filing of the liquidation petition:—Held, that the court could annul the adjudication, either under r. 266 of 1870 or under its general jurisdiction. *Id.*

**Practice—Appeal to House of Lords.**—Where the House of Lords held that a bankruptcy ought to be annulled, and remitted the matter to the bankruptcy court, the court, upon motion, ordered that the order of the House of Lords be made an order of the court in bankruptcy, that the bankruptcy be annulled, and that the proper advertisements be inserted in the London Gazette. *Harding, Ex parte*, 14 W. R. 825.

**At what Stage.**—The Court of Bankruptcy has no power to annul an adjudication before advertisement. *Indbrooke, Ex parte*, 9 Jur., N. S. 950; 8 L. T. 781; 11 W. R. 1006.

A bankrupt cannot supersede his commission before a surrender. *Bean, Ex parte*, 1 Rose, 211; 17 Ves. 47; *S. P., Jones, Ex parte*, 11 Ves. 409; *Roberts, Ex parte*, 1 Madd. 72; 2 Rose, 378.

**Limit of Time.**—In a proper case an adjudication of bankruptcy may be annulled upon an application made after the expiration of the time limited for appealing from it. Sect. 10 of the Bankruptcy Act, 1869, has no application to an appeal from an adjudication, or to an application to annul it. *Grissel, Ex parte, Stanger, In*

re, 22 Ch. D. 436; 48 L. T. 405; 31 W. R. 264—C. A.

**Costs.**—An order was made by the Court of Appeal to annul an adjudication of bankruptcy, on the ground that the debtor must be presumed to have been dead when it was made. Probate had been granted of a will executed by the debtor:—Held, that the costs and charges of the trustee properly incurred, and the costs of all parties of the application to annul and of the appeal, must be paid out of the estate, and that the executors must confirm all acts properly done by the trustee in the bankruptcy. *Id.*

**On what Grounds—Defective Proceedings.**—A fiat issued against the plaintiff on the 20th July, 1849, upon a debt due from a banking company, in which he was a member, to G., the petitioning creditor, without any judgment having been obtained against the public officer, and a warrant of seizure in the ordinary form was issued to the messenger, dated the 30th of July. The creditors' assignee was appointed August 21st. The 12 & 13 Vict. c. 106, came into operation on October 11th, and on the 18th of October a seizure of the plaintiff's goods was made by the messenger, under the warrant:—Held, that the fiat was invalid, and that either the petitioning creditor or the messenger was liable for the wrongful seizure, but the court declined to determine which of the two was liable, as it was not required by the case submitted for their opinion. *Davison v. Farmer*, 6 Ex. 242; 20 L. J., Ex. 177.

The fact that the examination of a bankrupt was imperfect and inaccurate affords no reason why an order duly made to annul the adjudication, to which order the assignees and creditors assented in ignorance of such imperfection and inaccuracy, should be discharged, and the proceedings revived. *Adams, In re*, 10 L. T. 212.

Such an order will not be discharged, even when such imperfection has arisen from the bankrupt's own fraudulent misrepresentation and concealment (of which the assignees and creditors were ignorant) of certain debts due to him at the time of the adjudication, if at the date of the order the assignees had knowledge of other fraudulent misrepresentations and concealment by the bankrupt in his examination, and yet, in assenting to the annulment, relied upon its fulness and accuracy. *Id.*

When the creditors fail to appoint a trustee by reason of a quorum not being present, the court ought not to annul the adjudication if one creditor wishes the bankruptcy to proceed, and his debt is so much greater than all the others that he is substantially the only creditor. *English Joint Stock Bank, Ex parte, Finney, In re*, 6 L. R., Ch. 79; 40 L. J., Bk. 43; 23 L. T. 652; 19 W. R. 140.

Therefore, where the petitioning creditor's debt amounted to 3,232*l.*, and there were only two other unsecured creditors, whose debts amounted to 67*l.* and 42*l.* respectively, and the petitioning creditor appeared but the two others did not:—Held, that the bankruptcy ought to proceed under the registrar as trustee. *Id.*

**Infancy.**—A petition to annul an adjudication on the ground of the infancy of the bankrupt, but which was not presented until after the expiration of the time limited for that pur-

pose by 12 & 13 Vict. c. 106, s. 233, dismissed as out of time, the case of an infant being no exception. *West, In re*, 3 De G., Mac. & G. 198; 22 L. J., Bk. 71.

**More Doubts as to Validity.**—It is not sufficient ground for annulling an adjudication that its legal validity may be subject to doubt. *Bower, Ex parte*, 1 De G., Mac. & G. 468; 21 L. J., Bk. 61; 16 Jur. 734.

**Equitable Grounds.**—A commissioner has jurisdiction to annul an adjudication for equitable invalidity. *Johnstone, Ex parte*, 4 De G. & S. 204; 15 Jur. 739.

Discussion of the circumstances requisite to justify the annulling of an adjudication on equitable grounds. *Upfill, Ex parte*, 1 L. R., Ch. 439.

**No Act of Bankruptcy—Costs.**—A debtor was absent from his place of business for several days without making any provision for the payment of a bill or of other debts, and creditors to whom these debts were due called during his absence and were delayed. On an adjudication being obtained, founded on this as an act of bankruptcy, he shewed cause and deposed to his absence being occasioned by the necessity of his taking steps in a litigation between himself and some of his workmen:—Held, that as this explanation was uncontradicted, the commissioner had properly annulled the adjudication; but as the debtor was wholly insolvent, and had pending the disputed adjudication filed a declaration of insolvency, and was, immediately after the first adjudication was annulled, again adjudicated bankrupt on the application of a friendly creditor, the court reversed so much of the decision as directed the petitioning creditor to pay the costs of annulling the first adjudication. *Barney, Ex parte, Horton, In re*, 4 De G., F. & J. 503; 9 Jur., N. S. 286.

**Petitioning Creditor failing to appear in Action by Bankrupt.**—When a bankrupt brought an action against the petitioning creditor, who resided in Scotland and did not appear to it, the court, after giving him time to appear, of which he did not avail himself, annulled the adjudication. *Wolheim, Ex parte*, 32 L. J., Bk. 26; 7 L. T. 581; 11 W. R. 125—L. J.

When a bankruptcy was annulled, and the official assignee retained his costs out of the estate, the petitioning creditor was ordered to pay those costs and the costs of the bankrupt himself. *Id.*

**Debt not fully substantiated.**—Held, that even if the petitioning creditors' debt was not fully substantiated, that would not be a sufficient reason for the court annulling the adjudication in the general exercise of its jurisdiction. *French, Ex parte, Trim, In re*, 52 L. J., Ch. 48; 47 L. T. 339.

**Fraud—Knowledge of Petitioners.**—An order by a commissioner, reversing an order annulling an adjudication on the ground of fraud and wilful concealment, was discharged, the petition not alleging that the petitioners were deceived thereby, and it being shewn that they were aware of the fraud at the time the

bankrupt passed his last examination. *Adams, Ex parte*, 8 L. T. 815.

— **When made on Debtor's Petition.**—Semble, a creditor's petition to annul an adjudication made on the debtor's petition, may be supported if it goes on to pray adjudication against the debtor on an act of bankruptcy clearly proved, and to show that assets may be made available on the proposed adjudication, which could not be reached under the existing adjudication. *Potter, Ex parte*, 13 W. R. 189; 11 L. T. 35.

Where a bankrupt who had executed a trust-deed for the benefit of his creditors had obtained an adjudication against himself, the validity of which was open to doubt, the court suspended proceedings under it, at the instance of a creditor undertaking to apply for an adjudication on his own petition, although creditors' assignees had been appointed and opposed the application. *Taylor, Ex parte*, 6 De G., Mac. & G. 737.

The mere want of assets was not sufficient ground for annulling an adjudication made upon the petition of the bankrupt. *Enaby, Ex parte*, 35 L. J., Bk. 23; 12 Jur., N. S. 579; 14 L. T. 692; 14 W. R. 849.

— **Effect of Annuling not considered.**—The circumstance that an order to annul will leave unimpeached an assignment of all the bankrupt's effects to the creditor applying for the annulling order is not sufficient ground for refusing to annul an adjudication unsupported by legal requisites. *Bean, Ex parte*, 1 De G., Mac. & G. 486; 21 L. J., Bk. 26.

— **After Composition with Creditors under 12 & 13 Vict. c. 106, s. 230.**—At a meeting to consider an offer of composition with a view to annul an adjudication under the above section, creditors might vote by letter of attorney, although not residing out of England. *Clegg, Ex parte*, 4 De G. & S. 606; 20 L. J., Bk. 22; 15 Jur. 984.

In order to render a composition under the above section binding on all the creditors of a bankrupt, the offer of composition must be made to all the creditors, and not confined to nine-tenths in number and value of the creditors who have signed the composition agreement. *Taylor v. Pearce*, 2 H. & N. 36; 26 L. J., Ex. 371; 3 Jur., N. S. 917.

In order to give the Court of Bankruptcy jurisdiction to grant a certificate to a trader, pursuant to 12 & 13 Vict. c. 106, s. 221, it was not necessary that there should be an acceptance by each creditor of the composition agreed to by three-fifths in number and value; it was sufficient for such purpose that there had been a tender of such composition to the creditors; and a creditor refusing to accept the money tendered could not, by a demand of it after the certificate had been granted, prevent the certificate from operating to bar the original debt. *Tindall v. Hibberd*, 2 C. B., N. S. 199; 26 L. J., C. P. 173; 3 Jur., N. S. 667.

— **Liquidation Proceedings.**—After the presentation of a petition for adjudication, the debtor summoned a meeting of his creditors under the Bankruptcy Act, 1869, s. 125, with a view to liquidation by arrangement, but before the meeting an adjudication was made, with a

stay of proceedings till after the meeting, the petitioning creditors consenting. At the meeting the creditors resolved to accept a composition; and the resolution having been confirmed at a subsequent meeting and duly registered, the adjudication was thereupon annulled by the registrar on the application of the debtor:—Held, that the adjudication was properly annulled. *Foster, Ex parte, Pooley, In re*, 10 L. R., Ch. 59; 44 L. J., Bk. 22; 31 L. T. 397; 23 W. R. 145.

**Objection, when to be taken.**—When it is intended to rely on the insufficiency of the evidence of trading or other effects to impeach the validity of the adjudication, the objection ought to be taken in the first instance, when the insufficiency may be cured by additional evidence. *Lowenthal, Ex parte, Lowenthal, In re*, 9 L. R., Ch. 591; 43 L. J., Bk. 83; 30 L. T. 668.

Under 12 & 13 Vict. c. 106, a trader, on the 11th of October, assigned all his estate to trustees for the benefit of his creditors, but the deed contained a proviso that if he should within two calendar months petition for arrangement under the 12 & 13 Vict. c. 136, s. 211, or sign a declaration of insolvency, the deed was to be void and the property was to be administered under the Court of Bankruptcy. Four days afterwards he presented such a petition, and obtained protection. On the 31st of October a creditor petitioned for an adjudication on the act of bankruptcy committed on the 11th, and an adjudication was made on the 2nd of November. Notice to dispute the adjudication was given on the 6th, and on the 13th the same was annulled; but on appeal:—Held, that the adjudication must stand, the arrangement clauses not superseding or controlling the powers conferred by ss. 101 and 104. *Trherne, Ex parte*, 30 L. J., Bk. 6—L. J.

**Application for, after abortive Liquidation Petition—Payment of Applicant's Debt.**—A debtor filed a liquidation petition in August, 1879. A receiver of his property was at once appointed, and injunctions were granted to restrain some of the creditors from proceeding against him for their debts. The first meeting of the creditors was held on the 20th of October, 1879, when it was resolved to adjourn to the 15th of December, 1879. Similar resolutions for adjournment were passed again and again, the meeting being ultimately, on the 15th of November, 1882, adjourned to the 28th of March, 1883. No resolutions for liquidation by arrangement or composition were passed. In January, 1883, two of the creditors applied to the Court of Bankruptcy by motion, under sub-s. 12 of s. 125 of the Bankruptcy Act, 1869, for an adjudication of bankruptcy against the debtor. At the adjourned meeting on the 28th of March, 1883, the creditors resolved that it was inexpedient in the interests of the creditors that any further proceedings should be taken under the petition, and that application should be made to the court to discharge the receiver, and dismiss the petition, or stay all further proceedings under it. The registrar, on the 3rd of May, made an adjudication. The debtor appealed, and on the hearing of the appeal an offer was made by a friend of his to pay the debts of the two creditors in full, and to provide for their costs of the ap-

plication, the payment to be made by the friend out of his own moneys, and an undertaking being given by him that neither directly nor indirectly should the payment be made out of the debtor's assets:—Held, that, notwithstanding the resolution of the 28th of March, and having regard to the fact that the receiver had not been discharged, the liquidation proceedings were still pending, and that if the adjudication order was discharged, no other creditor would be injured, for that the court would have jurisdiction to adjudicate the debtor a bankrupt on the application of any other creditor. The adjudication was accordingly discharged on the terms of payment proposed, and on the undertaking of the debtor to apply to the Court of Bankruptcy for leave to summon a fresh first meeting of the creditors. *McHenry, Ex parte, McHenry, In re*, 24 Ch. D. 35; 48 L. T. 921; 31 W. R. 873—C. A.

Held, by Baggallay and Cotton, L. JJ., and semble per Bowen, L. J., that the court had jurisdiction to order a fresh first meeting of the creditors under the petition. *Id.*

**Objection too Late.]**—A debtor was, without opposition on his part, adjudicated bankrupt. At the first meeting of creditors no quorum was present, and this fact was represented to the judge, who directed the adjudication to go on with the registrar as trustee. There were only three creditors besides the petitioning creditor. The bankrupt and the three creditors applied to have the bankruptcy annulled, and raised a question as to the sufficiency of the petitioning creditor's debt:—Held, that as the bankrupt had not disputed the debt at the time of the adjudication he could not do so afterwards, and that neither he nor the creditors had any right to ask to have the adjudication annulled on this ground. *Hooper, Ex parte*, 45 L. J., Bk. 83; 34 L. T. 262; 24 W. R. 930.

**Promises in Consideration of Assent.]**—A. having accepted a bill of exchange drawn upon him by B., in order to induce B. to consent to the annulling of the bankruptcy of a friend of A., and having been compelled to pay the bill to a bona fide holder:—Held, that A. could not recover back the amount so paid from B. *Watson v. Bennett*, 12 W. R. 1008.

Where a bankrupt trader compounded with his general creditors for 4s. in the pound, but gave, as security to one creditor, his I O U for the whole debt, in order to induce him to concur in annulling the bankruptcy, and afterwards, in consideration of a loan, exchanged the I O U for bills of exchange, which he accepted, a court of equity, at the instance of the trader, declared the bills invalid. *Mare v. Warner*, 3 Giff. 100; 7 Jur., N. S. 1228; 4 L. T. 351; *S. P.*, *Mare v. Earle*, 3 Giff. 108; 7 Jur., N. S. 1230; 4 L. T. 352.

##### 5. EFFECT OF ANNULING.

**No retrospective Effect.]**—A supersedeas of a commission under the old bankrupt law, and the annulling a fiat under 1 & 2 Will. 4, c. 56, had no retrospective effect, so as to invalidate acts done under the commission or fiat. *Smallcombe v. Olivier*, 2 D. & L. 217; 13 M. & W. 77; 13 L. J., Ex. 305; 8 Jur. 606.

A fi. fa. was lodged in the sheriff's hands, to

be executed on the goods of a debtor, against whom a judgment had been obtained. Previously to the issuing of a writ, a fiat in bankruptcy had issued against the debtor, under which he was declared a bankrupt, and assignees were appointed. The sheriff returned nulla bona; but, before he had made the return, the Court of Review made an order that the fiat should be annulled if the Lord Chancellor should think fit; and, after the return was made, the Lord Chancellor made an order accordingly. In an action against the sheriff for a false return:—Held, that the order of the Court of Review had no operation until the Chancellor's order. *Id.*

Held, secondly, that the return was not false, inasmuch as neither a supersedeas of a commission in bankruptcy, under the old law, nor the order of the Chancellor, annulling the fiat in bankruptcy, under 1 & 2 Will. 4, c. 56, had any retrospective effect. *Id.*

Held, thirdly, that even if it had, the sheriff, being a public officer, and having made the only return he could make at the time, ought to be protected. *Id.*

**New Adjudication—Same Assignees.]**—Where a commission is superseded, and another issued, though the same assignees are chosen, they have no title whatever under the first commission. *Bartlett v. Tuchin*, 1 Marsh. 583; 6 Taunt. 259; 2 Rose, 435.

**Apprenticeship Indentures.]**—Where a fiat issued against the master of an apprentice, but was afterwards annulled, by means of a composition between the bankrupt and his creditors, the indentures of apprenticeship were not restored. *Allen v. Coster*, 3 Beav. 274.

**Right of Bankrupt to impeach Transactions.]**—A purchase was made from the assignees of a bankrupt in which their solicitor was interested, so as to invalidate the transaction. Afterwards the bankruptcy was by arrangement annulled, without prejudice to any sale or other act done by the assignees; and the bankrupt by deed, to which he and the assignees alone were parties, ratified their acts, relieved them from all claims in respect of them, and agreed to execute all further deeds necessary for confirming them. After this, the bankrupt filed a bill against the purchasers to impeach the sale to them. The purchasers alleged that the bankrupt had obtained the annulling order by fraudulent suppression:—Held, that by virtue of the annulling order the bankrupt had the right to impeach all sales on any grounds on which they might have been impeached if the bankruptcy had not been annulled, and that the deed executed by him did not affect this right. *Adams v. Swoorder*, 2 De G., J. & S. 44.

Held, also, that the annulling order being in force, the court must treat it as valid, and could not enter into the question whether it was obtained by fraud. *Id.*

**Vesting of Property.]**—A person in whom the estate of a bankrupt was, on the annulling of the bankruptcy, vested under the Bankruptcy Act, 1869, s. 81, having sued for a debt due to the bankrupt, the defendant pleaded a set-off by way of mutual credit at the time of the bankruptcy, between the defendant and the bankrupt, for unliquidated damages provable in bankruptcy,

and which would have been provable against the bankrupt had the proceedings in bankruptcy continued against him:—Held, that the plea was good, as the vesting order vested the property of the bankrupt in the plaintiff, subject to the right to set off debts which would have been provable in the bankruptcy. *West v. Baker*, 1 Ex. D. 44; 45 L. J., Ex. 113; 34 L. T. 102; 24 W. R. 277.

**Revesting of Property.**—A bankrupt was refused his certificate on the ground of fraudulent concealment of property. Subsequently a consent order for annulling the bankruptcy was obtained, in consideration of a friend of the bankrupt paying a sum to the creditors. After this the assignees discovered that other property to a large extent had been concealed by him, and they presented a petition to discharge the annulling order, as having been obtained by fraud, and before this petition had been heard, filed a bill to restrain him from getting in the concealed property. The petition was ultimately dismissed, on the ground that the assignees having, when they consented to the annulling order, been aware of previous fraudulent concealment, could not be held to have consented to the order on the faith of the bankrupt having made a full disclosure of his property:—Held, that the proceedings in the cause ought to be stayed without costs. *Elsey v. Adams*, 2 De G., J. & S. 147; 10 Jur., N. S. 469; 10 L. T. 492.

A trader having been adjudicated bankrupt on a debtor summons issued by a banking firm, a trustee was appointed, who realized the estate, and paid the proceeds into the bank, in pursuance of a resolution of creditors. The banking firm were afterwards adjudicated bankrupt, the sum paid in by the trustee then standing to his credit in their books. Afterwards the order adjudicating the trader bankrupt was reversed on appeal, and no order was made under the Bankruptcy Act, 1869, s. 81, as to his property. In an action by the trustee in the bankruptcy of the banking firm against the trader to recover the amount of his debt to them:—Held, that he was entitled to set off the amount so paid into the bank by the trustee in his bankruptcy. *Bailey v. Johnson*, 7 L. R., Ex. 263; 41 L. J., Ex. 211; 20 W. R. 1013—Ex. Ch. Affirming, 6 L. R., Ex. 279; 40 L. J., Ex. 189; 24 L. T. 711; 19 W. R. 1069.

**Special Arrangement.**—A judgment creditor levied execution for a debt of over 50*l*. on the goods of a trader a few days before the commission of an act of bankruptcy on which the debtor was adjudicated bankrupt. After the appointment of a trustee in the bankruptcy, the creditors passed resolutions under the Bankruptcy Act, 1869, s. 28, that the adjudication should be annulled, and that they would accept a composition payable by instalments, to be secured by the covenant of the bankrupt, and by an assignment of all his personal property to the trustee. This arrangement was approved by the court; the bankruptcy was annulled, and the debtor executed the assignment to the trustee:—Held, that the effect of the composition arrangement having been approved by the court, was to continue vested in the trustee all the property which had previously been vested in him as trustee in the bankruptcy, and that the execution creditor could not proceed with the execution on the annulment of the adjudication.

*Lennard, Ex parte, Chidley, In re*, 1 Ch. D. 177; 45 L. J., Bk. 49; 33 L. T. 553; 24 W. R. 182—C. A.

Held, also, that even if the property revested in the debtor on the annulment of the bankruptcy, it revested in him subject to an equitable interest in all the creditors, and to an obligation on his part to execute an assignment to the trustee. *Id.*

**Second *fi. fa.* on a Judgment obtained before Bankruptcy.**—The defendant having recovered judgment against the plaintiff, issued a writ of execution, under which the sheriff seized the plaintiff's goods. The plaintiff thereupon filed a petition for liquidation, and an injunction was granted restraining the defendant from proceeding further under the execution until after the date named for hearing. On that date the plaintiff was adjudicated bankrupt; the sheriff then withdrew voluntarily, and a trustee was appointed, who took possession of the plaintiff's estate. The creditors subsequently agreed to accept a composition "upon the debts proved and admitted in the bankruptcy," to annul the adjudication, and to hand back his property to the plaintiff. The court affirmed the resolution, and an order was made accordingly. The defendant, who was no party to the composition, directed the sheriff to retake the goods, and the sheriff again seized the plaintiff's effects under the same writ of execution:—Held, that by virtue of s. 81 of the Bankruptcy Act, the property of the bankrupt reverted to him unconditionally; that the resolutions being not binding on the defendant, his unexhausted right to retake the goods under the original writ was preserved by the words "shall revert to the bankrupt for all his estate and interest therein;" and that the second seizure was therefore lawful. *Crew v. Terry*, 2 C. P. D. 403; 46 L. J., C. P. 787.

#### 6. ACTION FOR MALICIOUS ADJUDICATION.

S., an attorney, having been instructed by H. to make J. bankrupt obtained a debtor summons, and served it on him, who thereupon applied to the registrar of the county court to dismiss the summons. Having heard both parties, the registrar made an order on the 12th of April that he should, within seven days, enter into a bond, with two such sufficient sureties as the court should approve, to pay such sum as should be recovered by H. in any proceeding taken for the recovery of the debt due to him from the debtor, together with costs; and that all proceedings on the summons should be stayed until the court in which such proceedings for the recovery of the debt should be taken had come to a decision thereon. S. drew up the order, which was the first of the kind made by the county court in pursuance of the statute. During the seven days a correspondence took place as to the proposed sureties, who were objected to by S. on behalf of H., and no bond having been executed in consequence, a petition in bankruptcy was, by the express order of H., presented by S. on the 21st of April, and on the same day a receiver was appointed, the act of bankruptcy alleged being that the petitioning creditor had served on J. a debtor summons, and that he being a trader had for seven days neglected to pay the debt alleged to be due, or to secure or compound for the same. J. objected to the peti-

tion; and after several hearings the county court judge on the 8th of May adjudged him to be bankrupt. This decision was affirmed by the chief judge in bankruptcy, but was afterwards reversed by the lord justice of appeal, who annulled the proceedings on the ground that the order of the 12th of April was a stay of proceedings at the time of the petition and adjudication:—Held, per Kelly, C. B., and Cleasby, B., that upon these facts an action was maintainable by J. against S. for maliciously and without reasonable and probable cause presenting the petition and causing him to be adjudicated a bankrupt. Held, contra, per Martin, B., and Bramwell, B., that such an action was not maintainable by J. against S. *Johnson v. Emerson*, 6 L. R., Ex. 329; 40 L. J., Ex. 201; 25 L. T. 337.

## IX. ASSIGNEES AND TRUSTEES.

### 1. OFFICIAL ASSIGNEES.

**Under 5 & 6 Viet. c. 122, s. 49.**—The official assignee, under 5 & 6 Viet. c. 122, s. 48, was a provisional assignee of the estate and effects of the bankrupt, and was to all intents and purposes sole assignee until others were appointed by the creditors to act with him. *Dunn v. Hill*, 2 Dowl. N. S. 1062; 11 M. & W. 470; 12 L. J., Ex. 316; 7 Jur. 426.

**Accounts.**—Where a retired official assignee omitted to close his accounts, or to deliver up his books, the commissioner having omitted to make a periodical audit of the accounts, the court, in ordering that the balances due from and to the official assignee be paid into court, directed the retiring salary of the official assignee to be suspended until the result of the inquiries was known. *Johnson, In re*, 9 L. T. 672.

### 2. CREDITORS' ASSIGNEES.

#### a. Choice and Appointment.

**Right to Vote—Public Officer of Company.**—The public officer of a company may vote by attorney, on behalf of the company, at the choice of assignees. *Ackroyd, Ex parte*, 1 Mont. D. & D. 555.

**— Creditor who has assigned Debt.**—A creditor who has assigned his debt may vote in the choice of assignees. *Hart, In re*, 1 Fonb. N. R. 57.

A power of attorney to vote on the choice of assignees is extinct when once executed. *Ib.*

**— Bankruptcy of Executor.—Tenant for Life.**—An executor of a will was declared bankrupt. Under the will he took both real and personal estate, in trust for the testator's widow, for her life, with remainder to her infant children. He fraudulently misapplied the trust property, and under his bankruptcy the widow was admitted to prove against his estate. On the choice of assignees, she applied for leave to vote:—Held, that she was sufficiently interested to be entitled to vote. *Cudvallader, Ex parte*, *James, In re*, 4 De G., F. & J. 499; 31 L. J., Bk. 66; 6 L. T. 485—L. J.

**— Co-Trustees.**—Where one of several trustees of a charitable society became bankrupt,

and his co-trustees tendered a proof for the amount due from him to the charity, and on the commissioner refusing to admit the proof without an order of the court, an order was obtained, and the debt proved by the co-trustees in pursuance thereof:—Held, that the co-trustees were not creditors entitled to vote at the choice of a creditors' assignee; and they having been the only persons voting, the choice was set aside, and a new one directed. *Rowe, Ex parte*, 1 De Gex, 111; 14 L. J., Bk. 17.

**Petition to set aside—Creditor whose Proof adjourned.**—A creditor whose proof has been neither admitted nor rejected, but only adjourned, cannot be heard on his petition to set aside the choice of assignees. *Morse, Ex parte*, 1 De Gex, 478; 16 L. J., Bk. 9; 11 Jur. 482.

**Grounds for Setting aside.**—Where the amount of a creditor's debt, which would have turned the choice of assignees, was not disputed on his application to prove it, but the proof was opposed by the solicitor who issued the fiat on an invalid objection, which induced the commissioners to reject the proof, and they refused to adjourn the choice for a reasonable time to enable the creditor to produce an unnecessary document, the production of which was insisted upon by the commissioners, and the whole proceeding appeared to be a stratagem of the solicitor to hurry on the choice of assignees, and prevent the creditor from voting in such choice, a new choice was directed. *Spiller, Ex parte*, 2 Mont., D. & D. 43; 5 Jur. 659.

Where the solicitor of a trader, declared bankrupt on his own petition, held powers of attorney from friendly creditors to vote at the choice of assignees, and opposed, on insufficient grounds, a proof which would have turned the choice, and carried it by his powers of attorney, another proof having been also omitted to be placed on the proceedings:—Held, a proper case for setting aside the choice, although the proceedings had advanced nearly as far as a declaration of dividend. *Carter, Ex parte*, 3 De G. & J. 116.

Where the commissioners, at the election of assignees, rejected votes which would have turned the choice, on the ground that the creditors tendering them had an adverse interest to the general body of creditors, the court set aside the choice which had been ratified by the commissioners, and without directing a new one, declared the assignees elected by the majority duly chosen. *Stallard, Ex parte*, 2 Mont., D. & D. 469; 6 Jur. 112.

A. B. and C. were chosen assignees. B. had been represented at the meeting by a gentleman to whom he had given a power of attorney to vote, but words in the printed form empowering the attorney to accept the office of assignee on behalf of B. were struck out:—Held, that this rendered the choice of all three invalid, and the appointment and confirmation were vacated. *Boddington, In re*, 6 L. T. 207—L. J.

**Purchasing Debt to obtain Appointment.**—It is an abuse of the bankruptcy law to purchase a debt due by a bankrupt in order to procure the appointment of a trustee favourable to the bankrupt, or to a creditor, or a particular class of creditors. *Harper, Ex parte*, *Pooley, In re*, 20 Ch. D. 685; 51 L. J., Ch. 810; 47 L. T. 177; 30 W. R. 650—C. A.

**Proof of Appointment.]**—In order to prove his title as creditors' assignee, the plaintiff put in evidence a certificate dated before action, certifying his proper appointment before action, signed by the registrar and commissioner, and sealed with the seal of the Court of Bankruptcy:—Held, that the certificate so sealed was conclusive, and that the defendant could not go into evidence to shew that there was no signature by the commissioner or his deputy till after action brought. *Kelly v. Morray*, 1 L. R., C. P. 667; 35 L. J., C. P. 287; 12 Jur., N. S. 769; 14 L. T. 624; 1 H. & R. 684.

**Ratification by Commissioners.]**—It is a good practice not to ratify the choice of assignees, unless the persons chosen are present, and accept the trust. *Heath, Ex parte*, 4 Deac. 294; Mont. & Chit. 667.

Where the creditors choose three assignees, and the commissioners reject one, there must be a new choice. *Wilson, Ex parte*, 1 Mont., D. & D. 234.

**Appointment of new Trustees.]**—When the proceedings in a bankruptcy have been suspended by a resolution of the creditors, passed under the Bankruptcy Act, 1861, s. 110, and the trustee appointed by the creditors to wind up the estate and effects of the bankrupt has died, the Court of Chancery has jurisdiction, under the Trustee Acts, to appoint new trustees. *Raphael, In re*, 9 L. R., Eq. 233; 39 L. J., Ch. 200; 18 W. R. 247.

**On Lunacy.]**—When one of the trustees of a creditors' deed registered under the Bankruptcy Act, 1861, has become of unsound mind, the lords justices sitting in lunacy have jurisdiction under the Trustee Acts to appoint a new trustee. *Donisthorpe, In re, Thomson, In re*, 10 L. R., Ch. 55; 44 L. J., Bk. 536; 31 L. T. 369; 23 W. R. 100.

#### b. Removal.

**Discretion of Commissioner—Interference by Court.]**—The removal of assignees is a matter within the discretion of the commissioner, with which the appellate court will not interfere merely because it doubts whether it would have acted as the commissioner has done. *Bates, Ex parte*, 1 De G., Mac. & G. 452; 21 L. J., Bk. 20; 16 Jur. 459.

Where the commissioner gave the assignees time to consider whether they would remove solicitors whom they had appointed, and who were related to the bankrupt, or would themselves retire, and the assignees declined to do either, and the commissioner removed the assignees, the court dismissed, with costs, an appeal from the commissioner's decision. *Ib.*

A trustee in bankruptcy can be removed by the court from his office under sect. 83, sub-s. 4, of the Bankruptcy Act, 1869, only upon good cause shewn, not at the mere discretion of the registrar. But, in making an order for the removal of a trustee for good cause, the registrar is exercising a judicial discretion, and if he has exercised his discretion according to law, the Court of Appeal will not disturb his order. *Sheard, Ex parte, Pooley, In re* (No. 1), 16 Ch. D. 107; 44 L. T. 259—C. A.

**Grounds for Removal—Non-compliance with**

**Statute.]**—Where an order appointing a creditors' assignee had been made by the creditor on an ex parte application, such assignee being the clerk to the solicitor who was one of the principal creditors, the court, on the ground that 24 & 25 Vict. c. 134, s. 53, had not been complied with, ordered his removal. *Smale, Ex parte*, 7 L. T. 376; 11 W. R. 47—L. J.

**Declining to Act.]**—When a creditor's assignee appointed at a first meeting declines to act, the court will forthwith remove him, reserving the question of the payment of the costs occasioned by such removal. *Saph, In re*, 13 W. R. 352.

**Omission to render Accounts.]**—The omission of a creditor's assignee to render accounts within the time prescribed by 24 & 25 Vict. c. 134, s. 129, and to attend two meetings appointed for the examination of the bankrupt, are sufficient grounds for his removal from the assigneeship. *Raulings, Ex parte*, 9 Jur., N. S. 1183; 9 L. T. 275; 12 W. R. 5.

A creditor's assignee was ordered to pay the costs of one of the adjournments occasioned by his absence. *Ib.*

**Fraud.]**—Where an assignee connived at the insertion of a fictitious debt in a bankrupt's balance-sheet, attended with other circumstances of fraud, he was ordered to be removed and to pay the costs of the petition, and of his removal, together with the costs of a new choice. *Perryer, Ex parte*, 1 Mont., D. & D. 276.

**Selling his Debt.]**—Where an assignee has sold his debt to a creditor who was adverse to the fiat, he was removed, and a new one chosen in his room, and he was restrained from voting in the choice of the new assignee. *Stagg, Ex parte*, 2 Mont., D. & D. 186.

**Becoming Bankrupt.]**—If an assignee becomes bankrupt, the commissioners may direct his removal, and a new choice. *Bonsor, Ex parte*, 1 Mont., D. & D. 194.

Where a trustee having, either solely or jointly with others, control over the trust property has recently become bankrupt, and it is not shewn that he has since become possessed of means, the court will, as a general rule, order his removal on the petition of the *cestui que trust*, under s. 117 of the Bankruptcy Act, 1869. *Adams' Trust, In re*, 12 Ch. D. 634; 48 L. J., Ch. 613; 41 L. T. 607; 28 W. R. 163.

**Proof improperly rejected.]**—It is the settled practice of the Court of Bankruptcy not to vacate the appointment of a trustee merely because a proof has been improperly rejected. In order to induce the court to vacate the appointment, special circumstances—such as that the rejection of the proof has been procured by fraud—must be shewn. At any rate an application for such an order must be made very promptly after the rejection of the proof. *Kimber, Ex parte, Thrift, In re*, 11 Ch. D. 869—C. A.

**Managing Clerk of Purchaser of Estate.]**—Where the sole assignee was the managing clerk of a solicitor, who had bought an estate of the bankrupt, and had neglected to complete the

purchase, the court ordered him to be removed, and that there should be a new choice. *Ashmore, Ex parte*, 3 Mont., D. & D. 461.

— **Request of Assignee.**—An assignee may be removed at his own request, in order that he may bid at a sale of part of the bankrupt's estate. *Perkes, Ex parte*, 3 Mont., D. & D. 385.

— **Petition by Bankrupt—Collusion.**—On a petition by a bankrupt for the removal of one of two assignees, where it appeared that he was a mere instrument in the hands of the other assignee, and that the petition was got up between them in collusion, and out of a spirit of hostile opposition to the assignee against whom it was presented, the petition was dismissed. *Oakes, Ex parte*, 2 Mont., D. & D. 60; 5 Jur. 612.

### c. Powers and Liabilities.

#### i. Generally.

— **Cannot delegate Authority.**—Assignees cannot delegate their general authority. *Douglas v. Brown*, 1 Mont. 93.

— **But One can give good Discharge.**—Where there are more assignees than one, one of them may receive money belonging to the estate, and give a good discharge for it. *Smith v. Jamesons*, 1 Esp. 114.

— **Unless others Dissent.**—But it is otherwise where the express dissent of the other assignee appears. *Bristow v. Eastman*, 1 Esp. 174; Peake, 223.

— **Where one Absconded—Money in Joint Names.**—Money deposited in the bank in the name of three assignees, ordered to be paid to the cheques of two, the third having absconded. *Hunter, Ex parte*, 2 Rose, 363; 1 Mer. 408.

— **Death of One.**—Where part of a bankrupt's estate was paid into the bank in the names of five assignees; and one of them having died, and another gone abroad, the remaining assignees applied to the bank for the money, for the purpose of a dividend, but the bank refused to pay it without proof of the other two assignees being dead: the court made an order on the bank to pay the money to the three remaining assignees. *Collins, Ex parte*, 2 Cox, 427.

— **Acting Assignee—Liability of Others.**—If four persons are chosen assignees, and, at the choice, it is verbally agreed that one shall act, and notice is given to the banker to pay the drafts of the one, and a dividend is declared, and notice is given to the creditors "that they may receive the dividend upon application to the assignees," and the acting assignee pays the dividends by cheques, which are dishonoured, he having overdrawn the account and absconded, the other three assignees are liable. *Booth, Ex parte*, 1 Mont. 248.

— **Power to purchase Property of Debtor to the Bankrupt.**—The trustee of an estate in bankruptcy had a large claim against an insolvent estate. Before the claim was admitted he joined in the purchase of assets of the latter

estate:—Held, that the sale could not be set aside. *Boswell v. Coaks*, 23 Ch. D. 302; 52 L. J., Ch. 465; 48 L. T. 929; 31 W. R. 540.

#### Of Joint and Separate Estates of Partners.]

—On the appointment of a trustee of the joint estate of two debtors, the separate estate of each also vests by law in such trustee, and resolutions of the separate creditors appointing a trustee and assigning the separate estate to him are invalid. *Philps, Ex parte, Moore, In re*, 19 L. R., Eq. 256; 44 L. J., Bk. 40; 31 L. T. 734; 23 W. R. 230.

The trustee of the joint estate has a right to be heard on all matters connected with the separate estate. *Id.*

The proceedings having been transferred to the London court, no further proceedings, either as to the joint or separate estate, ought to have been taken in the local court. *Id.*

Upon a liquidation petition by two partners, two persons were by three several resolutions appointed trustees of the joint estate and of the two separate estates respectively. One of the trustees resigned, whereupon the continuing trustee was, by a resolution of the joint creditors, appointed "sole trustee of the property of the debtors;" but no resolution was passed appointing any one to be trustee of either of the separate estates:—Held, that the continuing trustee was able to convey real property, part of one of the separate estates, to a purchaser, for all the interest of the debtor at the commencement of the liquidation. *Waddell, In re*, 2 Ch. D. 172; 45 L. J., Ch. 647; 34 L. T. 237.

— **Use of Name.**—A trustee in bankruptcy cannot be compelled to allow, and ought not to allow, the use of his name to impeach a dealing with property as a fraudulent preference, for the benefit not of the creditors generally but of a particular creditor holding a security on the property dealt with. *Cooper, Ex parte, Zucco, In re*, 10 L. R., Ch. 510; 44 L. J., Bk. 121; 33 L. T. 3; 23 W. R. 782.

— **Contempt, Committal for—Terms upon which Release from Custody granted.**—A trustee in a liquidation who has been committed to prison for non-compliance with an order directing him to pay a sum of money, part of the debtor's property, received by him in his character of trustee, into court, was ordered to be released upon his undertaking to pay the amount due by quarterly instalments. *Hedger, Ex parte, Frank, In re*, 42 L. T. 192.

#### ii. Power to Lease Bankrupt's Property.

The court cannot sanction the renewal of a lease by assignees, for the purpose of carrying on the bankrupt's business, if any creditors object to that arrangement, notwithstanding it may have been determined upon by a majority of creditors present at a meeting duly convened for that purpose. *Miller, Ex parte*, 1 Mont., D. & D. 39.

#### iii. Power to Sell Bankrupt's Property.

An order for sale of such part of a bankrupt's property as is likely to depreciate in value may properly be made before the choice of a trade assignee; but where no reason exists for an im-



mediate sale, the creditors' assignee is the proper person to have the management; all the estate of the bankrupt vests in him upon his appointment. *Stowers, In re*, 12 W. R. 534.

**Official Assignee need not Concur.]**—A bona fide sale of a bankrupt's property by the creditors' assignee alone, without the concurrence of the official assignee, is valid. *Ward, In re*, 26 Beav. 207; 28 L. J., Ch. 175; 5 Jur., N. S. 164; 32 L. T. 189.

**Charges of Agent employed to Sell.]**—A scale of charges of an agent, employed by assignees to sell a bankrupt's stock by tender, is properly settled by the rule adopted by the Court of Bankruptcy at an intermediate rate between that applicable to a sale by auction and that applicable to a sale by valuation. *Hunt, Ex parte*, 5 De G., Mac. & G. 387.

It is not incumbent on the appellate court to decide such a question, although both parties submit to its jurisdiction. *Id.*

**Sale to Debtor.]**—To an action for goods sold, the defendant pleaded that since the cause of action arose, and before action, the estate of the plaintiff went into liquidation under the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, and B. was duly appointed trustee. The plaintiff replied that the trustee for good and valuable consideration sold, assigned, and transferred to him all the estate vested in him as trustee under the liquidation:—Held, that the sale was warranted by s. 25, sub-s. 3, and the plaintiff entitled to sue in his own name; and that the replication was no departure from the declaration. *Kitsen v. Hardwicke*, 7 L. R., C. P. 473; 26 L. T. 846.

The creditors of a liquidating debtor passed a resolution agreeing to the liquidation, appointing a trustee, and directing the trustee to resell to the debtor all the estate, other than a certain debt, in consideration of the debtor's promissory notes for 7s. 6d. in the pound, payable by three equal instalments, and such a sum as would pay the costs of the liquidation. The resolution was subsequently confirmed and registered:—Held, that the clause authorizing the trustee to resell the estate to the debtor was ultra vires and void, and must be rejected, but that the rest of the resolutions was not thereby rendered invalid, and that the liquidation must proceed in the ordinary course. *Dugdale, Ex parte*, 36 L. T. 324; 25 W. R. 468.

**Sale by Trustee to his Partner invalid.]**—A trustee in bankruptcy cannot sell to his partner, even by auction, the bankrupt's property. *Moore, Ex parte, Moore, In re*, 45 L. T. 558; 30 W. R. 123.

**Trustee has a Discretion as to Time of Sale.]**—Subject to resolutions of the creditors, a trustee in bankruptcy has a discretion as to when and how he will sell a contingent reversionary interest of the bankrupt, and the court will not interfere with the discretion, at the instance of a creditor, unless it is shewn that the trustee is acting so very absurdly that no reasonable man would thus act. *Lloyd, Ex parte, Peters, In re*, 47 L. T. 64—C. A.

**Assignment of Onerous Property to Pauper.]**—Although a trustee in bankruptcy, who has

taken actual possession of leasehold property of the bankrupt, receives notice from the landlord to disclaim the lease under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), but does not disclaim, he may nevertheless relieve himself of liability to the landlord by assigning the lease, even without having previously offered to surrender it, and the mere fact that the trustee knows the assignee to be a pauper will not invalidate such assignment. *Hopkinson v. Lovering*, 11 Q. B. D. 92; 52 L. J., Q. B. 391; 47 J. P. 519.

**Right of Action—Action commenced by Trustee in Bankruptcy—Right of Assignee of Trustee's Interest to proceed with the Action—Champerty.]**—The trustee in bankruptcy of a man who had conveyed away some real property absolutely, commenced an action against the grantee to have it declared that the conveyance was a mortgage, and that the deed ought to stand as a security only for the money advanced. The action had proceeded no further than the issue of the writ, when the trustee sold and assigned the subject-matter of the action to a purchaser for value:—Held, that the assignee from the trustee in bankruptcy was entitled to continue the action. Whether such a right could not have been assigned by the grantor himself, *quære*. *Sear v. Lawson*, 15 Ch. D. 426; 49 L. J., Bk. 69; 42 L. T. 893; 28 W. R. 929—C. A. Affirming, 42 L. T. 805; 28 W. R. 763.

#### iv. Power to Sell Book Debts and Goodwill of Business.

**Under 24 & 25 Vict. c. 134, s. 137.]**—Book debts, within the meaning of this section, are such debts accruing in the ordinary course of a man's trade as are usually entered in the trade books. *Shipley v. Marshall*, 14 C. B., N. S. 566; 32 L. J., C. P. 258; 9 Jur., N. S. 1060; 8 L. T. 430.

A., a saddler, and proprietor of newspapers, sold the copyright in one newspaper to B., who was to pay for it by instalments. A. became bankrupt; the assignees sold to A. himself the balance of the debt due to him from B., as a book debt:—Held, that the transaction created a book debt, being such a debt as would, in the ordinary course of trade, be entered in a trader's books, though such an entry is not necessary to constitute a book debt. *Id.*

**Bill of Exchange not a Book Debt.]**—Book debts are debts entered in books during the course of business, and where a bankrupt carried on the business of a grocer, a bill of exchange is not a book debt, and so does not pass under a sale by the court of his book debts. *McEvoy v. Bent*, 11 W. R. 314.

**Books of Solicitor.]**—The above section does not authorize the sale of the books of a solicitor who has become bankrupt. *Roberts, Ex parte*, 33 L. J., Bk. 8; 10 Jur., N. S. 28; 9 L. T. 469; 12 W. R. 183.

**One Partner Bankrupt—Book Debts of Partnership.]**—The Bankruptcy Act, 1861, s. 137, which makes it necessary that an assignee should have the sanction of the Court of Bankruptcy to justify him in selling by private contract all or any of the book debts due or growing due to the bankrupt, and the books relating thereto and

the goodwill of his trade or business, relates to the sale of book debts, &c., belonging to the bankrupt only, and not to the book debts, &c., of a dissolved partnership, of which only one partner is bankrupt, such book debts, &c., not being assets distributable or saleable in the bankruptcy. *Motion, In re, Maule v. Davis*, 9 L. R., Ch. 192; 43 L. J., Bk. 59; 29 L. T. 757; 22 W. R. 225.

#### v. Power to Appeal against Directions of Creditors.

The creditors of a bankrupt trader have no power to authorize the trustee to carry on the business of the bankrupt, except so far as may be necessary for the beneficial winding-up of the business. So that if the majority of the creditors pass a resolution authorizing the trustee to carry on the business for any other purpose, such as the hope of making a profit thereby, the resolution is not binding upon the non-assenting minority, and the court ought to interfere and to declare it invalid. *Emmanuel, Ex parte, Batey, In re*, 17 Ch. D. 35; 50 L. J., Ch. 305; 44 L. T. 832; 29 W. R. 526—C. A.

Under s. 20 of the Bankruptcy Act, 1869, a trustee in bankruptcy is entitled to apply to the court for directions in relation to any particular matter arising under the bankruptcy, as to which the creditors have already, by resolution at a general meeting, given him directions, and the court has power for just cause shewn to direct the trustee to disregard the directions of the creditors and to act contrary to them. In such a case the court ought not to order the resolution to be vacated or to declare it void, but simply to direct the trustee to disregard it. Even though there be no fraud in the passing of a resolution giving the trustee directions as to the administration of the estate, yet, if the majority of the creditors have voted, not simply with the view of administering the estate in the best way for the benefit of all the creditors, but with the view of favouring the debtor or persons whom he is alleged to have fraudulently preferred, the court ought to direct the trustee to disregard the resolution. Sect. 20 is to be construed with reference to s. 14. *Cooks, Ex parte, Poole, In re*, 21 Ch. D. 397; 52 L. J., Ch. 63; 47 L. T. 496; 31 W. R. 105—C. A.

#### vi. Power to Continue or Compromise Actions.

**Continuing Actions.**—Where the trustee of a liquidating debtor elects, under the C. L. P. Act, 1852, s. 142, not to continue a pending action commenced by the debtor, such election is not a bar to a subsequent action by the trustee in his representative capacity founded on the same cause of action. *Bennett v. Gamgee*, 2 Ex. D. 11; 46 L. J., Ex. 33; 35 L. T. 764; 25 W. R. 81. Affirmed on appeal, 46 L. J., Ex. 204; 36 L. T. 48; 25 W. R. 293—C. A.

When a sole plaintiff becomes bankrupt the action does not abate, and the trustee in the bankruptcy can obtain an order of course to carry on the same. *Jackson v. North Eastern Railway Company*, 5 Ch. D. 844; 46 L. J., Ch. 723; 36 L. T. 779; 25 W. R. 518—C. A.

**Interpleader—Joinder of Trustee in Bankruptcy.**—If, after an interpleader issue has been settled, the execution debtor files a petition for liquidation, and the trustee under the liquidation

claims the goods in respect of which the issue has been directed, the trustee will, upon his application, be added as a claimant in the trial of the issue. *Bird v. Mathews*, 46 L. T. 512—C. A.

**Compromising Actions.**—A trustee in bankruptcy having in respect of his title to the bankrupt's property a right to sue in his own name, and also in his official name under s. 83, sub-a. 7 of the Bankruptcy Act, 1869, has all the rights of an ordinary litigant, including the right to compromise any action instituted by him, and he may consent to take less than was originally claimed. The 27th section of the Bankruptcy Act, 1869, which gives a trustee general power to make compromises with the sanction of the committee of inspection, does not affect his right to compromise actions instituted by him as trustee. *Leeming v. Murray (Lady)*, 13 Ch. D. 123; 48 L. J., Ch. 737; 28 W. R. 338.

See further, post, XXVI., ACTIONS BY AND AGAINST ASSIGNEES AND TRUSTEES.

#### vii. Power to Appoint a Solicitor.

**Consent of Committee of Inspection.**—The consent of the committee of inspection, required by the 29th section of the Bankruptcy Act to be given to the appointment of a solicitor by the trustee, may be given by the inspectors separately, and a meeting is not required for that purpose. *White, Ex parte, Gearing, In re*, 29 W. R. 632.

#### viii. Power to Continue or Disclaim Contracts.

**Continuing Contracts.**—Trustees being required to decide whether they would disclaim contracts to repair railway waggons for a term, did not disclaim, but continued to perform the contracts for two years, and then discontinued to do so:—Held, that the contractees had no personal remedy against the trustees, and no right to payment in full of damages for the breach out of the estate, but merely a right to prove for the amount of such damages. *Davis, Ex parte, Smezzum, In re*, 3 Ch. D. 463; 45 L. J., Bk. 137; 35 L. T. 389; 25 W. R. 49—C. A.

**Enforcing Contracts against.**—Specific performance of a liquidating debtor's contract will not be decreed against his trustee without the latter's consent. *Holloway v. York*, 25 W. R. 627.

**Disclaiming Leases and Contracts.**—See post, X., PROPERTY OF BANKRUPT OR LIQUIDATING DEBTOR.

#### ix. Power to Purchase Creditor's Debt.

A purchase by an assignee, for the benefit of the bankrupt's estate, of the interest of a creditor therein, was set aside at the instance of the creditor, where the assignee did not shew that he had given the creditor full information as to the state of the assets, and the periods at which the dividends would be likely to be paid. *Poolley v. Quilter*, 2 De G. & J. 327; 27 L. J., Ch. 874; 4 Jur., N. S. 345.

**x. Liability on Keeping Property in Hand.**

**Under 24 & 25 Vict. c. 134, s. 175.]**—The assignee of a bankrupt, having taken possession of his estate, worked up some of the raw material, and then purchased it, by debiting himself with the market value:—Held, that as the assignee he had no power to contract with himself, and was, therefore, chargeable with the payment of 20l. per cent., provided by this section, from the time the sale was made. *Ridgway, Ex parte*, 11 Jur., N. S. 97; 11 L. T. 467.

**Under 32 & 33 Vict. c. 71.]**—The Bankruptcy Act, 1869, s. 30, charging a trustee with interest at 20l. per cent. per annum upon the excess above 50l. of any moneys retained in his hands for more than ten days, does not apply to a trustee under a liquidation. *Brooker, Ex parte, Fastledge, In re*, 2 Ch. D. 57; 45 L. J., Bk. 51; 34 L. T. 604; 24 W. R. 655—C. A.

**xi. Liability to account.**

**Accounts rendered by Assignees' Solicitor.]**—Assignees received no money, nor made any payments, for or on account of the estate personally; all the receipts and payments were had and made by their solicitor. The solicitor stated on oath the accuracy of the accounts, namely, that all the receipts and payments were such as were disclosed in certain documents which he laid before the commissioners; but it did not appear that the assignees verified the accuracy of the accounts:—The court held that the accounts were open. *Rees, Ex parte*, 9 Jur. 996.

**After Lapse of Time.]**—Where there had been no audit of the assignees' accounts, and large sums had been received by them, held, that the official assignee acted properly in calling for an audit, although twenty-five years had elapsed since any step had been taken, and no creditor made any complaint; but the court being of opinion that the official assignee might, with little difficulty, and at a small expense, have satisfied himself that the circumstances did not render it incumbent upon him to continue to prosecute a claim against the creditors' assignee, he was not entitled to his full costs as against the latter, there being no estate. *Shaw, Ex parte*, 1 De Gex, 242.

When a bankrupt petitioned for an inquiry against his assignees, under a commission which had been issued seventeen years ago, and there had been no transactions relating to the personal estate for fifteen years, the inquiry was refused as to the personal estate; but it being sworn that one of the assignees had been in the receipt of the rents and profits of the real estate up to the period of his death, which happened a few months before presenting the petition, an inquiry was directed as to the real estate against the surviving assignee. *Newhouse, Ex parte*, 1 Mont., D. & D. 508; 5 Jur. 250.

**In Case of Composition.]**—When a trustee has been appointed under the 279th of the Bankruptcy Rules, 1870, for receipt and distribution of a composition, and after all the creditors have been paid, a balance remains in the trustee's hands, the Court of Bankruptcy has jurisdiction to take an account as between the trustee and the debtor in order to ascertain the amount of

the surplus, and to order the surplus so ascertained to be paid over by the trustee to the debtor. *Carew, Ex parte, Carew, In re*, 10 L. R., Ch. 308; 44 L. J., Bk. 67; 32 L. T. 318; 23 W. R. 459.

**Default in rendering Accounts—Committal for Contempt.]**—The mere fact that a trustee in bankruptcy has within four days after his resignation or removal from office neglected to render the accounts prescribed by General Rule 126 of the Bankruptcy Act, 1869, is not sufficient ground for his committal to prison by the Court of Bankruptcy, as for a contempt. To warrant such committal there must be some evidence that he has after notice from the court wilfully failed to perform the duties imposed upon him by the rule. *Pookes Royal, In re, or Royle, In re*, 7 Q. B. D. 9; 50 L. J., Q. B. 656; 44 L. T. 314.

**xii. Liability of New Trustee for Non-payment of Moneys received by his Predecessor.**

One of two partners was appointed trustee under a liquidation, and, before the affairs were wound up, died. At the time of his death he was indebted to the estate in 201l. The surviving partner was then appointed trustee on his giving an undertaking in writing to make good any deficiency. The latter never received anything on behalf of the estate. An order of court was made for payment of the 201l., and on its being disobeyed an application was made to commit the surviving partner:—Held, that no order to commit could be made because it was not shewn that the debtor had ever had the money in his possession. *Cuddeford, Ex parte, Hincks, In re*, 45 L. J., Bk. 127; 34 L. T. 666; 24 W. R. 931.

**xiii. Liability to Pay Costs.**

If a trustee makes an unsuccessful application to the court, he will, in the absence of special circumstances, be ordered to pay the costs; and if the estate is insufficient for payment of the costs, the trustee must bear them personally. *Angerstein, Ex parte, Angerstein, In re*, 9 L. R., Ch. 479; 43 L. J., Bk. 131; 30 L. T. 446; 23 W. R. 581.

A trustee in bankruptcy can be made personally liable for the costs of a suit to which he is a party, subject to the Court of Bankruptcy allowing him to recoup himself out of the bankrupt estate, if his conduct has been bona fide. *Pitts v. La Fontaine*, 6 App. Cas. 482; 50 L. J., P. C. 8; 43 L. T. 519—P. C.

The sole defendant becoming bankrupt, his trustees were added as defendants, and an order made that the action proceed against the trustees. The trustees did not move to discharge the order, and on the hearing appeared and cross-examined the plaintiff's witnesses:—Held, that they were liable to the costs of the action, but the account of profits was limited to an account of the profits received by the bankrupt. *Watson v. Holliday*, 52 L. J. Ch. 543; 48 L. T. 545; 31 W. R. 536—C. A. Affirming, 20 Ch. D. 70; 51 L. J., Ch. 906; 46 L. T. 878; 30 W. R. 747.

**Appeals.]**—Where the county court had refused to approve of resolutions for a scheme of settlement under s. 28 of the Bankruptcy Act, 1869, and the trustee appealed to the chief judge

who reversed the order, and the Court of Appeal finally restored the order of the county court judge, the trustee was allowed the costs of his application to the county court judge out of the assets, if any, but was ordered to pay the costs of the appeals to the chief judge and to the Court of Appeal. *Strawbridge, Ex parte, Hickman, In re*, 32 W. R. 173—C. A.

**Committal on Non-payment.**—A trustee in liquidation was ordered to pay the taxed costs of the solicitor and the costs of the motion upon which the order was made. On default, he was committed to prison for his contempt of court in disobeying the order:—Held, that the order of committal was wrong, for that the costs of the motion could not be said to be moneys in his hands as a trustee within s. 4, sub-s. 3 of the Debtors Act, 1869. *Sharp, Ex parte, Hind, In re*, 37 L. T. 168.

#### xiv. Liability to Indemnify Bankrupt.

It seems to be quite contrary to the principle of the laws relating to bankrupts and insolvents that the assignees taking the property for division among the creditors should be liable, either personally or out of the assets of the estate, to indemnify the bankrupt or insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate and from which claims he has not been discharged by his bankruptcy or insolvency. *Leri v Ayers*, 3 App. Cas. 842; 47 L. J., P. C. 83; 38 L. T. 725; 27 W. R. 79—P. C.

Acceptance of shares, in the absence of any special conduct in relation to them, will not be inferred from the execution or acceptance of the trusts of a deed transferring them as part of a bankrupt's estate to trustees for the creditors. *Id.*

#### d. Remuneration and Allowances.

Trustees under an assignment for benefit of creditors employed an agent to proceed to America to recover part of the assigned property. Afterwards, the debtors became bankrupt, and three of the trustees were appointed assignees:—Held, that the assignees ought to be allowed in their accounts the expense of employing the agent. *Shaw, Ex parte*, 1 De Gex, 242.

For the purpose of bringing expenses within the description of just allowances, it is not necessary to shew that they have actually benefited the estate, if there was a fair probability of their so doing. *Id.*

An assignee, who had acted as solicitor to the fiat, was allowed to charge for his clerk's time employed in the business of the bankruptcy, as costs out of pocket, but not any profit thereupon. *Newton, Ex parte*, 5 De G. & S. 584.

Where an adjudication has been annulled, the official assignee will be allowed to deduct from any assets in his hands the expenses properly incurred by him in the custody and realization of the estate; but the court may order such expenses and the costs of all parties to be paid by the petitioning creditor. *Wollheim, In re*, 32 L. J., Bk. 26; 7 L. T. 531; 11 W. R. 128—L. J.

**Costs of Actions.**—The Court of Bankruptcy had authority, independently of the 153rd section  
VOL. I.

of the Act of 1849, to allow the assignees in their accounts the costs of an unsuccessful action brought by them, although not one which the bankrupt, but for his bankruptcy, could have brought; and creditors who did not object to an order sanctioning an action until after the result was ascertained, could not be heard to object that the action should not have been sanctioned. *Edmondson, Ex parte, Thompson, In re*, 4 De G., F. & J. 486.

#### Charges of Trustee—Power to Tax in Composition under s. 28 of Bankruptcy Act, 1869.]

—The creditors of a liquidating debtor resolved on a liquidation by arrangement, and appointed a trustee and a committee of inspection, and they resolved that the remuneration of the trustee should be such as the committee of inspection should from time to time determine. Afterwards the creditors authorized the trustee to accept an offer made by the debtor, under s. 28 of the Bankruptcy Act, 1869, to pay a composition, he also paying the costs, charges, and expenses of the solicitors, receiver, and trustee in relation to the settlement of his affairs and of the scheme of arrangement. The arrangement was approved by the court:—Held, that after the confirmation of this scheme the court had jurisdiction to tax the trustee's charges, notwithstanding that his account had been audited and approved by the committee of inspection subsequently to the confirmation of the composition arrangement. *Ranby, Ex parte, Ranby, In re*, 14 Ch. D. 467; 43 L. T. 11; 28 W. R. 804—C. A.

#### Disallowance of Remuneration voted by Creditors.]

—When the comptroller has reported to the court that a trustee has failed to perform the duties imposed on him by the act and the rules, the court has power to disallow the trustee the remuneration which has been voted to him by the creditors. *Lister, In re, Simmons, Ex parte*, 2 Ch. D. 749; 45 L. J., Bk. 113; 34 L. T. 744.

#### e. Release.

##### Jurisdiction of Court over Trustee after Release.]

—The trustee of a liquidating debtor sold the whole estate for a sum equal to 7s. 6d. in the pound upon the amount of the proveable debts, to be paid in three instalments, on the 23rd of April, the 23rd of June, and the 23rd of August. On the 23rd of April the creditors resolved that the debtor should have his discharge as from the 30th of April, subject to a certificate by the trustee that the first instalment of the purchase-money had been paid, and that promissory notes for the other instalments had been delivered to him, and that the close of the liquidation should take place, and the trustee be released on and from the 23rd of October:—Held, that, notwithstanding the release of the trustee, the court had jurisdiction to order him to pay a dividend to a creditor. *Prager, In re, Société Cockrill, Ex parte*, 3 Ch. D. 115; 45 L. J., Bk. 124; 34 L. T. 665.

After the release of a trustee in liquidation, the Court of Bankruptcy has no jurisdiction to order the trustee to pay rent due to the landlord of leasehold property occupied by the trustee during the liquidation. *Cartier, Ex parte*,

*Ware, In re*, 8 Ch. D. 731; 39 L. T. 185; 27 W. R. 106—C. A.

Sect. 53 of the Bankruptcy Act, 1869, applies to a release given by the creditors to the trustee under a liquidation by arrangement. *Ib.*

## f. Enforcing Bond for Discharge of Duties.

A bond with sureties given by a trustee to the chief judge, as surety for the faithful discharge of the duties of his office, may be enforced by the order of a county court. *Parry, In re*, 4 Ch. D. 250; 35 L. T. 768; 25 W. R. 128.

## g. Bankruptcy of Assignee.

Under 12 & 13 Vict. c. 106, s. 156.]—A., being indebted to B., absconded to America, upon which B. sent out a power of attorney to an agent there to recover from A. what money he could; B., hearing of a similar proceeding by another creditor, sued out a fiat against A., and was chosen one of his assignees; and afterwards, B.'s agent in America obtained a sum of money from A. and remitted it to B. in England:—Held, that this money was received by B. in his character of assignee; and that B., having himself become bankrupt, might, under 6 Geo. 4, c. 16, s. 105, be charged with the amount, together with interest at 5l. per cent., notwithstanding he had obtained his certificate. *Ralph, Ex parte*, 3 Mont. D. & D. 331; 7 Jur. 683.

See further, *ante*, col. 824.

## X. PROPERTY OF THE BANKRUPT OR LIQUIDATING DEBTOR AND THE TRUSTEE'S TITLE THERETO.

### 1. GENERAL PRINCIPLES.

#### a. Assignees take subject to all Equities.

An assignment in bankruptcy, like any other assignment by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. *Mitford v. Mitford*, 9 Ves. 100.

Assignees take subject to all equities under which the bankrupt stood. *Herbert, Ex parte*, 13 Ves. 188. See also *Harris v. Truman*, 9 Q. B. D. 264; 51 L. J., Q. B. 338; 46 L. T. 844; 30 W. R. 533—C. A.

A prisoner was made bankrupt and a trustee appointed immediately before his conviction for felony:—Held, that the trustee took his property subject to the possibility of an order for costs of the prosecution being made on it. *Reg. v. Roberts*, 9 L. R., Q. B. 77; 43 L. J., M. C. 17; 29 L. T. 674; 22 W. R. 60; 12 Cox, C. C. 574.

**Right as against Wrongdoer.**]—A., a trader, purchased a plant and stock, under an agreement to pay the purchase-money by instalments, a proper assignment to be executed when the whole of the instalments should have been paid, and the vendor having power, in case of default for fourteen days, after notice in writing, to pay the several instalments, to re-enter and expel the purchaser. Default having been made in payment of the instalments, but the vendor not having availed himself of his power to resume possession in the manner provided by the agree-

ment, and A. having become bankrupt:—Held, that his assignees were entitled to recover the whole value of the goods, in an action against the wrongdoer. *Turner v. Hardeastle*, 11 C. B., N. S. 683; 31 L. J., C. P. 193.

#### b. Property out of Jurisdiction.

Assignees of a bankrupt can receive property of the bankrupt out of the jurisdiction. *Scott v. Bentley*, 1 Kay & J. 281; 24 L. J., Ch. 244; 1 Jur., N. S. 394.

The assignment under an English commission vests in the assignees, and without the necessity of intimation, the whole of the bankrupt's personal property in Scotland; and all subsequent diligence by any Scotch or other creditor is thereby precluded. *Selkrig v. Davies*, 2 Rose, 97; 2 Dow, 230.

**Money Recovered Out of Jurisdiction by Creditors.**]—A., B., & C. being partners in England, A. & B. resided in England, and C. went to a foreign country for the purpose of managing the affairs of the house in that country. D. was also resident in England, where a debt was contracted by him to A., B. & C. D. became insolvent, and C., knowing that D. had stopped payment, and after a commission of bankruptcy had in fact issued against him, attached, in the names of himself and his partners, a debt due to D. in the foreign country, by legal process, and obtained payment of it under the judgment of a court of justice in that country; the assignees of D. had a right to recover the money so received by C., in an action against A., B., & C. for money received to the use of the assignees. *Phillips v. Hunter*, 2 H. Bl. 402—Ex. Ch.

A British creditor of a bankrupt, who has, by means of the laws of any foreign state, succeeded in obtaining possession of the goods of a bankrupt situate in that state, is, in bankruptcy, answerable for them to the assignees. *Robinson, In re*, 11 Ir. Ch. Rep. 385.

**Australian Bankruptcy—Property in England.**]—A. was adjudged insolvent under an act of the Australian Legislature, which enacts that the personal property of insolvents shall vest in their assignees by virtue of their appointment. No assignment was executed by A. He was entitled to a share of a residue consisting of stock in the Court of Chancery in England. The fund was claimed by the assignees, and by the executrix of A. in England:—Held, that the right to receive it depended on the domicile of A.; that if he was domiciled in Australia, his assignees were entitled to receive it; but if in England, his executrix was entitled. *Blithman, In re*, 2 L. R., Eq. 23; 35 L. J., Ch. 255; 12 Jur., N. S. 84; 14 L. T. 6; 35 Beav. 219.

Real estate in England does not vest in the assignee under a bankruptcy in Victoria where no deed has been executed under the colonial statute. *Waite v. Bingley*, 21 Ch. D. 674; 51 L. J., Ch. 651; 30 W. R. 698.

#### c. Relation of Title of Assignees.

**Bankrupt Adjudicated on his own Petition.**]—Where a fiat and adjudication proceeded on the bankrupt's own petition, under 7 & 8 Vict. c. 96, s. 41, the title of the assignees related back only

to the act of bankruptcy on which the fiat proceeded. *Steeenson v. Newnham*, 13 C. B. 285; 22 J. L., C. P. 110; 17 Jur. 600—Ex. Ch.

Semble, it was the same under 12 & 13 Vict. c. 106, ss. 93, 101. *Ib.*

An adjudication on a petition in form *a pauperis* of a debtor in custody has relation back to the time of the bankrupt's commitment or detainer, and therefore the title of his assignees will prevail against that of a creditor who under a bill of sale has seized the bankrupt's goods subsequently to the commitment or detainer. *Bramwell v. Eglinton*, 5 R. & S. 39; 33 L. J., Q. B. 130; 10 Jur., N. S. 583; 10 L. T. 295; 12 W. R. 551.

**Execution by Sheriff of Goods under Unregistered Bill of Sale—Relation back.**—The taking in execution of goods comprised in an unregistered bill of sale does not, under s. 8 of the Act of 1878, avoid the bill of sale altogether, but only to the extent necessary to let in the claim of the execution creditor: consequently, where, by the doctrine of relation back of the title of the trustee in bankruptcy, an execution is avoided, the execution being swept away as if it never existed, the title of the holder of the unregistered bill of sale, which but for the execution would have been good as against the trustee, continues good as against him. *Blai-berg, Ex parte, Toomer, In re*, 23 Ch. D. 254; 52 L. J., Ch. 461; 49 L. T. 16; 31 W. R. 906—C. A.

**Equitable Assignment of future Receipts of Business.**—An assignment by a trader of the future receipts of his business, even if made for value, is, as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative as against the title of the trustee in the bankruptcy. *Brice v. Bannister* (3 Q. B. D. 569) distinguished. *Nichols, Ex parte, Jones, In re*, 22 Ch. D. 782; 52 L. J., Ch. 635; 48 L. T. 492; 31 W. R. 661—C. A.

**Fraudulent Transfer of Property—Payment by Agent—Liability of Agent to Trustee in Bankruptcy of Principal.**—An agent, who, in obedience to the previous direction of his principal, pays away money of the principal which is in his hands, knowing before he makes the payment (though he did not know when he received the money) that the payment will when completed constitute an act of bankruptcy on the part of the principal, is not liable to the trustee in the subsequent bankruptcy of the principal for the money so paid away. The trustee could recover the money from the agent only on the ground that he had paid away the money of the trustee, and in such a case the money would become the trustee's money only on the completion of the act of bankruptcy to which his title would relate back, i.e., not until after the money had left the agent's hands. *Helder, Ex parte, Lewis, In re*, 24 Ch. D. 339—C. A.

See further, *ante*, ACT OF BANKRUPTCY.

#### d. Delay of Trustee in taking Possession.

**Debtor continuing Trading—Sale to bona fide Purchaser.**—The mere fact that the trustee has not taken possession of a debtor's property for

two months after the date of his appointment, but has allowed the debtor to continue trading as before, will not be sufficient to destroy his right to the property notwithstanding that it has been sold by the debtor to a bona fide purchaser in the meantime. *Cooper, Ex parte, Green, In re*, 39 L. T. 260.

**Shares in Public Company—No Notice to Company.**—The holder of shares in a limited company became bankrupt, and his share certificates came into the hands of his assignee. The bankruptcy was duly advertised, but the assignee gave no express notice of it to the company, and took no steps to have the shares registered in his name. The bankrupt died without having obtained his discharge, and his executrix having made a declaration of the loss of the share certificates, obtained the issue of fresh certificates and the registration of the shares in her name. She afterwards sold the shares to purchasers for value without notice. Subsequently the assignee, five years after the bankruptcy, claimed to be entitled to the shares, and to have the company's share register altered accordingly. On motion by the assignee to have the register rectified in this respect:—Held, that, under the circumstances, the assignee had lost any right he might have had to the shares. *London and Provincial Telegraph Company, In re*, 9 L. R., Eq. 653; 39 L. J., Ch. 419; 23 L. T. 237; 18 W. R. 597.

**Furniture—Execution Creditor.**—When assignees allow a bankrupt to remain in undisturbed possession, for a period of four years, of furniture which they might at the time of adjudication have properly claimed, they cannot afterwards claim it against execution creditors. *Hannington, Ex parte, Stafford, In re*, 18 W. R. 959.

**Benefit of Contract.**—A contract for the sale by the defendant to the bankrupt of railway shares was to be performed on the 1st of July, 1835. To a declaration by the assignees for a breach of contract in not delivering the shares, the defendant pleaded that the assignees did not adopt the contract within a reasonable time after the bankruptcy, and averred that the contract was abandoned by mutual consent:—Held, that the circumstance of the assignees having suffered a considerable period to elapse without requiring the contract to be performed, was evidence whence the jury might infer an abandonment. *Lawrence v. Knowles*, 7 Scott, 381; 5 Bing. N. C. 399.

In such a case the assignees ought to make their election within a reasonable time. *Ib.*

#### e. Prerogative of Crown.

Though the crown is named in some of the sections of the Bankruptcy Act, 1869, it is not bound by the other provisions of the Act. In particular, the relation back of the title of the trustee in a liquidation to the filing of the petition does not affect the rights of the crown under an extent issued against the property of the debtor between the filing of the petition and the appointment of a trustee. Notwithstanding the filing of a liquidation petition and the appointment of a receiver by the court on the application of the debtor, his property remains

vested in him as before, until the creditors have determined what they will do, and the property is bound by an extent issued by the crown between the filing of the petition and the appointment of a trustee. *Postmaster-General, Ex parte, Bonham, In re*, 10 Ch. D. 595; 48 L. J., Bk. 84; 40 L. T. 16; 27 W. R. 325—C. A.

## 2. Compelling Bankrupt to Convey prior to Bankruptcy Act, 1869.

The order for a bankrupt to join in the conveyance of his estate is quite a matter of course, unless he disputes the validity of the fiat. *Bradstock, Ex parte*, 1 Mont., D. & D. 118; *S. P., Brown, Ex parte*, 3 Mont. & Ayr. 262; 2 Deac. 479.

A petition that a bankrupt be compelled to convey was refused until he could have an opportunity of trying the validity of the commission. *Thomas, Ex parte*, 1 Mont. & Mac. 64; 2 Glyn & J. 278.

A bankrupt, who is disputing the commission at law cannot, although nonsuited, be compelled to convey. *Id.*

**Property out of Jurisdiction.**—The court cannot compel a bankrupt to execute to his assignees an assignment of debts due to him in America, though the American government will not take notice of the rights of the assignees under the bankrupt laws of this country. *Blakes, Ex parte*, 1 Cox, 398.

## 2. REAL PROPERTY.

### a. Freeholds.

**When Assignees' Title Vests.**—Before the 12 & 13 Vict. c. 106, s. 142, the bargain and sale to the assignees of the bankrupt's freehold lands did not relate to the act of bankruptcy, so as to vest the title in the assignees from that time. *Doe d. Eddale v. Mitchell*, 2 M. & S. 446; 2 Rose, 265.

B. having become bankrupt in 1823, while the 5 Geo. 2, c. 30, was in force, an assignee was appointed, who died in 1840. In 1844, and after the 1 Will. 4, c. 36, lands came to B. by descent, which he conveyed to the defendant in 1845. B. died in 1855, without ever having obtained a certificate. In 1858, assignees under the bankruptcy were appointed, and recovered the lands by ejectment. In detinus for the title deeds:—Held, first, that by 12 & 13 Vict. c. 106, ss. 4, 142, on the appointment of the assignees, the property in the land, and deeds relating to it, vested in them. *Plant v. Cotterill*, 5 H. & N. 430; 29 L. J., Ex. 198; 2 L. T. 20; 8 W. R. 281.

Held, secondly, that inasmuch as until their appointment there was no detention of the deeds adversely to them, the Statute of Limitations was no answer to their claim. *Id.*

**Estate descended after Bargain and Sale to Assignees.**—An estate descended after the bargain and sale of the commissioners, and before certificate, was the property of the bankrupt, and did not vest in the assignees, except by a subsequent assignment. *Carleton v. Leighton*, 3 Mer. 667.

**Bankrupt's Interest as Tenant by Curtesy to Wife's Fee in Remainder.**—A bankrupt, after

obtaining his certificate of discharge, became entitled to an estate by the curtesy, but at the date of his discharge his wife was only tenant in fee in remainder expectant upon a life interest. The assignees claimed the benefit of the husband's estate:—Held, that until the estate subject to the curtesy became vested in the wife in possession, the husband had no inchoate or transmissible interest which could pass to the assignees. *Gibbins v. Eyden*, 38 L. J., Ch. 377; 20 L. T. 516; 17 W. R. 481.

**Estates Tail.**—A common bargain and sale to assignees passed an estate tail of which the bankrupt was possessed. *Jackson, Ex parte*, 2 Deac. & Chit. 458.

A tenant in tail mortgaged for years, became bankrupt, and died without suffering a common recovery; his assignee had the estate clear of the mortgage, by 21 Jac. 1, c. 15, s. 12; but if the bankrupt had suffered a recovery, it would have let in the mortgage and other incumbrances. *Beek d. Hawkins v. Welsh*, 1 Wils. 276.

A joint commission issued against A., tenant for life, and B., tenant in tail male, remainder in fee to S. and his heirs, who were partners in trade:—Held, that the assignees only took an estate in the premises for the life of A. and a base fee, determinable on the death of B. and failure of issue male of his body. *Jervis v. Tugleur*, 3 B. & A. 557. And see *Doe d. Spencer v. Clark*, 5 B. & A. 458; 1 D. & R. 44.

**Life Estate in Remainder subject to Assumption of Donor's Name.**—If at the time of the bankruptcy a bankrupt has a life interest in premises expectant upon the death of the tenant for life, and there is a provision that the person who is entitled to the use and occupancy of the premises should reside and dwell therein, and assume the name of the donor, and upon his neglect or refusal to comply with these conditions should be considered as dead, and the grant as to him be void, and be for the person next entitled thereto; and if after the bankrupt obtains his certificate the tenant for life dies, the estate passes to the assignees. *Gouldney, Ex parte*, 1 Mont. & Chit. 75, 89; 3 Deac. 570.

**Benefice.**—On the 30th of October, 1862, a sequestrari facias, at the instance of a judgment creditor of G., issued to the bishop of the diocese, and on the 31st, at 9.38 a.m., was lodged at the office of the bishop's registrar. On the 1st of November a sequestration issued, which was published on the 2nd. On the 31st October, G. petitioned for adjudication of bankruptcy against himself, and his petition was filed on the same day at 12.25 p.m.; on the 17th of November a creditors' assignee was appointed, and on the 9th of January, 1863, he applied for a sequestration, which issued on the 10th, and was published on the 18th:—Held, first, that profits of the benefice did not pass to him under 24 & 25 Vict. c. 134, s. 135, until he had obtained a sequestration. *Hopkins v. Clarke*, 4 B. & S. 836. Affirmed, 5 B. & S. 753; 33 L. J., Q. B. 334; 10 Jur., N. S. 1071; 11 L. T. 204; 12 W. R. 1029—Ex. Ch.

Held, secondly, that the judgment creditor was not a creditor having security for his debt within 12 & 13 Vict. c. 106, s. 184, which disentitles such a creditor from receiving more than a rateable part of his debt. *Id.*

Held, thirdly, that therefore he was entitled to

the profits of the benefice as against the creditor's assignee. *Id.*

— **No Priority between Trustees in different Bankruptcies.**—Held by James and Cotton, L. J.J. (dissentiente Brett, L. J.), that the effect of s. 88 of the Bankruptcy Act, 1869, is only to give priority to a sequestration issued by the trustee in the bankruptcy of a beneficed clergyman over a sequestration issued by an individual creditor in respect of a debt provable in the bankruptcy, but that the section has no application as between sequestrations issued by the trustees in two different bankruptcies. *Chick, Ex parte, Meredith, In re*, 11 Ch. D. 731—C. A.

**Sequestration after Discharge.**—Held, by the court unanimously, that the fact that a bankrupt beneficed clergyman has obtained an order of discharge does not prevent the trustee in the bankruptcy from issuing a sequestration of the profits of the benefice which the bankrupt held at the time of the bankruptcy. *Id.*

**Disclaimer of Freeholds.**—*See post*, DISCLAIMER OF ONEEROUS PROPERTY.

#### b. Copyholds.

Formerly the commissioners might except the copyhold estates of a bankrupt out of the bargain and sale, and convey them directly to the purchasers. *Harvey, Ex parte*, Buck, 493.

Where a copyhold was sold under a commission, a good title was made by a bargain and sale from the commissioners to the purchaser. *Holland, Ex parte*, 4 Madd. 483.

A. became entitled to a copyhold estate on the death of his mother, to which she had been admitted by copy of court-roll. Before he could be admitted, he became bankrupt, and shortly afterwards died without admittance. The commissioners and assignees under the commission executed a bargain and sale to B. of the copyhold estate, to which he was duly admitted:—Held, that he took a fee-simple conditional at common law; and that the commissioners had power to execute a valid conveyance of his estate by bargain and sale, pursuant to 13 Eliz. c. 11, s. 7, 1 Jac. 1, c. 15, s. 17, and 21 Jac. 1, c. 19, s. 12, although the bankrupt died before the bargain and sale, and although he never had been admitted tenant of the manor. *Doe d. Spencer v. Clark*, 1 D. & R. 44; 5 B. & A. 458.

The course, under 24 & 25 Vict. c. 134, s. 114, read together with sect. 212 of 12 & 13 Vict. c. 106, is for the assignees to apply to the court, upon affidavits of a bona fide offer of sale and adequacy of price, for an order to direct a sale of the property, and to sanction the conditions. It should also appear that the purchase-money has been paid into the bank. *Haines, In re*, 6 L. T. 109.

Under 24 & 25 Vict. c. 134, s. 114, assignees of a bankrupt have such an interest in his copyholds as to make them necessary parties to a bill for specific performance of an agreement to execute a mortgage of such copyholds. *Poole v. Bursell*, 8 Jur., N. S. 1224; 6 L. T. 777; 10 W. R. 861.

#### c. Powers of Appointment.

A trader, being seised of an estate for life, with a general power of appointment, with remainder, in default of appointment, to himself in fee, after having committed an act of bankruptcy, upon

which he was afterwards declared a bankrupt, executed an appointment in favour of an appointee:—Held, that all his interest having passed to the assignee by the assignment, such appointment was void; and, therefore, that his assignee under the commission had a sufficient legal estate to maintain an ejectment. *Doe d. Coleman v. Britain*, 2 B. & A. 93.

By a marriage settlement, a husband took an estate for life, with power of appointment to children, remainder to trustees to preserve, &c., remainder to children in tail in default of appointment, remainder to husband in fee in default of issue. The husband became bankrupt, conveyed in the usual way all his property by bargain and sale to his assignees, and afterwards executed an appointment to his son in fee, after his own life estate. The assignees sold the life estate to the bankrupt's mother:—Held, that the son took nothing under the appointment, but was entitled to an estate tail under the original settlement. *Badham v. Lee*, 7 Bing. 695; 1 M. & Scott, 14.

#### d. Chattels Real.

##### i. Leaseholds.

##### a. Prior to the Bankruptcy Act, 1869.

**Under 12 & 13 Vict. c. 106, s. 145.**—This enactment is similar to 6 Geo. 4, c. 16, s. 75, and 49 Geo. 3, c. 121, s. 19, which did not extend to a parol agreement for a lease. *Sutton, Ex parte*, 2 Rose, 86.

And is confined to cases between lessor and lessee, and does not extend to cases between a lessee and his assignee of a lease. *Young v. Taylor*, 3 B. & A. 521.

It did not apply to a contract, in its nature not a lease, but for a purchase of property. *Hope v. Booth*, 1 B. & A. 505.

**Agreement for Lease.**—An agreement for a lease is not annulled by the bankruptcy of the intended lessee. *Morgan v. Rhodes*, 1 Mont. & Ayr. 214.

The owner of a long term in land agreed to let it for three years, and also, when called upon by the tenant, to grant him a lease for three years, seven years, or the whole term. The tenant continued in the occupation beyond the three years and became bankrupt:—Held, that the option of taking a lease for seven years or the whole term passed to the assignee. *Buckland v. Papillon*, 2 L. R., Ch. 67; 36 L. J., Ch. 81; 12 Jur., N. S. 992; 15 L. T. 378; 15 W. R. 92.

B. covenanted with the bankrupt that he would procure a lease to be granted to him of certain premises by a third person:—Held, that this was an agreement for a lease, within 6 Geo. 4, c. 16, s. 75, and that B. was entitled to call on the assignees to elect whether they would accept or decline such agreement. *Benecke, Ex parte*, 1 Deac. 186.

**In whom the Term is Vested.**—If a lessee becomes bankrupt, the term remains vested in him, until either the assignees elect to take it, or until he himself delivers it up, under 6 Geo. 4, c. 96, s. 75. *Tuck v. Tyson*, 6 Bing. 321; 3 M. & F. 715.

The interest of a bankrupt in leaseholds is not finally divested until the creditors' assignees are chosen. *Turner v. Nicholls*, 16 Sim. 565; 18 L. J., Ch. 278; 13 Jur. 293.

The general assignment of a bankrupt's per-



sonal estate does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate; and, therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequently to the bankruptcy. *Copeland v. Stephens*, 1 B. & A. 593.

Assignees of a bankrupt are not liable as assignees of a term, unless they have done some act which unequivocally indicates to the lessor that they have elected to take the benefit of the lease. *Goodwin v. Noble*, 8 El. & Bl. 587; 27 L. J., Q. B. 204; 4 Jur., N. S. 208.

The remedy of the lessor is by application to the Court of Bankruptcy under 12 & 13 Vict. c. 106, s. 145. *Id.*

—Under 12 & 13 Vict. c. 106, s. 145.]—Under 12 & 13 Vict. c. 106, s. 145, a bankrupt's interest in leasehold property remains in the assignees until they elect not to take the demise. *Cartwright v. Glover*, 2 Giff. 620; 30 L. J., Ch. 324; 7 Jur., N. S. 857; 3 L. T. 880; 9 W. R. 408.

Therefore, where assignees allowed a bankrupt to remain in possession of leasehold premises, and pay rent to the lessor, but afterwards sold without his knowledge:—Held, that the sale was valid. *Id.*

—Pleading.]—In an answer to an action by a landlord against assignees of a bankrupt for rent, the latter may plead that the term did not vest in them; and to avoid the effect of 1 & 2 Will. 4, c. 56, s. 25 (similar to 12 & 13 Vict. c. 106, s. 141), also, that it did vest, but that they abandoned it, and were not therefore liable. *Thompson v. Bradbury*, 3 D. P. C. 147; 1 Scott, 279; 1 Bing. N. C. 327.

Proceedings to compel Election—What a reasonable Time.]—In one case the assignees were allowed ten days to make their election. *Scott, Ex parte*, 1 Rose, 446, n.

From the 10th to the 23rd of March is a reasonable time for assignees to elect whether they will accept or reject the bankrupt's lease. *Fletcher, Ex parte*, 1 Deac. & Chit. 356.

—Order where Suspicion that Lease is Void.]—Upon a petition that assignees may elect whether they will accept or reject a lease, and the assignees elect to reject it, if there is some reason to suspect that the lease is void, and that the landlord had no title to grant it, the court will not order the assignees to deliver up possession of the premises, but merely to deliver up the lease. *Williams, Ex parte*, 2 Deac. 330.

—Where Lease equitably Mortgaged.]—A lessor was entitled, under 6 Geo. 4, c. 16, s. 75, to an order on the assignees to elect whether they would accept or decline a lease, notwithstanding the lease was in the hands of a third person, with whom it was deposited by the bankrupt by way of equitable mortgage. *Vardy, Ex parte*, 3 Mont., D. & D. 340; *S. P., Clunes, Ex parte*, 1 Madd. 76; 2 Rose, 452.

Assignees of a bankrupt lessee, who had made an equitable mortgage of his lease previously to his bankruptcy, upon the petition of the lessor, under 6 Geo. 4, c. 16, s. 75, were ordered to elect to accept or decline the lease. *Hanbury or Banbury, Ex parte*, 12 L. J., Bk. 43; 7 Jur. 660.

#### —Lessor Partner with Bankrupt Lessee.]

—Mortgagor and mortgagee joined in demising trade premises to a lessee, and at the same time the mortgagee and lessee entered into partnership by articles, according to which the demised premises were to be considered as partnership property. The lessee became bankrupt:—Held, that the court had jurisdiction to order the assignees to elect whether they would take or abandon the premises. *Norton, Ex parte*, 3 Mont., D. & D. 312.

—Costs.]—On petition by a lessor, to compel assignees to elect whether they will accept or decline the lease, the court has no power to make the assignees pay the costs, or to give the lessor the costs out of the bankrupt's estate. *Bright, Ex parte*, 2 Glyn & J. 79.

A copy of a petition by a landlord, under 6 Geo. 4, c. 16, s. 75, was served upon an equitable mortgagee of the lease:—Held, that he was entitled to have his costs of appearing on the petition paid him by the petitioner. *Hanbury or Banbury, Ex parte*, 12 L. J., Bk. 43; 7 Jur. 660. *S. P., Hopton, Ex parte*, 2 Mont. D. & D. 347; 5 Jur. 804.

#### What amounts to an Election—Using Premises.]

—If the assignees intermeddle with and assume the management of a farm, this is a sufficient election to take the term, and make them liable to the landlord, in consideration of their tenancy, for all mismanagement. *Thomas v. Pemberton*, 7 Taunt. 206.

A., while he held of the plaintiff from year to year two farms, X. and Y., upon the terms of certain written agreements, at certain rents, payable quarterly (X. being a holding from Michaelmas, and Y. a holding from Lady-day), became bankrupt in August, 1866. His assignees took possession of both the farms, and continued in occupation of X. till Lady-day, 1867, and of Y. till Christmas, 1866. Disputes arose between the assignees and the plaintiff, and the former committed divers breaches of the terms on which A. held the farms, and in October and November they refused to allow the landlord or his incoming tenant to come upon the farms to sow, plough and crop the lands, as the outgoing tenant was required by the terms of the tenancy. They also sub-let the pasturage till Christmas, 1866:—Held, that these acts shewed unequivocally that the assignees had elected to become tenants to the plaintiff of the farms, therefore they were liable for breaches of the terms on which A. held. *Bradshaw v. James*, 20 L. T. 781; 17 W. R. 1010.

Where assignees of a bankrupt, who was lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises till the 10th, and ordered them to be milked there:—Held, that they thereby became tenants to the lessor; and, the cows being removed on the 10th to avoid a distress for arrears of rent, that he had a right to follow and distrain them under 11 Geo. 2, c. 19. *Welch v. Myers*, 4 Camp. 368.

A coachmaker, who was tenant from year to year of premises, and had several coaches on hire, became bankrupt, and his assignees entered upon the premises to keep the coaches in repair, in pursuance of the bankrupt's contract; in August the bankrupt's effects were sold, and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michael-

mas following. In an action by the landlord for a quarter's rent due the Christmas following:—Held, that the assignees were liable. *Ansell v. Robson*, 2 C. & J. 610.

Where assignees enter upon and take possession of leasehold property, they become chargeable with the covenants in the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold. *Hanson v. Stevenson*, 1 B. & A. 303.

Assignees of a bankrupt, lessee of an hotel, upon the bankruptcy closed the hotel, with the exception of the tap, which was occupied by a third party, tenant to the bankrupt before the bankruptcy. He was supplied, by order of the assignees, with beer and spirits, at a slight advance over cost price, he keeping the proceeds of the business for himself, and the profit on the sale to him being credited to the bankrupt's estate. The licence of the tavern was renewed in the bankrupt's name by the assignees. A distress was put in upon the premises on two occasions by the lessor; and the assignees, after asking for time, paid rent and costs of distress, for the purpose, as they stated, of saving the furniture, which was afterwards removed from the premises by their order. On their being threatened with ejectment for breaches of covenant, their attorneys said they would resist the ejectment. The tap was afterwards closed by their order:—Held, that these facts did not show an election to take the lease. *Goodwin v. Noble*, 8 El. & Bl. 587; 27 L. J., Q. B. 204; 4 Jur., N. S., 208.

The assignee of a bankrupt lessee, chosen on the 15th of November, kept the bankrupt in the premises, carrying on the business for the benefit of the creditors, until April following, and himself occasionally superintended; but on the 23rd December disclaimed the lease by letter to the landlord:—Held, that notwithstanding such disclaimer he had elected to accept the lease by using the premises for the benefit of the creditors. *Clarke v. Hume, R. & M.* 207.

— **Payment of Rent.**—Where the assignee of a bankrupt, on being applied to, replied, that if he could not let it by the next quarter-day, he would give up the property, and continued in and paid rent until that time:—Held, that it was an assent. *Broome v. Robinson*, 7 East, 339.

— **Payment of Rent to avoid Distress.**—Assignees of a bankrupt, having allowed his effects to remain on the premises occupied by him nearly a twelvemonth after the bankruptcy, for the purpose of preventing a distress, paid the arrears of the rent due, at the same time intimating to the landlord that they did not mean to take the lease unless it could be advantageously disposed of; the effects were soon after sold, and removed from the premises; the lease was at the same time put up to sale by order of the assignees, but there were no bidders for it; they omitted to return the key to the landlord for nearly four months after; however, they were not asked for it, and they in no other way made use of the premises:—Held, that they were not, under these circumstances, liable to the landlord as assignees of the lease. *Wheeler v. Bramah*, 3 Camp. 340; 1 Rose, 363.

— **Exercising Acts of Ownership.**—A bankrupt, at the time of his bankruptcy, in

1847, had deposited the lease of a house with the plaintiff as a security for advances. In 1859, a year and a half after the bankrupt's death, the plaintiff obtained an order from the Court of Bankruptcy for a sale of the house, and that if the amount of his debt was not realized at the sale, the assignees should assign the lease to the plaintiff. That amount was not realized, and in 1860 the assignees, in pursuance of the order, assigned the lease to the plaintiff. In ejectment by him against the widow of the bankrupt:—Held, that, assigning the lease to the plaintiff was an acceptance of the lease by the assignees; but that it was a question for a jury whether they had accepted it within a reasonable time. *Mackley v. Pattenden*, 30 L. J., Q. B. 225; 7 Jur., N. S. 1056; 4 L. T. 285; 9 W. R. 601.

Where assignees of a bankrupt who was possessed of a term, part of which he had underlet to another, released such under-tenant, and on being afterwards asked by the lessor to elect, refused to take the original lease:—Held, that this did not amount to an acceptance by them, and that they were not liable as assignees of the term. *Hill v. Dobie*, 2 Moore, 342; 8 Taunt. 325.

**Endeavouring to Effect a Sale.**—Assignees have a right to do reasonable acts to ascertain the value of property. *Hope v. Booth*, 1 B. & Ad. 505.

Assignees are not concluded by putting up premises to sell; they may make an experiment to see if the lease is beneficial; but where they put up the premises to auction, and found a purchaser, and received a deposit, but the contract of sale afterwards went off, without the assignees shewing any reason why they did not enforce the sale:—Held, that they were liable to the payment of rent, as assignees of all the estate and interest of the bankrupt in the premises. *Hastings v. Wilson*, Holt, 290.

But the mere fact that the assignees advertised and put the estate up to sale (without stating themselves to be the owners or possessed thereof), they never having in fact taken possession of the premises, and there being no bidder, and the premises were not sold, is no more than an experiment to ascertain the value of the lease, and not an assent on the part of the assignees. *Turner v. Richardson*, 7 East, 335; 3 Smith, 330.

If a bankrupt has a lease of premises, and also a reversionary interest in them, and his assignees sell his estate and reversionary interest in the premises, it amounts to an acceptance of the lease by the assignees. *Page v. Godden*, 2 Stark. 309.

If the assignee holds the lease from December to May, and puts a person into possession, with instructions to let the premises, and several applications are made by parties desirous to take them, but they remain unlet, and on the landlord calling upon the assignee for payment of rent, he says he will pay it if he can make anything by the house; and the jury find that this is only a conditional acceptance of the lease, and that he has not retained it an unreasonable time, the court will not disturb the verdict. *Lindsay v. Limbert*, 12 Moore, 209; 2 C. & P. 526.

If the assignees so act as to make the property of less value to the landlord, and as if the property were vested in them, it is said to be an election. *Carter v. Warne*, 4 C. & P. 191.

If a sale takes place on the premises of the stock-in-trade, and the house and shop fixtures, and the catalogue states that on the same day will be sold the valuable lease of the premises, with commanding shop, held for an unexpired term of sixteen years from Lady-day preceding, at the low rent of 20*l.* per annum, and the catalogue describes the sale to be made without reserve, and contains a list of fixtures, some of them belonging to the landlord, and some put up by the bankrupt, and the lease is bought in, but all the fixtures are sold, and the premises much injured by their being taken down and carried away, it is a taking possession.

**Election—What Covenants Assignees bound to enter into.]**—A., before his bankruptcy, agreed to take a lease of a cotton mill, and entered into possession. After his bankruptcy, one of his assignees took possession, and agreed to accept the lease, a draft of which was sent to the assignees, containing covenants personally binding on them during the whole of the term, and one in particular, to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease, and even if they were, that the Court of Review had no jurisdiction to compel specific performance of the agreement. *Lucas, Ex parte*, 3 Deac. & Chit. 144; 1 Mont. & Ayr. 93.

#### B. Under the Bankruptcy Act, 1869.

##### Leaseholds vest in Trustee on Appointment.]

—Under the Bankruptcy Act, 1869, ss. 17, 23, 24, the leaseholds of a liquidating debtor vest in the trustee on his appointment, subject to his power of disclaimer; and if there is no valid disclaimer the trustee is personally liable for the rent accruing due after his appointment and on the covenants of the lease. *Wilson v. Wallant*, 5 Ex. D. 155; 49 L. J., Ex. 437; 42 L. T. 375; 28 W. R. 597; 44 J. P. 475.

##### Landlord's Right to Distrain for Rent.]

—When the trustee continues in possession of premises of which the liquidating debtor was tenant, not having disclaimed the lease, the landlord has a right, as against the trustee, to distrain, without obtaining leave from the Court of Bankruptcy, for rent accruing due after the commencement of the liquidation, even though it is rent which, under the terms of the lease, is payable in advance. *Hale, Ex parte, Binns, In re*, 1 Ch. D. 285; 45 L. J., Bk. 21; 33 L. T. 706; 24 W. R. 300.

**Liability of Trustee for Rent.]**—A trustee who takes actual possession of leasehold property of the bankrupt, and does not, when called upon by the landlord so to do, disclaim the lease in the way provided by s. 23 of the Bankruptcy Act, 1869, is personally liable for the rent which accrues due after he takes possession. *Dressler, Ex parte, Solomon, In re*, 9 Ch. D. 252; 48 L. J., Bk. 20; 39 L. T. 377; 27 W. R. 144—C. A.

Sect. 35 only gives the landlord a right of proof for the proportionate part of the rent up to the date of the adjudication, but does not relieve the trustee from his personal liability. *Ib.*

The leasehold estate of a bankrupt or debtor liquidating his affairs by arrangement vests absolutely in the trustee upon his appointment, and

he has no right of election to accept or decline the leases, his only remedy being by disclaimer; and if he neglects or is unable to disclaim, he becomes personally liable in respect of the covenants contained in the leases as from the date of his appointment: but he is not liable for any breach of covenant happening before his appointment. The plaintiff demised to M. a wharf for twenty-one years: the lease contained covenants for rent and repairs by the lessee. M. deposited the lease with S. as security for a debt. M. filed a petition for liquidation on the 8th of December, 1880, and the defendant was appointed trustee on the 3rd of January, 1881. The defendant never took possession of the wharf; but he negotiated with S. for the assignment of the lease to him: the negotiations proved abortive. The plaintiff served the defendant with a notice requiring him to disclaim; but the defendant failed to do this. The plaintiff then brought the present action to recover two quarters' rent, due respectively on the 25th of December, 1880, and on the 25th of March, 1881, and damages for breach of the covenant to repair:—Held, that the plaintiff could not recover from the defendant the quarter's rent falling due on the 25th of December, 1880, because the defendant was not appointed trustee until the 3rd of January, 1881; but that the defendant was personally liable for the quarter's rent due on the 25th of March, 1881, and for breach of the covenant to repair, on the grounds, first, that by virtue of his appointment as trustee all the property of the liquidating debtor vested in him without any election on his part; and, secondly, if an election on his part was necessary, he had, by his conduct, elected to accept the lease. *Titterton v. Cooper*, 9 Q. B. D. 473; 51 L. J., Q. B. 472; 46 L. T. 870; 30 W. R. 866—C. A.

**—Landlord's Remedy.]**—A debtor filed a liquidation petition on the 14th of September, and on the 3rd of October a trustee was appointed. On the 26th of November the creditors resolved that the trustee should sell the debtor's estate for a sum sufficient to pay the creditors 4*s.* in the pound; that the debtor's discharge should be granted on the filing of the trustee's certificate that the provisions of this scheme of settlement had been complied with; and that the close of the liquidation and the release of the trustee should take place on and from the 28th of January. On the 4th of January these resolutions were approved by the court. The debtor was tenant of some business premises and some chattels for a term which expired on the 25th of December. The trustee took possession of the premises and the chattels, and remained in possession of them until the expiration of the term, but he did not pay the landlord the quarter's rent which fell due on the 25th of December. On the 26th of February the landlord applied to the Court of Bankruptcy for an order directing the trustee to pay him that quarter's rent. There was evidence that several applications had been made to the trustee for the rent in the course of January, and that he had said that he had left money with the debtor to pay it:—Held, that either the landlord's remedy was a personal one against the trustee, in which case the Court of Bankruptcy had no jurisdiction in the matter, or that, if there was a remedy in the Court of Bankruptcy, the trustee had done nothing more

than commit a default in the administration of the assets, from liability for which he was protected by the release, there being nothing to shew that there had been any fraud in obtaining it. *Carter, Ex parte, Ware, In re*, 8 Ch. D. 731; 39 L. T. 185; 27 W. R. 106—C. A.

#### γ. When Bankruptcy works a Forfeiture.

**Proviso to be Void in case of Bankruptcy.]**—Property may be limited or leased to a man to go over or to revert back in the event of his bankruptcy. *Brandon v. Robinson*, 1 Rose, 197; *S. C.*, nom. *Brandon, Ex parte*, 18 Ves. 429.

If a lease to a trader contains a proviso that it shall be void if he becomes bankrupt, the term does not pass to his assignees, but determines altogether upon that event taking place. *Roe d. Hunter v. Galliers*, 2 T. R. 133.

But, to prevent it passing, there must be an express proviso to that effect. *Doe d. Goodbehers v. Betan*, 3 M. & S. 353; 2 Rose, 456.

An estate was devised to A. for life, determinable in case he should be declared a bankrupt, or do or suffer anything whereby the estate would, if belonging to him absolutely, pass to any other person. At the time of the testator's death there was an adjudication of bankruptcy subsisting against A., but before any rent accrued due in respect of the devised estate, it was annulled with the consent of creditors:—Held, that the clause of forfeiture did not take effect. *White v. Chitty*, 1 L. R., Eq. 372; 35 L. J., Ch. 343.

**Covenant not to Assign or Underlet without Licence.]**—The usual covenant, not to let, &c., will not prevent a lease from passing to the assignees. *Doe d. Cheere v. Smith*, 1 Marsh. 359; 5 Taunt. 795; 2 Rose, 280.

A. granted a lease to B., which contained a covenant that B., his executors or administrators, without mentioning assigns, should not underlet without the consent of the lessor: B. became bankrupt, and his assignees assigned the premises to C.; B. obtained his certificate, and C. re-assigned the premises to him, after which he underlet them to another person:—Held, that B. having been discharged at the time of his bankruptcy from all covenants in the lease, by 49 Geo. 3, c. 121, s. 19, the underletting by him, which was in the character of assignee, was no forfeiture of the lease. *Id.*

A proviso in a lease, that the lessee, his executors or administrators, shall not assign without the lessor's consent in writing, did not prevent the commissioners from assigning the lease to the assignees without such consent. *Doe d. Goodbehers v. Betan*, 3 M. & S. 353; 2 Rose, 456.

When a lease contained covenants not to assign or underlet, with a proviso that in case the tenant should voluntarily or otherwise lose possession of the farm, the lessor might re-enter:—Held, that the assignees in bankruptcy of the tenant (the lessor having accepted the assignees) were in by contract with the lessor, and not by operation of law, and were, therefore, bound by the covenants in the lease. *Dyke v. Taylor*, 2 Giff. 566; 6 Jur., N. S. 1329; 3 L. T. 530. Affirmed, 30 L. J., Ch. 281; 7 Jur., N. S. 583; 3 L. T. 717; 9 W. R. 408.

The assignees, after an injunction restraining them from parting with possession without the lessor's consent, put into possession an agent,

who cultivated the farm with his own moneys, receiving no wages from the assignees:—Held, an invasion of the injunction. *Id.*

In cases of bankruptcy, the assent of the lessor was presumed in law to have been given to the assignment of the premises by the commissioners. *Wadham v. Marloice*, 2 Chit. 600; 4 Dougl. 54; 8 East, 314, n.; 1 H. Bl. 438, n.

#### —Composition Deed—Effect of Execution.]

—A lessee, who covenanted not to assign the demised premises without the consent in writing of the lessor, executed a deed, under 24 & 25 Vict. c. 134, s. 42, whereby he assigned all his property to trustees for the benefit of his creditors:—Held, that the assignment was a forfeiture of the lease. *Holland v. Cole*, 1 H. & C. 67; 31 L. J., Ex. 481; 8 Jur., N. S. 1066; 6 L. T. 503; 10 W. R. 563.

**Disclaimer of Leaseholds.]**—See post, DISCLAIMER OF ONEROUS PROPERTY.

#### ii. Growing Crops, Fixtures and Goodwill.

**Growing Crops out by Mortgagor's Trustee after Notice.]**—A mortgagor presented a petition for liquidation of his estate, and the trustee appointed went into possession of the mortgaged lands and commenced cutting the growing crops. The mortgagee then put a man in possession and required the trustee to give up possession, which he declined to do. In an action against the trustee an injunction was granted restraining him from cutting crops and from removing the crops cut after the demand made by the mortgagee. *Ragnall v. Villar*, 12 Ch. D. 812; 48 L. J., Ch. 695; 28 W. R. 242.

**Crops when severed from Land.]**—Though a bill of sale under the Bills of Sale Act, 1854, does not require registration in respect of growing crops, yet when the crops are subsequently severed by the grantor they become personal chattels, and, if possession has not been taken of them by the grantee before the commencement of the bankruptcy of the grantor, they will pass to the trustee in the bankruptcy. *Brantom v. Griffiths* (1 C. P. D. 349; 2 C. P. D. 212) distinguished; *National Mercantile Bank, Ex parte, Phillips, In re*, 16 Ch. D. 104; 50 L. J., Ch. 231; 44 L. T. 265; 29 W. R. 227—C. A.

#### **Fixtures—Forfeiture of Lease—Assignee's Right to Enter and Remove Fixtures.]**

—A lessee covenanted to erect a steam-engine, machinery, and buildings proper for carrying on the business of a shipwright, on the land demised, and to leave the same for the lessors at the expiration or other sooner determination of the term, "it being by the indenture declared, that all steam and other engines, machinery, &c., set up upon the premises at any time during the term for the purpose of carrying on the trade of a shipwright, together with all fixtures, should not be removed therefrom, but should, upon the expiration or other sooner determination of the term, belong to the landlords, and not to the tenant, without any payment being made to him for the same." The lease then went on to provide "that the last-mentioned stipulation should not be construed to apply to any machinery or other articles which might be erected or set up on the demised premises by the lessee during the term,

for any other purpose than that of carrying on the business of a shipwright; but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery from the premises. The lease contained a further proviso, that in the event of the lessee becoming bankrupt it should be lawful for the lessors to re-enter, and upon such entry to take possession of, have, and use as their own property, without paying anything for the same, all steam and other engines which should be found on the premises, and which should be used or employed in or about the business of a shipbuilder thereon." The lessee having become bankrupt, the lessors re-entered for the forfeiture:—Held, that the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the shipbuilding business, and to a reasonable time for that purpose. *Stansfeld v. Portsmouth (Mayor, &c.)*, 4 C. B., N. S. 120; 27 L. J., C. P. 124; 4 Jur., N. S. 440.

**Goodwill of Mortgaged Public-house.**—The goodwill of a mortgaged public-house is not a personal goodwill, but belongs to the mortgagor's trustee in liquidation as against the mortgagee. *Punnett, Ex parte, Kitchen, In re*, 16 Ch. D. 226; 50 L. J., Ch. 212; 44 L. T. 226; 29 W. R. 129—C. A.

**Tenant's Fixtures.**—A mortgage (by way of underlease) executed in 1877 of a leasehold public-house contained no express assignment of the fixtures. There was a clause by which, "for the purpose of better securing the punctual payment of the interest" on the mortgage debt, the mortgagor attorned tenant to the mortgagee of the mortgaged property at a yearly rent equal to the amount of a year's interest. And there was a proviso that the mortgagee might, at any time after the day when the first instalment of rent should become due, enter upon the property and determine the tenancy, without giving the mortgagor any notice to quit. Two years afterwards the mortgagor became bankrupt. The mortgagee had taken no step to determine the tenancy:—Held, that, as the tenancy was created only for the purpose of giving an additional security for the payment of the interest, the mortgagee did not cease to be a mortgagee because he was made a landlord, and that he was entitled as against the trustee in the bankruptcy of the mortgagor to trade fixtures which had been annexed to the public-house after the execution of the mortgage. *Id.*

**Fixtures put up by previous Tenant—Sign-board of Inn.**—At the Royal Oak Inn, Bettws-y-Coed, there was, in 1847, a signboard affixed to the wall of the house by staples. The inn was then held by E. R. as tenant from year to year. In the same year David Cox, who was a friend of E. R., went up a ladder and painted on the old signboard a picture of an oak tree, with horsemen riding underneath. The picture so painted remained as the sign of the house. In 1849 Cox retouched and varnished the picture. In 1866 owing to alterations in the house, the picture was taken down and placed, first in a sitting-room and afterwards (being framed and glazed) in the hall of the inn, where it was affixed to the wall. In 1861 E. R. died, and was succeeded in the tenancy of the house, by his son, R. R., who

took a lease of the house from Lord W. D. for twenty-one years, containing a covenant to surrender the house and fixtures at the end of the term. In 1863 R. R. died, having devised all his property to his wife, who subsequently married D. X. In August, 1871, D. X. surrendered the lease to Lady W. D., who on the same day granted him a lease for fifty-eight years, containing a like covenant to surrender. D. X. died in 1876, and his widow thereupon conveyed all her interest in the inn (expressly reserving the signboard) to M. A. T., who, by arrangement, retained the signboard at the inn for two years. At the end of the two years Mrs. D. X. sent for the signboard, but Lady W. D.'s agent forbade its removal, and it remained in the hall of the inn till the filing of a petition for liquidation by M. A. T.:—Held, that M. A. T. had no right of property in the signboard; that it was not a chattel of which reputed ownership could be predicated, and that, as against M. A. T. and her trustee in liquidation, Lady W. D. had a clear right of preventing the removal of the fixture. *Willoughby D'Eresby (Baroness) or Sheen, Ex parte, Thomas, In re*, 44 L. T. 781; 29 W. R. 527. Reversing *S. C.*, 43 L. T. 638; 29 W. R. 248.

### iii. Shares in Companies holding Real Estate.

Where a company was formed by act of parliament for the purchase of lands to make a canal, and the act declared that the shares "shall be deemed personal estate, and shall be transmissible as such":—Held, that though the profits arose out of land, the shares were personal property, passing as such to the assignees, on the bankruptcy of the proprietor. *Lancaster Canal Company, Ex parte*, 1 Deac. & Chit. 411; 1 Mont. 116; 1 Mont. & Bligh, 94; *S. P., Lawrence, Ex parte*, 1 De Gex, 269.

But shares in the Vauxhall Bridge Company, who are seised of a real estate, were not within the 21 Jac. 1, c. 19, s. 11. *Vauxhall Bridge Company, Ex parte*, 1 Glyn & J. 101.

### 3. THINGS IN ACTION.

#### Unliquidated Damages in respect of Contract.]

—Assignees may maintain an action for unliquidated damages, which have accrued before the bankruptcy by non-performance of a contract. *Wright v. Fairfield*, 2 B. & Ad. 727.

**Reversionary Interests.**—After the appointment of assignees under 12 & 13 Vict. c. 106, s. 141, an assignment for value by a bankrupt of a reversionary interest cannot prevail against the right of the assignees. *Coombe, In re*, 1 Giff. 91; 5 Jur., N. S. 784; 7 W. R. 609.

#### Chose in Action of Wife before Marriage.]

—Assignees of a bankrupt cannot, in their names alone, maintain an action on a chose in action (e. g., a promissory note) made to the wife of a bankrupt before her marriage. *Sherington v. Yates*, 1 D. & L. 1032; 12 M. & W. 853; 13 L. J., Ex. 249—Ex. Ch. Overruling 11 M. & W. 42; 2 D., N. S. 803; 12 L. J., Ex. 216.

**In right of Wife.**—A right of entry vested in husband and wife in right of the wife passes to the assignees of the husband upon his bank-

ruptcy. *Mitchell v. Hughes*, 6 Bing. 689; 4 M. & P. 577.

**Contract for Personal Services.**—A. agreed in writing with B. & C. on behalf of themselves and D., as partners in trade, to serve them, B. and C., and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account during that period without their consent; and B. and C. agreed to pay him wages after the rate of 3*l.* 3*s.* per week, so long as he should serve them faithfully:—Held, that the right of action in respect of the damages or penalty having accrued before the bankruptcy of B., and the damages relating rather to the property than to the person, feelings or character of B., the right of action in respect of the damages passed to the assignees of B. *Beckham v. Drake* (in error), 2 H. L. Cas. 579; 11 M. & W. 315; 12 L. J., Ex. 486; 13 Jur. 921.

**Damages for Misrepresentation.**—To a declaration for a fraudulent misrepresentation, whereby the plaintiff was induced to pay 2,000*l.*, and sustained great loss, was adjudicated a bankrupt, suffered personal annoyance, and was injured in his character and credit, the defendant, except as to the claim in respect of the adjudication, and of the remainder of the personal damage, pleaded that before action the plaintiff had been adjudicated bankrupt; that the loss sustained was a pecuniary loss, and that the right to sue for it passed to his assignees:—Held, that the only damage recoverable was a direct pecuniary loss, the right to sue for which passed to the assignees, and therefore that the plea was a good answer to the whole declaration, and might have been so pleaded. *Hodgson v. Sidney*, 1 L. R., Ex. 313; 35 L. J., Ex. 182; 14 W. R. 923; 4 H. & C. 492.

**Interest.**—Assignees of a bankrupt banker are entitled to interest accruing after the bankruptcy on the overdrawn accounts of the customers of the bank. *Pott v. Bevan*, 1 C. & K. 335; 7 M. & G. 604; 8 Scott, N. R., 319; 13 L. J., C. P. 187; 8 Jur. 560.

**Money payable in consideration of Partnership.**—A sole trader having agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, and having become bankrupt five months after the commencement of the partnership, when only one instalment was due, his assignees are entitled at the respective periods to receive the remaining instalments. *Akhurst v. Jackson*, 1 Swans, 85.

**Right to Indemnity.**—Where there is an implied duty on the part of a lessee to indemnify his under-tenant from the consequences of the non-performance of his covenants with the superior landlord, for breach of which an action would lie, and the under-tenant's goods are seized under a distress for rent by the superior landlord, the injury resulting to the under-tenant from the distress gives a right of action to his assignees. *Hancock v. Caffyn*, 1 M. & Scott, 521; 8 Bing. 359.

**Amount of Damages.**—H., before his bankruptcy, hired a carriage of M., and let it to the

defendant; the defendant sent it back to H. damaged; M. repaired it with the assent of H., and (H. having become bankrupt) proved the amount due for repairs under his commission:—Held, that his assignee had a right of action against the defendant, although his estate paid no dividend, but for nominal damages only. *Porter v. Vorley*, 9 Bing. 93; 2 M. & Scott, 141.

**For Breach of Agreement to sell Property in Consideration of Payment of Debts.**—A. & S., being traders in embarrassed circumstances, sold their business to the defendant upon condition that he should pay certain debts owing by them. This he failed to do, and left a balance of 1,750*l.* unpaid to the creditors of A. & S. A. & S. afterwards liquidated their affairs by arrangement under the Bankruptcy Act, 1869, and the plaintiff having been appointed trustee, brought an action for breach of contract:—Held, that he was entitled to recover the sum of 1,750*l.*, and not merely nominal damages. *Porter v. Vorley* (9 Bing. 93) disapproved of. *Ashdown v. Ingamells*, 5 Ex. D. 280; 43 L. T. 424—C. A.

**Claim against Crown.**—Y., having taken proceedings in the Court of Costa Rica for the recovery of two cargoes of goods, the British vice-consul interfered, and obtained an order for the suspension of the suit. He thereupon applied for compensation to the crown. Before and after these acts of the vice-consul, Y. was adjudicated a bankrupt:—Held, that he could not maintain his claim, as it was not in respect of a mere personal wrong, but affected the right to property, and therefore became vested in his assignees. *Young, In re*, 12 W. R. 537—P. C.

**Debentures.**—A debenture of a joint stock company, by which the company undertakes to pay a sum of money, with interest, and charge its undertaking and property with the payment, is a chose in action within the meaning of s. 15, sub-s. 5, of the Bankruptcy Act, 1869. *Pryce, In re, Rensburg, Ex parte*, 4 Ch. D. 685; 36 L. T. 117; 25 W. R. 432.

An assignment of such a debenture by indorsement in blank confers a good title on the assignee as against the trustee in bankruptcy of the assignor, notwithstanding that the assignee gives no notice to the company until after the commencement of the bankruptcy. *Id.*

**Trespass to Goods.**—An action for seizing and taking the plaintiff's goods, under a false and unfounded claim of a debt, per quod he was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and his lodgers left his house, does not pass to his assignees on his bankruptcy. *Brewer v. Dew or Drew*, 11 M. & W. 625; 1 D. & L. 383; 12 L. J., Ex. 448; 7 Jur. 953.

**Trespass to Dwelling-House.**—Action for breaking and entering the plaintiff's dwelling-house, and creating a noise and disturbance and damaging the doors, and seizing his goods and exposing them to sale on the premises without his leave, whereby he and his family were disturbed and annoyed in the possession of the same, and he was prevented carrying on his business. Plea, that the plaintiff became bank-

rupt after action brought:—Held, that the primary personal injury to the bankrupt being the principal and essential cause of action, it still remained in the bankrupt, and did not pass to his assignee; and, therefore, that the plea was bad. *Rogers v. Spence (in error)*, 12 C. & F. 700; *S. C.* in Ex. Ch. 13 M. & W. 571; 15 L. J., Ex. 49; and in Ex. 2 D., N. S. 999; 11 M. & W. 191; 12 L. J., Ex. 252.

**Trespass to Land—Assignees not having made their Election.**—A right of action of trespass quare clausum fregit, is maintainable by a tenant from year to year, who has become bankrupt after the committing the trespass, and before the commencement of the suit; and does not pass to the assignees by the assignment, unless they interfere; as the bankrupt may sue as a trustee for, and has a good title against all persons but, them. *Clark v. Calvert*, 3 Moore, 96; 8 Taunt. 742.

**Seduction of Debtor's Daughter.**—A right of action for seduction of a man's daughter, per quod servitium amisit, does not pass to his assignees in the event of his bankruptcy. *Howard v. Crowther*, 8 M. & W. 601; 5 Jur. 91.

**Policies of Insurance.**—A policy of insurance, effected by a bankrupt upon his own life at an annual premium, passes to his assignees, however small the apparent value of it may be at the time of his bankruptcy, and although there are considerable arrears of premium due upon it; and if, instead of delivering it up as part of his effects, he secretly assigns it to another person, who pays the arrears of the premium, and upon the death of the bankrupt receives the sum insured, this sum, deducting the amount of the arrears so paid, may be recovered by the assignees as money received to their use. *Schondler v. Wacc*, 1 Camp. 487. But see *Grant v. Hill*, 4 Taunt. 380; and *Wills v. Wells*, 2 Moore, 247; 8 Taunt. 264.

A policy of life assurance is a thing in action, and is therefore excepted from the operation of the reputed ownership clause, s. 15, of the Bankruptcy Act, 1869. *Ibbetson, Ex parte, Moore, In re*, 8 Ch. D. 519; 39 L. T. 1; 26 W. R. 843—C. A.

**Proviso for Avoidance on Suicide of Assured.**—B., a merchant domiciled at Valparaiso, effected an insurance on his life with an insurance company in London. The policy was to be void if the insured committed suicide, but if any third party acquired a bona fide interest therein by assignment, or by legal or equitable lien, for a valuable consideration, or as security for money, the assurance should nevertheless to the extent of such interest be valid and of full effect. While the policy was in force, B. declared himself bankrupt, and by that act itself made, according to the law of Valparaiso, a cession of all his property to the court before whom the declaration was made, and the property thereupon vested by operation of law in the escribano or official notary of the court. After this, B. committed suicide. At a meeting of creditors after his death, creditors were duly appointed assignees to the estate, which thereupon, by operation of law, shifted from the escribano to them as assignees. In an action by them as such assignees to recover the amount insured by the policy:—Held, that they were not

third parties, having a bona fide interest by assignment, or by legal or equitable lien for a valuable consideration, or as security for money within the meaning of the exception. *Jackson v. Forster*, 1 El. & El. 463; 28 L. J., Q. B. 166; 5 Jur., N. S. 547. Affirmed, 1 El. & El. 470; 29 L. J., Q. B. 8; 5 Jur., N. S. 1247—Ex. Ch.

**—Against Fire—Partners.**—Utensils of trade being property of one partner, and insured in his name, were left in the order and disposition of the partners. A fire happened, by which they were consumed. After the fire, a joint commission issued against the partners. The insurance money was paid to the joint assignees:—Held, that the insurance money did not pass by the assignment under the joint commission. *Smith, Ex parte*, 3 Madd. 63; Buck, 149.

**Chose in Action of Bankrupt—Sale by Trustee**—**Notice under Judicature Act, 1873, s. 25, sub-s. 6.**—An agreement made between A. and D., not under seal, stipulated that until the lease of certain premises thereby agreed to be granted should be executed, D., his heirs, executors, administrators, and assigns should be bound by all the covenants set forth in the agreement, amongst which was a covenant that D., his heirs, executors, administrators, and assigns should leave the whole of the premises and fixtures then in and intended to be fixed in or about the messuage and premises in a perfect and tenable state of repair at the expiration of the term therein mentioned, or sooner determination thereof. No lease by deed was ever granted in accordance with the agreement, but D. and his representatives entered into possession under the agreement and continued therein until the expiration of the term for which it was intended the lease should be granted. During the currency of the term mentioned in the agreement A. was adjudicated a bankrupt, and his trustee, acting in accordance with the provisions of the Bankruptcy Act, 1869, sold and assigned to the plaintiff all the property of the bankrupt. In an action for breach of the contract to repair:—Held, that the contract in the agreement was binding upon the defendant, the personal representative of D., and that the right of action in respect of the breach of the contract was a chose in action of the bankrupt, which passed under the assignment to the plaintiff, and that the plaintiff was not bound to have given notice of the assignment under s. 25, sub-s. 6, of the Judicature Act, 1873. *Gibbon v. Dudgeon*, 45 J. P. 748.

**Bond assigned before Bankruptcy—Right to Sue remains in Bankrupt.**—A money bond, assigned by the obligee to creditors to secure a debt of larger amount, does not pass to assignees under a fiat against him, although the assignment is expressed to be for further security, and contains a proviso to defeat it on payment of the debt. *Dangerfield v. Thomas*, 9 A. & E. 292; 1 P. & D. 287.

See further, ORDER AND DISPOSITION, *post*, col. 894.

#### 4. BANKRUPT'S BOOKS.

**Assignment of Books of Account—Who entitled to.**—The 110th of the Bankruptcy Rules,

1870, does not apply to an assignment of the books of account of a bankrupt before the bankruptcy; consequently the trustee of the bankrupt assignor is not entitled to the possession of the books of account, which, long before the bankruptcy, the bankrupt had assigned to a third party for value. But, *semble*, he is entitled to inspect the books for the purpose of aiding him in the administration of the bankrupt's property. *Good or Wood, Ex parte, West, In re*, 21 Ch. D. 868; 51 L. J., Ch. 831; 46 L. T. 823.

#### 5. BILLS OF EXCHANGE.

**Accommodation Bills.**—A bill payable to the order of the drawer, and accepted for his accommodation, does not pass under a commission against the payee, and he may indorse it after an act of bankruptcy; and his indorsee for a valuable consideration has a right of action. *Wallace v. Hardacre*, 1 Camp. 46, 179. And see *Willis v. Freeman*, 12 East, 656.

**Bills transferred before Bankruptcy—Incomplete Indorsement.**—The payee of a bill, who is a trader, and has delivered it over for a valuable consideration, and forgotten to indorse it, may indorse the bill after he has become a bankrupt. *Smith v. Pickering, Peake*, 50.

Assignees were ordered to indorse a bill which a bankrupt, before his bankruptcy, had transferred to the petitioner for a valuable consideration, but without indorsement: the indorsement to be special, so as to secure the assignees from personal liability. *Mowbray, Ex parte*, 1 J. & W. 428.

**Bills discounted by Banker.**—Where bankers discount a bill for a customer, giving him credit for the amount of the bill, and debiting him with the discount, the bill becomes the property of the bankers, and, upon their bankruptcy, their assignees may maintain an action upon it, although there is no balance due to them from the customer. *Carstairs v. Bates*, 3 Camp. 301.

**Short Bills in Bankers' Hands.**—Short bills in the hands of a banker are specifically the property of the remitter, subject to a lien for the balance of the account. *Routon, Ex parte*, 17 Ves. 431; 1 Rose, 15; *S. P., Waring, Ex parte*, 19 Ves. 349.

And are to be delivered up, subject to the bankrupt's lien, and indemnifying the estate against the engagements on account of the party claiming them. *Ib.*; *S. P., Buchanan, Ex parte*, 1 Rose, 280; 19 Ves. 201.

A short bill in the hands of a bankrupt as agent, and not by consent or the course of dealing, is considered as cash; to be returned, or the proceeds received after the bankruptcy, though the bill was due previously, and retained so as to discharge the indorser. *Solleres, Ex parte*, 18 Ves. 229; 1 Rose, 155.

A customer paying bills not due into his bankers' in the country, whose custom it was to credit their customers to the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers upon their becoming bankrupt: the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are

liable to refund it to the customer, in an action for money had and received. *Giles v. Perkins*, 9 East, 12.

Where bills are paid in at a bankers' as short bills (i.e., bills which the bankers are to present when due, and carry the proceeds to account), and the bankers afterwards become bankrupts; if before the choice of assignees some of the bills were paid, the customer cannot recover the value of such bills as were so paid, in an action of trover against the assignees. *Tennant v. Strachan*, 4 C. & P. 31; *M. & M.* 377.

— **Sent to Bankers' London Agents.**—Where a country banker has short bills of his customer in his possession, and sends them to his London bankers, and becomes bankrupt, the short bills remaining in that condition continue the property of the holder; but the London bankers acquire a lien on the bills, and they are a security to them for the general balance due to them from the country banker. The assets available to the London bankers must be marshalled, and the residue, after satisfying the London bankers' lien, is payable among the short bill holders equally. *Froggatt, Ex parte*, 3 Mont., D. & D. 322; 7 Jur. 910. See *Burkworth, Ex parte*, 2 De G. & J. 194; 27 L. J., Bk. 5.

If A. deposits bills, indorsed in blank, with B. his banker, to be received when due, and the latter raises money upon them, by pledging them with C. another banker, and afterwards becomes bankrupt, A. cannot maintain trover against C. for the bills. *Collins v. Martin*, 1 B. & P. 648; 2 Esp. 520.

— **What are Short Bills.**—Whether bills are to be considered short or not, does not depend on the particular mode of entering them in the banker's books, but upon the habits of dealing between the parties, and all the circumstances together. The mode of entering them is only evidence. *Pearce, Ex parte*, 1 Rose, 232; *S. C.*, nom. *Pease, Ex parte*, 19 Ves. 15; *S. P., Thompson, Ex parte*, 1 Mont. & Mac. 102.

A. was in the habit of indorsing and paying into his country banker, B.'s, hands bills not due, which were entered by B. in his pass-book, as bills to his credit to the full amount. By the custom of the bank, the customers were at liberty to draw for the amount of such bills immediately, and the bank was at liberty to pay away such bills as they thought fit. There was no evidence of A.'s knowledge of this custom, and A. swore that he never gave authority to B. to negotiate them, but deposited them only that B. might receive the value when at maturity; that he never drew on account of any bill till after it was due; that the balance of accounts, independently of the bills, was always in his favour; and that he never received more than one such bill (deposited by another customer) in answer to his cheques. B. having negotiated them to C. as a security for a debt, and B. becoming bankrupt before the bills were due:—Held, that they did not pass to B.'s assignees; and, therefore, that A. was entitled to be indemnified from the surplus security in the hands of C. *Benson, Ex parte*, 1 Deac. & Chit. 435; 1 Mont. & Bligh, 120.

Where a customer of a country banker was in the habit of indorsing and paying into his hands



bills of exchange, which were never written short, but entered to the full amount in the pass-book, on the day they were paid in, and also in the books of the bank, to the credit of the customer, as "bills" (not as "cash"), and after such entry the customer was at liberty to draw to the full amount, by cheques, and the bankers became bankrupts, having in their possession several of the customer's bills so paid in: and the assignees having converted the same to their use:—Held, that the customer (who had a cash balance in his favour at the time of the bankruptcy) might maintain trover against the latter for the amount, there being no evidence that he had, in point of fact, agreed that, when the bills were paid in, they were to become the property of the bankers. *Thompson v. Giles*, 8 D. & R. 733; 2 B. & C. 422.

Undue bills of exchange were from time to time remitted to a banker by a customer, and indorsed to the banker. The course of dealing was that the bills were not entered short; but though they were distinguished in the account as bills, the full amounts were entered in the cash column under the dates on which the bills were paid into the bank, and the customer was at all times at liberty to draw cheques to the extent of the balance in his favour, as appearing on the account thus made out. Interest was allowed by the banker upon the bills only from the time when their amount was received:—Held, that, in the absence of evidence of the customer's acquiescing in or authorising the banker's treating the bills as his own, from the time of their being paid in they remained the property of the customer, subject to the lien of the banker for his cash balance; that the banker had no right to negotiate them unless the balance of the account was in his favour; and that on the bankruptcy of the banker, such of them as remained in his hands in specie did not pass to his assignees, but, subject to such lien as above mentioned, belonged to the customer. *Barkworth, Ex parte*, 2 De G. & J. 194; 27 L. J., Bk. 5; 4 Jur., N. S. 547.

B. deposited India bills with her bankers, specially indorsed by her, to receive the amount when due; the balance of her banking account (exclusive of the amount of the bills) being then in her favour, and continuing so up to the bankruptcy of the bankers. The bankers charged discount on the bills in their account with B., who might have drawn on them for the amount; it being the custom of the bankers to consider ordinary bills, so deposited, as cash. The bankers paid the bills away to a creditor, with whom the assignees afterwards settled an account, charging him with the amount of the bills, and receiving from him a balance due to the estate:—Held, that B. was entitled to be reimbursed the whole amount of the bills from the assignees. *Bond, Ex parte*, 1 Mont., D. & D. 10.

Bankers refused to discount bills for a customer, but agreed that he should draw upon them in the usual way, depositing with them the bills. The bills were deposited accordingly, but the bankers forthwith discounted them with a London correspondent, who remitted them to a fourth party. The bankers having become bankrupt, and the fourth party agreeing to deal with the bills as the court should direct:—Held, that the customer was entitled to the bills, accounting for the amount paid in respect of his cheques upon the bankers, but that he was not entitled to

be reimbursed in full a sum which he had paid to their London correspondent in satisfaction of the claims of the latter in respect of the bills. *Edwards, Ex parte*, 6 Jur. 877.

**Bills held by Bankrupt in Right of Others.]**—A merchant abroad sent drafts from time to time to his London correspondent for acceptance, under an authority and upon an understanding that the liabilities of the latter, in respect of such acceptances, should be covered by means of bills payable in London, to be remitted to him from time to time. The presumption is, until an agreement to the contrary is shewn, that the London correspondent was not intended to treat the bills so remitted as cash, or to discount them before maturity; and, therefore, two of such bills, which were existing in specie in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees. *Jombart v. Woollett*, 2 Mylne & C. 389.

**Pledged Bills.]**—C. being indebted to the defendants in a sum not yet payable, and pressed by them for security, handed to them a note by which C.'s debtor, S., promised to pay C. a sum exceeding C.'s debt to the defendants. This note was not payable to order, but C. indorsed it when he handed it over. Afterwards the defendants pressed C. to obtain negotiable paper from S. instead of the note, which they re-delivered to C. for that purpose. S. thereupon, after the time for C.'s paying the defendants had elapsed, took back the note, and accepted bills of exchange drawn by C. exceeding C.'s debt to the defendants, which bills C. desired him to give to the defendants. At the time of the acceptance C. intended to commit an act of bankruptcy, which S. knew, but the defendants did not know it. After the act of bankruptcy S. delivered the bills to the defendants. In trover, by C.'s assignees, for the bills, issue being joined on a plea of not possessed:—Held, that though S. was not agent for the defendants, the bills were not, at the time of the act of bankruptcy, in C.'s possession as reputed owner, with the consent of the true owners, within the 6 Geo. 4, c. 16, s. 72, merely as being in C.'s hands, inasmuch as they were subject to the same right as the note, which C. held only for a specific purpose as agent for the defendants. *Belcher v. Campbell*, 8 Q. B. 1; 15 L. J., Q. B. 11; 9 Jur. 1073.

But that, nevertheless, if S. did not know of the assignment by C. to the defendants of the debt due from S. to C., the assignment was not good as against the plaintiffs; and therefore, as against them, the defendants had no title, legal or equitable, to the note even while it remained in their hands, and consequently none to the bills. But that, if S. did know, the defendants were entitled to succeed on the issue. *Ib.*

A bill drawn on and accepted by C., and made payable to A., was deposited by A. with B., to secure a debt due from A. to B. A. afterwards became bankrupt:—Held, that B. was entitled to the bill, and to an order that the assignees might indorse it to him without recourse. *Prior, Ex parte*, 3 Mont., D. & D. 586; 13 L. J., Bk. 15.

**Bills indorsed to Bankrupt—Indorsement revoked before Delivery.]**—A banker at Lyons posted a letter containing bills of exchange to D. in London, but before the departure of the mail he received a telegram from D., telling him

to remit nothing. The banker accordingly sent to the post-office to reclaim his letter, which by the regulation of the French post-office he was entitled to do on complying with certain formalities. By mistake the formalities were not observed and the letter was forwarded to its destination. In the meantime D. had filed a petition for liquidation:—Held, that the property in the bills did not pass to the trustee. *Cote, Ex parte, Devez, In re*, 9 L. R., Ch. 27; 43 L. J., Bk. 19; 29 L. T. 598; 22 W. R. 89.

See further, ORDER AND DISPOSITION, post.

#### 6. GOODS APPROPRIATED TO MEET BILLS OF EXCHANGE.

A firm in Para, in South America, acted as agents for a firm in Liverpool for the purchase and shipment of goods. The course of dealing was as follows:—The Para firm raised money by the sale of bills of exchange, which they drew on the Liverpool firm, advising them in batches. They then shipped the goods and advised the Liverpool firm of the shipment, forwarding the bills of lading, which made the goods deliverable to the order of the Liverpool firm direct to them, and sent them an account debiting the invoice price of the goods and crediting the amount of some of the bills of exchange and parts of others, so that, interest being charged on both sides to the date of the account, the account exactly balanced. The Liverpool firm became insolvent, and at the time when they stopped payment large quantities of goods were on their way to them from the Para firm. Of the bills credited against the goods some were accepted but not paid, and others had not been accepted. The Para firm having also become insolvent, the trustees in whom their property was vested under the law of Para claimed the goods from the trustee in the Liverpool firm's liquidation, who had taken possession of the goods upon their arrival:—Held, that the relation of the consignors and consignees being that of agent and principal, the property in the goods passed to the Liverpool firm as soon as the goods were shipped and the bills of lading posted to the Liverpool firm, and that it so passed absolutely and not conditionally on the payment or acceptance of the bills of exchange, and that there was no reservation of any lien or charge upon the goods in favour of the consignors, and that, therefore, the trustee in liquidation was entitled to the goods. *Banner, Ex parte, Tappenbeck, In re*, 2 Ch. D. 278; 45 L. J., Bk. 75; 34 L. T. 199; 24 W. R. 476—C.A.

A firm in Ceylon employed a firm in England as their agents and factors, the course of business being that the Ceylon firm consigned cargoes to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee, together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent and executed a creditors' deed under the Bankruptcy Act, 1861, and then T. sold the coffee (which produced more than sufficient to cover the bills drawn against it) and enough of the other securities to satisfy his debt:—Held, that the Ceylon firm was entitled, as against the English firm in liquidation, to have

the remaining securities in T.'s hands marshalled, and to have a lien thereon for the balance due to them upon the coffee transaction. *Alston, Ex parte, Holland, In re*, 4 L. R., Ch. 168; 19 L. T. 542; 17 W. R. 266.

T. carried on business in America as T. & Co.; and also in partnership with M. at Liverpool, as T. & Co. (M. not being a partner in the firm of T. & Co.). On the eve of insolvency T. remitted bills to T. & Co. (represented by M.) in England, with a direction that the proceeds should be specifically appropriated to meet certain bills upon which P. would otherwise (contrary to the course of business arrangements carried on by T. in America) have been liable. Notwithstanding the direction of T., M., upon receiving the bills, handed them over to L., manager of a bank at Liverpool, by whom they were applied (with notice of T.'s direction) in discharge of liabilities of T. & Co. to the bank:—Held, that the bills were received by M. as agent, and not as partner of T., and that T. had not lost his right of directing the appropriation of these bills as assets of the American firm by his partnership in the Liverpool firm. *Thayer v. Lyster*, 30 L. J., Ch. 427; 9 W. R. 360.

Held also, that, looking at the course of dealing between T. and P., the appropriation directed by T. on the eve of his insolvency, in favour of P., did not amount to a voluntary preference; and that, notwithstanding such contemplated insolvency, P. was entitled to sue L. and M. in respect of the proceeds of the bills diverted by them (with full notice) from the specific purpose to which T. had directed their appropriation. *Id.*

**On double Insolvency.]**—The principle of Lord Eldon's decision in *Waring, Ex parte* (19 Ves. 345), namely, that where A. and B. are acceptor and drawer of bills of exchange, and property of the one comes to the hands of the other, to be held as security against the bills, and then both become bankrupt, the bill holders have a right to have the property applied exclusively, in the first instance, in payment of the bills, is applicable as well to cases of double insolvency as of double bankruptcy; and the principle is applicable although the property held as an indemnity is not sufficient to pay the bills in full. *Powles v. Hargreaves*, 3 De G., Mac. & G. 430; 23 L. J., Ch. 1; 17 Jur. 1083.

A trader and a firm of traders having agreed to assist by mutual advances, the following dealings took place between them:—The trader delivered to the firm several acceptances and a quantity of wool, and procured bills of exchange drawn by the firm to be accepted by strangers on the trader's indemnity. He also made payments on account of the firm. The firm on their part advanced to him cash to the amount of 5,000*l.*, and delivered to him several acceptances, exceeding the amount of the acceptances delivered and procured by the trader as above mentioned. By a contemporaneous memorandum, signed by the trader, he stated that he had consigned the wool in consideration of the advance of 5,000*l.*, and that the firm was to be at liberty to sell it if he should not, when called upon, reimburse their advances. The acceptances were chiefly those of strangers. It appeared that the wool was deposited in pursuance of an agreement that it was to be a security for all the advances made by the firm, and there was nothing to shew that the cash received by the firm upon the discount of the acceptances received by them from and on the indemnity of

the trader did not exceed the cash advance of 5,000*l.* On the affairs of the firm and of the trader being wound up, under arrangements analogous to the bankruptcy law:—Held, that the holders of the bills, delivered by the firm to the trader, were entitled rateably to the proceeds of the wool, according to the principle of *Waring, Ex parte*, (19 Ves. 345). *Ackroyd, Ex parte*, 3 De G., F. & J. 726.

L. (of London) drew bills of exchange on K. (of London), having previously arranged with K. that payment of the bills should be secured by mortgages of two estates in the colony of British Guiana. The mortgages were effected in November, 1865, and May, 1866, respectively, and were passed before one of the judges of the colony in the manner in which such securities are there made effective. Later in 1866 L. and K. respectively executed deeds of inspectorship, without assignment of assets. On a bill by certain holders of the bills, claiming the benefit of the security:—Held, that the principle of *Waring, Ex parte*, (19 Ves. 345) applied to the case, and that the plaintiffs and other holders of the bills were, subject to the rights of a prior mortgagee, entitled pro rata to the benefit of the security. *City Bank v. Luckie*, 5 L. R., Ch. 773; 23 L. T. 376; 18 W. R. 1181.

Business transactions were carried on between R. & Co., of London, and B. & Co., of Barbadoes, on a general account between the two houses. The course of business was for B. & Co. to draw bills of exchange upon R. & Co., and sell them in Barbadoes; and in order to keep R. & Co. in funds to meet the bills so drawn upon them, and repay them for any moneys expended on behalf of B. & Co., B. & Co. were in the habit of buying bills in Barbadoes and remitting them to R. & Co. The proceeds of such remittances were carried to the general account between the two firms. Between the time of certain remittances being posted in Barbadoes for transmission to R. & Co., and of the same being received by R. & Co., the London firm became bankrupt. Subsequently B. & Co. also failed:—Held, that, under the circumstances, there was no specific appropriation of the remittances, but that so far as the remittances were in specie at the time of R. & Co.'s bankruptcy, the assignees of B. & Co. were entitled to have the same appropriated to the purposes of the general account, subject to the right of appropriation by the London firm to items in such account; and that on R. & Co. submitting to appropriate the proceeds of such remittances to outstanding acceptances, the order in *Waring, Ex parte*, (19 Ves. 345), must be followed. *Trimingham v. Maud*, 7 L. R., Eq. 201; 38 L. J., Ch. 207; 19 L. T. 554; 17 W. R. 313.

L. & Co. employed S. & Co. as their correspondents at Havannah, and R. as their correspondent in London. They consigned certain cargoes to S. & Co., at the same time informing them that they would draw bills on R. for the value. This they accordingly did, and the bills were accepted by R. Before the bills came to maturity, S. & Co. sent remittances in short bills to R. to cover the amount of the bills, telling him to take them "against the acceptances." R. became bankrupt, and the acceptances were not paid, and soon after S. & Co. became insolvent:—Held, that the remittances must be applied to meet the acceptances, under the rule of *Waring, Ex parte* (19 Ves. 345). *Smart, Ex parte, Richardson,*

*In re*, 8 L. R., Ch. 220; 42 L. J., Bk. 22; 28 L. T. 146; 21 W. R. 237.

It is no objection to the application of the rule in that case that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable. *Id.*

Two distinct firms, L. & Co., of Bombay, and G. & Co., of London, were engaged in a joint adventure for buying and selling goods in England and India. The course of business as to the homeward shipments was that L. & Co. drew bills on G. & Co., which they discounted in India, and with the proceeds purchased cotton, which they consigned to G. & Co. specially to meet the acceptances. Both firms stopped payment, and went into liquidation. The holders of unpaid acceptances of G. & Co., which had been drawn in this way, claimed to have the proceeds of certain shipments of cotton specially appropriated to meet the acceptances:—Held, that the bill-holders were entitled to have the cotton specially appropriated upon the principle of *Waring, Ex parte* (19 Ves. 345), but subject to the rights of the creditors, if any, of the aggregate firms to have the cotton applied as part of the aggregate assets. *Dewhurst, Ex parte, Leggatt, In re, Gladstones, In re*, 8 L. R., Ch. 695; 42 L. J., Bk. 87; 29 L. T. 125; 21 W. R. 874.

—Where *Ex parte Waring* does not apply.] —M. borrowed money from a company, for which he accepted and gave to them bills of exchange, and deposited shares as a collateral security. When the bills became due M. wished the loan continued, and the managing director of the company sent him for acceptance fresh bills, with a letter stating them to be in place of those falling due. M. accepted the new set of bills on that footing. After this M. died insolvent, and the company was ordered to be wound up, and was admitted to be utterly insolvent. Both sets of bills had been negotiated, and were outstanding. The holders of the first set of bills applied to have such first set paid by means of the deposited shares, on the principle of *Waring, Ex parte*, (19 Ves. 345):—Held, that *Waring, Ex parte*, did not apply in favour of the holders of the first set of bills, for that the company, after receiving the new bills in place of the old ones, were bound to indemnify M. against the old ones, and had no right to apply his shares in payment of them. *General Rolling Stock Company, In re, Alliance Bank, Ex parte*, 4 L. R., Ch. 423; 38 L. J., Ch. 714.

R. & Co., of Brazil, in the course of exchange operations with A., of Manchester, drew bills on him for 2,000*l.* which they sold, and about the same date transmitted to A. acceptances of another house for 1,900*l.* to cover the bills drawn. Before the covering remittances reached England, R. & Co. stopped payment and presented a petition for liquidation. A., being also in difficulties, refused to accept the bills drawn on him, and also became a liquidating debtor. The purchaser and holder of the dishonoured bills filed a bill against the trustees of the estates of R. & Co. and A., praying that the remittances might be applied in payment of the bills:—Held, that he had no equity to support the bill. *Vaughan v. Halliday*, 9 L. R., Ch. 561; 30 L. T. 741; 22 W. R. 886. Reversing 30 L. T. 249; 22 W. R. 503.

The doctrine of *Waring, Ex parte*, (19 Ves. 345) does not apply to a case where the bills

drawn by one of the insolvent firms on the other have not been accepted, nor in any other case in which the holder of the bills has no right of double proof against the two firms. *Id.*

A. contracted to build an iron steamship for B. for 7,600*l.* The money was to be paid by instalments at specified periods, as the building of the ship progressed, partly in cash and partly in bills, and from the time of paying the first instalment the ship was to be the property of B., to the extent of his advances, subject to A.'s lien for any unpaid instalments. B. gave his acceptances from time to time to the amount of 2,700*l.* to A., who discounted them with his bankers in the ordinary course. Before the ship was completed, A. and B. both became insolvent, and the bills were consequently dishonoured at maturity. B.'s creditors resolved to accept a composition, and their resolution was duly registered. B. subsequently abandoned the contract, and the trustee under A.'s bankruptcy finished the ship. The bankers, the holders of the bills, which were expressed to be drawn "for value received in iron screw steamer now building," claimed to stand in B.'s place, and to be entitled to a lien upon the ship for the moneys they had advanced on the bills:—Held, that the doctrine of *Waring, Ex parte* (19 Ves. 345), did not apply, and that the bill-holders were not entitled to the lien claimed by them. *Lambton, Ex parte, Lindsay, In re*, 10 L. R., Ch. 403; 44 L. J., Bk. 81; 32 L. T. 380; 23 W. R. 662. Affirming, *S. C.*, nom. *Greener, Ex parte, Lindsay, In re*, 32 L. T. 205.

The rule in *Waring, Ex parte* (19 Ves. 345), only applies to cases of double bankruptcy or insolvency, in which the estates of both parties are subject to an obligatory administration, and are under the control of the court. It has no application, therefore, to a case where one of the parties residing abroad had entered into a composition with his creditors which did not operate to bring him or his estate within the jurisdiction of the court. *General South American Company, Ex parte, Yglesias, In re*, 10 L. R., Ch. 635; 45 L. J., Bk. 54; 33 L. T. 112; 23 W. R. 843.

L. deposited certain securities with a company upon an agreement that the company might sell them and apply the proceeds in reimbursing themselves any money owing by L. to them. Subsequently the company accepted bills for L.'s accommodation. Afterwards, before the bills were paid, the company went into liquidation, and L. made an assignment for the benefit of his creditors. The only liability of L. to the company was in respect of these bills:—Held, that *Waring, Ex parte* (19 Ves. 345), did not apply, and that neither the bill holders nor L. were entitled to have the proceeds of the sale of the securities applied in payment of the bills. *New Zealand Banking Corporation, In re, Levi, Ex parte*, 7 L. R., Eq. 449; 20 L. T. 296; 17 W. R. 565.

A merchant in Spain was in the habit of drawing upon a firm of London merchants bills which they accepted for his accommodation, receiving from him a commission for so doing. To provide for the payment of these acceptances at maturity, and to keep the acceptors out of cash advances, the drawer used to remit to them other bills, which were specifically appropriated to meet the acceptances. The acceptors filed a liquidation petition, under which their creditors resolved to accept a composition. At the date of the filing

of the petition, specifically appropriated remittances to a large amount were in the possession of the liquidating debtors, and came into the hands of the receiver appointed under their petition. The merchant in Spain had also become insolvent, but no bankruptcy proceedings had been instituted against him:—Held, that the liquidating debtors were only entitled to be indemnified by means of the remittances against all liability on their acceptances; that, as their creditors had resolved to accept a composition, the only liability they had incurred on their acceptances was the amount of the composition, and that, therefore the merchant in Spain was entitled to have his remittances returned to him, subject to the amount of the composition thereon. *Gomez, Ex parte, Yglesias, In re*, 10 L. R., Ch. 639; 32 L. T. 677; 23 W. R. 780.

#### 7. MATERIALS BEING USED BY BANKRUPT IN EXECUTION OF CONTRACTS.

A contract by a trader to do works, contained a clause, that if he should become bankrupt, or delay proceeding with the works, his employer should have power, after a seven days' notice to him to proceed, to employ others to do the work, the advances made to the trader before his default should be taken as full payment, and all tools and materials being upon the works should become the property of the employer. The trader, having delayed to proceed with the works, was served on the 11th of April by his employer with notice to proceed. On the 17th of April the trader committed an act of bankruptcy; on the 19th April, the notice to proceed not having been complied with, his employer took possession of the tools and materials. Afterwards a fiat issued against the trader. In trover by his assignees, against the employer for tools and materials left upon the works by the bankrupt:—Held, that they did not become the property of his employer at the expiration of the seven days' notice, because they had vested in his assignees by relation on the 17th April, before the notice had expired. *Rouch or Roach v. Great Western Railway Company*, 4 P. & D. 686; 1 Q. B. 51; 2 Railw. Cas. 505; 5 Jur. 821.

H. & Co., being under a contract to deliver a quantity of sleepers to the defendants, applied to them for an advance of 600*l.* on a cargo of timber which had arrived, and was being discharged, but was not sawn up into sleepers, and which they stated would be sawn up in a day or two, and would then be worth 900*l.* The defendants gave a cheque for the 600*l.* after which, and before any of the cargo was delivered, one of the firm of H. & Co. committed an act of bankruptcy. The defendants thereupon seized the timber, a part of which only had been sawn into sleepers. In an action by the assignees of H. & Co., against the defendants, for the conversion of the timber:—Held, that what passed between the parties, at the time the advance was made, constituted an agreement in equity that the cargo should stand charged as security for the 600*l.*; and that the property did not pass to the assignees, so as to enable them to bring an action. *Langton v. Waring*, 18 C. B., N. S. 315; 11 L. T. 633; 13 W. R. 347.

A. contracted with W. to build a barge by the 5th June, and hired a yard for the purpose of performing the work. In June the work was not completed; but W. having made certain

advances, it was agreed, in writing, that the barge should be a security in the hands of W. for such advances. In July A. became bankrupt. The advances made by W. exceeded the value of the work done :—Held, that W. was entitled to a lien upon the barge, subject to the right of the assignees to complete the contract. *Watts, Ex parte*, 32 L. J., Bk. 35 ; 9 Jur., N. S. 238 ; 7 L. T. 585.

**Ships in course of Construction.]**—In March, 1854, J., a shipbuilder and manufacturer of steam-engines for ships, contracted to build a screw steamer for the plaintiff, according to specifications, for 16,000*l.*, to be paid by instalments of four sums of 1,000*l.* each, on days named in four successive months ; 3,000*l.* on a day named, "provided the vessel was plated and her decks laid ;" 3,000*l.* on a day named, "provided she was then ready for trial ;" 3,000*l.* on a day named, "provided she was according to contract, and properly completed ;" and the last 3,000*l.* on a given day after. The building of the ship was carried on under the superintendence of the plaintiff's agent, who from time to time rejected materials intended to be used, and caused others to be substituted. Soon after the building of the ship began, the plaintiff named her *The Britannia*, and she was thenceforth known by that name by J. and his workmen ; and in October, 1854, by the plaintiff's request, his name was punched on the keel. In November, the plaintiff pressed J., whose affairs had become embarrassed, to execute an assignment to him of *The Britannia*, and the engines and other fittings then in preparation for her : but J. refused, though he admitted that she was the property of the plaintiff. In December, J. became a bankrupt. In trover by the plaintiff against his assignees :—Held, affirming the judgment of the Queen's Bench, that the property in the ship passed to the plaintiff as she advanced in her progress ; but (reversing the judgment of the Queen's Bench), that the property in the materials purchased for, and destined to form part of, the ship, but which had not been inspected by the surveyor and adjusted to the ship, did not pass. *Wood v. Bell (in error)*, 6 El. & Bl. 355 ; 25 L. J., Q. B. 321 ; 2 Jur., N. S. 664—Ex. Ch. *S. C.*, in Q. B., 5 El. & Bl. 772 ; 25 L. J., Q. B. 148 ; 2 Jur., N. S. 349.

By an agreement between Y., who afterwards became a bankrupt, and the defendant, it was agreed that Y. should build a ship for the defendant on certain terms ; and it was also agreed, that in case Y. should fail to complete the ship according to such terms, the defendant might enter upon and take possession of the ship (which was to be then deemed the property of the defendant), and "cause the works thereby agreed to be done to be completed by any person whom he should think fit to employ, using such of the materials of" Y. as should be applicable to the purpose. A ship was laid down by Y. in his building yard, but he afterwards failed to complete the same, and the defendant entered and took possession of it according to the agreement. At that time there was a stock of timber belonging to Y. in his building yard, and provided by him for building the ship, and between the day the defendant so entered and the act of bankruptcy of Y., the defendant assorted into lengths all the timber applicable to the completion of the ship, and he removed a quantity of

it within the frame of the ship, but such timber was not at that time actually attached to the ship, though all was eventually, but after the act of bankruptcy, used by the defendant in completing the ship :—Held, that there had been no user of the timber by the defendant before the bankruptcy of Y. according to the meaning of the word "using" in the contract, and that the defendant had therefore acquired no property in the timber, but that the same passed to the assignees of Y. under his bankruptcy. *Baker v. Grey*, 17 C. B. 462 ; 25 L. J., C. P. 161 ; 2 Jur., N. S. 400.

A. contracted with B. to build a ship, and furnish her with every requisite for sea, the price to be paid by four instalments ; two to be paid in the progress of the work, and the others when the vessel was finished and launched. The two first instalments were paid at the times stipulated : when the hull was ready for launching, the ship was measured and surveyed with the privy of the builder ; and the master, who had been previously appointed, entered into the usual bond for the delivery of the register at the custom-house ; the ship was then registered in the name of the purchaser, and all the requisites of the register acts were complied with. The builder then received the third instalment. Before the ship was launched, the purchaser advertised for freight, chartered her for a voyage, and hired a crew, with the privy of the builder. The ship was not, in fact, launched, as stated in the register, but remained in the builder's yard ; and his men were at work upon her until the 3rd July. From the early part of June to the 30th of that month, an apprentice of the master was employed in the ship ; and on the 1st July his bedding was put on board. On the 30th June the builder committed an act of bankruptcy, and on the 8th July a commission issued against him. On the 2nd of July the purchaser took possession of the vessel whilst she remained on the builder's wharf, and took away a rudder and cordage ; and on the 4th she was launched, and afterwards equipped for sea at the purchaser's expense, the fourth instalment remaining unpaid :—Held, that as between the bankrupt and the purchaser there was such a transfer to, and general ownership in, the latter, as to exclude the operation of 21 Jac. 1, c. 19, s. 11, and bar an action of trover at the suit of the assignees ; but that they were entitled to such portion of the fourth instalment as should remain due after satisfying the expenses of completing the vessel for sea, according to the contract, and for which the bankrupt would have had a lien on the vessel. *Woods v. Russell*, 1 D. & R. 587 ; 5 B. & A. 942.

P. contracted with a shipbuilder to build him a ship for a certain sum, to be paid by instalments as the work proceeded ; the first instalment when the vessel was rammed, the second when she was timbered. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignees for the ship :—Held, that on the first instalment being paid, the property in the portion then finished became, by virtue of the contract, vested in P., subject to the right of

the builder to retain such portion for the purpose of completing the work, and earning the rest of the price: and that each material subsequently added became, as it was added, the property of P., as the general owner. *Clarke v. Spence*, 4 A. & E. 448; 6 N. & M. 399; 1 H. & W. 760.

In 1833, and until his bankruptcy, L. carried on the business of a shipbuilder, and on the 10th June, 1833, the following agreement was entered into:—"Particulars and description of a new ship, now about one-third built in the yard of L.;" then there followed a description of the length, breadth and depth of the ship, the number of tons she was to carry, and the timbers, and particulars of every thing she was to be built of and supplied with, "for 1,750*l.* and payment as follows opposite to each respective name." This agreement was signed by L., and after his signature followed these words:—"We, the undersigned, engage to take shares in the before-mentioned vessel as set opposite to our respective names, and also the mode of payment." The agreement was signed by several persons for different shares and at different times, and, amongst the rest, by the plaintiff for one-fourth in October, 1833. Below these signatures was written the following:—"14th July, 1833, I hereby agree to accept the above price and mode of payment, L." The plaintiff proved payment for his share by bills before the bankruptcy of L. A company signed the agreement for one-fourth, of which company H. was a member, and used to go to look at the vessel when building, and occasionally found fault with the work, which was improved in consequence; and L. told his foreman to act under H.'s direction. At the time of the bankruptcy, the frame of the vessel was on the stocks in L.'s building-yard in an unfinished state; and after the bankruptcy, some of the men continued to work upon her, and receive their money from H. :-Held, that under these circumstances, the property in one-fourth of the vessel did not pass to the plaintiff. *Laidler v. Burlinson*, 2 M. & W. 602.

Shipbuilders on the 11th of April by a written instrument of that date agreed to build a vessel for a purchaser, at a price payable by instalments. The agreement had been negotiated for the purchaser by a shipbroker, who had, pending the negotiations, and before the agreement was signed, advanced 400*l.* to the shipbuilders, who had already commenced building the vessel, upon the understanding that it was to be secured to him by an assignment of the agreement when perfected, and by a charge or lien on the vessel. Accordingly, by a deed of the 12th of April, the builders, in consideration, as was therein stated, of 500*l.*, on or immediately before the execution of the deed, paid by the broker to the builders, assigned the agreement to the broker; and it was agreed that, subject to a lien given by that agreement to the purchaser, the vessel, and all stores about the builders' yard, should be the property of the broker, to be held in lien to the extent of all moneys due from the builders to the broker, and that the aggregate of moneys secured should not exceed 500*l.* Upon the execution of this agreement the broker advanced to the builders the further sum of 100*l.* On the 19th of May the agreement of the 11th of April was cancelled, owing to differences between the builders and the purchaser; and the former, for the purpose of securing the broker from loss by reason of the cancellation, proposed to him that

he should become the absolute owner of the vessel. He assenting thereto, an agreement was signed by the parties on and dated the 20th of May, whereby the builders agreed to sell, and the broker agreed to purchase, the hull of a new vessel then in course of building by the builders at their yard, to be completed according to specification for 1,150*l.*; and the 500*l.* already advanced by the broker to the builders should be taken as part payment of the purchase-money, and that if the builders did not finish the vessel by the 21st of June, or should before its completion cease working at it, the broker might enter the builders' yard and complete with their materials and at their cost. The builders made no further progress with the vessel, and were adjudicated bankrupts on the 2nd of June. Neither the assignment of the 12th of April, nor the agreement of the 20th of May, was registered under the Bills of Sale Act, and the vessel was never registered under the Shipping Acts; but on the 20th of May the builders granted, under the provisions of the Merchant Shipping Act, 1854, the usual builders' certificate, whereby they certified that they had built the vessel for and on behalf of the broker. The evidence shewed that the moneys advanced by the broker were not applied specifically to the building of the vessel, but were applied generally for the purposes of the builders' business, and that the builders were utterly insolvent on the 20th of May, and probably were so on the 12th of April; that before the 20th of May rumours were current in the town that they had stopped payment and had paid off their workmen, except their foreman and apprentices, and that these rumours were well founded; but, on the other hand, the evidence failed to show either that these rumours were so general as that they ought to be assumed to have reached the broker; or that the broker was in any manner aware of the insolvency of the builders on the 20th of May, or until after that date. Upon a bill filed by the broker against the assignees in bankruptcy of the builders:—Held, first, that he had no title to relief under the agreement of the 12th of April, because it was by the agreement of the 20th of May merged into and taken as part payment of the purchase-money under that agreement. *Swinston v. Clay*, 3 De G., J. & S. 558; 32 L. J., Ch. 503; 8 L. T. 563; 11 W. R. 811.

Held, secondly, that he was entitled to relief to the extent of 500*l.* and interest (Knight Bruce, L. J., however, expressing a doubt as to the propriety of this limitation), under the agreement of the 20th of May, because the Bills of Sale Act had no application to the case, and the vessel was not in the order and disposition of the bankrupts; and the sole question being, whether there was a fraudulent preference of the broker by the builders, the evidence failed to shew it. *Id.*

If a shipbuilder makes a rudder, intending it to form part of a ship when completed, and the purchaser of the ship treats it as the ship's rudder, though it is never attached to the ship, and remains unfinished in the builder's possession at his bankruptcy, this is evidence for the jury that the rudder is that of the ship, and the property of the purchaser. *Goss v. Quinton*, 4 Scott, N. R. 471; 3 M. & G. 825; 12 L. J., C. P. 173.

#### 8. SHIPS, CARGOES AND FREIGHTS.

**Ship sold by Bankrupt—Bill of Sale un-**  
F R 2

**registered.**]—A purchaser, by a bill of sale, in due form, from one who afterwards becomes a bankrupt, has a good legal title, though unregistered, against the bankrupt and all who claim under him, by 17 & 18 Vict. c. 104. *Scapleton v. Haymen*, 2 H. & C. 918; 33 L. J., Ex. 170; 10 Jur., N. S. 497; 12 W. R. 317.

**Cargoes.**]—The owners of a ship sent her to Charleston, where a cargo of cotton was put on board, with which she returned to this country; on her arrival the mortgagee of the ship took possession of the ship and cargo:—Held, that the assignees of the owners, who had become bankrupt before the arrival of the vessel, were entitled to maintain trover against the mortgagee for the cargo. *Brancher or Branker v. Molyneux*, 3 Scott, N. R. 332; 3 M. & G. 84; 5 Jur. 778.

**Freight.**]—Action for freight due on a charter-party; plea, the bankruptcy of the plaintiffs; replication, that the plaintiffs before their bankruptcy were indebted to D. & Co., and by an order indorsed on the charter-party requested the defendants to pay D. & Co. all sums which should become due on the charter-party; that the charter-party, with the order indorsed, was delivered to D. & Co., and that the defendants had notice of the order. The rejoinder traversed the notice. The plaintiffs having offered their ship to the defendants on charter, at 16s. per ton per month, the latter objected, on the ground that the ship was too large. Whereupon the plaintiffs offered to take half the ship, or adventure in partnership with the defendants. It was thereupon arranged that a charter-party should be executed by the plaintiffs and defendants, and that an agreement as to the adventure should be signed by A., the plaintiffs' clerk, as their agent, and a memorandum of guarantee should be signed by the plaintiffs. The agreement stated, that the trading cargo should be upon the joint account and risk of the defendants and A.; and that, after payment or deduction of the freight, the profit or loss should be borne and received or paid by the parties in equal moieties. The plaintiffs guaranteed A. from all losses and expenses happening in the course of such trading. The plaintiffs, being indebted to D. & Co. in a large sum of money, subsequently deposited the charter-party with them as a security, with an indorsement upon it, directed to the defendants, requiring them to pay the amount due to D. & Co. Notice of this was afterwards given to the defendants. The plaintiffs subsequently became bankrupts. The action was brought by D. & Co., in the names of the bankrupts, to recover the freight due under the charter-party:—Held, first, that the defendants were bound, in the first instance, to pay the freight to the plaintiffs, and that, on the final settlement of accounts, the profit or loss was to be borne by the parties in equal proportions. *Boyd v. Mangles*, 3 Ex. 387. Held, secondly, that the transactions amounted to an absolute assignment to D. & Co. of the plaintiffs' interest in the freight, so as to prevent it vesting in their assignees, and that the plaintiffs were entitled to recover as trustees for D. & Co. *Id.*

A., in consideration of money advanced and to be advanced by B. & Co., assigned all the freight to arise from a ship, under any existing or future charter-party or other contract, for or

in respect of her intended voyage to India and back to England. After the freight had been earned and ascertained, A. became bankrupt:—Held, that such assignment was good, and that his assignees were not entitled to sue for the freight. *Leslie v. Guthrie*, 1 Scott, 683; 1 Bing. N. C. 697; 1 Hodges, 83.

**Ships in course of Construction.**]—See Materials being used by Bankrupt in Execution of Contracts, *ante*, col. 866.

## 9. LEGACIES.

A legacy left to a bankrupt at any time before the allowance of the certificate passes under the assignment. *Tudway v. Bowen*, 2 Burr. 716; 2 Ld. Ken. 423.

So, a legacy falling to a bankrupt before allowance of his certificate, by the testator's death, pending an unfounded petition to stay it, goes to his assignees, unless the petition was presented with that object. *Ansell, Ex parte*, 19 Ves. 208.

**Annuity to Cease on Alienation.**]—An annuity given by will to a trader for life, payable to him only upon his own receipt, and no other, and to cease immediately upon alienation, does not pass by the assignment, as by that act it ceased. *Dommett v. Bedford*, 6 T. R. 684; 3 Ves. jun. 149.

But an annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge, passes on A.'s bankruptcy to his assignees. *Graves v. Dolphin*, 1 Sim. 66.

## 10. LICENCE OF PUBLIC-HOUSE.

A lease of a public-house, determinable on the bankruptcy of the lessee, contained a covenant by the lessee upon the determination of the term to assign the licences to the lessor. The lessee having become bankrupt before the expiration of the term:—Held, that his trustee took no interest in the licences, and that the covenant was valid, entitling the lessor to have the licences delivered up to him, though they were not assignable. *Royle, Ex parte, Britnor, In re*, 46 L. J., Bk. 85; 25 W. R. 560.

## 11. MONEY PAYABLE TO BANKRUPT ON A CONTINGENCY.

A solicitor pending a suit in chancery received from A., his client, in 1846, his bill for costs already incurred, upon an agreement with A. to refund the amount to him in the event of his obtaining a decree for costs in the suit. A. became bankrupt in 1847, and shortly after obtained his certificate, and died. The suit proceeded (the assignees not interfering), and a decree was pronounced under which the costs were awarded to A., and were received by the solicitor. In an action against the solicitor by A.'s assignees:—Held, that the contingent right to have the amount advanced by him for costs repaid under the agreement (which was a valid agreement, and made upon a sufficient consideration), was an interest in A., which, on his bankruptcy, passed to his assignees; and, consequently, that they were en-



titled to recover the sum so paid to A., as money received to their use. *Morgan v. Taylor*, 5 C. B., N. S. 653; 28 L. J., C. P. 178; 5 Jur., N. S. 791; 7 W. R. 285.

By a decree, the solicitor, in addition to the sum paid to him by A. in 1846, received a further sum for costs due to a former solicitor in the suit:—Held, that the assignees were not entitled to receive this sum, although it appeared that no claim had been made thereto by such former solicitor. *Ib.*

**Contingent on obtaining Discharge.**—Interest in property given to an uncertificated bankrupt, contingently on his obtaining his certificate, passes to his assignees on the happening of that event. *Davidson v. Chalmers*, 33 Beav. 653; 33 L. J., Ch. 622; 10 Jur., N. S. 910; 11 L. T. 217; 12 W. R. 592.

A testatrix provided, that in case her nephew, who was an uncertificated bankrupt, should obtain his certificate, so as to be enabled to hold and enjoy real and personal estate for his own absolute personal use, enjoyment and benefit, free from the control of any other person, the income of her residue should be paid to him for life. On his subsequent discharge, under 24 & 25 Vict. c. 134, s. 180:—Held, that his life interest passed to his assignees as a contingent interest then coming into possession. *Ib.*

## 12. PATENT RIGHTS.

A patent right, for the exclusive exercise of an invention, obtained from the crown, by an uncertificated bankrupt, is affected by the previous assignment of the commissioners, and vests in the assignees. *Heise v. Stevenson*, 3 B. & P. 565.

**Proviso for Forfeiture if held in Trust for more than Five Persons.**—If, by a private act of parliament, the sole making of a newly-invented machine is vested in certain persons, with a proviso that it shall be forfeited in case it shall become "vested in, or in trust for, more than five persons or their representatives otherwise than by devise or succession (reckoning executors and administrators only as the single persons they represent):"—Held, that if one of the persons becomes bankrupt, the right passes to his assignees; and that though there are more than five creditors, yet the assignees do not hold it in trust for "more than five persons, otherwise than by devise or succession," within the meaning of the act. *Bloxam v. Elsec*, 1 C. & P. 558; R. & M. 187.

## 13. PENSIONS AND ALLOWANCES.

A pension payable to a military officer on his retirement from the service of the East India Company does not, upon his bankruptcy, pass to his assignees; such pension not being granted by deed, and consequently not recoverable by an action. *Gibson v. East India Company*, 7 Scott, 74; 5 Bing. N. C. 262.

**Pension of Retired Civil Servant of Crown is "Income."**—The effect of sects. 15 and 17 of the Bankruptcy Act, 1869, is to vest in the trustee in a bankruptcy all the "property" of the bankrupt of whatever nature, including the matters dealt with by sect. 23 and sects. 87 to 95, but subject to the exceptions and qualifications intro-

duced by those sections. The pension of a retired judge of a crown colony, granted by the Secretary of State for the colonies, and voted annually by the legislature of the colony, is, in case of the bankruptcy of the judge, "property" which vests in the trustee in the bankruptcy, but it is "income" of the bankrupt within sect. 90 of the Bankruptcy Act, 1869, and is subject to the power thereby given to the court to determine how much of it shall be set aside for the benefit of the bankrupt's creditors. *Huggins, Ex parte, Huggins, In re*, 21 Ch. D. 85; 51 L. J., Ch. 935; 47 L. T. 559; 30 W. R. 878—C. A.

**Voluntary Allowance is not "Salary or Income" of Bankrupt.**—A purely voluntary allowance made to a bankrupt is not "income" within the meaning of s. 90 of the Bankruptcy Act, 1869, and no order can be made for the payment of any part of such an allowance when received by the bankrupt, to the trustee in the bankruptcy. In order that s. 90 may apply, the payment must be one to which the bankrupt has a legal or equitable claim. *Wicks or Chatterby, Ex parte, Wicks or Wiz, In re*, 17 Ch. D. 70; 50 L. J., Ch. 620; 44 L. T. 836; 29 W. R. 525—C. A. Reversing, 44 L. T. 159; 29 W. R. 400.

## 14. STOCKS AND SHARES.

**Stock held by Bankrupt as Trustee.**—Stock standing in the name of a bankrupt in trust for other persons did not pass to his assignees under 6 Geo. 4, c. 16, s. 72, although it was not entered in the name of the bankrupt as trustee in the bank books. *Witham, Ex parte*, 1 Mont. D. & D. 624.

**Stock Registered in Fictitious Name.**—Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the court, on a bill filed by the assignees against the Bank of England, ordered the bank to erase from their books the fictitious name, and insert that of the bankrupt. *Green v. Bank of England*, 3 Y. & C. 722.

**Election of Assignees to take.**—A shareholder in a railway company having become bankrupt, afterwards, and before he obtained his certificate, calls were made. The assignees possessed themselves of the scrip, and a correspondence took place between the official assignee and the trade assignee, in the course of which the latter sent the former a statement of the bankrupt's property, comprising in it the value of the shares, and resulting in an estimate of the probable amount forthcoming to work the flat and pay dividends. The trade assignee subsequently wrote to the official assignee, suggesting the propriety of selling the shares, which continued in the possession of the assignees:—Held, that there was no sufficient evidence to warrant a jury in concluding that the assignees had accepted the shares. *South Staffordshire Railway Company v. Burnside*, 6 Railw. Cas. 611; 5 Ex. 129; 20 L. J., Ex. 120.

R., became bankrupt, being possessed of 100 shares in an incorporated company, which were standing in his name in the company's books. Only 25*l.* per share had been paid. The shares were of no value at the time of the bankruptcy. R. handed the certificates of the shares over to his assignees. For five years after the bank-



ruptcy, neither the assignees, nor the bankrupt, nor the company took any step respecting the shares. At last, the shares having risen in value, the assignees claimed them, and demanded to be registered in the company's books as the owners. This the company declined to do. An action was brought by the assignees, and, on an issue joined on the allegation that the assignees were owners of and entitled to the shares, it was contended for the company that, as the possession of these shares was coupled with a liability to pay the remaining 75*l.* per share, the property in them did not vest in the assignees until they accepted them; that it was necessary for the assignees to do some act to denote acceptance, and do that act within a reasonable time after the bankruptcy; that the question of reasonable time was a question of law for the judge; and that five years' delay unexplained was an unreasonable time in law:—Held, that, assuming an acceptance of the shares was necessary to prove the assignees' title, and that the acceptance ought to be within a reasonable time, still that the facts proved were evidence of their title, and that the question of reasonable time was for the jury; but that the judge ought to direct the jury that the reasonable time for accepting did not begin to run until some party interested in the shares had taken some step respecting them. *Graham v. Van Diemen's Land Company*, 11 Ex. 101; 3 O. L. R. 887; 24 L. J., Ex. 213; 1 Jur., N. S. 806—Ex. Ch.

See further, ORDER AND DISPOSITION, *post*.

#### 15. STOCK EXCHANGE DIFFERENCES.

In an action by assignees of a bankrupt, for money received by the defendant for the assignees, it appeared that the defendant was official assignee of the Stock Exchange for the management of the estates of those members who, being unable to fulfil their engagements on the Stock Exchange, become defaulters. Before the receipt of the money by the defendant, the bankrupt, a stockbroker and member of the Stock Exchange, was declared a defaulter, having at the time contracts with members of the Stock Exchange, which had the form of legal contracts for the sale and delivery of stock, but there was no intention that stock should be delivered, and the contracts were to be settled by the payment of differences. Under the rules of the Stock Exchange the defendant collected the differences upon the contracts upon which the bankrupt was a gainer, and, before notice of an act of bankruptcy, distributed among members, to whom the bankrupt was indebted for differences, all except a small amount, which was paid over, after he was adjudicated a bankrupt under 12 & 13 Vict. c. 106, s. 223, to the treasurer of a fund for decayed members, according to the rules of the Stock Exchange:—Held, that the action could not be maintained, because, as to the money paid over before the adjudication, it was not money had and received by the defendant to the use of the assignees. And as to the money paid over after the adjudication, the contracts, as well as the payment and receipt of the differences, being illegal by 7 Geo. 2, c. 8, neither the bankrupt nor his assignees could maintain an action to enforce the contracts or recover the sums paid. *Nicholson v. Gooch*, 5 El. & Bl. 999; 25 L. J., Q. B. 137; 2 Jur., N. S. 303.

Held also, that the differences were not paid to the defendant as the agent of the bankrupt, but for the purpose of being distributed among the Stock Exchange creditors of the bankrupt. *Id.*

By the rules of the London Stock Exchange, when a member is declared a defaulter, the contracts for the sale and purchase of stocks and shares, which have been made by him for the next settling or account day, are closed by a person, called the official assignee, appointed by that body, at the market prices of the stocks and shares, the subjects of the contracts, at the time of the default, and those members who, on that footing, owe differences upon their contracts with the defaulter are bound by the rules, on pain of being themselves declared defaulters, to pay those differences to the official assignee. And the official assignee is bound by the rules to employ the moneys thus received by him in the first place in paying to those members, to whom, upon the same footing, differences are due upon their contracts with the defaulter, the differences so due to them:—Held, that the moneys thus received by the official assignee, being an artificial fund created by the rules of the Stock Exchange, do not form part of the assets of the defaulter, and do not pass to his trustee in bankruptcy. *Grant, Ex parte, Plumby, In re*, 13 Ch. D. 667; 42 L. T. 387; 28 W. R. 755—C. A.

See further, PROTECTED TRANSACTIONS, *post*.

#### 16. PROPERTY OF BANKRUPT'S WIFE.

**Wife's Chose in Action.**—Assignees cannot in their names alone maintain an action to recover the amount of a promissory note made to the wife of the bankrupt before her marriage. *Sherington v. Yates*, 1 D. & L. 1032; 12 M. & W. 853; 13 L. J., Ex. 249—Ex. Ch.

An action for the conversion of goods of a wife effected before marriage, is vested in the assignees on the bankruptcy of the husband, such right being one which, if vested in the bankrupt before the bankruptcy, must have accrued to the assignees on their appointment. *Richardson v. Alexander*, 10 C. B., N. S. 324; 30 L. J., C. P. 268; 8 Jur., N. S. 13.

The action for such conversion of the wife's goods before marriage must be brought, on the bankruptcy of the husband, without having previously vested it in himself, in the name of the wife and assignees. *Id.*

**Wife's Executory Interest.**—A. bequeathed a house to B. for the residue of a term of years, if B. should so long live, and continue to inhabit therein; and after B.'s decease, or giving up the possession, A. bequeathed the house to C., the wife of B., for the remainder of the term, in case she should so long live therein and remain the widow of B., with further limitations to the issue of B. B. entered with the assent of the executors of A. B., being in insolvent circumstances, went to sea for six months: C. continued to occupy the house and to carry on B.'s trade therein. During the absence of B., a commission of bankruptcy issued against him. After his return, B. continued the occupation and the business until the house was sold by his assignees, when B. and C. were turned out of possession by the vendee. B. died. C. remaining a widow, demanded possession:—Held, that the bequest to C. did not, in equity, enure as a

limitation to her separate benefit, and that her executory estate passed to the assignees of B., as being such an interest as B. could "lawfully depart withal." *Doe v. Shaw v. Steward*, 3 N. & M. 372; 1 A. & E. 300.

**Money of Wife paid into Bank to Credit of Debtor.**—Money raised by a wife by the mortgage of her separate estate, and paid into a bank to the credit of her husband, who drew cheques upon it for various purposes as occasion required, is equivalent to a gift to him from the wife, and upon a liquidation of his affairs passes to the trustee. *Grainger, Ex parte*, 24 L. T. 334.

#### 17. PARTNERSHIP PROPERTY.

**Where one Partner is Solvent.**—The assignees can obtain no share of the partnership effects until they first satisfy all that is due from the bankrupt partner to the partnership. *Holderness v. Shackels*, 8 B. & C. 612; 3 M. & R. 25.

Under a separate commission, the assignees and the solvent partners are tenants in common. *Barker v. Goodwin*, 11 Ves. 83.

The assignee of a bankrupt partner is a tenant in common of the partnership goods with the solvent partner, and therefore cannot maintain an action for their conversion against an auctioneer for selling such goods by direction of the solvent partner. *Lewis v. White*, 8 L. T. 320.

One of two tenants in common of goods committed an act of bankruptcy; after which the defendant, by direction of the other tenant in common, sold the goods:—Held, first, that the assignees of the bankrupt could not recover from the defendant the proceeds of the sale in an action for money had and received, nor maintain detinue. *Morgan v. Marquis*, 9 Ex. 145; 2 C. L. R. 276; 23 L. J., Ex. 21.

Held, secondly, that the defence that the goods were sold by direction of the solvent partner might be given in evidence under non detinet. *Id.*

Where partnership goods had been taken in execution upon a bonâ fide judgment against a solvent partner whose co-partner was bankrupt; upon a bill filed by the assignee, an injunction was granted to restrain the judgment creditor, who had purchased all the share, right and interest of the solvent partner in the goods, and had subsequently professed to sell the whole as her own property, from delivering possession of the goods to the purchaser. *Fraser v. Kershaw*, 2 Kay & J. 496; 25 L. J., Ch. 445; 2 Jur., N. S. 880.

**Where Partnership is Insolvent.**—On the appointment of a trustee of a joint estate under a liquidation petition filed by partners, the separate estate of each of the partners, as well as their joint estate, vests in him. *Philps, Ex parte, Moore, In re*, 19 L. R., Eq. 256; 44 L. J., Bk. 40; 31 L. T. 735; 23 W. R. 230.

The separate creditors of one of the partners, therefore, though they may afterwards resolve to accept a composition in satisfaction of their separate debts, cannot vest the separate estate in any other trustee. But it is the duty of the trustee appointed by the joint creditors to administer the separate estate in accordance with the resolutions of the separate creditors, and then to carry over the surplus to the joint estate. *Id.*

The joint creditors of two partners resolved upon a liquidation by arrangement, and appointed a trustee. Afterwards the separate creditors of one of the partners resolved to accept a composition, and that the debtor should assign his separate estate to a trustee (not the same person as the trustee chosen by the joint creditors) to secure the payment of the composition:—Held, that the latter part of this resolution was ultra vires, and that the trustee of the joint estate had a locus standi to oppose its registration. *Id.*

*See further, ORDER AND DISPOSITION.*

#### 18. PROPERTY VESTED IN TRUSTEE UNDER PRIOR BANKRUPTCY.

**Where former Assignees do not Intervene.**—The assignees under a second fiat may maintain an action against a third person for the conversion of property acquired by the bankrupt after the date of the first fiat, the assignees under the first fiat not intervening. *Morgan v. Knight*, 15 C. B., N. S. 669; 33 L. J., C. P. 168; 9 L. T. 803; 12 W. R. 428.

**Title of former Assignees must have been Divested.**—To an action for a debt the defendant pleaded that before the accruing of the debt the plaintiff became bankrupt, and a commission issued against him under 6 Geo. 4, c. 16; that the commissioners certified that he had in all things conformed to the bankruptcy laws, and that there did not appear to them any reason to doubt the fulness of the discovery made by the bankrupt of his estate, which certificate was allowed by the Lord Chancellor; that the plaintiff afterwards became bankrupt a second time, and his estate did not produce 15s. in the pound, whereupon the assignees under the second bankruptcy served the defendant with notice of their claim to the debt:—Held, that this plea was bad, as not shewing that the title of the assignees under the first bankruptcy was divested so as to vest the property of the bankrupt in the assignees under the second. *Wagner v. Imbrie*, 2 L. M. & P. 510; 6 Ex. 882; 20 L. J., Ex. 416; 15 Jur. 803.

**Acquiescence of former Assignees.**—A bankrupt, after having obtained his certificate under a second bankruptcy, but not having paid 15s. in the pound, set up in trade as a tailor and draper, and sent circulars soliciting custom to several of the creditors who had proved under the second bankruptcy, and among others to one of the creditors' assignees. He continued to trade for five years without molestation on the part of the creditors, having his name conspicuously written on the trade premises, and having exposed to view there stock in trade of considerable value, and then became bankrupt a third time:—Held, that the assignee under the last bankruptcy could not be called upon to deliver up the assets collected by him to the assignees under the second fiat. *Jungmichel, Ex parte*, 2 Mont., D. & D. 471; 6 Jur. 87.

Assignees under a second commission, under which a bankrupt had obtained his certificate, but had not paid 15s. in the pound upon the debts proved, permitted the bankrupt again to go forth to the world and gain credit as a trader:—Held, that they had thereby lost

their right under 6 Geo. 4, c. 16, s. 127, to call upon the assignee under a third fiat to pay over the assets which he had collected. *Butler, Ex parte*, 2 Mont., D. & D. 731; 6 Jur. 937.

Held, also, that the principle of equity applied as well to real as to personal property, notwithstanding the clause of order and disposition in 6 Geo. 4, c. 16, s. 72, only referred to personal property. *Ib.*

A party who has taken possession of the goods of an intestate after his death, cannot set up as a defence to trover by the administrator, that the intestate had been first insolvent and then bankrupt, and had not paid 15s. in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees: the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them. *Fyson v. Chambers*, 9 M. & W. 460.

—**Of Second Assignees.**—The acquiescence of the assignees under a second bankruptcy in a subsequent trading by the bankrupt, does not bar their claim to his future estate and effects, under 6 Geo. 4, c. 16, s. 127. *Birch* or *Bisell, In re*, 2 Kay & J. 328; 25 L. J., Ch. 323; 2 Jur., N. S. 370.

#### 19. PROPERTY HELD BY BANKRUPT AS TRUSTEE FOR OTHERS.

**Real Estates.**—Estates of which a bankrupt is seised as a bare trustee, do not pass to his assignees. *Gennys, Ex parte*, 1 Mont. & Mac. 255.

**Debts.**—A debt due to a bankrupt as trustee for another does not pass to his assignees. *Winch v. Keeley*, 1 T. R. 619; *S. P., Carpenter v. Marnell*, 3 B. & P. 40.

Action by husband and wife for money lent by the wife whilst she was sole and unmarried. Plea, that the husband became bankrupt, and that his assignees were appointed before the action, by reason whereof the assignees became entitled to the debt. Replication, that before the marriage, and whilst the wife was sole and unmarried, by a deed between the husband and the first part, the wife of the second part, and H. and J. of the third part (being a settlement entered into before the intermarriage of the plaintiffs), the money was assigned to H. and J. to have, receive and recover, and to hold the same to them, upon trust in the deed mentioned in favour of the wife, and for her sole and separate use during her life, and for the child or children of the intended marriage. The replication stated, that the plaintiffs appointed H. and J. as their attorneys, to recover the money from the defendant for the purpose of holding the same upon these trusts, and that the action was commenced and prosecuted in the names of the plaintiffs, by the direction of H. and J., by virtue of the power given to them, and for recovering, receiving and holding the money as the trustees named in the deed, and upon the trusts in favour of the wife, and of the children of the marriage, and not for the use or benefit of the husband, or of his creditors.—Held, that the replication was good, and that the debt did not pass to the assignee; under the bankruptcy of the husband,

but might be sued for by the husband and wife. *Parnham v. Hurst*, 8 M. & W. 743.

**Goods set aside for particular Creditor.**—The assignees of a bankrupt do not take under the assignment property the equitable title to which has been transferred before the bankruptcy. *Burn v. Carvalho (in error)*, 4 N. & M. 889; 1 A. & E. 883. Affirming *Carvalho v. Burn*, 3 B. & Ad. 382; 1 N. & M. 700; 4 Mylne & C. 690; 3 Jur. 1141.

But such equitable transfer must have been complete before the bankruptcy; it must have been a transfer of the whole, or an ascertained part of specific property, and absolute, not contingent. *Ib.*

A., having goods in the hands of B., as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and, by a subsequent letter to B., did direct B. to deliver over the goods to D., as the agent of C. at that port. Before the delivery of the goods, a commission issued against A. under an act of bankruptcy committed while the letter was on its way to B., and the goods were delivered by B. to D., in ignorance of the bankruptcy.—Held, that C. had a good title in equity to the goods. *Ib.*

**Money received by Overseer of Poor.**—If money is received by an overseer of the poor, and kept apart by itself, and he becomes a bankrupt, it does not pass to his assignees. *Rex v. Eggington*, 1 T. R. 369.

**Bankrupt—A Stranger to Trust.**—A trustee instructed his stockbroker to sell for him a sum of consols, which he informed the broker he held as a trust fund, and to invest the proceeds of sale in the purchase of certain railway stock. The broker sold the consols for cash, and received in payment a cheque which he paid to the credit of his current account with his bankers, and he bought the railway stock for the next settling day. On the settling day the railway stock not having been paid for, the broker was declared a defaulter on the Stock Exchange, and soon afterwards he filed a liquidation petition. The principal claimed to have the balance which, at the time of the failure, was standing to the broker's credit at his bankers, appropriated to make good the proceeds of sale of the consols.—Held, that as the broker had notice of the trust, the proceeds of sale retained the character of trust money in his hands, and could be followed by the principal if they could be traced. *Cooke, Ex parte, Strachan, In re*, 4 Ch. D. 123; 46 L. J., Bk. 52; 35 L. T. 649; 25 W. R. 171—C. A.

**Trustee with Life Interest in Trust Property.**—W. A., who at the time of his death in 1867 was carrying on the business of a farmer, gave his residuary personal estate to his widow and a co-trustee, upon trust to permit his widow to have the use and enjoyment of his household furniture, and the dividends, interest and annual income and produce of his other residuary estate for life, and then upon trusts in favour of the testator's two sons. The testator's residuary estate consisted almost entirely of the household furniture and farm stock, and the widow, with the consent of her co-trustee, carried on the business of the farm. She took a new lease of the farm in her own name, and painted her own

name upon the carts; but the financial part of the business was carried on through a joint banking account opened in the names of "the executors of the late W. A." In 1879, the widow presented her petition for liquidation. All the property in her possession consisted of the furniture and farm stock bequeathed by the testator, or of stock which had replaced the original stock in the ordinary course of business. Upon being sold, it realized a sum of 2,063*l.* 15*s.* 6*d.*, with produce estimated at 250*l.* still to be realized. The testator's residuary account had been passed at 1,917*l.* 7*s.* 6*d.*:—Held, that the farming stock in the hands of the widow was well ear-marked as trust property, and that only the life interest of the widow in the proceeds of the realization passed to the trustees in the liquidation. *Barber, Ex parte, Anslow, In re*, 42 L.T. 411; 28 W. R. 522.

See further, ORDER AND DISPOSITION, *post*, col. 894.

## 20. SECURED CREDITORS AND PROPERTY HELD AS SECURITY.

**Judgment Creditor who has obtained and served Garnishee Order Nisi.]**—A judgment creditor who has obtained a garnishee order nisi attaching debts due to the judgment debtor, before the debtor has filed a liquidation petition, is a secured creditor within the Bankruptcy Act, 1869, s. 16, sub-s. 5. *Joselyne, Ex parte, Watt, In re*, 8 Ch. D. 327; 47 L. J., Bk. 91; 38 L. T. 661; 26 W. R. 645—C. A.

The judgment creditor's title to the attached debts will therefore prevail over that of the trustee, even though some of the debts did not become actually payable till after the commencement of the liquidation. *Ib.*

A garnishee order obtained and served by an execution creditor, especially when made absolute before the bankruptcy, constitutes the execution creditor a creditor "holding a security on the property of the bankrupt" within the Bankruptcy Act, 1869, s. 12. *Emanuel v. Bridger*, 9 L. R., Q. B. 286; 43 L. J., Q. B. 96; 30 L. T. 194; 22 W. R. 404.

An execution creditor who has obtained, served and made absolute a garnishee order before the bankruptcy, is also a creditor holding a "charge on the bankrupt's estate, as a security for a debt due to him" within the Bankruptcy Act, 1869, s. 16, sub-s. 5. *Ib.*

The word "charge" in s. 16, sub-s. 5, has a wider meaning than the word "mortgage" or "lien" contained in the same section. *Ib.*

A judgment creditor who has obtained a garnishee order under the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 61, and served it on the garnishees before the presentation by the judgment debtor of a petition for liquidation by arrangement or composition, is a creditor holding a security on the property of the judgment debtor within the meaning of the Bankruptcy Act, 1869, s. 12. *Low v. Blakemore*, 10 L. R., Q. B. 485; 44 L. J., Q. B. 155; 33 L. T. 473; 23 W. R. 856.

A garnishee's order and an attachment issued under the Common Law Procedure Act, 1854, unless followed by seizure and sale before the presentation of a petition for liquidation, do not make the creditor a secured creditor within the meaning of the Bankruptcy Act, 1869, s. 40. *Greenway, Ex parte, Adams, In re*, 16 L. R.,

Eq. 619; 42 L. J., Bk. 110; 29 L. T. 75; 21 W. R. 866. *But see preceding cases.*

**Foreign Attachment.]**—A creditor who has served a writ of foreign attachment in an action in the court of the Lord Mayor of London is a "creditor holding security upon the property of the debtor" within the meaning of s. 12 of the Bankruptcy Act, 1869, although the presentation of a liquidation petition by the debtor, followed by an interpleader order, has prevented the creditor from proceeding to judgment in the action. *Lery v. Lovell*, 11 Ch. D. 220; 48 L. J., Ch. 357; 27 W. R. 428.

A writ of foreign attachment in the Mayor's Court of London, subsequently perfected by judgment, gives the issuing creditor a security within the meaning of the Bankruptcy Act, 1869, s. 12, although the debtor may have filed a liquidation petition before judgment is actually signed. *London Cotton Mills Company, In re, Brander, In re*, 25 W. R. 109.

A creditor who obtains a foreign attachment in the Mayor's Court is not a creditor holding security within s. 12 of the Bankruptcy Act, 1869, at all events until he is paid under the attachment; and, although he has obtained and served his garnishee order prior to the debtor's act of bankruptcy, he will have no right as against the trustee to the debt attached. *Barnfather v. Barrow*, 37 L. T. 231.

**Money paid into Court.]**—An action upon an overdue bill of exchange for 1,200*l.* was brought against the acceptors. They obtained leave to appear and defend the action, upon paying into court 880*l.* to abide the event. An order was afterwards made referring the matter in dispute to arbitration. Before any award was made, they filed a liquidation petition. The trustee claimed the 880*l.* for distribution among the creditors generally:—Held, that the plaintiff in the action was, at the commencement of the liquidation, a secured creditor, and that an inquiry must be directed in the Court of Bankruptcy to ascertain to how much of the 880*l.* he was entitled. *Banner, Ex parte, Keyworth, In re*, 9 L. R., Ch. 379; 43 L. J., Bk. 102; 30 L. T. 620. Affirming, *N. C.*, 43 L. J., Bk. 55; 29 L. T. 849; 22 W. R. 350.

An alleged debtor having in November committed an act of bankruptcy by non-compliance with a debtor summons, the summoning creditor presented a bankruptcy petition against him. He disputed the debt and applied to have the petition dismissed, and an order was made adjourning the petition sine die, on the terms of his paying 125*l.* into court, to abide the result of an action to be brought by the summoning creditor for the alleged debt. The 125*l.* was paid into court on the 18th of January, and the action was commenced on the 21st of January. On the 10th of May the debtor was adjudicated a bankrupt on the petition of another creditor. Afterwards judgment was entered in the action for the plaintiff for the debt claimed and costs:—Held, that the title of the trustee in the bankruptcy did not relate back to the act of bankruptcy committed on the debtor summons so as to defeat the right of the summoning creditor to the 125*l.*, but that he was entitled to have the 125*l.* paid out to him. *Bouchard, Ex parte, Moijen, In re*, 12 Ch. D. 26; 48 L. J., Bk. 105; 28 W. R. 129—C. A.

**Lands held by Creditor under Elegit.**—Since the coming into operation of the Judicature Act, 1873, it is not necessary for a judgment creditor, who seeks to obtain equitable execution of the judgment creditor's equitable interest in land, previously to sue out an elegit. *Ecans, Ex parte, Watkins, In re*, 11 Ch. D. 691; 48 L. J., Bk. 97; 40 L. T. 526; 27 W. R. 712. Affirmed, 13 Ch. D. 252; 49 L. J., Bk. 7; 41 L. T. 565; 28 W. R. 127—C. A.

The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional upon the receiver's giving security, operates as an immediate delivery of the land in execution. When the security is afterwards given the order relates back to the date when it was made. *Ib.*

A judgment creditor became the transferee of a legal mortgage of leaseholds belonging to the judgment debtor. He then commenced an action in the Chancery Division, claiming an account and payment of what was due to him on both mortgage and judgment; or a sale of the property and payment out of the proceeds; and the appointment of a receiver. On the same day he obtained ex parte an order extending over eight days, appointing an interim receiver of the rents, without security. On the eighth day he obtained, on notice, an order absolute for the appointment of the same person to be receiver of the rents, upon his giving security. On the same day the debtor filed a liquidation petition, and a receiver of his property was appointed by the Court of Bankruptcy. It did not appear which receiver was appointed first. The receiver in the action never gave security. The creditor had not sued out an elegit.—Held (affirming the decision of Bacon, C. J.), that the appointment of the receiver in the action was such a delivery in execution by lawful authority of the mortgaged lands within the meaning of s. 1 of the act 27 & 28 Vict. c. 112, as to render the judgment creditor a secured creditor, within the meaning of s. 16, sub-s. 5, of the Bankruptcy Act, 1869, and that he was entitled to hold the lands as a security for his judgment debt as well as for his mortgage debt. *Ib.*

**Deeds deposited.**—S. & Co., who were merchants in London and Shanghai, applied to A. & Co., who were merchants in Prussia, to open a credit on their behalf for 5,000*l.*, and offered to deposit with them as a security the title-deeds of a house at Shanghai. The negotiation was commenced verbally, when all parties were in Prussia, but was concluded, after some correspondence, by a letter written by S. & Co. to A. & Co. from London, inclosing the title-deeds of the house at Shanghai. A. & Co. accordingly accepted bills drawn by S. & Co. and payable in London. S. & Co. shortly afterwards became liquidating debtors, a considerable sum being then due to A. & Co. on the bills. No conveyance or memorandum of the deposit was made at the British Consulate at Shanghai, but the house remained registered in the name of S. & Co. A. & Co. accordingly applied for an order that the trustee in liquidation should convey the house to them. Evidence was adduced, that according to the law of Prussia, the contract was binding personally on S. & Co., but that, as the necessary formalities for perfecting the security at Shanghai had not been gone through, A. & Co. had no mortgage or lien on the house:—Held,

by Mellish, L. J., that the contract must be governed by English law, and that A. & Co. had a good security on the house by the deposit of the deeds. *Holthausen, Ex parte, Scheibler, In re*, 9 L. R., Ch. 722; 44 L. J., Bk. 26; 31 L. T. 13.

Held, by both the Lords Justices, that whether the contract was governed by English or by Prussian law, the contract was personally binding on S. & Co., and could be enforced against their trustee in liquidation; and the court made an order to sell the house and pay the proceeds to A. & Co. *Ib.*

See further, PROOF OF DEBTS, *ante*.

## 21. DISCLAIMER OF ONEROUS PROPERTY.

### a. Under Statutes prior to the Bankruptcy Act, 1869.

**Under 12 & 13 Vict. c. 106, s. 145.**—A let to B., from year to year, premises adjacent to a shop previously occupied by B. Some time afterwards, A. allowed B. to convert the front of the premises into one large shop window, and to make an entry through the party-wall into his old shop, upon condition that at the determination of the tenancy the premises should be restored by him to their original state. Subsequently he became bankrupt.—Held, that as the agreement to restore the premises was not made contemporaneously with the letting, it was not a condition or agreement within 12 & 13 Vict. c. 106, s. 145, and from which the bankrupt could be relieved under that section upon the assignees declining to take. *Maples v. Pepper*, 18 C. B. 177; 25 L. J., C. P. 243; 2 Jur., N. S. 739.

—Section must be strictly complied with.]

—A plea under 12 & 13 Vict. c. 106, s. 145, to an action for breaches of covenants in a lease, that the lessee became bankrupt, that the assignees declined to take the lease, and that within fourteen days after notice thereof the lessee executed a surrender, and offered to deliver up the possession of the premises to the lessors, is bad, for not shewing the impossibility of a literal compliance with the conditions of the section, as that the lease was lost or destroyed, or the like. *Colles v. Ecanon*, 19 C. B., N. S. 372; 34 L. J., C. P. 320; 12 L. T. 672; 13 W. R. 1017.

—**Liability of Tenant for Rent.**—A tenant who has become bankrupt, and delivers to his landlord the possession of the premises during a current half year, is not liable for a proportionate part of the rent to the time when he so delivered them up to his landlord. *Slack v. Sharp*, 3 N. & P. 390; 8 A. & E. 366; 1 W., W. & H. 496; 2 Jur. 839.

**Assignee cannot enforce Covenants against Lessor.**—By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as after mentioned, it was agreed between the lessor and lessee, and the lessor covenanted that, on the expiration or other sooner determination of the term, he, the lessor, should and would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side. The lessee became bankrupt, and his assignee declined the lease (which was delivered up), but he re-

quired the fixtures to be repurchased, and brought an action of covenant against the lessor for not appointing an appraiser :—Held, that, as by 6 Geo. 4, c. 16, s. 75, the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee against the lessor. *Kearsey v. Carstairs*, 2 B. & Ad. 716.

— **Nor Agreements made in Contemplation of Tenancy continuing.**—A bankrupt agreed in writing to take a lease of a manufactory for a term of years, and the landlord agreed to erect at his own expense certain buildings, upon the bankrupt paying an additional rent upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt, on the verbal assurance of the landlord that the bankrupt might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord unless he allowed them the sum which the bankrupt had expended on the buildings :—Held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt. *Ladd, Ex parte*, 3 Deac. & Chit. 647.

— **Liability of Surety.**—A surety for a lessee is liable in respect of the breaches of covenant which accrue after the date of a commission against the lessee, but before the delivery up of the lease by the bankrupt. *Tuck v. Tyson*, 6 Bing. 346; 3 M. & P. 715.

If a lease is delivered up by the lessee, in pursuance of the statute, it does not operate, by relation, as a surrender of the lease from the date of the commission. *Id.*

— **Underlease of Disclaimed and Undisclaimed Leaseholds.**—In 1840, A. being lessee of a warehouse and cellar, under a demise from B., and also lessee, under C., of other adjoining property, comprising a vault, D. became tenant from year to year to A. of the warehouse and cellar, and vault, at an annual rent of 185*l.*, made up of 140*l.* for the warehouse and cellar, and 45*l.* for the vault. On the 27th October, 1845, A. became bankrupt, 92*l.* 10*s.* being at that time due as rent from D. to the bankrupt. The assignees, upon being appointed, elected to take the property held under B., and on 26th February, 1846, elected not to take the property held under C. An action having subsequently been brought by the assignees of A. against D. to recover the 92*l.* 10*s.* and 35*l.* for a quarter's rent, due at Christmas, for the warehouse and cellar :—Held, that they could well sue for the quarter's rent due since the bankruptcy in their representative character as assignees. *Graham v. Allsopp*, 3 Ex. 186; 18 L. J., Ex. 85.

— **Bankruptcy of Assignee of Lease.**—Covenant for rent. Plea, that before the rent became due, the defendants, by deed, assigned all their interest in the demised premises to A., subject to the payment of the rent, and performance of the covenants contained in the lease; and that A. covenanted to pay the rent and perform the covenants contained in the lease; that the de-

fendants delivered the lease to him, and he accepted the same, and entered on the premises by virtue of the assignment; the plea then stated, that A. became bankrupt, and that the arrears of rent accrued after the date of the commission; that the assignee of his estate declined the lease, and that the bankrupt, within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, devisees of the reversion :—Held, that the plea was bad, inasmuch as the 6 Geo. 4, c. 16, s. 75, did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants. *Manning v. Flight*, 3 B. & Ad. 211.

#### b. Under the Bankruptcy Act, 1869.

— **What Interests may be Disclaimed.**—A bankrupt was tenant of leasehold premises under an agreement for a monthly tenancy. By an agreement of even date the bankrupt contracted to purchase the unexpired residue of the lease. This contract remained unperformed at the time of his bankruptcy. On application to the court by the trustee for leave to disclaim :—Held, that he had an interest in the premises, and was entitled to apply for and obtain leave. *Roberts, In re*, 30 L. T. 266.

— **Lease of Chattels.**—A lease of chattels is not a "leasehold interest" within the meaning of r. 28 of the Bankruptcy Rules, 1871; and therefore a trustee in bankruptcy may disclaim a lease of chattels under s. 23 of the Bankruptcy Act, 1869, without leave of the court. *Sheffield Waggon Company v. Stratton*, 48 L. J., Ch. 35; 40 L. T. 238; 27 W. R. 120—C. A.

— **Expired Lease.**—A lease of a house was vested in a bankrupt as assignee. The trustee in the bankruptcy did not disclaim the lease, but he did not take possession of the property or exercise any act of ownership over it. The bankrupt continued to live in the house, his friends paying the rent for him. After the expiration of the term the lessor sued the original lessee on his covenant to repair, claiming 400*l.* damages. The lessee served a third party notice on the trustee, claiming to be indemnified by him, as assignee of the term, against all breaches of the covenant since the date of the bankruptcy and the trustee's appointment. The trustee then applied to the Court of Bankruptcy for leave to execute a disclaimer in respect of the lease. The lessor opposed the application, and the registrar refused it on the ground that the lease had expired. The trustee appealed, giving notice to the lessor, who did not appear on the hearing of the appeal :—Held, that leave to disclaim might be given, as it could not prejudice the rights of any person who was not before the court, but without expressing any opinion of those rights. *Paterson, Ex parte, Throckmorton, In re*, 11 Ch. D. 908—C. A.

The trustee in a bankruptcy may disclaim a lease of the bankrupt even though the lease has been determined by effluxion of time or by forfeiture between the appointment of the trustee and the execution of the disclaimer. And in such a case the effect of the disclaimer, when executed, is that neither the lessor nor the trustee can claim the benefit of any provisions contained in the lease which were to come into

operation at the expiration or sooner determination of the term. *Dyke, Ex parte, Morrish, In re*, 22 Ch. D. 410; 52 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278—C. A. Affirming, 47 L. T. 26; 30 W. R. 592.

Semble, that the trustee may also disclaim a lease which has been determined before his appointment. *Ib.*

**When Disclaimer allowed.]**—In cases where the property acquired by the trustee under the Bankruptcy Act, 1869, consists of leasehold interests, the Court will exercise its discretion in allowing the trustee to disclaim such interest. *Wilson, In re*, 13 L. R., Eq. 186; 20 W. R. 363.

**Power of Court to impose Conditions.]**—In giving leave to the trustee in a bankruptcy to disclaim a leasehold interest of the bankrupt, the court has, under r. 28 of 1871, power to impose a condition (such as the payment to the lessor of the rent in full up to the date of the disclaimer), even though no third party has acquired from the bankrupt an interest in the lease. *Ladbury, Ex parte, Turner, In re*, 17 Ch. D. 532; 50 L. J., Ch. 838; 45 L. T. 5—C. A.

On giving leave, under r. 28 of the Bankruptcy Rules, 1871, to the trustee in a bankruptcy to disclaim a leasehold interest of the bankrupt, the court will not order the trustee to pay the landlord any compensation for his use and occupation of the demised property, except under special circumstances, one instance being where the trustee's occupation has been beneficial to the bankrupt's estate. *Isherwood, Ex parte, Knight, In re*, 22 Ch. D. 384; 52 L. J., Ch. 370; 48 L. T. 398; 31 W. R. 442—C. A.

Rule 28 does not mean that in every case in which leave to disclaim a lease is given, the lessor is to be placed in the same position as regards the interval before execution of the disclaimer as if there had been no disclaimer. *Ladbury, Ex parte* (17 Ch. D. 532), explained and distinguished. *Ib.*

Notwithstanding the insertion of an attornment clause in a mortgage deed, the real relation between the parties is that, not of landlord and tenant, but of mortgagee and mortgagor, and this fact, as well as the nature of the rent reserved by the clause, must be taken into account in considering whether, on giving leave to the trustee in the bankruptcy of the mortgagor to disclaim the tenancy created by the attornment clause, any terms should be imposed for the benefit of the mortgagee. *Ib.*

When the trustee in a bankruptcy applies for leave to disclaim a lease of the bankrupt, the court will not order any compensation to be paid to the landlord unless the trustee has kept him out of possession of the property, and his occupation has resulted in a benefit to the bankrupt's estate. *Icard, Ex parte, Bushell, In re* (No. 2), 23 Ch. D. 115; 48 L. T. 502—C. A.

The principle on which the court exercises its discretion under r. 28 is that the trustee ought not to be allowed to increase the bankrupt's estate at the expense of the landlord. *Isherwood, Ex parte* (22 Ch. D. 384), explained. *Ib.*

In determining whether, on giving leave to the trustee in a bankruptcy to disclaim a lease of the bankrupt, the trustee should be ordered to pay compensation to the landlord in respect of his occupation of the leasehold premises, the court will have regard not merely to the ques-

tion whether the occupation has actually produced a profit to the bankrupt's estate, but also to the question whether the possession was retained by the trustee with a view to obtaining such a profit. *Arnall, Ex parte, Witton, In re*, 24 Ch. D. 26; 49 L. T. 221—C. A.

The rule, as laid down by Cotton, L. J., in *Isherwood, Ex parte* (22 Ch. D. 384), adopted in preference to that expressed by Jessel, M. R., in *Icard, Ex parte* (23 Ch. D. 115). *Ib.*

The court ordered compensation to be paid by the trustee in a bankruptcy as a condition of giving him leave to disclaim the lease of the bankrupt's place of business, although during part of the time during which the trustee had been in occupation a bailiff had been in possession of the bankrupt's goods under a distress for rent, and the landlord had been allowed to place bills on the premises stating that they were to be let, and that application for that purpose was to be made to him. *Ib.*

**Whether Discretion the Subject of Appeal.]**—The imposing of conditions on the trustee is a matter of judicial discretion, and the Court of Appeal will not readily interfere with the exercise of discretion by the judge of first instance. *Arnall, Ex parte, Witton, In re*, 24 Ch. D. 26; 49 L. T. 221—C. A.

**Injury to third Parties.]**—In determining whether leave should be given to a trustee in bankruptcy to disclaim a leasehold interest of the bankrupt, the court ought to have regard only to the question whether the disclaimer will be for the benefit of the persons interested in the administration of the bankrupt's estate, and ought not to have regard to any collateral consideration, such as the injury which the disclaimer might occasion to third parties. *East and West India Dock Company, Ex parte, Clarke, In re*, 17 Ch. D. 759; 50 L. J., Ch. 789; 45 L. T. 6; 30 W. R. 22—C. A.

**Lease deposited with equitable Mortgagee—Assignment by Trustee—Right of Trustee to Indemnity.]**—When the trustee of a bankrupt desires to disclaim a lease which the bankrupt has deposited by way of equitable mortgage, he will not be allowed to do so to the prejudice of the mortgagee, but if he assigns the lease to the mortgagee, the latter must covenant to indemnify him against liability under the lease. *Buxton, Ex parte, Müller, In re*, 15 Ch. D. 289; 43 L. T. 183; 29 W. R. 28—C. A.

**Application to Trustee to Disclaim—Notice by Post.]**—The mere posting of an application to the trustee in bankruptcy requiring him to decide whether he will disclaim or not is not sufficient under the 24th section of the Bankruptcy Act, 1869, but such application must be received in order that the time for disclaimer may be limited in accordance with the section:—Semble, that the application would be received within the section if delivered through the post at the office of the trustee to the person there in charge. *Reed v. Harvey*, 5 Q. B. D. 184; 49 L. J., Q. B. 294; 42 L. T. 511; 28 W. R. 423; 44 J. P. 474.

**Time in which to Disclaim.]**—A trustee in liquidation received from the lessors, on the 24th of November, a notice, calling on him to dis-

claim a lease held by the debtor within twenty-eight days, under the Bankruptcy Act, 1869, s. 24. After some correspondence respecting the property, the lessors wrote a letter to the trustee on the day before the twenty-eight days expired, in which they asked for a reply to their letter of the 24th of November, at his earliest convenience. The trustee, after the twenty-eight days had expired, applied to the court for leave to disclaim the lease:—Held, that the lessors had waived their right to insist on an answer within twenty-eight days, and leave to disclaim was given. *Moore, Ex parte, Stokoe, In re*, 2 Ch. D. 802; 35 L. T. 386; 24 W. R. 720—C. A.

— **Extension of Time.**—When the trustee of an estate has received a notice calling upon him to disclaim a lease within twenty-eight days, under the Bankruptcy Act, 1869, s. 24, and requires an extension of time beyond the twenty-eight days in order to obtain the consent of the court under r. 28 of the Bankruptcy Rules, 1871, he must apply for such extension before the twenty-eight days have elapsed, unless he can shew some special circumstances to excuse the delay. *Lovering, Ex parte, Jones, In re*, 9 L. R., Ch. 586; 43 L. J., Bk. 94; 30 L. T. 621; 22 W. R. 853.

The mere fact that the lessor has availed himself of the provisions contained in the debtor's lease to compel the trustee in liquidation to pay half a year's rent in advance, is not, in the absence of negotiation, or of anything to mislead the trustee, or of special circumstances to excuse the delay, a ground for enlarging the time, after the expiration of the twenty-eight days (fixed by the Bankruptcy Act, 1869, s. 24), for notice to be given by the trustee, whether he disclaims the lease or not. *Harris, Ex parte, Richardson, In re*, 16 Ch. D. 613; 44 L. T. 282; 29 W. R. 899.

**Appeal against Leave to Disclaim.**—On the application of a trustee, leave was given to him to disclaim a lease which was vested in the bankrupt. The trustee executed a disclaimer, and after this had been done, but within the time allowed for bringing an appeal, a person with whom the bankrupt had deposited the lease by way of equitable mortgage, and who was present when the order giving the leave to disclaim was made, gave notice of appeal from the order:—Held, that the disclaimer having been executed, the lessor's title was complete, and the appeal was dismissed. *Woods, In re, Ditton, Ex parte*, 3 Ch. D. 459; 45 L. J., Bk. 141; 24 W. R. 1008—C. A.

After unconditional leave has been given by the court to a trustee in bankruptcy to disclaim a lease of the bankrupt, and the trustee has executed a disclaimer, it is too late for the lessor to appeal from the order even for the purpose of getting conditions imposed on the trustee. The Court of Appeal has then no power to impose conditions. If the lessor desires to appeal from such an order, he ought to apply when it is made for a stay of proceedings under it. *Sadler, Ex parte, Hawes, In re*, 19 Ch. D. 122; 51 L. J., Ch. 201; 30 W. R. 173—C. A.

The discretion of the county court judge in giving leave to disclaim is not properly the subject of appeal. *Edmonds, Ex parte, Tipping, In re*, 48 L. T. 77.

**Effect of Disclaimer without Leave of Court.**—The 28th rule of the Bankruptcy Rules, 1871, provides that when any property of a bankrupt acquired by a trustee in bankruptcy shall consist of a leasehold interest the trustee shall not execute a disclaimer without leave of the court:—Held, that the effect of the rule was to make it the duty of the trustee as between himself and the Court of Bankruptcy to obtain the leave of the court before disclaiming a tenancy, but that it did not render the disclaimer inoperative as between the landlord and the trustee where no such leave had been obtained. *Reed v. Harvey*, 5 Q. B. D. 184; 49 L. J., Q. B. 294; 42 L. T. 511; 28 W. R. 423; 44 J. P. 474.

"Whatever may be the effect of a disclaimer by a trustee without the leave of the court, I would recommend any trustee in bankruptcy to think once, to think twice, to think thrice, before he ventures to disclaim without leave of the court." *Per James, L. J., in Ladbury, Ex parte, Turner, In re*, 17 Ch. D. 532; 50 L. J., Ch. 838; 45 L. T. 5—C. A.

**Signature of Disclaimer.**—A disclaimer in writing signed by the trustee's solicitor is not a valid disclaimer "by writing under the hand" of the trustee within s. 23. *Wilson v. Wallani*, 5 Ex. D. 155; 49 L. J., Ex. 437; 42 L. T. 375; 28 W. R. 597; 44 J. P. 475.

**Omission to Disclaim.**—If a trustee when called upon to decide whether he will disclaim a continuing contract of the bankrupt, does not disclaim it, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it, and in that case the other party to the contract is entitled, under the Bankruptcy Act, 1869, s. 31, to prove against the bankrupt's estate for the damages occasioned by the breach of the contract, and this is his only remedy. *Sneezum, In re, Davis, Ex parte*, 3 Ch. D. 463; 45 L. J., Bk. 137; 35 L. T. 389; 25 W. R. 49. Affirming, 34 L. T. 805—C. A.

The trustee does not by not disclaiming adopt the contract, either personally or on behalf of the estate. *Id.*

**Disclaimer operates as a Surrender of Chattels and Land.**—Sect. 15 of the Bankruptcy Act, 1869, must be read in conjunction with and as qualified by sect. 23, and the effect of a disclaimer of a lease to a bankrupt by the trustee in the bankruptcy, is to give up to the lessor the entirety of that which is comprised in the demise. Therefore, if a bankrupt be the lessee of land and personal chattels, demised to him as one subject-matter at one entire rent, a disclaimer of the lease by the trustee operates as a surrender to the lessor of the chattels, as well as the land, and the trustee cannot claim the chattels under sect. 15 (sub-s. 5), as having been at the commencement of the bankruptcy in the order or disposition of the bankrupt as reputed owner with the consent of the true owner. *Allen, Ex parte, Fussell, In re*, 20 Ch. D. 341; 51 L. J., Ch. 724; 47 L. T. 65; 30 W. R. 601—C. A.

— **Fixtures.**—After the trustee in a bankruptcy has executed a disclaimer of a lease vested in the bankrupt, he is not entitled, even though he be in possession of the leasehold premises, to remove the tenant's fixtures. *Stephen, Ex parte*,



*Lavies, In re*, 7 Ch. D. 127; 47 L. J., Bk. 22; 37 L. T. 613; 26 W. R. 136—C. A.

The effect of the disclaimer is to give the landlord an absolute title to the fixtures as from the date of the order of adjudication. *Ib.*

Where a trustee severs and sells tenant's fixtures attached to leasehold property of a bankrupt and subsequently disclaims the lease, the landlord is entitled to the proceeds of the sale of the fixtures. *Brook, Ex parte, Roberts, In re*, 10 Ch. D. 100; 48 L. J., Bk. 22; 39 L. T. 458; 27 W. R. 255—C. A. Reversing *S. C.*, nom. *Foster, Ex parte, Roberts, In re*, 47 L. J., Bk. 101; 38 L. T. 888; 26 W. R. 834.

The effect of a disclaimer by the trustee in a liquidation of a lease vested in the debtor is to place the trustee in the position of never having had any estate in the leasehold property. Consequently, any severance by the trustee of the fixtures attached to the disclaimed property after the date of the trustee's appointment, is necessarily a wrongful act, and gives the landlord a right to recover the value of the fixtures from the trustee. Whether, after severing the fixtures, the trustee has any right to disclaim the lease, *quære*. But at any rate he cannot as against the landlord assert the invalidity of his own disclaimer. *Ib.*

#### —Removal by Trustee before Disclaimer.]—

A lease contained a proviso that the lessee, his executors, administrators and assigns, might at any time or times during the continuance of the term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards, remove any buildings or machinery which he or they might have erected on the demised premises for trade purposes. The lessee filed a liquidation petition, and the trustee in the liquidation sold the trade machinery and fixtures, which were then removed by the purchaser. The trustee afterwards disclaimed the lease:—Held, that the disclaimer having, by virtue of sect. 23, the operation of a surrender of the lease as from the date of the appointment of the trustee, the proviso was, by construction of law, with all the other provisions of the lease, put an end to before the removal, and consequently that the removal could not be justified, and the lessor was entitled to the proceeds of sale. *Glegg, or Gregg, Ex parte, Latham, In re*, 19 Ch. D. 7; 51 L. J., Ch. 367; 45 L. T. 484; 30 W. R. 144—C. A.

#### —Sale by Trustee before Disclaimer.]—

A trustee in liquidation of the affairs of the tenant for years of leasehold premises upon which were certain fixtures, sold the fixtures by auction, and subsequently, without any formal disclaimer, surrendered the premises to the landlord prior to the expiration of the term and before the purchaser of the fixtures had removed them. The landlord having let the premises with the fixtures thereon to an incoming tenant:—Held, that the purchaser was nevertheless entitled to the fixtures, as the trustee, having sold them to him, could not deprive him of his right by afterwards surrendering the lease. *Saint v. Pilley*, 10 L. R., Ex. 137; 44 L. J., Ex. 33; 33 L. T. 93; 23 W. R. 753.

#### Effect of Disclaimer on Covenants in Lease.]

—By a covenant in the lease the landlord agreed, at the end or other the sooner determination of

the term, to pay and allow to the tenant for (inter alia) the hay and straw grown in the last year, which should be left for the incoming tenant, at a feed price. Certain other farming covenants in the lease had been admittedly broken by the tenant:—Held, that by reason of the operation of the disclaimer by the trustee, the lease must be considered as at an end for all purposes; and that therefore the landlord must pay for the hay and straw at the market price:—Held, also, that the landlord could not be entitled to damages in respect of breaches of the covenants in the lease. *Morriash, Ex parte, Dyke, Ex parte, Morriash, In re*, 47 L. T. 26; 30 W. R. 952. Affirmed, 22 Ch. D. 410; 52 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278—C. A.

#### Effect of Disclaimer on Rights and Liabilities of third Parties—Underlessee.]—

A disclaimer by the trustee in bankruptcy of a lease or other onerous property of the bankrupt operates as a surrender only so far as is necessary to relieve the bankrupt and his estate and the trustee from liability, and does not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed. If, for instance, the bankrupt has granted an underlease of property demised to him, a disclaimer of the original lease by his trustee in bankruptcy does not affect the right of the lessor to distrain on the property for the rent reserved by the original lease, and to re-enter for breach of the lessee's covenants in the lease, or for non-payment of the rent reserved thereby. But, if the underlease is made at a rent less than the rent reserved by the original lease, the underlessee is, after the disclaimer, entitled to prove in the bankruptcy for the value of the difference between the two rents. *Walton, Ex parte, Lery, In re*, 17 Ch. D. 746; 50 L. J., Ch. 657; 45 L. T. 1; 30 W. R. 395—C. A.

The lessee of a house agreed to underlet a portion of it at less rent than he paid and taking a premium, and the provisions of the agreement differed in material respects from those of the lease. The underlessee paid the premium and took possession under the agreement. The lessee afterwards became bankrupt; the trustee disclaimed the lease; and the lessor commenced an action of ejectment against the underlessee. Upon a bill by the underlessee to restrain the action of ejectment and compel the lessor to grant him a lease in accordance with the terms of his agreement with the lessee:—Held, that the underlessee had no equity to compel the lessor to grant him a lease in accordance with the terms of the underlease. *Taylor v. Gillott*, 20 L. R., Eq. 682; 44 L. J., Ch. 740; 32 L. T. 795; 24 W. R. 65.

When a lessee sublets, and afterwards becomes bankrupt, and his trustee, under s. 23 of the Bankruptcy Act, 1869, and under an order of the Court of Bankruptcy, disclaims the lessee's interest in the premises, the lessor is not entitled to eject the sub-tenant. A lessee for a term of years by deed demised part of the premises for a shorter term, and the sub-lessee entered into possession. The lessee afterwards liquidated by arrangement, under the Bankruptcy Act, 1869, and his trustee, under an order of the Court of Bankruptcy, disclaimed the lessee's interest in the premises. Notice of the application to the court for leave to disclaim was given to the sub-lessee, within a reasonable time before the order was made. The lessor having brought an action

to recover possession of the part of the premises demised to the sub-lessee as from the date of the appointment of the trustee:—Held, that the lessor was not entitled to recover possession. *Taylor v. Gillott* (20 L. R., Eq. 682), commented upon. *Smalley v. Harding*, 7 Q. B. D. 524; 50 L. J., Q. B. 367; 44 L. T. 503; 29 W. R. 554—C. A.

The disclaimer of a lease under the Bankruptcy Act, 1869, s. 23, will not destroy an underlease if the provisions of the underlease harmonize with those in the original lease. *Lovering, Ex parte, Jones, In re*, 9 L. R., Ch. 586; 43 L. J., Bk. 94; 39 L. T. 621; 22 W. R. 853.

**Disclaimer by Trustee of Assignee of Lease.]**—The assignee of a lease became bankrupt, and his trustee disclaimed. In an action by the lessor against the lessee upon his covenant in the lease, to recover rent which had accrued due between the order of adjudication and the disclaimer:—Held, that the lessee was liable; and by Martin and Pigott, B.B. (Bramwell, B., dissentiente), that a disclaimer under the Bankruptcy Act, 1869, s. 23, by the trustee of the assignee of a lease does not affect the rights and liabilities inter se of the lessor and original lessee. *Smyth v. North*, 7 L. R., Ex. 242; 41 L. J., Ex. 103; 20 W. R. 683.

The disclaimer of a lease by the trustee in bankruptcy of the assignee of the lease does not affect the liability of the lessee on his covenant to pay rent, in respect of rent accruing either before or after the date of the disclaimer, although he has never been in actual possession of the demised property, and the bankrupt assignee has sub-demised it. *East and West India Dock Company v. Hill*, 22 Ch. D. 14; 52 L. J., Ch. 44; 47 L. T. 270; 31 W. R. 55—C. A.

**Liability of Bankrupt's Surety.]**—The plaintiff being lessee of a farm for a term of years assigned the lease to P., taking the covenant of the defendant as surety for the due payment of the rent to the lessor for the residue of the term. During the continuance of the term P. became bankrupt, and his trustee having obtained the requisite leave of the court disclaimed all interest in the lease. Subsequently the lessor demanded from the plaintiff the half-year's rent accruing after the bankruptcy. The plaintiff paid the rent and brought an action to recover the amount from the defendant under his covenant. Neither the plaintiff nor the defendant had entered upon or taken possession of the farm:—Held, that the plaintiff was entitled to recover. By Manisty, J., on the ground that the disclaimer operated only as a surrender so far as was necessary to relieve the bankrupt, his estate, and the trustee from liability without otherwise affecting third parties, and that the plaintiff as lessee remained liable for the rent and had his remedy over against the defendant as the bankrupt's surety. By Watkin Williams, J., solely on the authority of *East and West India Dock Company v. Hill*, supra. *Harding v. Preece*, 9 Q. B. D. 281; 51 L. J., Q. B. 515; 47 L. T. 100; 31 W. R. 42; 46 J. P. 646.

**Contract to Purchase—Deposit Money.]**—A person contracted to purchase certain lands and paid a deposit, the contract containing no provision for forfeiture of the deposit on non-completion through the purchaser's default. After the title had been accepted, but before completion,

the purchaser was adjudicated bankrupt, and his trustee disclaimed all interest under the contract, and demanded that the deposit should be returned to him:—Held, that, as the contract had gone off through the purchaser's default, the trustee had no right to recover the deposit. *Barrell, Ex parte, Parnell, In re*, 10 L. R., Ch. 512; 44 L. J., Ch. 138; 33 L. T. 115; 23 W. R. 846

**Contract to Sell—Trustee's Right to Indemnity.]**—The lessee of certain premises having agreed, prior to the filing of a liquidation petition, to assign the lease to a third party, the trustee in the liquidation will not be permitted to execute a disclaimer of the lease except upon the terms of executing such assignment, but upon executing the assignment he will be entitled to an indemnity against any liability which he may incur thereby. *Edmonds, Ex parte, Tipping, In re*, 48 L. T. 77.

**Disclaimer relieves Trustee from all Liability.]** A trustee in bankruptcy upon disclaimer of a lease granted to the bankrupt does not become personally liable to the lessor, either upon an implied contract of tenancy, or as a trespasser, in respect of the period between the time when his actual occupation ceases, and the date when the disclaimer is executed:—Quære (per Cockburn, C. J., and Thesiger, L. J.), whether upon the execution of the disclaimer all personal liability of the trustee ceases in respect of the period during which he has had an actual occupation of the demised hereditaments. *Lourey v. Barker*, 5 Ex. D. 170; 49 L. J., Ex. 433; 42 L. T. 215; 28 W. R. 559—C. A.

A disclaimer of a lease to a bankrupt by the trustee in the bankruptcy operates to relieve the trustee from all liability under the lease, not merely from liability as from the date of the adjudication. *Allen, Ex parte, Fussell, In re*, 20 Ch. D. 341; 51 L. J., Ch. 724; 47 L. T. 65; 30 W. R. 601—C. A.

**Disclaimer of Freehold Estate of Bankrupt.]**—An owner of freehold property, "burdened with onerous covenants" within the meaning of s. 23 of the Bankruptcy Act, 1869, the title-deeds of which he deposited with an equitable mortgagee, became bankrupt. The trustee in bankruptcy executed a disclaimer of the property under the said section. Subsequently he and the bankrupt purported to convey the property to the equitable mortgagee, whose assigns contracted to sell the same to a purchaser. On a summons taken out by the purchaser under the Vendor and Purchaser Act, 1874:—Held, that there had been a complete disclaimer by the trustee of the bankrupt's estate; that the subsequent conveyance was inoperative; and that the legal estate was outstanding and could not be got in under the Trustee Act, 1850. *Mercer and Moore, or Beardsworth and Moore, In re*, 14 Ch. D. 287; 49 L. J., Ch. 201; 42 L. T. 311; 28 W. R. 485.

**Property Disclaimed reverts to Crown.]**—Semble, where the freehold property of a bankrupt is disclaimed by the trustee under s. 23 of the Bankruptcy Act, 1869, it reverts to the crown. *Id.*

## 22. ORDER AND DISPOSITION.

### a. Generally.

Under 21 Jac. 1, c. 19, Bankrupt must have

**been Trader at time of Ownership.]**—Under 21 Jac. 1, c. 19, s. 11, in order to bring a case within the statute, the bankrupt must have been a trader when he was in possession of the property. *Gornon v. East India Company*, 7 T. R. 228.

**Question of Fact for Jury.]**—The question of order and disposition is essentially a question of fact for the jury. *Emmerson v. Barnett*, 20 W. R. 110.

**In Case of Person employed to manage Property.]**—A person who was employed by the trustee under a bankruptcy to continue in the management of an hotel at weekly wages, presented a petition for liquidation:—Held, that the doctrine of order and disposition could not arise. *Bolland, Ex parte, Gatehouse, In re, Porter, In re*, 24 L. T. 335.

**Consent of true Owner.]**—The true owner has a right, at any time before the fiat, to take back his goods which he has allowed the bankrupt to have the possession of as the reputed owner, provided he does so without notice of any prior act of bankruptcy, it being a transaction with the bankrupt within 12 & 13 Vict. c. 106, s. 133, and therefore protected. *Graham v. Furber*, 14 C. B. 134; 2 C. L. R. 10; 23 L. J., C. P. 10; 18 Jur. 61.

Under 12 & 13 Vict. c. 106, s. 125, goods are not in the possession of a bankrupt at the time of the bankruptcy by the consent and permission of the true owner, if such owner, before the act of bankruptcy, gives notice that he requires the possession. *Brewin v. Short*, 5 El. & Bl. 227; 24 L. J., Q. B. 297; 1 Jur., N. S. 798.

If before the date of a fiat, and before notice of an act of bankruptcy, the true owner bona fide demands possession of the goods, and communicating with the bankrupt, does that which shews that the goods do not longer, with his consent, remain in the possession, order and disposition of the bankrupt, the title of the true owner is not defeated by a prior act of bankruptcy. *Ib.*

H. had given a bill of sale of his effects to secure a sum of money borrowed from C. At a meeting of H.'s creditors, at which C. was present, it was proposed that H. should execute an assignment of all his property for the benefit of his creditors; and on the following morning H. executed such an assignment to M., under which possession was taken. A few hours after C. sent a man, N., to take possession under his bill of sale. N. came to the door of H.'s house, and H. said to him, "You are too late; you must see Mr. M." N. then went to M., who asked him what he wanted. N. said, "I have come to take possession under the bill of sale for C." shewing the bill of sale. M., after seeing it, said, "Too late, as I am in possession under a bill of sale for the benefit of all the creditors." N. then said, "Well, if I am too late, I cannot help it; I will go to Mr. C." He then went away:—Held, that this was only an intention to demand the goods and to get possession, and therefore was not a transaction within s. 133 of the 12 & 13 Vict. c. 125. *Ib.*

**— Possession obtained by Fraud.]**—Oil merchants gave a lien on oil belonging to them in the hands of other persons to a creditor, who, trusting to an incorrect representation of the oil merchants, delayed taking possession or giving

notice of the lien, and the merchants repossessed themselves of the oil, mixed it with their general stock, and became bankrupt:—Held, that the lien was good, and that the oil was not in the order and disposition of the bankrupts with the consent of the true owner. *Bell, Ex parte, De Gex*, 577; 17 L. J., Bk. 9; 11 Jur. 986.

A., a trader, induced B., by fraud, to contract to sell him goods. After they were delivered a fiat issued against A., and his assignees refused to deliver up the goods to B., who thereupon sued them in trover:—Held, that he was entitled to recover, these not being goods in the possession, order and disposition of the bankrupt. *Load v. Green*, 15 M. & W. 216; 15 L. J., Ex. 113; 10 Jur. 163. See *Stevenson v. Newnham*, 13 C. B. 285; 22 L. J., C. P. 110.

Merchants in London were in the habit of dealing with Reed Brothers, of Old Town Street, Plymouth. On receipt of an order from Joseph Reed & Sons, of Mincing Lane, Plymouth, they forwarded the goods asked for, under the mistaken belief that they were dealing with their old customers. The person trading as Joseph Reed & Sons was an uncertificated bankrupt, and his trustee at once seized the goods:—Held, that the trustee was bound to restore the goods, or to pay the amount due for them. *Barnett, Ex parte, Reed, In re*, 3 Ch. D. 123; 45 L. J., Bk. 120; 34 L. T. 664; 24 W. R. 904.

#### — Goods Bought after Act of Bankruptcy.]

—A trader bought goods at an auction after he had committed an act of bankruptcy, and he obtained possession of the goods without paying for them, and before the act of bankruptcy was known to the vendor. Two days after he had received the goods he was adjudicated bankrupt. The vendor applied to the trustee in the bankruptcy for the return of the goods, on the ground that the purchase by the bankrupt was fraudulent:—Held, that no case of fraud had been proved, and that the goods passed to the trustee. *Rhodes, Ex parte, Shackleton, In re*, 44 L. J., Bk. 52; 32 L. T. 102; 23 W. R. 303. Affirmed, nom. *Whittaker, Ex parte, Shackleton, In re*, 10 L. R., Ch. 446; 44 L. J., Bk. 91; 32 L. T. 443; 23 W. R. 555—C. A.

#### Goods in Ownership of Bankrupt at Time of prior Act of Bankruptcy.]

—The 12 & 13 Vict. c. 106, s. 125, relating to goods in the order and disposition of a bankrupt at the time he becomes bankrupt, extends to goods which are in his order and disposition at the time of his committing any act of bankruptcy capable of supporting the adjudication, though such act is prior to the act on which the adjudication is founded. *Stansfeld v. Cubbitt*, 2 De G. & J. 222; 27 L. J., Ch. 266; 4 Jur., N. S. 395.

On the 19th April, 1856, A., a trader, executed a bill of sale, assigning all his furniture and effects on the premises where he was carrying on business to B., for securing a sum of money and interest. On the 15th May, the 5th June, the 24th June, the 15th July, and the 5th August, similar bills of sale were made by A. to B., but the last of such bills of sale was the only one of them which was registered under 17 & 18 Vict. c. 36. Such registration took place on 23rd August, 1856. In July, 1856, A. had committed one or more acts of bankruptcy, and the goods comprised in the bills of sale continued in his possession during the first ten days of August,

1856. In December, 1856, A. was adjudicated bankrupt. Prior to the date of the first bill of sale, in April, 1856, and thence to his bankruptcy, A. was in embarrassed circumstances, and that fact was known to B. Upon a bill in equity by his assignees, for setting aside all the bills of sale as fraudulent and void:—Held, first, that if B. had any title at all under the bills of sale, or any of them, it was only under the last of such bills of sale; and that as to that bill of sale, it was not a contract or dealing, within 12 & 13 Vict. c. 106, s. 133. *Ib.*

Held, secondly, that notwithstanding the subsequent registration, the goods comprised in the bills of sale were in the order and disposition of the bankrupt during the first ten days of August. *Ib.*

The 17 & 18 Vict. c. 36, has in no degree affected the doctrine of reputed ownership. *Ib.*

**Articles not connected with Business—Onus of Proof.]**—When a trader is in possession at his place of business of articles not in their nature connected with his business, and the trustee in his bankruptcy claims the articles on the ground that the bankrupt was the reputed owner of them, much stronger evidence will be required to prove the reputed ownership than in the case of articles connected with the business, the inference from the nature of the articles being that they are not connected with the business. *Loxering, Ex parte, Murrell, In re*, 24 Ch. D. 31; 52 L. J., Ch. 951; 49 L. T. 242; 32 W. R. 217—C. A.

#### b. Goods and Chattels not subject to reputed Ownership.

**Chattels Real.]**—Chattels real are not within the doctrine of reputed ownership. *Stephens v. Sole*, 1 Ves. 352; *Roe v. Galliers*, 2 T. R. 133.

**Heirlooms.]**—Furniture left by a testator to trustees to be enjoyed with the mansion-house by whomsoever should be entitled for the time being to the freehold estates, but not to be removed without leave of the trustees, will not pass. *Shaftesbury (Earl) v. Russell*, 3 D. & R. 84; 1 B. & C. 666.

**Fixtures.]**—Stills and other things fixed to the freehold did not pass to the assignees under the words "goods and chattels," in 21 Jac. 1, c. 19, s. 11. *Horn v. Baker*, 9 East, 215.

**Machinery affixed to the freehold of iron works** is not considered to be within the order and disposition of a bankrupt trader, where, by the custom of the country, such articles are furnished by, and continue to be the property of, the lessor. *Rufford v. Bishop*, 5 Russ. 346. And see *Hubbard v. Bagshaw*, 4 Sim. 326.

The furniture of a coal-mine is property of which the party who works the mine is the reputed owner, and which, upon his bankruptcy, will vest in his assignees. *Coombs v. Beaumont*, 2 N. & M. 235; 5 B. & Ad. 72.

A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of goods and chattels in 6 Geo. 4,

c. 16, s. 72, nor had the bankrupt the actual or apparent ownership. *Ib.*

**—Mortgaged.]**—Where A. took the lease of a house and premises for a term of years, and took the tenant's fixtures in the house at a valuation from the landlord and afterwards assigned the term to B. by way of mortgage, expressly including the fixtures, and subsequently became bankrupt:—Held, that the fixtures were not goods and chattels within the order and disposition of the bankrupt, and did not pass to his assignees. *Boydell v. M'Michaels*, 1 C., M. & R. 177; 3 Tyr. 974.

L. took a lease of a mill and iron-forge, and bought the fixed and moveable implements; but it was agreed that they should be delivered up at the end or other determination of the term, at a valuation, if the lessors should give fifteen months' notice of their desire to have them. L. afterwards conveyed all his interest in the premises, implements, &c. to a creditor, in trust, if default should be made by L. in paying certain instalments, to enter upon and sell the same, and satisfy himself out of the proceeds, re-assigning the residue: and if the lessors should require a re-sale of the implements, the proceeds of such re-sale were to go in discharge of the debt, if unsatisfied. L. made default, and subsequently became bankrupt, after which, and during the term, the creditor, who had not before interfered, entered upon the property:—Held, on trespass brought by the assignees, that L. had, at the time of the bankruptcy, the reputed ownership of the moveable goods, but not of the fixtures. *Clark v. Crownshaw*, 3 B. & Ad. 804.

A tenant of leasehold premises assigned them by way of mortgage, and afterwards became bankrupt. The lease contained a covenant to yield up all fixtures to the mortgagee belonging or to belong:—Held, that the fixtures did not pass to the assignees as goods and chattels in the possession, order and disposition of the bankrupt; and that the mortgagee might maintain an action as reversioner against the assignees for removing them. *Hitchman v. Walton*, 4 M. & W. 409; 1 H. & H. 374.

A. & B., being in trade as copper rolling manufacturers, purchased the fee-simple of an old mill, and fitted it up with greatly improved and altered machinery and gear. They then mortgaged the property to the plaintiff by the description of "all that land, mills, and factories, and also all the steam-engine, boilers, mill gear, millwright work, and machinery, then or thereafter to be fixed on the said land," with a covenant not to remove any part without permission of the mortgagee. Afterwards A. & B. became bankrupts:—Held, first, that they having placed the machinery and chattels in connection with the land while seized of the land in fee, they had united the property in the chattels with property in the land, and therefore a conveyance of the land itself alone would pass all chattels so connected with it. *Mather v. Fraser*, 2 Kay & J. 536; 25 L. J., Ch. 361; 2 Jur., N. S. 900.

**—What are Fixtures.]**—Held, secondly, that the conveyance to the mortgagee passed every description of chattel connected with the land in any manner further than by its own weight, but that such chattels as were on the premises merely resting by their own weight did not pass, *Ib.*

v. *Miller*, 12 C. B., N. S. 659; 31 L. J., C. P. 309; 9 Jur., N. S. 60.

A registered bill of sale does not take goods thereby assigned out of the reputed ownership of the assignor if they remain in his possession, though the possession may be in accordance with the terms of the instrument. *Harding, Ex parte, Fairbrother. In re*, 15 L. R., Eq. 223; 42 L. J., Bk. 30; 28 L. T. 241.

A bill of sale was executed on the 9th of January, 1872. On the 23rd of January the grantor filed a petition for liquidation. On the 30th of January the bill of sale was registered, and on the 12th of February the trustee under the liquidation took possession of the property. The bill of sale provided that the grantor should continue in possession of the property until default in payment upon demand of what should be due to the grantee. The grantor remained in possession of the property until the 12th of February, no demand for payment or possession having been made by the grantee. On that day the grantee authorized an agent to take possession, but no possession was taken by him:—Held, that the trustee was entitled to the property as against the bill of sale holder. *Ib.*

A trader assigned his goods by way of mortgage, subject to a proviso that it should be lawful for him to hold and make use of the goods until default in payment of the money secured, after demand in writing. The mortgagee allowed the trader to continue in possession of the goods until after his bankruptcy:—Held, that the goods were at the time of the bankruptcy in his order and disposition, with the consent of the true owner. *Freshney v. Carrick*, 1 H. & N. 653; 26 L. J., Ex. 129.

— **Life Estate of Grantor.**—A., being at the time in partnership with his son and others, executed a deed of gift, whereby he gave, granted, and confirmed to his son certain paintings, articles of plate, and other effects, which he had in his dwelling-house, upon trust for himself (A.) for life, and after his decease for his son absolutely. At the time the deed was executed, formal possession was given to the son by the delivery of one painting in the name of the whole; but, with that exception, the effects were left in the possession of A. at his house, and the change of ownership was not made public, further than by its being communicated by A. to some of his friends. The firm afterwards became bankrupt:—Held, that, inasmuch as the son had omitted to give notice of the change of ownership, the possession of A. was referable to his original title, and that he was in the reputed ownership of the goods at the time of the bankruptcy. *Castle, Ex parte*, 3 Mont., D. & D. 17; 12 L. J., Bk. 30; 7 Jur. 47.

**Ante-nuptial Settlement.**—Household furniture, linen and plate belonging to B. were assigned to him by deed, in contemplation of his marriage to the plaintiff, in trust, after the marriage, to stand possessed thereof during the joint lives of B., the settlor, and his intended wife, for her sole and separate use independently of A. The marriage took place, and B. afterwards became bankrupt. The settled furniture was then in the house in which he resided with his wife:—Held, that it was not at the time of his bankruptcy in his order and disposition with the consent of the true owner, so as to pass the

property in it, under 6 Geo. 4, c. 16, s. 72, to his assignees; and the fact of the furniture not having been the wife's before the marriage was immaterial. *Simmonds v. Edwards*, 16 M. & W. 838; 11 Jur. 592.

— **Post-Nuptial Settlement.**—A husband and wife, at a time when she was under age, executed a deed which purported to convey freehold property of the wife to a purchaser for 500*l.* The deed was not acknowledged by the wife. The husband received the 500*l.* The purchaser afterwards contracted to sell the property, and his sub-purchaser required the concurrence of the wife in the conveyance to him. The wife, who was then of age, refused to concur, unless the husband would execute a bill of sale of his furniture to a trustee for her, to secure the payment of 425*l.* for her separate use. This was done by the husband; and she then executed the conveyance to the sub-purchaser. The bill of sale was registered. Possession of the furniture was given to the trustee by delivering to him a silver fork in the name of the whole, and the keys of the house where the furniture was. But the furniture remained, until the husband filed a liquidation petition, in the house which was occupied by him and his wife, and it was used by them:—Held, that the execution of the bill of sale amounted to a purchase of the wife's concurrence in the conveyance; that the possession was consistent with the terms of the deed; and that the wife's trustee was entitled to the furniture as against the trustee under the liquidation. *Cor, Ex parte, Reed, In re*, 1 Ch. D. 302; 33 L. T. 757; 24 W. R. 302.

A husband, in consideration of an advance made to him by his wife of her separate property, agreed by parol to settle the furniture in their residence to her separate use, and subsequently assigned it to a trustee for her by a deed-poll which was registered as a bill of sale, but the registration turned out to be void. The husband afterwards became bankrupt:—Held, that his assignee was entitled to the furniture. *Ashton v. Blackshaw*, 9 L. R., Eq. 510; 39 L. J., Ch. 205; 21 L. T. 197; 18 W. R. 307.

**Character of Possession changed—Death of Grantor.**—A trader being indebted to certain persons, gave them a bill of sale of his furniture, which was not registered. He died intestate, and his widow took out administration to him, and continued to carry on his business on her own account for fourteen months, when she became bankrupt:—Held, that the furniture and other things included in the bill of sale were in the order and disposition of the bankrupt, with the consent of the true owners, and formed part of her assets distributable amongst her creditors. *Kitchen v. Ibbetson*, 17 L. R. Eq. 46; 43 L. J., Ch. 52; 29 L. T. 450; 22 W. R. 68.

— **Grant by Partners—Dissolution.**—On the 29th of April, 1876, two partners in trade executed a mortgage of their trade fixtures and loose chattels. The mortgage was not registered as a bill of sale. On the 7th of June, 1876, the partnership was dissolved, and the business was thenceforth carried on by one of the two partners alone. On the 29th of January, 1877, the outgoing partner executed an assignment of his half share in the mortgaged property to the com-

tinuing partner, subject to the mortgage. On the 22nd of March, 1878, the continuing partner filed a liquidation petition. At the date of the filing of the petition the mortgaged property was in his sole possession. The retiring partner remained solvent. The mortgagee had not demanded possession of the loose chattels, but there was no evidence of any actual consent on his part to the change of possession:—Held, that the loose chattels passed by virtue of the reputed ownership clause to the trustee in the liquidation. *Brown, Ex parte, Reed, In re*, 9 Ch. D. 389; 48 L. J., Bk. 10; 39 L. T. 338; 27 W. R. 219—C. A.

**Grantee taking Possession.**—The holder of a bill of sale of the household furniture and other effects of a trader (the inventory relating only to the household furniture and not to the stock-in-trade), by agreement with the trader, sent to take and preserve possession of the furniture and effects for the holder a young woman, who thenceforth lived with the trader in all respects as one of his family, the apparent possession of the trader continuing as before. The trader shortly afterwards became bankrupt, and his assignees having brought an action against the holder of the bill of sale to recover the value of the goods assigned by it, the jury was directed to find a verdict for the defendant if they believed that the young woman actually, and not merely colourably, took possession of the goods on the part of the holder of the bill of sale, and would not allow them to be dealt with without his instructions:—Held, that this was not a misdirection, and (the jury having found for the defendant) that the furniture and effects were not in the possession, order, or disposition of the trader at the time of his bankruptcy. *Vicario v. Hollingworth*, 20 L. T. 362; 17 W. R. 613.

A *bonâ fide* assignee for value under a bill of sale of household furniture and effects, immediately sent a person into the house to take and keep, and who took and kept, possession; but the assignor, down to the date of his bankruptcy, continued to live in the house and use the furniture as before:—Held, that the furniture and effects were in the possession or apparent possession of the bankrupt within the meaning of the Bills of Sale Act, 17 & 18 Vict. c. 36. *Hootman, Ex parte, Vining, In re*, 10 L. R., Eq. 63; 39 L. J., Bk. 4; 22 L. T. 179; 18 W. R. 450.

A., an innkeeper at Sheerness, being indebted to B., under what the jury thought sufficient pressure on the 30th of May employed his own attorney to prepare a bill of sale of all his effects in favour of B., to secure an existing debt and a small further advance (the amount being about a fair equivalent for the value of the goods), and sent it to B. On the 10th of July B. sent a man to A.'s premises to paint out A.'s name, and on the 13th went down to Sheerness and took possession, leaving A. there to manage the concern on his behalf. On the 15th A. filed a petition in bankruptcy, and on the 16th was duly adjudged bankrupt. In an action by the assignees to recover the value of the goods thus conveyed, the jury having found that the transaction was *bonâ fide*, and the possession was really and notoriously taken by B. prior to the bankruptcy:—Held, that the transaction could not be avoided, either as an act of bankruptcy (there being no relation) or as a fraudulent preference; and that the goods were not in his

order and disposition at the time of his bankruptcy. *Shrubsole v. Sussans*, 16 C. B., N. S. 452.

A trader executed a bill of sale of his stock-in-trade, and all his other effects, to an auctioneer, on the 17th of June; in pursuance of an arrangement between the parties, the auctioneer came on the premises of the trader, and attempted to sell the goods, but there were no buyers, and nothing was sold; he then left the premises, and the trader remained there, and continued to carry on business till the 22nd, when he committed an act of bankruptcy. The sale had been advertised, but it did not appear that the goods were advertised to be sold as the goods of the auctioneer:—Held, that notwithstanding the attempted sale, the goods were in the possession of the bankrupt as reputed owner, with the consent of the true owner at the time of the bankruptcy, and therefore passed to his assignees. *Reynolds v. Hall*, 4 H. & N. 519; 28 L. J., Ex. 257.

But where at a meeting of B.'s creditors, A. claimed certain property pledged to him, and it was agreed to place the same in the hands of third persons to be sold, and such persons took possession accordingly, and afterwards a petition for adjudication of bankruptcy was presented against B., and he was made a bankrupt:—Held, that the goods were no longer in his order and disposition at the time of his bankruptcy. *Tatham v. Andree*, 1 Moore, P. C. C., N. S. 386; 9 L. T. 2.

**— Goods on Grantee's Premises.**—A., having contracted with a canal company to build locks and bridges on the canal, as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises, on the banks of the canal; and on the company's advancing money to him, they took a bill of sale of these goods, and a symbolical delivery of them by a halfpenny; afterwards the company issued execution upon a judgment confessed by A., and the sheriff seized these goods, and A. became a bankrupt:—Held, that A. had not such a possession of the goods, as would enable his assignees to take them within the 21 Jac. 1, c. 19, s. 11; for the best delivery was given that the nature of the goods would admit of, they being before on the company's premises. *Manton v. Moore*, 7 T. R. 67.

On the 29th of November, the holder of an unregistered bill of sale of the household furniture of H., took possession by sending in a broker's man, who remained in the house and slept in an upper room, but did not remove any of the furniture or interfere with the use of it by H., who went on using it exactly as before. On the 19th of December placards were posted in the neighbourhood of the house announcing a sale of the furniture on the 28th, but, with the exception of a reference to a firm of solicitors for particulars, there was nothing in the placards from which it could be inferred that the sale was not made by H. himself. On the 23rd he committed an act of bankruptcy, and was adjudged bankrupt on the following day:—Held, that the goods belonged to the trustee, as being in the apparent, if not the actual, possession of the bankrupt, for that the possession taken by the broker's man was merely "formal possession," within the Bills of Sale Act, 1854; and that the placards could not take the furniture out of the

bankrupt's apparent possession, as they did not shew that the sale was to be made under a bill of sale. *Lewis, Ex parte, Henderson, In re*, 6 L. R., Ch. 626; 24 L. T. 785; 19 W. R. 835.

— **Before Time provided by Deed—Assent of Grantor.**—On the 2nd of November, 1870, B. and H. executed a bill of sale of their machinery and plant to R., for securing the repayment of a sum of money advanced by him. The bill of sale contained a proviso for entry and seizure by R. in case default should be made in payment for the space of twenty-four hours after demand. R. demanded payment on the 3rd of May, 1871, by a notice which was served on B. at half-past two p.m., and on H. at five p.m. R. took possession at half-past nine on the following morning. On the 6th of May, B. and H. having previously surrendered the keys to R., filed a petition for liquidation; and N. was appointed receiver and took possession. The workmen were paid off by N. on the morning of the 9th of May. The person put in possession by R. continued in possession until the 19th of May. N. was subsequently appointed trustee. It was contended on behalf of the trustee that the possession by R., having been taken before the expiration of the twenty-four hours after demand, was illegal; and that R. could not set up a title through an illegal act:—Held, nevertheless, that as no objection had been made by the debtor to the possession taken by R., the title of R. must prevail over that of the trustee. *Redfern, Ex parte, Ball, In re*, 19 W. R. 1058.

— **Possession, how obtained.**—If the grantee under an unregistered bill of sale has, before the bankruptcy of the grantor, acquired possession of the goods so as to exclude the apparent possession of the grantor, it is immaterial whether the possession has been obtained by means of a transaction which, taken per se, would have amounted to a fraudulent preference. *Symons, Ex parte, Jordan, In re*, 14 Ch. D. 693; 42 L. T. 106; 28 W. R. 803—C. A.

**Attempt to take Possession.**—A trader, on the 23rd of September, in consideration of H. discounting some acceptances which would fall due within twenty-one days, gave him a bill of sale on his furniture. It was arranged that the bill of sale should not be registered before the acceptances became due and were dishonoured. They were so dishonoured on the 12th of October. On that day the trader gave H. fresh acceptances in lieu of the old ones, and a second bill of sale of the furniture. The same arrangement as before was made respecting the registration of this bill of sale. On the 30th of October the last-mentioned acceptances were dishonoured, and H. instructed his broker to take possession of the furniture. On the 31st of October H. registered the bill of sale, and the trader committed an act of bankruptcy. On the same day the broker attempted to obtain possession of the goods, but was refused admission to the house until next day, when he took possession:—Held, that the second bill of sale having been made upon a new arrangement and for a fresh consideration, and having been duly registered within twenty-one days, was valid, and that since the creditor before the bankruptcy had done all he could to obtain possession of the goods, the order and disposition clause did not

apply. *Harris, Ex parte, Pulling, In re*, 8 L. R., Ch. 48; 42 L. J., Bk. 9; 27 L. T. 501; 21 W. R. 44.

A trader debtor assigned goods to his creditor as security for the payment of his debt on a certain day, by a bill of sale which authorized the creditor to enter the house at any time, take possession of the goods, and if refused admission break into the house. The debtor retained possession without interference by the creditor till the day when payment was due. On that evening and the next morning the creditor's agents kicked at the gates and tried for hours to get in, intending to take possession. The gates were kept closed, and they were refused admission, till the debtor had filed a petition for liquidation, and thereby committed an act of bankruptcy. A trustee was afterwards appointed, who claimed the goods as being at the commencement of the bankruptcy in the possession of the debtor as reputed owner by the consent of the true owner:—Held, that though the creditor had made no actual demand of possession, yet as he had done all in his power to take possession short of a forcible entry, there was no consent of the true owner, and that the creditor was entitled to his security. *Cohen, Ex parte, Sparke, In re*, 40 L. J., Bk. 14.

**Taking Possession of Part.**—A trader executed a bill of sale of his stock-in-trade in his shop and his furniture in his dwelling-house to secure a debt. The shop and the dwelling-house were situate in different streets in the same town. An agent of the bill of sale holder took possession of the stock-in-trade just before the debtor filed a liquidation petition, but he did not take possession of the furniture till after he had received notice of the filing of the petition:—Held, that the possession taken of the stock-in-trade operated as a withdrawal of the consent of the mortgagee to the furniture remaining in the debtor's order and disposition. *Edick, In re, Phillips, Ex parte, Alexander, Ex parte*, 4 Ch. D. 496; 46 L. J., Bk. 30; 35 L. T. 912; 25 W. R. 231.

The day before the possession was taken the mortgagee had instructed his agent to go and take possession of the property. Semble, that the giving of these instructions amounted to a withdrawal of the mortgagee's consent to the property remaining in the debtor's order and disposition. *Id.*

Ten months before his bankruptcy a trader assigned all his goods to the plaintiff by a bill of sale, executed under a threat of seizure. Six days before the issuing of the fiat, upon the sheriff's seizing the goods under a *fi. fa.*, the plaintiff claimed them as his, but the sheriff refused to give him possession. He also claimed the goods from the messenger of the Court of Bankruptcy, and, on his refusing to deliver them, brought an action against the assignees. The jury found that the bill of sale was *bonâ fide* and for a full consideration:—Held, that the goods and chattels did not remain in the order and disposition of the bankrupt. *M'Cue v. James*, 19 W. R. 158.

— **Requirements of Bills of Sale Act, 1854.**—To defeat the title of the holder of an unregistered bill of sale of chattels as against the trustee under the liquidation of the mortgagor, it is sufficient that the chattels are, at the com-

mencement of the liquidation, in the visible possession of the mortgagor, even though the mortgagee has taken possession, so as to prevent the goods being removed by any one else, and with the bona fide intention of himself removing them forthwith. *Jay, Ex parte, Blenkhorn, In re*, 9 L. R., Ch. 697; 43 L. J., Bk. 122; 31 L. T. 260; 22 W. R. 907. Reversing, 43 L. J., Bk. 37.

In order to defeat the title of the trustee in bankruptcy of the mortgagor, the Bills of Sale Act, 1854, requires that much more should be done by the mortgagee than would be necessary with reference to the doctrine of reputed ownership. *Id.*

Two ladies executed, on the 16th of June, 1873, a bill of sale of all their furniture and other effects, including some cows and a pony, to secure the repayment of a loan of 144l. The bill of sale was never registered. On the 10th of February, 1874, the mortgagee put two men into possession. These men slept in the house, but the mortgagors continued to use the furniture and other articles just as formerly. They retained the keys of the premises and used the pony when they pleased, and the cows were milked by their servant. On the morning of the 14th of February the men in possession commenced removing the furniture and packing it into vans which had been brought there, the vans, while they were being loaded, standing on a drive inside the premises occupied by the mortgagors. In the afternoon the vans with the furniture and also the cows and the pony were taken away. But before this had been done, about noon the same day, the mortgagors filed a liquidation petition:—Held, that the mortgagee had not done enough before the petition was filed to take the goods out of the possession or apparent possession of the mortgagors; that up to the morning of the 14th of February the mortgagee's possession was only a formal one, and inasmuch as the mortgagors had, on the 11th of February, committed an act of bankruptcy, by executing a second mortgage of their furniture and other effects (which formed substantially their whole property) to secure an antecedent debt, that the trustee under the liquidation was entitled to the goods. *Id.*

Under the terms of an unregistered bill of sale of goods, given to secure a debt, the grantor was to be allowed to remain in possession of the goods until default in payment of the debt after demand. Default having been made, the grantee became entitled under the bill to take possession of the goods, and accordingly demanded them from the owner of a house in which the grantor had placed them, and threatened to take them by force. The grantor, however, remained in possession of the goods until she filed a petition for liquidation:—Held, that the fact that the grantee was entitled to and demanded possession did not take the goods out of the grantor's possession within the Bills of Sale Act, and that the trustee was entitled to the goods as against the grantee. *Ancona v. Rogers*, 1 Ex. D. 285; 46 L. J., Ex. 121; 35 L. T. 115; 24 W. R. 1000—C. A. Reversing, 33 L. T. 749.

Held, also, that if the grantor had bailed the goods with a bailee to hold on account of the grantor, the goods would still have been in the possession of the grantor within the act, and would not have been taken out of the grantor's possession by the fact that the grantee was entitled to and demanded possession. *Id.*

In an action to enforce an agreement by B., an innkeeper, to give a bill of sale of his furniture and effects, A., obtained the appointment of a receiver, who entered into possession on the 16th of March, 1876, and served the customers. During the night B. absconded, and next day (the 17th of March) filed a liquidation petition, under which a receiver was appointed in bankruptcy. The two receivers remained in joint possession:—Held, that the case did not fall within the provisions of the Bills of Sale Act, and that the possession of A.'s receiver had taken the goods out of the order and disposition of B. at the time of his bankruptcy; and accordingly that the title of A. prevailed over that of B.'s trustee in bankruptcy. *Taylor v. Eckersley*, 5 Ch. D. 740; 36 L. T. 442; 25 W. R. 527.

A bill of sale was executed in July, 1870, in accordance with an agreement made in October, 1868. The grantor filed a petition for liquidation on the same day, but after the execution of the bill of sale, and the bill of sale was registered within twenty-one days. The grantee having taken possession of the goods before adjudication:—Held, that the title of the holder of the bill of sale prevailed over that of the trustee. *Homan, Ex parte, Broadbent, In re*, 12 L. R., Eq. 598; 19 W. R. 1078.

A debtor on the eve of insolvency being pressed for payment by a creditor, wrote a letter purporting to transfer to him 500 tons of coals lying at his wharf, the proceeds of which he agreed to hand over to the creditor till his debt was discharged. On the following day the debtor filed a petition for liquidation. The next day the creditor, not having heard of the filing of the petition, but suspecting that the debtor was insolvent, made a formal demand for the coals, and sent a man to take possession of them, who was forcibly ejected by the debtor. The letter was registered under the Bills of Sale Act, and a resolution was afterwards passed by the creditors agreeing to a liquidation:—Held, that the letter operated as an equitable assignment of the coals, and although it was intended by the parties that the coals should remain in the possession of the debtor, yet the creditor had a right to demand possession of them if he suspected the insolvency of the debtor; and that when that was done they ceased to be in the order and disposition of the debtor with the consent of the true owner. *Montagu, Ex parte, O'Brien, In re*, 1 Ch. D. 554; 34 L. T. 197; 24 W. R. 309—C. A.

**Prior Act of Bankruptcy without Notice.]**—The holder of an unregistered bill of sale of personal chattels, given to secure a bona fide present advance, took actual possession under the powers contained in his mortgage deed. Five days later the mortgagees filed a liquidation petition, and the trustee claimed the goods comprised in the bill of sale, on the ground that his title related back to an act of bankruptcy which the debtor had committed by denying himself to some of his creditors who called at his place of business the day before possession was taken. The mortgagor was ignorant of the prior act of bankruptcy:—Held, that the trustee was entitled to the goods. *Turner, In re, Attwater, Ex parte*, 5 Ch. D. 27; 46 L. J., Bk. 41; 35 L. T. 682; 25 W. R. 206—C. A.

**Unregistered Agreement for Bill of Sale.]**—



Though an unregistered agreement may be a good consideration to support a duly registered bill of sale, it cannot be itself relied on as giving any right to the holder against the trustee in bankruptcy, though possession has been demanded under it. *Mauckay, Ex parte, Jerome, In re*, 8 L. R., Ch. 643; 42 L. J., Bk. 68; 28 L. T. 828; 21 W. R. 664.

**Validity of Contracts not to charge or alienate Goods assigned by Bill of Sale.**—There is nothing illegal or contrary to the policy of the bankrupt laws in a stipulation by the assignor on an assignment of goods, under which they are to remain in his possession, not to do any act by means of which the goods assigned might become charged or alienated, or whereby the assignment might become ineffective, or the assignor might be deprived of them. *Hill v. Cowdery*, 1 H. & N. 360; 25 L. J., Ex. 285.

It is a breach of such stipulation for the assignor, while the goods are in his possession, to file a declaration of insolvency, upon which a fiat issues, under which the goods are seized by the assignees as being in the possession and order of the bankrupt as reputed owner by the consent of the true owner; for there would be nothing illegal or contrary to the policy of the bankrupt laws in an express stipulation by the assignor not to file such a declaration, so as that the goods assigned might be liable to be seized in bankruptcy, or while the goods remained in his possession; and his duty would be, to give notice to the assignee of his insolvency, that the latter might remove them, and thus they might no longer remain in the possession and order of the assignor as the owner by consent of the true owner; and as the effect of the act of bankruptcy, while the goods so remained in his order and possession was to vest them in the assignees in bankruptcy, the act of filing the declaration was an act by means whereof the assignee was deprived of the goods. *Id.*

**Bills of Sale Act, 1882, s. 15.**—The Bills of Sale Act, 1882, repeals the 20th section of the Bills of Sale Act, 1878, in respect of bills of sale given by way of security, but not in respect of bills of sale given by way of absolute transfer, and therefore chattels comprised in a registered bill of sale given by way of absolute transfer are not in the order and disposition of the grantor within the Bankruptcy Act. *Swift v. Pannell*, 24 Ch. D. 210; 48 L. T. 351; 31 W. R. 543.

Notwithstanding the repeal of s. 20 of the Bills of Sale Act, 1878, by s. 15 of the Bills of Sale Act, 1882, the effect of s. 3 of the latter act is, that the grantee of a bill of sale, registered under the Act of 1878 before the coming into operation of the Act of 1882, is, so long as the registration is subsisting, entitled to the protection afforded by s. 20 against the "order and disposition" of the grantor, even when an act of bankruptcy is committed by the grantor after the coming into operation of the Act of 1882. *Isard, Ex parte, Chapple, In re*, 23 Ch. D. 409; 52 L. J., Ch. 802; 49 L. T. 230; 32 W. R. 218—C. A.

#### d. Ships and Cargoes.

**Under 21 Jac. 1, c. 19, s. 11.**—The sole owner of a ship secretly mortgaged three fourth shares in her to a creditor as a security for a debt, and

was allowed by the latter to retain the sole possession, management, and control of her until he became bankrupt, and though the requisites of the registry acts had been complied with:—Held, that the whole vessel passed to the assignees under 21 Jac. 1, c. 19, s. 11, and that trover would lie against the mortgagee, who had taken possession of the ship upon the bankruptcy of the mortgagor. *Kirkley v. Hodgson*, 2 D. & R. 848; 1 B. & C. 588.

The owner of the major part of a vessel lying in port mortgaged it, and transferred the bill of sale to the mortgagees. The mortgagees did not take possession, but suffered the mortgagor and the other part owners to have the management, and act as the visible owners of the vessel. The mortgagor having become bankrupt, his share in the vessel passed to his assignees, under 21 Jac. 1, c. 19. *Hall v. Gurney*, 3 Dougl. 356.

**—Bill of Sale—Parol Agreement.**—A. & B., owners of a ship, executed an absolute bill of sale to C. & D. for a nominal consideration. There was a parol agreement between them that C. & D. should accept bills for the accommodation of A. & B.; that the ship should be a security to C. & D. for any advances they should make on such acceptances; and that, until default made by A. & B. in providing for the acceptances, the ship should remain in their possession and management. The ship was registered in the names of C. & D., but A. & B. remained in the possession and management of her, appeared to the world as owners, and obtained credit from appearing so. Before default made by A. & B. in providing for the acceptances, C. & D. became bankrupt, and their assignees immediately seized and sold the ship. A. & B. afterwards became bankrupt:—Held, that trover for the ship could not be maintained by their assignees against the assignees of C. & D.; for the parol agreement could not be set up against the bill of sale, and the case did not come within the 21 Jac. 1, c. 19, s. 11, the ship having been seized before the bankruptcy of A. & B.; and though the bill of sale, unaccompanied by possession, might be void as against creditors, it was binding upon A. & B. and their assignees. *Robinson v. McDonnell*, 2 B. & A. 134.

**—Mortgagee taking Possession on Arrival.**—Where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand; the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival:—Held, that he might maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. *Atkinson v. Maling*, 2 T. R. 462. And see *Richardson v. Campbell*, 5 B. & A. 196.

A transfer of a ship and cargo at sea, conveyed by M. to S. as a security for money borrowed, by executing and delivering to S. a bill of sale of the ship, and a policy upon the ship and cargo, and indorsing the bills of lading, did not pass the property to S., where S. neglected, upon the ship's return and notice thereof, to take possession, or to do any act to notify the transfer of the property to him; but that the property passed to the assignees of M., who became bankrupt, as being in the possession, order, and

disposition of M. at the time when he became bankrupt, within the 21 Jac. 1, c. 19. *Mair v. Glennie*, 4 M. & S. 240.

**Under 12 & 13 Vict. c. 106, s. 125.**—A ship purchased by a firm consisting of A., B., and C., and subject to a lien in favour of D. and E., was registered in the names of B., C., D., and E., and an agreement was subsequently entered into by the firm to assign the ship to other persons as security, of which no notice was given to D. and E. The firm having subsequently become bankrupt:—Held, that if the agreement had not been void under 17 & 18 Vict. c. 104, the interest of the mortgagees would not have passed to the assignee under the order and disposition clause in the 12 & 13 Vict. c. 106, s. 125. *Liverpool Borough Bank v. Turner*, 1 Johns. & H. 159; 29 L. J., Ch. 827. Affirmed, 30 L. J., Ch. 379.

**—Assignment of Ship in course of Building.]**

—A ship-builder assigned to a creditor an unfinished ship, and agreed to complete it at his own expense, the value of the finished ship to be set off against an equal amount of the pre-existing debt. The ship-builder's course of trade was to build ships on his own account, and sell them when complete. Before he had quite completed his ship, he became bankrupt:—Held, that the ship did not pass to his assignees as being within his order and disposition. *Holderness v. Rankin*, 2 De G., F. & J. 258; 29 L. J., Ch. 753; 6 Jur., N. S. 928; S. C., 28 Beav. 180; 6 Jur., N. S. 903, affirmed.

**—Bill of Sale Registered after Bankruptcy.]**

—By 3 & 4 Will. 4, c. 55, s. 31, the sale of a registered ship shall be by an instrument in writing containing a recital of the certificate of registry, otherwise such transfer shall not be valid or effectual for any purpose whatsoever, either in law or equity; by s. 34, no instrument shall be valid to pass the property in a ship or for any other purpose, until it shall have been registered by the proper officers; and by s. 35, as soon as it shall have been registered, it shall be valid and effectual to pass the property against all persons whatsoever. The mortgagees of a ship under a bill of sale in writing, executed before, but not registered until after, the bankruptcy of the mortgagor, had not taken possession of the ship; the bankrupt's assignees claimed to hold the ship, on the ground, either that it had not passed from the bankrupt at the time of the bankruptcy, or that it was in his order and disposition:—Held, that under these sections, the operation of a bill of sale commenced not from the time of execution, but from the time of registration only, and that all rights which accrued by the act of the law or of the vendor before registration, were as valid against the mortgagee or vendee as if the unregistered bill of sale had not existed; that the ship therefore passed to the assignees as part of the property of the bankrupt, and not as property of the mortgagee in the bankrupt's order and disposition. *Boyson v. Gibson*, 4 C. B. 121; 16 L. J., C. P. 147.

**—Unregistered Deposit of Mortgage Deeds**

**—Bankruptcy of Mortgagees.]**—Where registered mortgagees of three fishing boats deposited the mortgage deeds with their bankers as security for a debt, and afterwards became bankrupt:—Held, that, the statutory form of assignment

being by indorsement, the mortgages could not be dealt with by the bankrupts, and, therefore, were not in their order and disposition. *Lacon v. Liffen*, 4 Giff. 75; 9 Jur., N. S. 13. Affirmed on appeal, 32 L. J., Ch. 315; 9 Jur., N. S. 477; 7 L. T. 774; 11 W. R. 474.

**Cargoes at Sea—Notice to Master excused.]**—

A., by deed, dated the 11th of November, 1857, assigned the cargo with which the ship *Esturias* was then laden, and which thereafter should be placed on board, to B. for securing the balance of a banking account. On the 23rd January, 1858, notice of the deed was sent, directed to the captain of the ship, "west coast of Africa," but it never reached him. At the date of the deed, B. had reason to expect that the ship would soon sail on her homeward voyage. In fact, she was then on the west coast of Africa taking in and seeking cargo. On the 18th January, 1858, she was still taking in and seeking cargo, and on the 1st February to the 11th received part of the cargo of another ship belonging to A. On the 12th February she sailed on her homeward voyage. On the 1st March A. was adjudicated bankrupt. On the arrival of the *Esturias* the master was served with a copy of the notice. In an action by A.'s assignees to recover the proceeds of the cargo:—Held, that the deed operated as an equitable assignment of the cargo, and that there was no distinction between the part of the cargo put on board before the assignment and the part put on board after; and that there was no default in B. in not giving notice of the deed; and therefore the goods were not in the order and disposition of the bankrupt with the consent of the true owner within 12 & 13 Vict. c. 106, s. 125. *Acraman v. Bates*, 2 El. & El. 456; 29 L. J., Q. B. 78; 6 Jur., N. S. 294; 1 L. T. 322.

**—Assignment to Shipowner.]**—Goods, the

property of A., which were on board a ship were assigned to B., the owner of the ship, in order to secure a debt from A. to B. The ship at the time of the assignment was abroad, and under the command of the mate; before she arrived in England, A. committed an act of bankruptcy:—Held, that the goods were virtually in the possession of B. at the time of the assignment, and that he retained his lien as against the assignees of the bankrupt. *Belcher v. Oldfield*, 8 Scott, 221; 6 Bing. N. C. 102; 3 Jur. 1194.

**e. Goods Sold by Bankrupt but not Delivered.**

**Set Apart.]**—Wine sold by the bankrupt, remaining in the bankrupt's cellar, set apart in a particular bin, and marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, is not in the order and disposition of the bankrupt. *Marrable, Ex parte*, 1 Glyn & J. 402.

The plaintiff agreed to purchase from K. 100 quarters of barley, being part of a larger quantity which the plaintiff saw and approved of, and of which he took away a sample. It was also agreed that the plaintiff should send his own sacks to K.; that K. should fill the sacks with the barley, take them to a railway, and place them on trucks, to be conveyed to the plaintiff. The plaintiff sent 200 sacks, and K. filled 155 of them with barley from a larger quantity. The barley was not delivered, though

repeatedly demanded by the plaintiff, and promised by K.; K. becoming embarrassed, took the barley out of the sacks, and mixed it with the bulk, without the privity of the plaintiff. K. was soon after adjudicated a bankrupt. The assignees thereupon removed the barley, and claimed the whole as the bankrupt's property:—Held, that the property in the barley in the 155 sacks passed to the plaintiff by the appropriation made by K., with the assent of the plaintiff, a priori as well as subsequently. *Allridge v. Johnson*, 7 El. & Bl. 885; 26 L. J., Q. B. 296; 3 Jur., N. S. 913.

Held, also, that notwithstanding the prior conversion by K., the removal of the barley by the assignees was a conversion by them. *Ib.*

A carriage finished and paid for before the bankruptcy of the maker, but suffered to remain on his premises at the request of the person for whom it was made, on account of his being about to go abroad, cannot be taken by the assignees as in the order or disposition of the bankrupt, although such bankrupt put it in his shop front, and actually sold it to another. *Bartram v. Payne*, 3 C. & P. 175.

In such case an actual delivery of the carriage at the house of that person for whom it is made is not necessary to constitute him the owner. *Ib.*

A chariot was built to the plaintiff's order, and paid for by him: when finished in other respects, the plaintiff ordered a front seat to be added; but the builder being slow in making the addition, the plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. The plaintiff, being afterwards dissatisfied, ordered the chariot to be sold; and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became bankrupt, and his assignees seized the chariot:—Held, that the chariot did not pass to the assignees. *Carruthers v. Payne*, 5 Bing. 270; 2 M. & P. 429.

A. employed S. & B. to build him a greenhouse; when it was completed, they gave him notice of that fact, and requested him to remit them the price agreed on; A. accordingly remitted the money to S. & B., and desired them to keep the greenhouse until he sent for it. S. & B. afterwards packed up the sashes and framework, and deposited the whole with W., telling him it was the property of A., and requesting him to keep it for him, which W. consented to do; there had been no previous communication between A. and W. S. & B. becoming bankrupts, the greenhouse was taken possession of for their assignees:—Held, that the jury was warranted in finding that the greenhouse was not in their possession, order, and disposition as reputed owners. *Wilkins v. Bromhead*, 7 Scott, N. R. 921; 6 M. & G. 963; 13 L. J., C. P. 74; 8 Jur. 83.

If a person buying wine of a merchant permits it to remain in his cellar, though for the purpose of ripening, and the merchant becomes bankrupt, the assignees may take the wine as being in the possession of the bankrupt. *Tanner v. Barnett*, Peake's Add. Cas. 28.

**Goods Sold and Hired Back.**—A draper in London, being the owner of household furniture which was in his dwelling-house and shop, signed a written agreement by which he sold the furniture to a furniture dealer and hired it back

at a rent of 12s. 6d. a week. He remained in the use and occupation of the furniture under the agreement for more than four years, and then filed a petition for liquidation, under which a trustee was appointed:—Held, that the furniture was in the order and disposition of the debtor as the reputed owner at the commencement of the liquidation, and that the trustee was entitled to it. *Lovering, Ex parte, Jones*, *In re*, 9 L. R. Ch. 621; 43 L. J., Bk. 116; 30 L. T. 622; 22 W. R. 853.

P., a trader, being in want of capital, sold to the plaintiffs certain agricultural machinery (including a steam-engine and threshing machine, with their appurtenances) for the sum of 700*l.*, and signed a sale or receipt note for the same. The plaintiffs, thereupon, by an agreement in writing, let the said machinery on hire to P. for a term of three years at or for the sum of 882*l.* payable by quarterly instalments of 73*l.* 10*s.* and the said agreement provided (amongst other things) that in case of default being made by P. in the payment of the sum of 882*l.*, or the said quarterly instalments, or any part thereof, or if P. during the term became bankrupt, or assigned, or parted with the possession of the machinery or any part thereof, without the consent of the plaintiffs, it should be lawful for them to resume and take absolute possession of the said machinery. Neither the sale note nor the agreement was registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), and P. paid two instalments of 73*l.* 10*s.* due under the agreement and no more. P., without the consent or knowledge of the plaintiffs, and after he had made default in the payment of the instalments, parted with the possession of the steam-engine and threshing machine, with their appurtenances, and delivered the same to the defendant, who had no notice of the above agreement, for the purpose of having them sold by auction, and the defendant advanced 100*l.* to P. on them, and also incurred expenses in attempting to sell them. P. then committed an act of bankruptcy by absconding, and the plaintiffs demanded possession of the steam-engine and threshing machine, with their appurtenances, from the defendant, who claimed a lien upon them in respect of his commission and charges as auctioneer in such attempted sale, and also in respect of the advance of 100*l.*, which had not been repaid to him by P. In an action brought to recover the steam-engine and machinery with their appurtenances, or their value, and damages for their detention:—Held, that the plaintiffs were entitled to judgment on the grounds that the steam-engine and machinery (whether the agreement amounted to a bill of sale or not) were not in the possession or apparent possession of P. at the time of his bankruptcy, within the meaning of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1; nor in the order and disposition of P. within the meaning of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, sub-s. 5. *Lincoln Waggon and Engine Company v. Mumford*, 41 L. T. 655.

The purchaser of a dyer's plant, being unable to pay the purchase-money, re-sold it to the vendor, who never took actual possession, but demised it to the purchaser for three years, who, during that time, became bankrupt, and the assignees seized the plant in his possession, under 21 Jac. 1, c. 19, s. 11:—Held, that the property passed. *Bryson v. Wylie*, 1 B. & P. 83, n.

**Custom to Leave Goods in Seller's hands.]**—A custom that purchasers of hops from hop merchants should leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition—the custom not being clear, distinct, and precise enough to enable others to know that the hops so left were not the property of the possessor. *Thackwaite v. Cock*, 3 Taunt. 487; 2 Rose, 105. And see *White v. Wilks*, 5 Taunt. 176; 1 Marsh. 2.

Where a custom exists for the buyer to leave goods bought in the hands of the seller, and is so notorious as to be practically known to all persons dealing with the seller in his business, goods so left in the hands of the seller for a time not longer than is clearly within the custom do not on the bankruptcy of the seller pass to his assignees. *Priestley v. Pratt*, 2 L. R., Ex. 101; 36 L. J., Ex. 89; 16 L. T. 64; 15 W. R. 639.

P. purchased live stock from G., who became bankrupt within a week afterwards. Some of the animals were taken away by the buyer at the time of purchase; the remainder was left on the vendor's premises, and was taken possession of by his assignees. In an action of trover against the assignees, the jury found that it was a notorious custom in the trade to leave purchased cattle on the vendor's premises for the vendee's convenience, for such time as might be agreed upon between them:—Held, that upon this finding the animals were not at the time of the bankruptcy within the order and disposition of the bankrupt. *Ib.*

**Goods in Warehouse of Third Party.]**—A., a spirit merchant, sold to B., a wine merchant, several casks of brandy, some of which, at the time of the sale, were in A.'s own vaults, and others in the vaults of a warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine-trade at the place where the parties resided, that this sale had taken place; but no notice of it had been given to the warehouse-keeper, with whom some of the casks were deposited: A. having become bankrupt while the brandies remained where they were originally deposited.—Held, that the whole of them passed to his assignees as goods in his possession, order, and disposition, by the consent and permission of the true owner. *Knowles v. Horsfall*, 5 B. & A. 134.

**Custom.]**—Where the custom of country tea dealers in purchasing teas from wholesale houses in London was to leave the warrants, after payment, in the hands of the London dealers, to pass the entries and make the necessary arrangements with the dock authorities for the delivery of the teas so purchased and to deliver the teas in portions as the country dealers required them; and teas were purchased in the usual course from the bankrupts, who credited the purchasers in their books with the moneys so paid to them, and indorsed the names of the purchasers upon the warrants:—Held, that the

teas so purchased were not the subject of reputed ownership. *Birt, In re*, 15 L. T. 368.

When before the commencement of a bankruptcy the owner of goods in the possession or under the control of the trader demands the goods, bona fide, with the object of obtaining delivery of them, his consent to their remaining in or under the trader's possession or control is determined by the demand. *Ward, Ex parte, Conston, In re*, 8 L. R., Ch. 144; 42 L. J., Bk. 17; 27 L. T. 502; 21 W. R. 115.

Therefore, when a publican purchased of spirit merchants certain hogsheads of whisky, stored in the bonded warehouse of a third party, subject to the vendor's control, and the purchaser paid to the vendor the price of the goods and also the sum required to clear a particular hogshead of the whisky and demanded delivery thereof, although the vendor filed a petition for liquidation before any steps were taken for delivering the hogshead, the purchaser was entitled to the hogshead as against the trustee in liquidation. *Ib.*

At the time of the presentation of a petition for liquidation by arrangement there were lying in the bonded warehouse of the debtors, who were wine and spirit merchants, in Liverpool, certain butts of whisky which they had sold to the purchaser. The goods were left there for the convenience of the purchaser, to whom a delivery warrant had been given by the vendors, in which they stated that they held the goods to his order as warehousemen. The vendors did not carry on business as general warehousemen, but it was proved to be the usual custom of the wine and spirit trade, in Liverpool, for goods sold in bond to remain in the possession or under the control of the vendors, in the bonded warehouse in which they were at the time of sale, until they were required by the purchaser for use:—Held, that the existence of a custom of this nature, shewn to be well known among persons concerned in the wine and spirit trade, excluded the doctrine of reputed ownership, and that the goods did not pass to the trustee. *Watkins, Ex parte, Conston, In re*, 8 L. R., Ch. 520; 42 L. J., Bk. 50; 28 L. T. 793; 21 W. R. 530.

At the commencement of the liquidation of wine and spirit merchants, whisky which they had sold was lying in the bonded warehouse of a third party to the order of the vendors. The delivery order was not sent to the purchaser till after the petition had been filed. It was shewn that it is the well-known custom in the wine and spirit trade for goods after sale to remain in the bonded warehouse of the vendor, or in that of a third party to his order, till the purchaser requires them for use:—Held, that the custom excluded reputation of ownership in the vendors, and that the purchaser was entitled to the whisky, the giving of the delivery order being immaterial. *Vaun, Ex parte, Conston or Conston, In re*, 9 L. R., Ch. 602; 43 L. J., Bk., 113; 30 L. T. 739; 22 W. R. 811.

Held, also, that it was immaterial that the goods were in the warehouse of a third party, instead of being in the vendor's own warehouse. *Ib.*

**Furniture conveyed with House—Formal Delivery—Vendor remaining in Possession—Notoriety of Transaction.]**—Where, by agreement between B. and the defendant, B. agreed, on payment to him of a sum certain, to convey to the defendant a dwelling-house, and to deliver

possession of all the household furniture and stock; and that, after formal possession delivered to the defendant, B. should be allowed to remain in possession for three months, without paying rent; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and B. afterwards left in possession according to the agreement, and became bankrupt whilst he so remained in possession, and before the expiration of the three months:—Held, that this was not a possession by the bankrupt within 21 Jac. 1, c. 19, s. 11. *Muller v. Moss*, 1 M. & S. 335; 2 Rose, 99.

### f. Goods of Bankrupt in Warehouses.

**Dock Warrants and Warehouse Receipts.**—If property is assignable by transfer tickets, the reputed owner is the possessor of the tickets. *Ridout v. Lloyd*, 1 Mont. 103.

—**Where Transfer Complete.**—The custom of the London docks is to acknowledge no title in wines, unless accompanied with possession of dock warrants indorsed by the party to whom they were originally issued. Where A. received warrants from B. not indorsed by B., and A. delivered and indorsed them to C., who afterwards procured B.'s indorsement, and A. became bankrupt:—Held, that the wines passed to C. though the notice of the transfer to the dock company, and of the indorsement by B., were subsequent to the bankruptcy. *Davenport, Ex parte*, 1 Deac. & Chit. 397; 1 Mont. & Bligh. 165.

Held, also, that for want of B.'s indorsement to A., and transfer into A.'s name in the company's books, A. never had the order and disposition of them. *Ib.*

—**Deposited as Security.**—A. sold a quantity of lac dye, then lying in the E. I. Company's warehouse, to B.; and after being allowed to retain possession of the delivery warrant, pledged the latter to C. for an advance of money, and shortly afterwards became bankrupt, without having redeemed the warrant:—Held, that A. had not the possession, order, and disposition of the goods at the time of his bankruptcy within 21 Jac. 1, c. 19, s. 11, and consequently the property in the warrant did not vest in his assignees. *Greening v. Clarke*, 6 D. & R. 735; 4 B. & C. 316.

Where A., having occasion to borrow money of B., left with him, as a collateral security, warrants of the West India Dock Company for sugars deposited in their warehouses, and entered in his name in their books, and afterwards became bankrupt:—Held, that A. had not such a possession of the sugars as would enable his assignees to maintain trover for them, as the transfer of the warrants was a complete transfer of the possession before the bankruptcy, so as to take the case out of 21 Jac. 1, c. 19, s. 11. *Lucas v. Dorrien*, 1 Moore, 29; 7 Taunt. 278.

Goods were deposited in bond in the warehouse of L. to await the order of the depositor, who signed receipts for the same and delivered the receipts to his bankers to secure advances. No notice of such delivery of the receipts was given to L. The depositor subsequently became bankrupt:—Held, that the goods remained in his

order and disposition, and as such passed to his assignees. *In re, Wilson*, 14 L. T. 369.

**Goods left in Vendor's Name—Demand by Vendee.**—A., in France, employed B., in England, to sell wines on commission, as well as to purchase other wines on A.'s account, in London, for which he furnished him with letters of credit. The wines were generally bought and sold by B. in his own name. Part of the wines consigned by A. was in the dock warehouses, standing in B.'s name, and part formed one indiscriminate stock in B.'s cellar. A. closed connexion with B., and required him to deliver up all the wines; but B. neglected to comply with this requisition, and shortly afterwards became bankrupt:—Held, first, that the court had jurisdiction to order the assignees of B. to deliver up these wines to A.; secondly, that it was not a case of reputed ownership; thirdly, that A. might sue the purchasers of the wines, in the name of B., or his assignees. But, fourthly, that no order could be made for the payment to A. of any moneys, the produce of the wines, if mixed with the other moneys of B. at the time of his bankruptcy. *Moldant, Ex parte*, 3 Deac. & Chit. 351.

The 21 Jac. 1, c. 19, s. 11, only transferred to the assignees of a bankrupt such goods as, by the consent of the true owner, the bankrupt had in his possession at the time of his bankruptcy; therefore, where a purchaser of goods, lying at a wharf in the name of the seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months after, during which time the seller disposed of a part; but upon notice of the seller's insolvency, the purchaser carried the order to the wharfinger, and had the goods transferred into his own name; and nine days after that the seller became bankrupt:—Held, that his assignees were not entitled to these goods; for there was a complete transfer of the possession before the bankruptcy. *Jones v. Dwyer*, 15 East, 21; 1 Rose, 339.

### g. Goods of Bankrupt taken in Execution.

**Re-let to Debtor.**—If the furniture of a coffee-house is taken in execution by a creditor, and, without ever being removed, let by him to the keeper of the coffee-house, who becomes bankrupt while in possession of it, the assignees may seize it under 21 Jac. 1, c. 19, s. 11. *Lingham v. Biggs*, 1 B. & P. 82.

Secus, as to furniture in a ready furnished private house; and also as to horses. *Ib.* 88.

Where a judgment creditor purchased by a bill of sale from the sheriff machinery seized in execution, belonging to his debtor; and, after marking the same with the initials of his name, allowed the debtor to retain possession, upon his agreeing to pay a rent for the use of it, and the latter remained in possession until he committed an act of bankruptcy:—Held, that as the change of ownership was not notorious, the assignees were entitled to recover the property in trover, as there was no evidence to go to the jury, that the bankrupt had ever ceased to be the reputed owner. *Lingard v. Messiter*, 2 D. & R. 495; 1 B. & C. 308.

—**Custom of Hiring.**—The fact that it is the custom of furniture dealers to let out furniture

on a three years' hiring and purchase agreement does not disentitle the general public to assume that an ordinary householder is the real owner of the furniture which is in his house. *Brooks, Ex parte, or Pickering, Ex parte, Fowler, In re*, 23 Ch. D. 261; 48 L. T. 453; 31 W. R. 833; 47 J. P. 470—C. A. Affirming, 48 L. T. 32.

The furniture in the dwelling-house of a trader having been seized under an execution, a friend of his bought it from the sheriff at a valuation, and then verbally agreed that the debtor should continue in possession of it and use it as before, paying, by way of rent, interest at 5 per cent. per annum on the purchase money, until he should be able to repurchase it at the price given for it. This arrangement was carried out, and the debtor remained in possession of the furniture as before, until he filed a liquidation petition. He had not repurchased it. The trustee in the liquidation claimed it under the reputed ownership clause. It was admitted that there is a custom for furniture dealers to let out furniture on a three years' hiring and purchase agreement, but there was no other evidence as to the existence of any custom of hiring furniture:—Held, that the trustee was entitled to the furniture. *Id.*

#### —Warrant left with Debtor's Shopman.—

The plaintiff's attorney, upon issuing execution, wrote to the sheriff's officer, directing him to leave the defendant's mother, or any one else, in possession of the defendant's goods, and to allow his business to be carried on as usual. The officer delivered the warrant to the defendant's shopman, ordering him to carry on the business, and account for moneys received. No money was ever paid to the plaintiff, and the warrant lay in the shopman's hands from April to June; the defendant having then become bankrupt, and his assignees claiming his goods, the sheriff returned nulla bona to the plaintiff's writ. The jury having found a verdict for the sheriff in an action against him for a false return, the court refused to grant a new trial. *Doker v. Hasler*, 2 Bing. 479; B. & M. 198; 10 Moore, 210.

#### Adverse interference with Debtor's Possession.]

—Goods left in the possession of a trader at the time he becomes bankrupt, with the consent of the true owner, pass to his assignees, under 12 & 13 Vict. c. 106, s. 125, although before the bankruptcy the sheriff, under a fieri facias against the goods of the bankrupt, entered on the premises and stated that he took possession of the goods, but in fact left the bankrupt still apparently in possession of them; for the sheriff was not justified in seizing the goods, and therefore his assertion that he took possession had no effect in law. *Barrow v. Bell*, 5 El. & Bl. 540; 25 L. J., Q. B. 2; 2 Jur., N. S. 159.

Goods which had been mortgaged by a trader, before his bankruptcy, were, at the time of the bankruptcy, in the hands of the sheriff, under an execution against the bankrupt:—Semble, that they did not pass to his assignees, as being in his order and disposition with the consent of the true owner. *Fletcher v. Manning*, 12 M. & W. 571; 1 C. & K. 350; 13 L. J., Ex. 150.

On the 2nd of May a bill of sale of chattels was executed, and it was afterwards duly registered. The mortgagee did not demand possession of the goods until the 15th of June. The goods had been seized on the 5th of June by the sheriff

under an execution issued by another creditor, and on the 13th of June the debtor had filed a liquidation petition. The sheriff remained in possession till the 20th of June:—Held, that the sheriff's possession, being wrongful as against the mortgagee, did not prevent the goods from being in the order or disposition of the debtor at the commencement of the liquidation, and that they consequently passed to the trustee. *Edey, Ex parte, Cuthbertson, In re*, 19 L. R., Eq. 264; 44 L. J., Bk. 55; 31 L. T. 851; 23 W. R. 519.

#### h. Goods of Bankrupt in hands of Agent.

**Where Agent carries on Business on Bankrupt's Premises.]**—A Scotch firm had a branch in London, which was wholly conducted by an agent and manager, at a salary, but in their name. By contract he was to have a lien on goods consigned to him for bills accepted by him for the firm. The firm became bankrupt in Scotland:—Held, that the goods under the manager's control at the time were within the order and disposition of the bankrupts, and passed to their assignees unaffected by his lien. *Hoggard v. Mackenzie*, 25 Beav. 493; 4 Jur., N. S. 1008.

**Goods sent on Approval.]**—A horsedealer supplied a customer with a pair of horses, for which she paid 170*l.*, but finding the horses not according to warranty, she returned them. Thereupon the dealer sent another pair no better than the former, requesting the customer to keep them until he could furnish her with a better pair. This she did, until the dealer became bankrupt, without having repaid the 170*l.*, when it was found that the horses did not belong to him but to an employer, for whom he was agent to sell, but not to pledge, the horses:—Held, that the horses were in the bankrupt's order and disposition; and that the customer could not enforce a lien on them as against the trustee in bankruptcy. *Roy, Ex parte, Silence, In re*, 7 Ch. D. 70; 47 L. J., Bk. 36; 37 L. T. 508; 26 W. R. 82.

**Factor—Lien.]**—S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co. who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and F. & Co.), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name to be protected by F. & Co. Both F. & Co., and afterwards S., filed liquidation petitions. Before S.'s liquidation F. & Co.'s trustee demanded the timber in his hands, which was refused:—Held, that to the extent of the current bills, S.'s estate had a lien on the timber. *Fawcus, In re, Buck, Ex parte*, 3 Ch. D. 795; 34 L. T. 807.

**Money paid to Acceptor to take up Accommodation Bill—Bankruptcy of Drawer.]**—A drawer of an accommodation bill, a few days before it was due, voluntarily, and not in contemplation of bankruptcy, gave to the acceptor money wherewith to pay the bill. Before the bill was due,

the drawer became bankrupt, and his assignees sued the acceptor for the amount of the bill, as for money had and received to their use:—Held, that the action was not maintainable, as the authority to apply the money in payment of the bill having been conferred by the drawer upon the acceptor in performance of his implied contract to indemnify, was irrevocable. *Yates v. Hoppe*, 9 C. B. 541; 19 L. J., C. P. 180; 14 Jur. 372.

## 1. Property incapable of Manual Delivery.

### i. Policies of Assurance.

**Authority to retain Proceeds.]**—A letter was written by a trader, before his bankruptcy, to the agent of an insurance company, authorizing him to retain out of the proceeds of a fire policy the amount of the account due by the bankrupt to a particular creditor; the letter was not acted upon, and the policy remained in possession of the trader up to the time of his bankruptcy, when the policy came to the hands of the assignees, to whom the insurance company paid the full amount:—Held, that upon the true construction of the letter, it did not operate as an assignment pro tanto of the policy, nor create, in favour of the particular creditor, any charge or lien upon the proceeds; although the company had notice of the letter before they paid the money to the assignees. *Foster, In re*, 7 Ir. R., Eq. 294.

**Assignment—Notice must be given.]**—The assignment of a policy of insurance without notice to the office, does not prevent the operation of the clause of reputed ownership. *Tennyson, Ex parte*, 1 Mont. & Bligh, 67.

If notice of the assignment of a policy of assurance on a life is not given to the insurer, it remains, upon the bankruptcy of the assignor, in his order and disposition, although the office does not require notice, and keeps no book or registry of notices which might be given; and it passes to his assignees. *Williams v. Thorp*, 2 Sim. 257; *S. P., Colvill, Ex parte*, 1 Mont. 110; *Duncan v. Chamberlayne*, 4 Jur. 819.

Actual notice of the assignment of a policy effected with the Equitable Assurance Society is necessary to take the policy out of the order and disposition of the assured. *Thompson v. Speirs*, 13 Sim. 469.

**Deposit.]**—A policy effected by a bankrupt on his life, and deposited by him, before his bankruptcy, with the defendants, as a security for money then and previously advanced by them to him, is not in the order and disposition of the bankrupt, with the consent of the true owner, within 6 Geo. 4, c. 16, s. 72. *Gibson v. Overbury*, 7 M. & W. 555. *Explained in next case.*

A bankrupt delivered a policy of insurance on his life to the defendant, with the intention of giving him an interest in the money receivable under the policy, as security for a debt due to him from the bankrupt. No notice of the transaction was given to the office:—Held, that the policy itself, as well as the money receivable under it, was in the order and disposition of the bankrupt, and that, therefore, the assignee was entitled to recover that document from the defendant. *Green v. Ingham*, 36 L. J., C. P. 236; 2 L. R., C. P. 525; 16 L. T. 455; 15 W. R. 841.

Three policies of assurance on a life were deposited by A. with B., to secure a debt due from A. to B. No notice of the deposit was given to the offices with which the insurances had been effected. A. afterwards became bankrupt:—Held, that the policies were in his order and disposition at the time of his bankruptcy. *Prior, Ex parte*, 3 Mont., D. & D. 586; 13 L. J., Bk. 15.

A. (a retiring partner) agreed to assign a policy (part of the partnership assets) to B. (the continuing partner) on certain terms. B. mortgaged it to C., who gave notice to the office. B. afterwards became bankrupt:—Held, that the policy was not within the order and disposition of B., either as against A. or C. *Langmead, In re*, 20 Beav. 20.

**— Mutual Offices.]**—A bankrupt assigned, by way of security, two policies which he had effected on his life at two mutual offices, constituted on the principle of permitting the parties assured to participate in the profits, but no notice of the assignment was given at either of the offices previously to the bankruptcy. At one of the offices the custom was not to enter the transfer of any policy in the books of the office until the dropping of the life on which it was effected; and at the other office no entry of the assignment could be found:—Held, that the policies were subject to the charge, and did not belong to the assignees. *Heathcote, Ex parte*, 2 Mont., D. & D. 714; 6 Jur. 1001.

Notwithstanding a policy may have been effected with a mutual insurance company, express notice of a deposit of it by way of equitable mortgage must be given to the company, in order to take it out of the order and disposition of the depositor. *Bromley, In re*, 13 Sim. 475.

And notwithstanding the company has indorsed on the policy a regulation to the effect that they do not require notice; and the fact that one of the parties to the assignment was an agent for the office, does not amount to constructive notice of the assignment to the office, if he was not an agent for that particular purpose. *Patch, Ex parte*, 12 L. J., Bk. 44; 7 Jur. 820.

Where a policy of assurance is mortgaged, it is necessary for the mortgagee to give notice to the assurance office, in order to take such policy out of the order and disposition of the mortgagor, in the event of his becoming bankrupt. *Thompson v. Tomkins*, 2 Drew. & Sm. 8; 31 L. J., Ch. 633; 8 Jur., N. S. 185; 6 L. T. 305; 10 W. R. 310.

**Sub-mortgage by Mortgagee.]**—Policies of assurance were mortgaged and delivered to A., who gave notice to the offices. A. mortgaged and delivered these policies to B., who gave no notice to the offices, and did not make the transaction public. A. afterwards became bankrupt:—Held, that the policies were in the order and disposition of A. at the time of his bankruptcy. *Pott, Ex parte*, 12 L. J., Bk. 33; 7 Jur. 159.

Bankrupts, being mortgagees of various life policies, of which the respective offices had notice, deposited them with their bankers, to secure the repayment of advances, but the bankers gave no notice of such deposit to the different offices:—Held, that the policies must be considered as in the order and disposition of the bankrupts within 6 Geo. 4, c. 16, s. 72, and that the same principle applied to one of the policies which was effected with a mutual company. *Arkwright, Ex parte*, 3 Mont., D. & D. 129.

A mortgagee of a policy of assurance created an equitable sub-mortgage of it, by deposit, and became bankrupt. No notice of the original mortgage was given to the office, nor was any notice of the sub-mortgage given either to the office or to the mortgagor:—Held, that the sub-mortgage was invalid, as against the assignees. *Wood, Ex parte*, 3 Mont., D. & D. 315; 12 L. J., Bk. 42; 7 Jur. 521.

**Life Policy—Notice to Company of Mortgage.]**

—On the 7th of October, 1874, B. mortgaged a policy effected on his own life with the L. Company to P., who, on the 9th of October, 1874, gave notice of the mortgage to the insurance company. P., being indebted to the M. Bank on foot of a promissory note in which he joined for the accommodation of B., deposited the policy and mortgage deed with the bank on the 21st of February, 1878, but notice of the deposit was not given to the insurance company until July, 1880. B. filed a petition for arrangement on the 12th of September, 1877, and under a resolution of the 12th of March, 1878, all his estate and effects were vested in the official assignees and a trustee, for the benefit of his creditors. P. also filed a petition for arrangement on the 13th of June, 1879, and under a resolution all his estates and effects were vested in the official assignees and a trustee, in trust for his creditors. On the 19th of November, 1879, P. and C., who were partners, were adjudicated bankrupts on a creditor's petition:—Held, that the policy of insurance was, at the date of the adjudication, in the order and disposition of P. with the consent of the true owners. *Power, In re*, 11 L. R., Ir. 93.

**Notice to Office—No Notice to Mort-**

**gagor.]**—A mortgagee of a policy deposited it by way of sub-mortgage, and gave notice of the sub-mortgage to the insurance office, but not to the original mortgagor:—Held, that this was sufficient to take the policy out of the reputed ownership of the mortgagee. *Barnett, Ex parte*, 1 De Gex, 194.

**Sufficient Notice.]**—A letter to the secretary of an insurance office, in which the writer says, "I am holder of the under-mentioned policies," and inquires what the office would give for them, is sufficient notice of an assignment. *Stright, Ex parte*, 1 Mont. 502; 2 Deac. & Chit. 314.

A party to whom a bankrupt had assigned a policy of insurance, sent an agent to the office for the purpose of paying the annual premium, who, in the course of conversation with one of the clerks in the office, told him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Carbis, Ex parte*, 4 Deac. & Chit. 354.

A casual remark addressed to the secretary of an insurance company by a policy-holder, to the effect that he had deposited his policy as a security, is not notice to the company sufficient to take the policy out of the holder's order and disposition on his subsequent bankruptcy. *Edwards v. Martin*, 1 L. R., Eq. 121; 35 L. J., Ch. 186; 13 L. T. 236; 14 W. R. 25.

A party, with whom a bankrupt deposited a policy as security for an advance of money, sent an agent to the office for the purpose of ascertaining whether the bankrupt had paid the premium, with directions to him to pay it if the

bankrupt had omitted to do so. The agent told a clerk in the office that the policy had been so deposited; semble, that this was not such a notice to the office as to take the policy out of the order and disposition of the bankrupt; be the practice of the office requiring the notice to be in writing. *Edwards v. Scott*, 2 Scott, N. R. 266; 1 M. & G. 962; 1 Drink. 6; 4 Jur. 1062.

In 1845, R. effected a policy upon his life, and assigned it by way of mortgage to G. In 1858, W. (who was G.'s attorney) went to the office to pay a premium and to confer with the secretary upon other business connected with the office, and then informed him of the assignment. In 1862, R. became a bankrupt, and he died in 1871. After his death the office for the first time had notice of his bankruptcy:—Held, that the conversation between W. and the secretary in 1858 was a sufficient notice to the office that the policy had been assigned and was not in the bankrupt's order and disposition; the 30 & 31 Vict. c. 144 requiring such notice to be in writing not being at that time in force. *Alleton v. Chichester*, 10 L. R., C. P. 319; 44 L. J., C. P. 153; 32 L. T. 151; 23 W. R. 393.

**Where Solicitor Agent of Office.]**—D., having agreed to lend 1,000*l.* to W. upon a policy on his life, gave directions for effecting it to his attorney, L., of Tiverton, who was agent there of the West of England Insurance Company. L. accordingly transmitted proposals for a policy to the head office at Exeter, without mentioning that D. was the beneficial owner, and obtained it therefrom, and delivered it to D. L. was authorized by the company to receive notices of assignment of policies on their behalf. W. became bankrupt:—Held, that there was sufficient notice to take the policy out of the order and disposition of W., and to give the assignment validity as against his assignees, inasmuch as notice to L. was notice to the company, and notice communicated to him in his character of attorney to D., for the purpose of being transmitted to the company, was effectual as a notice to him in his capacity as agent to the company. *Gale v. Lewis*, 6 Q. B. 730; 16 L. J., Q. B. 119; 11 Jur. 780.

**Sending Notice by Post.]**—In 1816, D. assigned a policy on his life to a trustee, to secure a sum of money owing to W.; and soon afterwards the solicitor of W. caused a memorandum to be entered in the office of the company, directing that all letters were to be sent to such solicitor; and the premiums were thenceforth paid by W. through the hands of such solicitor, but the company was not informed on whose behalf the solicitor acted. In 1826, D. became bankrupt, and his assignees declined to interfere respecting the policy. The premiums continued to be paid by W. through his solicitor during his life, and by the executors of W. through their bankers after his death. D. died in 1839:—Held, that the policy was in the order and disposition of the bankrupt, and that there was not any notice given to the office of the assignment of the policy, to take it out of such order and disposition; that the conduct of the assignees did not amount to an abandonment of any right which they had to the benefit of the policy; that the executors of W. had a lien on the policy for the amount of the premiums which had been paid by W. and his estate, and the interest there-



on, and that they were entitled to payment of the amount thereof out of the moneys payable under the policy. *West v. Reid*, 2 Hare, 249; 12 L. J., Ch. 245; 7 Jur. 147.

**Notice after Act of Bankruptcy.]**—A deposit of a policy, by way of security for a debt, made previously to the commission of an act of bankruptcy by the depositor, and, previously to the issuing of a fiat, though subsequently to the act of bankruptcy, notified to the insurance company by the party with whom the deposit was made, is valid as against the assignees, under 2 & 3 Vict. c. 29 (similar to 12 & 13 Vict. c. 106); it not appearing that, at the time the notice was given to the company, the party giving it was aware of an act of bankruptcy having been committed. *Slyan, In re*, 1 Ph. 105; *S. P., Smith, Ex parte*, 6 Jur. 158.

**— After Adjudication.]**—W. having mortgaged a policy on his life, afterwards became bankrupt, and died four years after the bankruptcy. The mortgagee thereupon gave notice to the insurance office and claimed the proceeds of the policy. No previous notice had been given of the mortgage or of the bankruptcy:—Held, that notice after the bankruptcy was insufficient, and that the policy remained in the order and disposition of the bankrupt. *Webb, In re*, 2 L. R., Eq. 456; 36 L. J., Ch. 341; 16 L. T. 89; 15 W. R. 529.

No act of an assignee for value after bankruptcy can give validity to his assignment as against assignees in bankruptcy. *Id.*

Previously to his marriage, C. insured his life in two offices for two sums of 500*l.* each, and by his marriage settlement covenanted to insure his life for not less than 2,000*l.* On the 29th of October he handed over one of the policies to the solicitor for the trustees of the settlement, and on the 9th of December signed a memorandum stating that he handed over the policies to the trustee in pursuance of the covenant contained in the settlement. He was adjudicated bankrupt on the 13th of December. The other policy was handed over to the solicitor for the trustees on the 10th of January in the following year. Notice of the claim of the trustees to the policies was given to the offices after the bankruptcy, but before any notice had been given by the assignee:—Held, that the policies were in the order and disposition of the bankrupt at the commencement of the bankruptcy, and belonged to his assignee. *Caldwell, Ex parte, Currie, In re*, 13 L. R., Eq. 188; 41 L. J., Bk. 55; 20 W. R. 363.

**Evidence.]**—To secure a balance in which a bankrupt was indebted to a banking company, he had deposited two life policies, but no notice of the deposit had been given to the insurance office:—Held, that the want of notice to the office was not conclusive evidence of the policies being in the reputed ownership of the bankrupt, and that no evidence having been adduced of such reputed ownership, the company was entitled to the policies. *Cooper, Ex parte*, 2 Mont., D. & D. 1; 6 Jur. 467.

**Memorandum of Deposit Incorrect.]**—A memorandum of deposit stated that a policy on the life of the obligor was also deposited with a bond, but this was not the fact, and the policy

was found in the bankrupt's chest at the time of their bankruptcy:—Held, that the policy passed to the assignees. *Halifax, Ex parte*, 1 Mont., D. & D. 544.

**Assignee in Bankruptcy must give Notice.]**—The assignee in bankruptcy must be as diligent in giving notice to the company of the assignment of a policy, as a purchaser for value, and the notice is not sufficient unless given to the head office of the company. *Russell, In re*, 15 L. R., Eq. 26; 27 L. T. 706; 21 W. R. 97.

A policy effected by A. on his life was mortgaged in 1860 without notice to the office. He became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to B., who had no notice of the bankruptcy. After the death of A., B.'s solicitor gave notice to the office that this and other policies were mortgaged, and that he acted for the mortgagees, not naming them. Subsequently notice of the bankruptcy was given to the office:—Held, that this was sufficient to give priority to B. over the creditors in the bankruptcy of the assured. *Id.*

**Under Irish Bankruptcy.]**—On the 28th of June, 1873, M. H. by deed agreed to assign for value a policy, effected with the Reliance Assurance Society on his own life, to his father, W. H., who on the same day, by a separate deed assigned it to D. by way of equitable mortgage to secure a present loan and future advances. The parties were all resident in Ireland, and a memorandum at foot of the policy, which had been issued from the Dublin branch office, directed that notice of assignments should be given at the head office in London. Immediately upon the execution of the deeds of the 28th June, D. prepared a formal notice of the assignment to W. H., in whose name and at whose request it was signed by him and addressed and posted in Dublin to B., the society's secretary at the London office. M. H. was adjudicated a bankrupt in January, 1874, and died in the following August, when his assignees in bankruptcy gave notice to the London office, and claimed the proceeds of the policy as having been in his order or disposition at the time of his adjudication, B. deposing that D.'s notice had never reached the London office:—Held, per Ball, C., that the notice, having been duly posted, must be presumed to have reached its destination; and, per Christian, L. J., that, irrespectively of the question whether the notice was actually received at the office, the mere posting of it was effectual to prevent the policy from being in the order or disposition of the bankrupt at the date of his bankruptcy by the consent and permission of the true owner within the meaning of the Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict. c. 60, s. 313. *Hickey, In re*, 10 Ir. R., Eq. 117.

M. having effected a policy of insurance on his own life, and assigned it by a post-nuptial settlement to two trustees, became bankrupt, and his assignees served notice of the adjudication on the insurance company and claimed the policy; but no order for the sale of it was made under the Irish Bankruptcy Act of 1857, s. 313. The trustees gave no notice of the assignment to them till after the adjudication, when the surviving trustee claimed the policy, and served notice of the assignment on the company, in conformity with the provisions of 30 & 31 Vict. c. 144:—

Held, on an interpleader issue between the trustee and the assignees in bankruptcy, first, that the order of adjudication did not vest the policy in the assignees, and that the trustee, in the absence of an order for its sale under s. 313, was entitled to the policy as against them. *Bradley v. James*, 10 Ir. R., C. L. 441.

Held, secondly, that the trustee having given to the company the statutory notice of the assignment, though after the adjudication, the validity of the notice was not affected by the possibility of the assignees subsequently obtaining an order for sale under s. 313, and that, at least till such order was obtained, he was entitled to sue at law. *Ib.*

Held, thirdly, that an order giving the assignees power to intervene, if so advised, in an action brought by the trustee against the company, did not amount to, and had not the effect of, an order for sale under s. 313. *Ib.*

Held, fourthly, that the nonjoinder of the co-trustee, if alive, ought not to be permitted to defeat the result of the trial, inasmuch as the real question had been determined which the parties came to try, viz., the respective rights of the parties claiming under the settlement, and of the assignees in bankruptcy. *Ib.*

## ii. Shares in Companies.

**Transfer in Blank—Notice.]**—A transfer of shares in a company was executed by a shareholder, a blank being left for the name of the transferee and for the date. On the day on which the transfer was executed by the transferor, the assistant-secretary certified on the transfer, on the application of the purchaser, that the certificates for the shares were at the company's office, the certificates not having yet been issued to the shareholders. Before the name of a purchaser was inserted in the transfer, the transferor became bankrupt. The assistant-secretary of the company in his evidence said that after the certificate which he had made on the transfer, a transfer of the shares would not have been permitted except under the transfer or upon the production of that transfer cancelled.—Held, that the shares were neither in the order and disposition nor in the reputed ownership of the transferor at the date of his bankruptcy. *Morris v. Cannan*, 4 De G., F. & J. 581; 31 L. J., Ch. 425; 8 Jur., N. S. 653; 6 L. T. 521; 10 W. R. 589.

**Assignment—No Notice—Qualification as Director.]**—In 1846, A. lent money to B. to enable him to purchase the requisite amount of shares in two public companies, to qualify him for the office of director in each, and B. assigned the shares in both the companies, in which he had become director, to A. as a security for the loan. The qualification for the office of director in one of the companies, which was constituted by act of parliament, would have been lost by the disposal or reduction of the amount of that qualification, and the provisions of the deed by which the other company was constituted required that its directors should be possessed of or entitled to the requisite amount of shares in their own right. In 1854, B. signed a declaration of insolvency, upon which he was adjudicated a bankrupt, the shares then standing in his name, but five days previously A. gave notice to the directors of both companies of the assignment to him. At the time

of his bankruptcy B. was actually a director of one of the companies, and out of office by rotation in the other, in which he probably would have been re-elected:—Held, that the shares in neither company were in the possession, or order or disposition of B. at the time of his bankruptcy, with the consent of the true owner. *Littledale, Ex parte*, 6 De G., Mac. & G. 714; 24 L. J., Bk. 9; 1 Jur., N. S. 385.

**Mortgage—Notice to Directors.]**—A shareholder in a company made an assignment of certain paid-up shares by way of mortgage. The assignee gave no notice to the company. The assignor had also unpaid shares in the same company, and in the course of discussions at the board of directors respecting the unpaid shares the assignor verbally informed the directors of the assignment of his paid-up shares; but no entry was made on the minutes of this notice. The assignor afterwards became bankrupt:—Held, that, inasmuch as the directors received the information in the course of the transaction of the business of the company, the notice was sufficient to make the assignment complete in equity; and that the shares did not remain in the order and disposition of the bankrupt. *Agra Bank, Ex parte, Worcester, In re*, 3 L. R., Ch. 555; 37 L. J., Bk. 23; 18 L. T. 866; 16 W. R. 879.

Certificates of shares were deposited by the secretary of a company with a bank as a security for money advanced for the use of the company. The deposit was made with the knowledge of the directors of the company, but no formal notice of such deposit had been given to them:—Held, on the bankruptcy of the secretary, that the directors having knowledge of the transaction, no further notice was necessary and that the shares were not therefore within his order and disposition. *Strickart, Ex parte*, 34 L. J., Ch. 6; 11 Jur., N. S. 25; 11 L. T. 554; 13 W. R. 356.

The object of the Joint Stock Companies Act, 1856, s. 19, was that the company itself should not be bound by any trust, and that no notice should have any effect as against the company; but there is nothing in the act which precludes an equitable mortgage of shares in a company, or renders an equitable mortgagee incapable of perfecting his title as against the mortgagor and his assignees in bankruptcy, by giving notice of the mortgage to the company. *Stewart, Ex parte, Shelley, In re*, 4 De G., J. & S. 543.

The managing director, who was also the sole secretary of a company registered under the above act, joined with all his co-directors in making an equitable mortgage of their shares to a bank, as a security for an advance to the company. The bank gave no notice to the company. On the bankruptcy of the managing director:—Held, that his shares were not in his order and disposition with the consent of the bank as the true owner thereof, but that the bank was entitled to them as mortgagee. *Ib.*

**— By Secretary.]**—A holder of shares in a railway company, which was subject to the Companies Clauses Act, 8 & 9 Vict. c. 16, was one of the secretaries of the company, and a solicitor. He borrowed money of a client on a deposit of the certificates of the shares, but no further notice of the deposit was given to the company on the solicitor becoming bankrupt:—Held, that the shares were in his order and disposition, with the

consent of the client. *Boulton, Ex parte*, 1 De G. & J. 163; 26 L. J., Bk. 45; 3 Jur., N. S. 425.

— **By Director to Company.**—The directors of a company assigned their salaries and shares to the company to secure debts due from them on their private accounts, and empowered the company to direct the treasurer to retain their salaries and dividends, and to sell their shares for payment of their debts. One of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name:—Held, that they passed to his assignees as being in his order and disposition, but that the company had a right to set off against the bankrupt's debts the dividends and salary due to him at his bankruptcy. *Nelson v. London Assurance Company*, 2 Sim. & Stu. 292.

**Shares in Name of Another.**—R., having taken shares in a mining company, it became necessary, in order to complete his title, that he should sign a deed of association in London by a certain day. Finding this inconvenient, he desired his son to sign in his stead, and to let the shares stand in his (the son's name). The son executed the deed and received a voucher, certifying him to be the proprietor of seventy shares, not transferable without consent of the directors. The son afterwards sold the shares, and paid the proceeds to R., who had become bankrupt. His assignees having brought trover against him and his son for the voucher and shares:—Held, that there was no legal title on which the assignees could maintain an action. *Dawson v. Rishworth*, 1 B. & Ad. 574.

**Shares and Certificates of Shares.**—Shares in a company are not things in action within the Bankruptcy Act, 1869, s. 15, sub-s. 5. *Union Bank of Manchester, Ex parte, Jackson. In re*, 12 L. R., Eq. 354; 40 L. J., Bk. 57; 24 L. T. 951; 19 W. R. 872.

A trader deposited with a bank the certificates of five shares in a gas company to secure the balance of his account current. The bank gave no notice to the company of the deposit thus made. The trader became bankrupt, and the registrar, acting for the county court judge, ordered the bank to deliver up the shares to the trustee:—Held, that the bank was the true owner of the shares to the extent of the mortgage, and that the order had been properly made. *Id.*

**Chairman holding Shares on behalf of Company.]**

—The chairman of a company, with the assent of the company, held in his name shares in another company, which had been purchased with the money of the first-named company. The chairman became bankrupt:—Held, that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct. *Great Eastern Railway Company v. Turner*, 8 L. R., Ch. 149; 42 L. J., Ch. 83; 27 L. T. 697; 21 W. R. 163. *Reversing S. C.*, 41 L. J. Ch. 634; 26 L. T. 819; 20 W. R. 736.

**Sub-Mortgage.**—A trader, before his bankruptcy, agreed to give, as security for a debt which he owed, his interest in some shares in a

company which were already subject to a prior mortgage. At the commencement of the bankruptcy the shares were registered in the name of the first mortgagee. It was not satisfactorily proved that notice of the second mortgage had been given to the first mortgagee:—Held, that the bankrupt's interest in the shares at the time of the bankruptcy was a chose in action, and was therefore not, under the Bankruptcy Act, 1869, s. 15, in the order or disposition of the bankrupt, and consequently that, subject to the first mortgage, the second mortgagee was entitled to the shares to secure his debt. *Barry, Ex parte, For. In re*, 17 L. R., Eq. 113; 43 L. J., Bk. 18; 29 L. T. 620; 22 W. R. 205.

**Lien by Company.**—By a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the shares of such proprietors as were customers, and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificate of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignees under the clause of reputed ownership, so as to defeat the lien of the bank, which had been provided for in the deed. *Plant, Ex parte*, 4 Deac. & Chit. 160.

iii. *Debts.*

Sums retained by bankers against acceptances, and for which they have given marginal notes, are not debts due to the bankrupt in the course of his business within the order and disposition clause, Bankruptcy Act, 1869, s. 15, sub-s. 5. *Kemp, Ex parte, Fastledge, In re*, 9 L. R., Ch. 383; 43 L. J., Bk. 50; 30 L. T. 109; 22 W. R. 462.

The expression "debts due" in that clause is not to be confined to debts presently payable, but, on the other hand, will not include debts which were only contingent at the commencement of the bankruptcy. *Id.*

The words "debts due to the bankrupt in the course of his trade" in s. 15, sub-s. 5, of the Bankruptcy Act, 1869, do not extend to all debts due to the bankrupt during the period of his trading, but include only debts connected with the trade. *Pryce, In re, Rensburg, Ex parte*, 4 Ch. D. 685; 36 L. T. 117; 25 W. R. 432.

iv. *Things in Action.*

**Assignment of—Notice.**—Where a debt is assigned, unless notice is given to the debtor, the assignor must be considered as continuing to have the order and disposition of the debt until notice to the debtor of the assignment. *Dean v. James*, 1 N. & M. 392; 1 A. & E. 809; *S. P., Buck v. Lee*, 3 N. & M. 580; 1 A. & E. 804.

So, where one of two co-debtors releases his interest to his companion. *Id.*

— **Bond Debt.**—A bond debt was assigned by the obligee, and the bond delivered to the

assignee, but notice of the assignment was not given to the obligor previously to the bankruptcy of the obligee:—Held, that the debt remained in his order and disposition. *Monro, Ex parte*, Buck, 300.

— **Obligee Trustee interested in Bond.**—Where an obligee of a bond is a trustee for others, has himself an interest in the bond, and deposits it as security, notice must be given to the obligor to prevent the reputed ownership of the obligee. *Turk, Ex parte*, 3 Mont. & Ayr. 1.

— **Notice—To whom.**—Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assigned, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader. *Gardner v. Lachlan*, 4 Mylne & C. 129; 8 Sm. 115; 2 Jur. 1056.

— **Given Orally.**—A. made advances to B., a trader, and afterwards took from him, as a security, an assignment of an equitable life interest in stock and other property, standing in the name of and vested in three trustees under a marriage settlement. There being rumours about the solvency of B., A., in the course of conversation, subsequently to the assignment, and not with a view of giving validity to his security, mentioned to one of the trustees, who was not the acting trustee, that he was secured by the assignment:—Held, that this communication was a sufficient notice to prevent the interest of B. passing to his assignees on his bankruptcy, as property in his order and disposition. *Smith v. Smith*, 2 C. & M. 231; 4 Tyr. 52.

— **Notice not required.**—A firm of two solicitors had a mortgage of 600*l.* upon a share of an estate in Kent. The estate was sold, and in order to indemnify the purchasers from certain claims on it, the purchase-money was invested in consols in the name of one of the solicitors and another party, upon trust for indemnity, and subject thereto to secure the debt due to the firm. After this, the firm having money of a client in their hands, wrote to her a letter, offering to give her a charge for the amount on a mortgage for 600*l.* on a share of the estate in Kent. Upon the bankruptcy of the firm:—Held, that the letter created a valid charge upon the interest of the firm in the consols; and that, as one of the firm was a trustee of the stock, there was sufficient notice of the transaction to prevent the charge being defeated, on the ground that the stock was in the order and disposition or reputed ownership of the bankrupts. *Rogers, Ex parte*, 25 L. J., Bk. 41; 2 Jur., N. S. 480—L. J.

— **Bills of Lading—Deposit—Notice.**—A., having a contract with the Admiralty to deliver coals at certain foreign ports at stipulated prices, shipped coals in performance of the contract; and, in pursuance of the terms of the contract, deposited three parts of the bills of lading with the Admiralty, retaining a fourth part himself, which he deposited, together with the policies on the ships, with B., to secure an advance. The deposit was accompanied by a

letter, stating that it was made to secure the amount of the advance, and undertaking, in case of default in repayment at maturity or on demand, to enable B. to receive the value of the cargoes. B., having given no notice to the Admiralty until after he, B., was aware of an act of bankruptcy by A., on which an adjudication was afterwards founded:—Held, that the moneys which became due from the Admiralty passed to the assignees under the order and disposition clause of the 12 & 13 Vict. c. 106, s. 125. *North v. Gurney*, 1 Johns. & H. 509; 5 L. T. 18; 9 W. R. 678.

— **Goods substituted for those Pledged.**—A merchant pledged for value the bills of lading of an expected cargo, his property, in the profits of which his agents abroad were interested in a certain proportion. His agents, without the knowledge of the owner or the pawnees, disposed of part of the cargo abroad, after which the owner became bankrupt: he induced the agents to replace the goods disposed of by others, of which the agents gave him bills of lading, and he sent them to the pawnees, to make good their security:—Held, that the substituted goods passed to the assignees. *Meyer v. Sharpe*, 5 Taunt. 74; 2 Rose, 124.

— **Assignment of Contract for Supply of Goods—Bankruptcy of Assignor—No Notice.**—R. contracted to supply meat to a lunatic asylum; but, being unable to carry out the contract, assigned it to H., who delivered his own meat, but in R.'s name, the governing body of the asylum having no notice of the assignment, and not being aware that the contract was not being performed by R. The contract having been put an end to by notice from the committee of visitors of the asylum, and R. having become bankrupt, the assignee under the bankruptcy claimed the sum then due for meat supplied as being goods and chattels in the possession, order, or disposition of R. at the time of his bankruptcy, as reputed owner, with the consent and permission of H., the true owner:—Held, by Bovill, C. J., Byles and Keating, J.J., that the debt was within the order and disposition clause, and passed to the assignee; but that the latter could not avail himself of his right thereto without an order from the Court of Bankruptcy to sell,—a permission to sue for the debt not being sufficient for that purpose. *Cooke v. Hemming*, 3 L. R., C. P. 334; 37 L. J., C. P. 179; 18 L. T. 772; 16 W. R. 903.

Held, by Willes, J., that, the meat never having been in R.'s possession, the debt which resulted from the supply to the asylum (though apparently by R.) was not a debt in his possession, order, or disposition at the time of his bankruptcy, with the consent of the true owner. *Id.*

— **Where Assignee has taken every possible Step to obtain Debt.**—H., residing in Australia, was indebted to A. in 77*l.* 3*s.* 4*d.* On the 8th January, 1844, A. bona fide and for a valuable consideration assigned the debt to W., and on the 22nd January joined W. in a letter notifying to H. the assignment, and requiring him to pay the debt to W. This letter was posted on 1st February, 1844, in the ordinary way in which letters to New South Wales were posted, and could not have reached Australia before the 10th

of February, on which day a fiat in bankruptcy issued against A. On the 29th of January, 1844, H. remitted by letter 50*l.*, which was received after the fiat, and delivered over to W. The assignees of A. having sued W. for the amount:—Held, that W. having taken every possible step to obtain possession of the debt, it could not be said to remain in the order and disposition of the bankrupt, with the consent of the true owner, within 6 Geo. 4, c. 16, s. 72. *Belcher v. Bellamy*, 2 Ex. 303; 17 L. J., Ex. 219; see *Brewster, Ex parte*, 22 L. J., Bk. 62.

**Assignment of Plaintiff's Interest in pending Action.**—A debtor as plaintiff in an action then pending, by letter authorized his solicitor to pay over to the solicitor of the creditor whatever damages he might recover in the action, less his solicitor's costs, and also undertook to prosecute the action; thereupon the debtor's solicitor wrote to the creditor's solicitor, communicating the contents of that letter, and undertaking to hold over for the benefit of the creditor any sum to be recovered in the action, and notice of this undertaking was also given to the solicitor of the defendant in the action, who communicated the same to his clients:—Held, that there was a valid agreement to assign which prevented the amount recovered in the action from being in the order and disposition of the bankrupt. *Knowles, In re*, 1 Ir. L. R., Ch. 251.

**Assignment of Costs—Bankruptcy of Assignor before Order for Payment.**—B., a solicitor, entitled to costs in a suit, assigned the same to R., who gave notice to the plaintiff and the various solicitors in the suit of this assignment. B. became insolvent, and a few months afterwards, an order being made for the payment of his costs, the official assignee claimed them, on the ground that they were within B.'s order and disposition at the time of his insolvency:—Held, that the costs were not within his order and disposition at the date of the vesting order, inasmuch as the order for taxation and payment was not made until after that time. *Lord v. Colvin*, 2 Drew & Sm. 82; 6 L. T. 211; 10 W. R. 420.

**—Bankruptcy of Assignor before Fund for Payment of Costs created.**—A solicitor who had a claim for costs in an administration suit, borrowed money, and made an equitable assignment of his costs. At this time no order for payment of these costs had been made, and the solicitor's remedy was merely personal against his clients. He served notices on his clients, and on the defendant who represented the estate under the administration. Afterwards, the court made an order that a fund should be brought into court, and that, after paying certain charges, the same should be applied in payment of the solicitor's costs. The money was paid in, but was not sufficient to pay any part of the costs. The solicitor then became bankrupt, and after the bankruptcy money was paid into court, but the lender of the money did not obtain any stop order. *Romilly, M. R.*, held that the costs passed to the assignees of the bankrupt (*see* 23 Beav. 391; 26 L. J., Ch. 288; 3 Jur., N. S. 403), but upon appeal, the court decided that there was no negligence on the part of the lender of the money, for that the notices served before the money was paid into court prevented the costs from being in the order and disposition of the bankrupt with

the consent of the true owners, and that therefore they did not pass to his assignees, but belonged to the lender of the money. *Day v. Day*, 1 De G. & J. 144; 26 L. J., Ch. 585; 3 Jur., N. S. 782.

**Notice of Assignment of Chose in Action—Stop Order—Priority.**—A legatee of a reversionary interest under a will, which had been paid into court in an administration suit, presented a petition for liquidation in March, 1873, and a trustee was appointed. In July he assigned his interest in the legacy to J., who obtained a stop order on the fund in court. In November, 1876, he assigned his interest to E., without notice of the liquidation, who also obtained a stop order on the fund. Afterwards the trustee in liquidation obtained a stop order. The plaintiffs purchased the interest of the trustee in liquidation and of J., and contracted to sell the legacy to the defendant. The defendant required E.'s mortgage to be abstracted as an incumbrance on the estate:—Held, by Jessel, M. R., that E. having obtained a stop order before the trustee in liquidation, his interest was prior to that of the trustee's, and was an incumbrance on the estate:—Held, by the Court of Appeal, that the question of the priority of E.'s incumbrance was too doubtful to justify the vendor in omitting it from the abstract; and the decision of the Master of the Rolls was accordingly affirmed. *Palmer v. Locke*, 18 Ch. D. 381; 51 L. J., Ch. 124; 45 L. T. 229; 30 W. R. 419—C. A.

**Reversionary Interests.**—Leaseholds were bequeathed to trustees in trust to sell, and out of the proceeds to invest 3,000*l.* in government stock, and pay the dividends to F., the wife of E., for life, to her separate use without power of anticipation, and, subject thereto, to pay the principal to the children of F. and E. in such shares as she should appoint, with gifts over in default of appointment to the children of F. and E. living at the testator's death; powers were given to the trustees to sell the stock and invest the proceeds on private security or in the purchase of land, to be held upon the same trusts as were declared of the government stock. At the testator's death there were three children of F. and E. The trustees sold, and left the 3,000*l.* outstanding on a mortgage of the property (which was then held for a term of sixty-two years), executed by the purchaser to them. F., by deed, appointed the 3,000*l.* in different shares to her three children, subject to her life estate. The appointees, during F.'s life, assigned to D. the sums appointed to them, together with their respective estates and interest therein, to secure moneys advanced to their father. D. gave notice of the assignment to the trustees. Two of the appointees became bankrupt in F.'s lifetime; F. died, having had no other children. D. then filed a bill to raise the amount due to him:—Held, first, that the interests of F.'s children were not interests in lands, but were choses in action. *Daniel v. Freeman*, 11 Ir. R., Eq. 233.

Held, secondly, that the shares of the bankrupts were in their order and disposition with the consent of D. at the time of the bankruptcy, and passed to their assignees in bankruptcy. *Id.*

Where notice to trustees of an assignment of a chose in action is essential to complete title as between particular assignees, notice, as a general rule, is equally essential to complete title as

against the assignees in bankruptcy of an assignor. *Ib.*

Trustees were directed to raise out of real estate, by sale, mortgage, or otherwise, 2,000*l.*, for portions to be paid to younger children. Before the portions were raised or payable, one of the younger children created an incumbrance on his share, of which notice was not given to the trustees until after his bankruptcy:—Held, that the interest of the bankrupt was not of the nature of realty so as to exempt it from the doctrine of notice, and that the share passed to the assignees in bankruptcy, as in the order and disposition of the bankrupt. *Hughes, In re*, 2 H. & M. 89; 33 L. J., Ch. 725; 10 L. T. 813; 12 W. R. 1025.

The assignee of a share in a reversionary fund standing to the account of B. and her children, obtained a stop order and afterwards assigned the share by way of mortgage to A., and became bankrupt before the fund became distributable. A. presented a petition for payment to him, but obtained no stop order; the assignees of the bankrupt claimed the share, as being within his order and disposition, with the consent of the true owner:—Held, that the assignees were entitled to the fund, discharged of the mortgage. *Bartlett v. Bartlett*, 1 De G. & J. 127; 26 L. J., Ch. 577; 3 Jur., N. S. 705.

A bankrupt's reversionary interest in a legacy is not exempted from the rule as to order and disposition, by the mere circumstance of such interest being reversionary at the time of the act of bankruptcy. *Rawbone, In re*, 3 Kay & J. 476; 26 L. J., Ch. 588; 3 Jur., N. S. 837.

But to bring such an interest within the operation of the rule, it must be in the order and disposition of the bankrupt with the consent of the true owner; and where the true owner has no knowledge, nor any means of knowing, of the bankrupt's interest, consent on his part cannot be predicated. *Ib.*

Where a reversionary interest in a fund in court had been mortgaged, but the mortgagees obtained no stop-order, and the mortgagee became insolvent before the interest became reducible into possession:—Held, that the reversionary interest was not in the order and disposition of the insolvent so as to vest in his assignee. *Grainge, In re*, 12 L. T. 564; 13 W. R. 833.

Notice of an assignment of a reversionary interest given to the solicitor of the trustees is notice to the trustees, so as to take it out of the order and disposition of the assignor on his insolvency. *Rickards v. Gledstones*, 2 Giff. 298; 8 Jur., N. S. 455; 5 L. T. 416. Affirmed, 5 L. T. 568.

A person entitled to a reversionary share of a trust fund became bankrupt in 1866. The trustees of the fund had no notice of the bankruptcy till 1878. In 1871 the bankrupt assigned his reversionary share for value to a purchaser who had no notice of the bankruptcy and who gave immediate notice of the assignment to the trustees of the fund. The reversion fell into possession in 1878:—Held, by the Court of Appeal, that under the terms of the Bankruptcy Act, 1849, s. 141, the title of the assignee in bankruptcy must prevail against that of the particular assignee. *Bright's Settlement, In re*, 13 Ch. D. 413; 42 L. T. 308; 28 W. R. 551—C. A.

Under 32 & 33 Vict. c. 71.—A., for good consideration, gave B. a written undertaking to pay

over to him all dividends that he should receive on his proof against a bankrupt's estate. A. became bankrupt, and B. then gave notice of his claim to the trustees in the first bankruptcy:—Held, that there was a good equitable assignment of the dividends, and that B. was entitled as against A.'s trustee in bankruptcy. *Irring, In re, Brett, Ex parte*, 7 Ch. D. 419; 47 L. J., Bk. 38; 37 L. T. 507; 26 W. R. 376.

**Warrants of Attorney.**—C. gave a warrant of attorney to A. to secure payment of a debt due from C. to A. D., who was the solicitor of C., as agent of A. deposited this warrant of attorney with B., to secure a debt due from A. to B. No express notice of this deposit was given to C. A. afterwards became bankrupt:—Held, first, that the circumstance of D. being the solicitor of C. did not amount to notice to C. of the deposit; and, secondly, that the warrant of attorney was in the order and disposition of A. at the time of his bankruptcy. *Price, Ex parte*, 3 Mont., D. & D. 586; 13 L. J., Bk. 15.

**Proof of Notice.**—A grantee of an annuity on the bankruptcy of the grantor stating that he had no doubt that his partner in business, who managed the transaction, had given the executors of the estate charged notice of the annuity, is not sufficient to take the share of the grantor out of his order and disposition. *Foster v. Bonner*, 8 L. T. 530; 11 W. R. 742.

**Mortgages.**—A person to whom estates are mortgaged to secure the balance due from time to time on an account current, mortgages his security and becomes bankrupt. In such a case, it is not necessary to give notice of the sub-mortgage to the original mortgagor, to take the mortgage debt out of the order and disposition of the original mortgagee. *Wright, In re*, 1 Mont., D. & D. 550.

London sub-mortgagees of shipments at Ceylon and Hong Kong sent thither, directed to the parties in possession, notices of their security by the next direct mail, there being another and earlier mail by a different route, by which the notices might possibly have sooner reached their destination. Before, however, this could have taken place by either mode of transmission, the sub-mortgagors became bankrupt:—Held, that the notice was sufficient to take the goods out of their reputed ownership. *Kelsall, Ex parte*, De Gex, 352.

A bond executed to secure the payment of bills of exchange was mortgaged, together with the bills which were indorsed. Afterwards the mortgagor deposited the bonds and bills by way of sub-mortgage, and became bankrupt. No notice of the sub-mortgage having been given to the obligor:—Held, that the sub-mortgage was good against the assignees. *Barnett, Ex parte*, 1 De Gex, 194.

#### v. Right to publish Newspapers.

If the printer and publisher of a newspaper assigns his interest therein to a creditor, as a security, but continues to print and publish as before, and no affidavit of the change of interest is delivered to the commissioners of stamps, and the printer becomes bankrupt, the right to the paper will pass to his assignees. *Longman v. Tripp*, 2 N. R. 67.

A., being registered proprietor of a newspaper, mortgaged the copyright, and the type and machinery used in printing it, to B. After the mortgage to B., A. continued to be the sole registered proprietor of the newspaper, and was generally known and recognized as its proprietor. On the 16th February, 1857, the sheriff seized the type and machinery under a *feri facias*, upon a judgment obtained by a creditor. On the 18th February, 1857, when the sheriff was in possession of the type and machinery, A. was declared bankrupt:—Held, first, that A.'s right to publish the newspaper came within the term goods and chattels in the 12 & 13 Vict. c. 106, s. 125. *Baldwin, In re, Fins, Ex parte*, 2 De G. & J. 230; 27 L. J., Bk. 17; 4 Jur., N. S. 522.

Held, secondly, that such right was in the order and disposition of the bankrupt at the time of his bankruptcy. *Ib.*

But held, thirdly, that the type and machinery were not in the order and disposition of the bankrupt at the time of his bankruptcy. *Ib.*

#### Property of which the Bankrupt was not the original Owner.

##### i. Goods to be dealt with in way of Bankrupt's Trade.

**Goods sent to be Sold.**—[If a person sends his servant to sell his timber at another man's wharf, such timber does not pass to the assignees of the owner of the wharf, who becomes bankrupt, as goods in his order and disposition. *Boddy v. Esdaile*, 1 C. & P. 62.

—**Sold in Bankrupt's Name.**—[Where goods are delivered to a bankrupt to sell in the name of another, his selling them in his own name does not place them in his reputed ownership. *Carlson, or Carlson, Ex parte*, 2 Mont. & Ayr. 39; 4 Deac. & Chit. 120.

**Skins sent to be Dressed—Mixing with Debtor's Stock.**—[A. was in the habit of sending skins to B.'s tan-yard to be dressed, with an account, as of a sale, of each parcel of skins to B.; and B. rendered an account of the dressed leather, as being sold by him to A. This mode of dealing was only practised by B. with A., nor was B. in the habit of dressing skins for any other persons:—Held, that a quantity of these skins, which were mixed with B.'s general stock at the time of his bankruptcy, passed to his assignees, on the principle of reputed ownership. *Batten, Ex parte*, 3 Deac. & Chit. 328.

**Goods to be Repaired.**—[In order to render goods in the possession, order or disposition of a bankrupt, two things are required—first, they must be in his possession under such circumstances as to render him reputed owner of the goods; and secondly, they must have been left in his possession through some impropriety or laches of the true owner, under circumstances calculated to enable the bankrupt to obtain a false credit by inducing the world to look on him as the true owner. *Hamilton v. Bell*, 10 Ex. 545; 24 L. J., Ex. 45; 18 Jur. 1109.

When property is left by the true owner in a shop where goods are notoriously left by parties for other purposes than for sale, the proprietor of the shop is not a reputed owner of them within the statute. *Ib.*

A. purchased some clocks of a London tradesman who kept a shop, in which were exposed for sale clocks and watches. A portion of the tradesman's business was to clean and repair clocks, and such as were sent to him for that purpose stood amongst those in the shop which were for sale. A. kept the clocks which he had purchased with the tradesman, with directions that they were to be sent to him when they had been cleaned and put in order. The tradesman some time afterwards became bankrupt, A.'s clocks still remaining in his shop. In an action by him against the assignees for taking these clocks:—Held, that under the circumstances, there was no evidence either that the bankrupt was the reputed owner of the goods or that they were in his possession, order or disposition, and, consequently, that the goods did not pass to the assignees. *Ib.*

The question of reputed ownership is one purely of fact. *Ib.*

#### Corn to be Ground—Miller's Option to Buy.]

—On the bankruptcy of a miller, C. claimed as his own, and removed from the mill without the knowledge of the receiver, 109 sacks of wheat, which he had sent five weeks previously (as he alleged) on approval. It was proved by the bankrupt and his clerk, and from his books, that he was not in the habit of receiving other people's corn to grind and return as flour, but that he used to receive corn from C. and kept it until a price was fixed for it, when he debited himself with such price. C. deposed that the bankrupt might have found a purchaser for it, or have bought it for himself, or that he, C., might have taken it back:—Held, that the wheat was in the order and disposition of the bankrupt at the time of the bankruptcy with the consent of the true owner, and must be given up to the trustee. *Bell, In re, Clarke, Ex parte*, 47 L. J., Bk. 33; 37 L. T. 509.

**Goods sent on Sale or Return—Notorious Trade Custom.**—[In order that goods of another person in the possession of a bankrupt should pass to his trustee under the latter words of sub-s. 5 of s. 15 of the Bankruptcy Act, 1869, as "goods of which the bankrupt has taken upon himself the sale or disposition as owner," it is necessary that the bankrupt should have been the reputed owner of the goods. *Wingfield, Ex parte, Florence, In re*, 10 Ch. D. 591; 40 L. T. 15; 27 W. R. 346—C. A.

The effect of a notorious trade custom in excluding the operation of the reputed ownership clause, considered. *Ib.*

Books deposited by the owner with a bookseller, as part of his general stock, and sold by him on commission, do not, on his bankruptcy, pass to his assignees, as being in his possession, order or disposition, as reputed owner, within 6 Geo. 4, c. 16, s. 72. *Whitfield v. Brand*, 16 M. & W. 282; 16 L. J., Ex. 103.

Goods were sent from London to Sunderland, upon sale or return, and a letter, inclosing an invoice, requesting the buyer to return such of them as were not approved by him in as short a time as possible. The goods arrived at the shop of the buyer on the evening of the 13th November, and on the following day he committed an act of bankruptcy. In an action of trover by the seller against the assignees to recover these goods:—Held, that they did not pass to the assignees under the 21 Jac. 1, c. 19, s. 11, as the bankrupt

should have been allowed a reasonable time to select such goods as he was disposed to retain. *Gibson v. Bray*, 1 Moore, 519; 8 Taunt. 76; Holt, 556.

Goods were sent to a trader on a contract of sale and return, within the Statute of Frauds, and he having become bankrupt before the delivery of them, they were received and detained by his assignees; the vendor thereupon brought trover, to which the assignees pleaded that the goods were bargained and sold before the bankruptcy:—Held, that there was no acceptance to support a bargain and sale, and that the property in the goods did not pass to the assignees. *Sadler v. Whitmore*, 5 Jur. 315.

Goods sent on sale and return not actually delivered at the time of the bankruptcy, are not in the reputed ownership of the bankrupt. *Ash-ton, In re*, Fonb., N. R. 258.

**Factor—Equitable Charge—Factors Act.**—A., being a factor and a warehouse keeper, by letter of hypothecation pledged to B. certain wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning, was added at the foot of a letter. After being pressed daily to deliver the warrants, A. absconded. B. thereupon obtained from A.'s clerk the keys of the warehouses and possession of the wools. A. was a few days afterwards adjudicated bankrupt. The wools belonged to third parties, who had, however, been under advances from the bankrupt and made no claim:—Held, that the letter created a good equitable charge; that it did not require registration under the Bills of Sale Act; that the goods were not in the order and disposition of the bankrupt; that the transaction was a valid pledge under the Factors Act; and that B. had a good title against the trustee in bankruptcy. *North Western Bank, Ex parte, Sice, In re*, 15 L. R., Eq. 69; 42 L. J., Bk. 6; 27 L. T. 461; 21 W. R. 69.

**Book Debts owing to Factor on Account of Principal.**—If it is a matter of notoriety that a man is acting in the capacity of a factor to another person, and the factor becomes bankrupt, the book debts owing to the factor on behalf of his principal will not pass to the trustee of his estate; nor will goods consigned by the principal to the factor for sale. *Boden, Ex parte, Wood, In re*, 28 L. T. 174.

**Goods sent by Factor on Approval.**—When chattels were sent by their owner to A., and he, acting necessarily as factor or agent to the owner, sent the chattels to B. on approval, in exchange for other chattels previously bought from A. and paid for but returned as unsatisfactory by B.; upon A.'s bankruptcy the chattels were held to be in his order and disposition within s. 15, sub-s. 5 of the Bankruptcy Act, 1869, although they were at that time actually in the possession of B. upon the terms mentioned above. *Roy, Ex parte, Sillence, In re*, 7 Ch. D. 70; 47 L. J., Bk. 36; 37 L. T. 508; 26 W. R. 82.

**Notice of Agency.**—Goods were consigned by manufacturers under an agreement which, in the opinion of the court, made the consignees, not purchasers of the goods, but agents of the manufacturers for their sale. The agents described themselves, upon a brass plate which was

affixed at their place of business, and also upon the invoices which they used, as merchants and manufacturers' agents. They acted as agents in the same way for several other manufacturers:—Held, that the creditors of the agents had notice of the agency sufficient to exclude the operation of the reputed ownership clause, and the trustee in their liquidation was ordered to deliver up to the manufacturers goods of theirs which were in the possession of the agents, in specie, at the commencement of their liquidation, and to pay over to the manufacturers the proceeds of the sale of their goods which had been sold. *Bright, Ex parte, Smith, In re*, 10 Ch. D. 566; 48 L. J., Bk. 81; 39 L. T. 649; 27 W. R. 385—C. A.

## ii. Goods in Bankrupt's Hands for Specific Purposes.

**Bills of Exchange.**—Bills remitted to a banker on the general account, cannot, on his bankruptcy, be laid hold of by the remitter; if remitted for a particular purpose, they must be so applied. *Pease, Ex parte*, 19 Ves. 49; S. C. nom. *Pearce, Ex parte*, 1 Rose, 232.

Bills lodged in a banker's hands, to be applied for a particular purpose, but not so applied, are claimable on the banker's becoming bankrupt, as they do not pass to his assignees. *Aiken, Ex parte*, 2 Madd. 192.

Whether bills in the possession of a bankrupt, not due at the time of the bankruptcy, pass to the assignees, or remain the property of the remitter, always depends upon the question of agency. So, where a foreign mercantile house remitted to a London house bills, some of which were not due when the London house became bankrupt:—Held, under the circumstances of the case, that the London house acted as agents to procure payment for the foreign house, and being fixed with the trust, that the bills did not pass to the assignees. *Smith, Ex parte, Buck*, 355; 2 Rose, 457.

A., a merchant abroad, wrote to B., his agent in England, a letter, inclosing bills, in which he said, "The above bills are belonging to and on account of C., and I will thank you to dispose of the same to him." Before the bills arrived B. became bankrupt, and the bills came to the possession of the assignees:—Held, that the directions in A.'s letter amounted to an appropriation of the bills, and that C. was entitled to claim them from the assignees. *Cotterell, Ex parte*, 3 Deac. 12; 3 Mont. & Ayr. 376; 1 Jur. 825.

If A. and B. have a general running account, consisting of bills drawn by B. on C. in favour of A., and of bills and other securities deposited by A. with B.; and, upon the failure of B. and C., A. is obliged to take up the bills received by him from B., whereby the balance of the accounts is in favour of A., still he cannot maintain trover for the bills deposited by him with B., unless they were specifically appropriated to answer B.'s drafts on C. in favour of A., and deposited for that purpose expressly. *Bent v. Fuller*, 5 T. R. 494.

By the terms of an agreement between F. & Co. and their bankers, S. & Co., the permission to discount indorsed bills of exchange was limited to the amount necessary to meet such acceptances of F. & Co., as were in the course of immediate payment at the house of S. & Co. To cover certain acceptances becoming due, F. & Co. remitted to S. & Co. an indorsed bill of ex-



change; these acceptances were however dishonoured by S. & Co., who soon afterwards stopped payment; S. & Co. then procured the bill to be accepted, and made an entry in their books of their having discounted it. A commission of bankruptcy having issued against S. & Co. :—Held, that S. & Co. had no right to discount the bill without executing the trust reposed in them, and their assignees were bound to deliver up the bill to F. & Co. *Frere, Ex parte*, 1 Mont. & Mac. 263.

Where a draft for money was intrusted to a broker to buy Exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds :—Held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor v. Plummer*, 3 M. & S. 562; 2 Rose, 457.

**Securities sent to Debtor to meet Bills—Shares.**—An agreement was made between a firm in England and another in America, that the latter should purchase American bank shares, and remit them to the English house for sale, drawing bills on the English house for the amount of the purchase-money, and that the proceeds of the sale of the shares should be applied by the English house in payment of the bills. Various bills were drawn by the American on the English house, and were negotiated by the former. Both houses became bankrupt, and the certificates of the bank shares did not arrive in England until after the bankruptcy of the English house, when they got into possession of the assignees :—Held, that the bill-holders were entitled to have the proceeds of the shares applied in payment of the bills, and that the shares were not within the operation of the clause of reputed ownership. *Brown, Ex parte*, 3 Deac. 91; 3 Mont. & Ayr. 471; 2 Jur. 82.

— **Bills.**—S. & J., of Buenos Ayres, bought from Latham & Co., of that place, in May and June, ten bills, drawn by them on Latham Brothers, of Liverpool, the sellers giving an express assurance that they would make remittances to Liverpool to meet them. On the 1st of August, Latham & Co. despatched bills to Latham Brothers, with a letter specifically appropriating them to meet the first five of the purchased bills. On 8th August, Latham Brothers became bankrupt. On 1st September, Latham & Co., not knowing of the bankruptcy, despatched other bills to Latham Brothers with a letter, appropriating them to meet the other five purchased bills :—Held, that the first remittance was effectually appropriated to meet the first five purchased bills, whether the drawing and accepting houses were identical or not; and that the assignees of Latham Brothers held it for S. & J., to the extent of what was due on those bills. *Lambert, Ex parte*, 1 De G. & J. 152; 26 L. J., Bk. 65; 3 Jur., N. S. 801.

B. was in the habit of drawing bills on H. & Co., bankers, and of remitting bills to them to an amount fully sufficient to meet their acceptances.

H. & Co. became bankrupt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B. upon H. & Co., and accepted by them; but H. & Co. had misappropriated the greater part of the bills remitted to meet them :—Held, that B. could not claim to have returned to him such of the remitted bills as remained in the hands of H. & Co. at the time of their bankruptcy, but that they must be applied so far as they would extend in payment of the bills accepted by H. & Co. *Carrick, Ex parte*, 2 De G. & J. 208.

— **Gold and Bills.**—A. and B. came to an agreement, that B. should purchase of A. all the light gold coin which he could send at a stated price, and that A. should, from time to time, draw upon B. for the money due upon such sale; and that B. should also, from time to time, accept other bills drawn by A. for his own convenience, for which A. was to remit value; after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A. (not knowing of the bankruptcy) sent a parcel of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s assignees :—Held, that A., who had since paid B.'s acceptances, might recover back the gold and bills sent after the bankruptcy, on the ground that they were sent for the particular purpose of paying the acceptances, and that, as that purpose was not answered, the property in the gold and bills remained in A. *Tooke v. Hollingworth*, 5 T. R. 215; 2 H. Bl. 501.

**Money lent to Debtor to arrange with Creditors.**—Where a trader, upon being arrested, borrowed money of his brother-in-law for the purpose of settling with his creditors, but not being able to do so, returned a part of it, and then became a bankrupt :—Held, that as the money was advanced for a special purpose, it did not pass by the assignment. *Toucey v. Milne*, 2 B. & A. 683; *S. P.*, *Edwards v. Glyn*, 2 El. & El. 29; 28 L. J., Q. B. 350.

**Dividend Warrants sent to Brokers for Collection.**—Dividend warrants, on which bankrupts, in their character of stock-brokers, were intrusted to receive the dividends, and which they had pledged for their own debt, were ordered to be delivered up to trustees who had employed the bankrupts as their brokers. *Gregory, Ex parte*, 2 Mont., D. & D. 613.

### iii. Goods in Hands of Bankrupt's Agent.

**Banker's Agent—Notice to Agent not to remit Funds.**—A London banker, having a branch bank at Edinburgh, stopped payment on the 2nd January, and wrote to his agent at Edinburgh, apprising him of the fact, and directed the business of the branch bank to be discontinued. On the 4th January, before this notice reached the agent, C. paid into the Edinburgh bank 305l. 15s. in notes and cash, to be remitted to the house in London; but after the news reached Edinburgh, and whilst the notes were still in the agent's possession gave him notice not to part with them; and they remained in his hands on the 26th January, when a fiat issued against the banker in London. The agent at Edinburgh having a lien on the funds in his

hands, the assignees permitted him to retain the 305*l.* 15*s.* in part satisfaction of his lien :—Held, that the assignees were bound to refund the sum to C. *Cunningham, Ex parte*, 3 Deac. & Chit. 58, 87 ; 1 Mont. & Blight, 269, 286.

So held, also, where the notes delivered to the agent were not identified. *Solomans, Ex parte*, 3 Deac. & Chit. 77.

So, also, where the notes were paid in by the customer on the 3rd January, to a sub-agent of the banker at Glasgow, who remitted them on the 4th to the banker's managing agent at Edinburgh. *Wylie, Ex parte*, 3 Deac. & Chit. 83.

#### iv. Goods Distrained on Bankrupt's Premises.

Goods belonging to a third person, which are on the premises of a bankrupt under a distress for rent by his landlord, are not in the possession, order and disposition of the bankrupt, although he is allowed to use them off the premises. *Sacker v. Chidley*, 11 Jur., N. S. 654 ; 13 W. R. 690.

#### v. Goods purchased by Bankrupt but not delivered.

**Goods left in Vendor's Possession.**—[A party, having goods in his own warehouse at Liverpool, sold them, and gave the following delivery order to the vendee :—"We hold to your order 39 pipes, &c., rent free, to the 29th November next." The goods remained in the warehouse unpaid for till the vendee became bankrupt. In trover for the goods by the assignee, evidence was given that, by the usage of Liverpool, goods sold while in warehouse, are delivered by the vendor handing to the vendee a delivery-order ; and that the holder of such order may obtain credit with a purchaser as having possession of the goods :—Held, that the bankrupt had not possession of the goods as reputed owner, with the consent of the true owner, within 6 Geo. 4, c. 16, s. 72. *Townley v. Crump*, 4 A. & E. 58 ; 5 N. & M. 606 ; 1 H. & W. 564.

Goods were sold under an invoice which expressed that they remained as rent. The vendee subsequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the part, which he paid. Subsequently the vendee became bankrupt, and the bill was dishonoured :—Held, that the assignee of the bankrupt vendee could not without paying the price maintain trover against the vendor for the residue of the goods which had remained in his hands. *Miles v. Gorton*, 2 C. & M. 504 ; 4 Tyr. 295.

**Bankruptcy of Purchaser before Delivery of Goods sold on Credit.**—[When the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, and to resell the goods, without first tendering them to the trustee. And the vendor is entitled to prove in the bankruptcy for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the con-

tract price and the price obtained on the re-sale. *Stapleton, Ex parte, Nathan, In re*, 10 Ch. D. 586 ; 40 L. T. 14 ; 27 W. R. 327—C. A.

Where farming produce has been purchased and the price paid before bankruptcy, but it appeared to be the custom of farmers to leave such produce upon the farm of the seller until it suited the convenience of the buyer to take it away :—Held, that this custom exempted such produce from passing to the assignees under the law of reputed ownership. *Terry, In re*, 7 L. T. 370 ; 11 W. R. 113.

**Possession is Question for Jury.**—[A, a farmer, meeting B. on his way to a fair with some sheep, negotiated for their purchase, but not being able to come to terms, the parties agreed that the sheep should remain for a time at A's farm. They remained there five days, and before the price was agreed upon, A. became bankrupt. In an action by B. against the assignees for seizing the sheep :—Held, that the question whether the sheep were in A.'s possession so as to make him reputed owner within 12 & 13 Vict. c. 106, s. 125, was a matter of fact for the jury, and that the assignees having put it as a matter of law at the trial, could not afterwards contend that the judge should have left the question to the jury. *Trismall v. Lovegrove*, 6 L. T. 329 ; 10 W. R. 527.

**Delivered at Railway Station.**—[Goods sold by a defendant to W., were by him delivered at a railway station, together with a delivery note (such delivery being in accordance with previous transactions between the parties), on the 7th of November. On the 9th, W. became bankrupt, and on the 11th (he not having in the meantime given any orders respecting the goods, or signified his acceptance of them) the defendant gave notice to the station master not to part with the goods. On the 1st of December, W.'s assignees gave notice to the railway company that they claimed the goods, which on the 5th were re-delivered to the defendant :—Held, first, that by delivery at the railway station, the defendant had divested himself of the right of stoppage in transitu ; secondly, that there was no such acceptance and receipt by the bankrupt, or any one on his behalf, of the goods, as would satisfy s. 17 of the Statute of Frauds ; and thirdly, that the goods were not in the order or disposition of the bankrupt. *Smith v. Hudson*, 6 B. & S. 431 ; 34 L. J., Q. B. 145 ; 11 Jur., N. S. 622 ; 12 L. T. 377 ; 13 W. R. 683.

**Delivery to Vendee's Agent.**—[Where goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them in transitu, and give them a new direction adverse to his principal ; but if he gives them a fresh direction in furtherance of the usual course of business of the principal, they pass to the assignees, as being in the order and disposition of the bankrupt. *Hawkes v. Dunn*, 1 Tyr. 413 ; 1 Price's P. C. 24.

**Engines fitted to Debtor's Ship.**—[Engineers contracted with the debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock company, for the price of 1,050*l.*, to be paid by approved bills ; one at three months for 260*l.* when the boiler and engine should be placed in the vessel, one at three months for 260*l.*, and one at six months for 530*l.*,

when the vessel should have made a trial trip. The vessel having been taken to the docks was there entered in the name of one of the engineers; and, whilst shipwrights and other agents of the debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip. In the interim the engineers had been paid 360*l.*, partly in cash and partly by the debtor's acceptance, which they discounted. On the day appointed for the trial trip the debtor filed a liquidation petition, and a receiver took possession of the vessel. A few days afterwards the debtor's acceptance was dishonoured:—Held, that the lien of the engineers for the unpaid price for the machinery and their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted the debtor's acceptance. *Willoughby, Ex parte, Westlake, In re.* 16 Ch. D. 604; 44 L. T. 111; 29 W. R. 985.

vi. *Goods let on Hire to Bankrupt.*

**Where Let with Land—Colliery.]**—Where a colliery, with all the machinery and implements necessary for working it, was leased for years, with a proviso for re-entry for the landlord on non-payment of rent, and a covenant on the part of the lessee, at the expiration or other sooner determination of the demise, to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a revaluation was to be made three months before the expiration of the demise, and the landlord recovered judgment in ejectment in Trinity term, for a forfeiture for non-payment of the rent, but did not execute the writ of possession until the 8th November, and the tenant committed an act of bankruptcy next day:—Held, first, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), though no previous valuation had been made; secondly, that the possession of the machinery and implements by the tenant was only qualified, and did not come within the 21 Jac. 1, c. 19, so as to bar the landlord's right of re-entry on the 8th November; and thirdly, that the tenant's use of the machinery and implements, in the interval between the judgment in ejectment and the execution of the writ of possession, did not give him the "possession, order, or disposition" thereof, with the consent of the true owner, within the meaning of the statute, so as to pass the property to his assignees. *Storer v. Hunter*, 5 D. & R. 240; 3 B. & C. 368.

**—Furniture.]**—A. lets a house to B. with a covenant that the lease shall determine on B. committing an act of bankruptcy, on which a commission should issue; and by another deed of the same date, A. grants the use of furniture to B. in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy. If B. becomes bankrupt, and the jury find that B. was the reputed owner of the furniture, it will pass to the assignees, notwithstanding these covenants. *Hickenbotham v. Groves*, 2 C. & P. 492.

In 1870 a daughter purchased from the trustee of her father in liquidation, and paid for out of

her own moneys the household furniture and effects of her father, but no formal assignment was made to her. The daughter continued to live with her father as before. She furnished the money for the rent, and he paid the rates and taxes and other outgoings. He voted at municipal and other elections in respect of his occupation. He carried on his business at the house, and his name was on the door-plate. In 1876 he became bankrupt:—Held, that the goods were in his order and disposition, and passed to his trustee in bankruptcy. *Moore, Ex parte, Cook, In re*, 36 L. T. 560.

**Where not Let with Land.]**—A., B. & C., partners and distillers, occupied certain premises, leased to A. and another, and used in common, in the trade, the stills, vats, and utensils necessary for carrying it on; the property of which stills, &c., afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and A. it was covenanted and agreed that A. should withdraw from the business, and permit C. and J. to use, occupy, and enjoy the distil-house and premises, paying the reserved rent, and the several stills, vats, and utensils of trade, specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A. and his wife, and the survivor, with liberty for C. and J., on the decease of A. and his wife, to purchase the distil-house and premises for the remainder of A.'s term, and the stills, vats, &c., mentioned in the schedule; and C. and J. covenanted to keep the stills, vats and utensils in repair, and deliver them up at the time if not purchased; and there was a proviso for re-entry if the annuity were two months in arrear. Under this, C. and J. took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix, who survived him, did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J., who continued in possession of the stills, vats, and utensils, on the premises:—Held, that the vats, &c., which were not fixed to the freehold, did pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners. *Horn v. Baker*, 9 East, 215.

**—Cart Horse.]**—W., a horse contractor, let out a cart horse on hire to N. & Co., who had it in their possession more than twelve months, and then became bankrupt:—Held, that it did not pass to their assignees, as being in their reputed ownership. *Wiggins, Ex parte*, 2 Deac. & Chit. 369.

**Goods to be paid for by Instalments.]**—A timber merchant hired from manufacturers of engines an engine upon the terms of an agreement of hiring and suspensory sale, the payment to be by monthly instalments, with liberty to the manufacturers to retake possession upon his default, the name of the manufacturers in the meanwhile to remain on engines as owners. He became bankrupt before all the instalments

were paid, and his trustees claimed to retain the engine as against the manufacturers:—Held, that the manufacturers continued owners under the agreement, and that there was no reputed ownership on the part of the bankrupt, as against them. *Stooke, Ex parte, Bampfild, In re*, 20 W. R. 925.

— **Custom.**—In an action by an owner of furniture let on hire to an hotel-keeper, who became bankrupt while it was in his possession, to recover damages from his assignees for seizing and selling it, if the plaintiff relies on a custom for hotel-keepers to hire a portion of their furniture, the question for the jury will be, whether the custom is so general as to raise a fair doubt and suspicion in the minds of persons trusting him, that the goods were not actually the goods of the plaintiff, or, in other words, whether it is so general, that persons must be supposed to have known that the goods, though in the possession, were not the property of the bankrupt. *Mullett v. Green*, 8 C. & P. 382.

When a custom of holding goods on hire is relied on to take the goods out of the order and disposition of a bankrupt, the custom must be one which the ordinary creditors of the bankrupt may be reasonably presumed to have known. *Pourell, Ex parte, Matthews, In re*, 1 Ch. D. 501; 45 L. J., Bk. 100; 34 L. T. 224; 24 W. R. 378—C. A.

Such custom may be proved either by reported cases, or by evidence of the custom as on a question of fact. *Id.*

On the bankruptcy of an hotel keeper a custom was alleged of hiring furniture for hotels. The custom was on slight but uncontradicted evidence considered by the chief judge to be sufficiently established, and on appeal, the appellant having declined an offer to have the custom tried by a jury, the appeal was dismissed. *Id.*

— **Re-sale and Hiring.**—A. and B. contracted for the purchase by B. of a billiard-table, the price to be paid by instalments. The table was delivered, and part of the price paid. B., having failed to pay some of the instalments as they became due, was induced by A. to sign the following agreement for the hire of the table at a monthly rent:—"This agreement is signed for A.'s satisfaction, and will become null and void on B. carrying out the original agreement." Upon the bankruptcy of B. the trustee sold the table and received the proceeds:—Held, that the trustee was entitled to the proceeds of the sale, upon the ground that the agreement for the purchase was not abrogated by the agreement for hire, and that consequently the table, being the property of the bankrupt, passed to the trustee. *Orme, Ex parte, Lloyd, In re*, 38 L. T. 328.

A coal merchant, at the time of his bankruptcy, had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act. These barges he had hired of the defendant, it being the custom for coal merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal merchant's assignees, under his bankruptcy:—Held, that it was properly left to the jury to find whether the custom was generally notorious in the coal trade; and that it was not necessary to direct them to inquire whether the

custom was notorious to the world at large. *Watson v. Peache*, 1 Scott, 149; 1 Bing. N. C. 327.

— **Hiring Agreement—Custom.**—C. & Co., upholsterers, lent furniture on hire to the defendants (who were hotel-keepers) to be paid for by monthly instalments, and on payment of the full price agreed upon, it was to become the property of the defendants. Until this had been done it was to remain the property of C. & Co. Upon one instalment being unpaid C. & Co. put a man in possession of the furniture, and the defendants executed an assignment of the lease of the hotel, and of all their personal chattels and effects including the hired furniture to C. & Co., and afterwards became bankrupts. The trustee in bankruptcy claimed the furniture on the ground that it was at the date of the bankruptcy in the possession of the bankrupts as reputed owners, with the consent of the true owners C. & Co.:—Held, that the assignment of the whole property which was duly registered was an act of bankruptcy, but that C. & Co.'s furniture not having been paid for remained their property, and was not in the order and disposition of the bankrupts, and did not pass by the assignment; that the assignment was good so far as it was a mortgage of the leasehold, but was void so far as it was an assignment of personality as being an act of bankruptcy, and that the trustee was entitled to all the personal effects of the bankrupts, but not to the hired furniture. *Craucour v. Salter*, 18 Ch. D. 30; 51 L. J., Ch. 495; 45 L. T. 62; 30 W. R. 21—C. A.

The custom of hiring furniture for the purposes of hotels is so notorious that no person giving credit to an hotel keeper is entitled to assume that the furniture of which he is in possession is his own property. The foundation of the doctrine of "reputed ownership," is that a man has been permitted to obtain false credit; this custom is so common, and so well known, that a man cannot gain false credit by the possession of furniture. *Id.*

A trader hired household furniture under a written agreement, whereby he was to pay a weekly rent for its use, and was to insure it, and the owner was empowered to repossess himself of it upon the hirer becoming bankrupt. The hirer became bankrupt. At the time of the bankruptcy the furniture remained in his house, in his apparently uncontrolled possession. Although no evidence was adduced of the existence of a custom of hiring furniture:—Held, that the court must take notice of such custom, and that the goods were not in the order and disposition of the bankrupt. *Emerson, Ex parte, Hawkins, In re*, 41 L. J., Bk. 20; 20 W. R. 110.

H., on the 30th of August, 1869, agreed with B., a furniture dealer, to hire furniture from him at the rate of 2l. per week. In the memorandum of agreement there was a provision that if H. should be sued or become bankrupt, B. should be at liberty to possess himself of the furniture. The agreement was never registered under the Bills of Sale Act. H., being still in possession of the furniture, became bankrupt on the 9th of June, 1871, and on the 6th of July the trustee took possession. On the 7th of July the trustee first received notice of B.'s claim to the furniture. The trustee applied that the furniture might be declared to be in the order

and disposition of the bankrupt with the consent of the true owner:—Held, that the furniture was not in the order and disposition of the bankrupt with the consent of the true owner, as the bankrupt could not have used it as his own without a direct fraud. *Id.*

Held, also, that the Bills of Sale Act had no application to the case. *Id.*

**Piano on Three Years' Hire System.**—A trader hired a piano from H. & Co. at 15*l.* a year, payable by monthly instalments, on the terms that in the event of default in payment of the instalments, or of his death, bankruptcy or insolvency, or execution issuing against him, H. & Co. might put an end to the hiring and take possession of the instrument; and that when the instalments amounted to 45*l.*, H. & Co. should assign the piano to the debtor, but that till such payment the debtor should have no property in the piano. The debtor paid one instalment under the agreement, and four months afterwards filed a liquidation petition, still having the piano in his possession:—Held, that a custom to let pianos on hire on the above terms being established, there was nothing in the agreement obnoxious to the provisions of the Bankruptcy Act, 1869, s. 15, sub-s. 5, and that the piano did not pass to the trustee under the order and disposition clause. *Blanchard, In re, Hattersley, Ex parte*, 8 Ch. D. 601; 47 L. J., Bk. 113; 38 L. T. 619; 26 W. R. 636.

#### vii. *Property held by Bankrupt as Trustee for others.*

**Shares.**—Where shares of a company stood in the name of a bankrupt, who was on all occasions the only apparent owner, and had possession of the certificate of the shares, but the shares belonged to another person, in whose favour there existed a secret declaration of trust:—Held, that the shares were not in the reputed ownership of the bankrupt. *Watkins, Ex parte*, 2 Mont. & Ayr. 349; 4 Deac. & Chit. 87.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account. The intestate died in 1801, and a commission issued against the bankers in 1810; notwithstanding which, the same partner continued to receive the dividends, and pay them to the intestate's widow up to the period of his own death, which happened in 1822; some time after which the assignees of the bankers claimed a lien on the debenture, for a debt due from the intestate to the banking-house:—Held, that after so long an abandonment of any claim of lien, the assignees could not support such claim; and the debenture, also, could not be considered as having been left in the order and disposition of the bankers, having been deposited in the nature of a trust. *Douglas, Ex parte*, 3 Deac. & Chit. 310.

By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares by holding them in the name of another party. A proprietor, who was already a holder of two shares, having purchased two others, caused them to be entered in the name of the bankrupt, in the company's books, with the knowledge of one of the direc-

tors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the proprietor; but no notice of the trust was taken in the books of the company, and the bankrupt held the certificate of the shares, and continued to receive the dividends thereon, accounting for them from time to time to the proprietor up to the period of his bankruptcy, when the shares were still standing in his name, during all which time he was treated as owner by the company, had notice of meetings served upon him, attended the meetings of the shareholders, and voted as a shareholder:—Held, that this was such a secret trust as was not within 6 Geo. 4, c. 16, s. 79, and that the shares were in the order and disposition of the bankrupt as reputed owner. *Burbridge, Ex parte*, 1 Deac. 131.

By the rules of a company, only principals could become subscribers. A. purchased forty shares in the name of the bankrupt, who verbally declared that he held them as a trustee for A., and the certificates of the shares were kept in A.'s possession, but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust until seven days before the fiat was issued:—Held, that the shares were in the order and disposition of the bankrupt as reputed owner, and passed to the assignees. *Orde, Ex parte*, 1 Deac. 166.

W., at the time of his bankruptcy, had standing in his name shares in the capital of the Provincial Bank of Ireland, as to some of which he was a trustee under a formal declaration of trust, and, as to the rest, beneficial owner. The shares were not numbered, and there was nothing in the mode of entry or transfer by which they could be distinguished. After the investment of the trust property in these shares, and before the bankruptcy, W. bought and sold several shares, but there were always sufficient standing in his name to answer the trust:—Held, that so many of the shares standing in his name at the time of his bankruptcy as equalled in number those upon which the trust fund had been invested were not in the order and disposition of the bankrupt. *Pinkett v. Wright*, 2 Hare, 120; 12 L. J., Ch. 119; 6 Jur. 1102.

S. became possessed (in trust, as executor of his deceased father) of certain shares in the joint stock of the Lead Smelting Company. The only evidence of a party's interest in the stock of this company, was a book in which were entered all transfers of shares. In this book there was an entry signed by S., purporting to be a transfer of the shares in question; from himself as executor, to himself in his individual character. Where the transfer was made in pursuance of a bona fide sale for a money consideration, the words "sell and assign" were used; but in this instance those words were erased. On the faith of his apparent ownership of these shares, S. acted as a director of the company, and received the dividends to his own use up to the time of his bankruptcy; and, on passing his accounts under the commission, he treated the shares as his own property. Upon an issue directed to try the right to these shares, between S. and another, as executors of the original proprietor, and the assignees of S., it was left to the jury to say whether or not the shares were, at the time of the bankruptcy, in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner. The jury

having found for the plaintiffs, the court refused to disturb the verdict. *Cooper v. De Tastet*, 2 M. & Scott, 714.

**Personal Representatives—Omitting to Administer.]**—Where a son entitled on the death of his mother to take out letters of administration, neglected to do so for twelve years, and remained in possession of her goods during that period, and became a bankrupt; and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees of the son in trover:—Held, that such goods were within 21 Jac. 1, c. 19, as being in the possession and disposition of the bankrupt with the consent of the true owner; and that the assignees were therefore entitled to them, as the bankrupt might have obtained a legal right by taking out letters of administration. *Fox v. Fisher*, 3 B. & A. 135.

**— Wife of Bankrupt.]**—Where the wife of a bankrupt has administered to her father, and become possessed as administratrix of his estate, to which she and her infant brothers and sisters are entitled, and the husband has continued the business of the father for their benefit, this is not such a possession of the goods as will be deemed an ordering and disposition within the statute. *Viner v. Cadell*, 3 Esp. 88.

A testator bequeathed furniture and effects to his wife, upon trust to be sold as soon as possible, and appointed her his executrix. Eight years afterwards she married, having still the goods in her possession; and she and her husband used and enjoyed them for six years more, at the end of which period he became bankrupt:—Held, that the assignees of the husband were entitled to the goods. *Moore, Ex parte*, 2 Mont., D. & D. 616; 6 Jur. 828.

**— Carrying on Testator's Trade.]**—An inn-keeper, who was a widow, having died intestate, two of her children, a son and daughter, took possession of her furniture and stock-in-trade, and carried on her business in their own names, for two years after her death, during which time they paid her funeral expenses and some of her debts, but without taking out administration to her estate, and at the end of that time became bankrupt, the daughter having a few months previously retired from the business and sold her share of it to the son. Another of the children then took out administration to the intestate, and claimed that part of her furniture and stock-in-trade which still remained in specie:—Held, that it belonged to the assignees as having been in the order and disposition of the son at the time of his bankruptcy. *Thomas, In re*, 1 Ph. 159; 3 Mont., D. & D. 40; 12 L. J., Ch. 59; 6 Jur. 979.

A husband directed his debts to be paid, and gave the residue of his estate to his wife, whom he appointed executrix. The widow proved the will, paid some of the debts, and for four years carried on, ostensibly on her own account, her late husband's business of a cow-keeper. At the end of that period she married a second husband, who shortly afterwards became bankrupt. There were then creditors of the testator still unsatisfied, who had been throughout aware of the widow's dealings in relation to the business:—Held, that they had no interest in the stock and property of the business as against the trustee in bankruptcy.

*Fells, In re, Andrews, Ex parte*, 4 Ch. D. 509; 46 L. J., Bk. 23; 36 L. T. 38; 25 W. R. 382.

**Where Trust Fund improperly dealt with.]**—

An owner of negotiable notes allowed the partners of a firm, one of whom was her trustee, to deposit them with a bank as security for advances. They were afterwards redeemed, and, without the knowledge of the owner deposited with another bank as security for a loan. Upon the eve of bankruptcy, the trustee, out of the partnership funds, paid off the debt and withdrew the notes. The notes had been treated by the firm as partnership property, but while not deposited they were kept in the possession of the trustee alone:—Held, that the notes remained trust property, and were not in the order and disposition of the bankrupts. *Sindair v. Wilson*, 20 Beav. 324; 24 L. J., Ch. 527; 1 Jur., N. S. 967.

A sole trustee who had appropriated 4,000*l.*, part of the trust property, deposited in the box in which he kept the trust deed and the securities for other portions of the trust funds two policies of insurance, one on his own life for 2,000*l.*, the other on the life of his father for 3,000*l.*, enclosing them in an envelope, with a memorandum that, in the event of his (the trustee's) death the amount of the inclosed policies was to be applied to the repayment of 4,000*l.* borrowed by him of the cestui que trust. Six years afterwards the trustee became bankrupt. The policy for 2,000*l.* was found by the officer of the Court of Bankruptcy inclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death:—Held, as between the cestui que trust and the assignees in bankruptcy: first, that notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement. *Bankhead, In re*, 2 Kay & J. 560.

Held, secondly, that there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy; in other words, the true owner within 12 & 13 Vict. c. 106, s. 125; and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests; the true owner and the reputed owner were the same person, and the 125th section did not apply. And an order was made, under the 130th section, for an assignment of the policy to the new trustees of the settlement. *Id.*

Trustees of a settlement only authorizing investments in government or real securities advanced part of the trust moneys to a banking firm, in which one of the trustees was a partner, on the security of a mortgage of bonds, in which some of the bankers were obligees. Afterwards another partner in the bank was appointed a new trustee of the settlement. The bankers became bankrupt. The bonds were left in the custody of the bankers, and no notice of the mortgage was given to any of the obligors. One of the partners and trustees of the settlement was the sole surviving obligee in one of the bonds:—Held, that he was the real, and not merely the reputed, owner of the bond debt, but that he held it in trust, and that it was not in the reputed ownership of the firm or of himself. *Geaves, Ex parte*, 8 De G., Mac. & G. 291; 25 L. J., Bk. 53; 2 Jur., N. S. 651.

Others of the bonds had, without the knowledge of the cestuis que trustent, been paid off and

replaced by different securities, which the bankers had set apart and marked with the names of the trustees of the settlement:—Held, that the securities were not in the reputed ownership of the bankers. *Id.*

**Goods held as Trustee—Malting Agent—Custom in Trade.**—Brewers had a malting agent, who acted for them alone. He had power, for the purpose of purchasing barley for malting, to draw on certain banking accounts of the brewers. He drew out money fraudulently, and bought barley on credit, which by his conduct, he represented to the brewers to be barley paid for with their money. He also bought malt, which he represented to have been made from barley bought with their money. He became bankrupt. The brewers seized all barley and malt upon his premises, the value of which was less than the moneys he had drawn out. The trustee in his bankruptcy sued the brewers for the value:—Held, that the barley and malt were not in the order or disposition of the malting agent as reputed owner thereof, it being notorious that malting agents are not usually the owners of the barley and malt on their maltings; and that consequently the brewers were entitled to judgment. That, as the bankrupt could not have been heard to say he was not trustee of the barley and malt for the brewers, the trustee in his bankruptcy likewise (the bankrupt not having been reputed owner) could not dispute the equitable right of the brewers. *Harris v. Truman*, 9 Q. B. D. 264; 51 L. J., Q. B. 338; 46 L. T. 844; 30 W. R. 533—C. A. Affirming, *S. C.*, 7 Q. B. D. 340; 50 L. J., Q. B. 633; 45 L. T. 255; 30 W. R. 135.

A. drew two bills upon B., which C. indorsed upon the security of cement in A.'s possession, and stored in A.'s warehouse. A. packed the cement in barrels, which he set apart in his own warehouse, which he marked with the initial letters of B.'s name, to whom also the invoice was sent, as on a purchase by him. A.'s bankers discounted the bills, and A. received the proceeds. A. soon after filed a petition for liquidation, at which time the cement remained in his warehouse, set apart and marked as before stated. One bill became due before and one after the filing of A.'s liquidation petition, and both were paid by C. C. claimed the cement as being held by A. as a trustee for him:—Held, that A. did not hold the cement as a trustee within the meaning of the Bankruptcy Act, 1869, and that the cement passed to his trustee, as being in his order and disposition, with the consent of C., the true owner. *Cohn, Ex parte, Cohn, In re*, 38 L. T. 884.

#### viii. Partnership Property.

**Dormant Partner.**—A dormant partner was within the 6 Geo. 4, c. 16, s. 72. *Church, Ex parte*, 1 Mont. 457.

Where A., the dormant partner of B., in a trading firm (the whole of the business being carried on by B. and in his name), allowed, on the dissolution of the partnership by effluxion of time, the partnership stock, effects, and debts to remain in the order and disposition of B.; and B., after continuing in trade for about two years afterwards on his sole account, became bankrupt:—Held, that A.'s share of the partnership property and effects, and of the debts due on the

partnership account at the time of the dissolution, passed to B.'s assignees, as being in the order and disposition of B. within 21 Jac. 1, c. 19, s. 11. *Gilpin, In re*, 3 D. & R. 636; *S. C.*, nom. *Enderby, Ex parte*, 2 B. & C. 389; *S. P.*, *Wilson, Ex parte*, Buck, 48. *But see next case.*

The goods of a partnership, in which one of the partners is a dormant partner and the sole ostensible partner becomes bankrupt, do not pass to his assignees, as being in his possession, order or disposition by the consent of the true owner. *Reynolds v. Bowley*, 2 L. R., Q. B. 474; 36 L. J., Q. B. 247; 16 L. T. 532; 15 W. R. 813; 8 B. & S. 406—Ex. Ch.

The fact of a business being carried on in the name of one ostensible partner does not make a reputed ownership in the partner whose name is used. *Id.*

A brother and a sister took to the business of their father, a farmer and a cowkeeper, and bought the stock. They then agreed to carry on business in partnership, but in the brother's name alone, the partnership of the sister being kept secret. She, however, lived on the farm, and helped her brother in carrying on the business. The partnership had lasted three years when he became bankrupt:—Held, that the sister's interest in the partnership effects was not in his order and disposition. *Id.*

A secret partnership is not within the meaning of the law as to reputed ownership, as there is a joint ownership, and no true owner as distinct from an apparent owner. *Id.*

*Enderby, Ex parte* (2 B. & C. 389), overruled. *Id.*

The share of a secret partner in the joint stock-in-trade, being in the possession of an apparent partner and the sole ostensible trader, was not liable on the bankruptcy of the latter, as being within the meaning or mischief of 21 Jac. 1, c. 19; the bankrupt having such an interest and qualified property in the secret partner's share as to destroy the essential requisites of a true and independent ownership on the one hand, and of a fraudulent and reputed ownership on the other. *Coldwell v. Gregory*, 1 Price, 119; 2 Rose, 149.

Where a secret partnership existed between A. and B. to underwrite policies of insurance in their separate names on their joint account, and A. died and B. became bankrupt:—Held, that premiums due on policies effected in A.'s name during his lifetime were not in the order and disposition of the bankrupt. *Brett v. Beckwith*, 26 L. J., Ch. 130; 3 Jur., N. S. 31.

**Nominal Partner.**—A trader, carrying on business in Regent-street, but residing elsewhere, associated the name of his son with his own in the business; the son, however, having no share in the profits, but merely a yearly salary. The house in Regent-street was leased to the father, the ground floor being used for the purposes of the business, and the other parts let out in lodgings, the rents of which were placed to the father's private account, and all taxes and other outgoings were also placed to his debit in the partnership books. The son was permitted to occupy apartments in the house for his own residence, but the father had the control over the entire property:—Held, that this property was not distributable among the joint creditors, but belonged to the separate estate of the father.

*Murton, Ex parte*, 1 Mont., D. & D. 252; 4 Jur. 849.

A wine merchant, carrying on business under the firm of J. R. & Co., announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of J. R., sen., & Co., but, as between the uncle and nephew, the latter received a salary only, and did not participate in the capital, profits or losses of the concern. Part of the stock-in-trade consisted of wines in the docks, which the uncle, on announcing the partnership, directed the dock company to deliver to the order of the new firm. On both becoming bankrupt:—Held, that these wines were in the reputed ownership of the two, and ought to be administered as joint estate. *Arbouin, Ex parte*, 1 De Gex, 359.

P., having dissolved a former partnership with H. & C., continued the business alone under the style of P., Son & Co., his own name alone being placed over the shop front. He employed his son to assist him in the management of the business, and authorized him to sign cheques and to order goods in the name of the firm, his intention being to take his son into partnership if the business prospered; but no partnership was in fact entered into between the father and the son. Ultimately P. and his son were jointly adjudicated bankrupts as ostensible partners. Of fifty-seven creditors who proved in the bankruptcy two deposed that the son had been held out to them as a partner by the father, and eight others deposed that they had always believed the son to be a partner:—Held, that there had been a sufficient holding out of the son as a partner to convert the assets of the business, which were originally the separate estate of the father, into joint estate of him and his son, so far as the creditors were concerned. *Hayman, Ex parte, Pulsford, In re*, 8 Ch. D. 11; 47 L. J., Bk. 54; 38 L. T. 238; 26 W. R. 597—C. A.

Held, also, that the doctrine of reputed ownership applied, and that the assets were distributable among the creditors of the firm as being in the apparent possession and reputed ownership of the firm with the consent of the true owner. *Id.*

**Infant Partner.**—[In order to bring goods, in the order and disposition of a bankrupt, within the provisions of the Bankruptcy Act, 1869, s. 15, sub-s. 5, they must be in the sole possession and sole reputed ownership of the bankrupt. *Dorman, Ex parte, Lake, In re*, 8 L. R., Ch. 51; 42 L. J., Bk. 20; 27 L. T. 528; 21 W. R. 94.

Therefore, where two partners, one of whom was an infant, committed an act of bankruptcy, and the adult partner was adjudicated bankrupt:—Held, that the machinery and trade fixtures in the house where the business was carried on, which belonged to the landlord, and were with his consent in the possession of the firm, did not pass to the trustee in the bankruptcy. *Id.*

**Dissolution of Partnership.**—[By a decree in a suit a partnership between the plaintiff and defendant was dissolved, and the business and partnership property were ordered to be sold as a going concern, either party being at liberty to bid. Under a subsequent order the plaintiff became the purchaser, he having in the meantime been carrying on the business for the benefit of the purchaser. Under the order approving of

the purchase by him he was allowed to go into possession at once as purchaser. He continued in possession for some time, and ultimately became bankrupt:—Held, that under the circumstances the business and partnership property were in his order and disposition with the consent of the true owner. *Graham v. McCulloch*, 20 L. R., Eq. 397; 32 L. T. 748; 23 W. R. 786.

Two partners traded under the name of one of them only, and upon a dissolution that one continued the business, the other retiring, but no apparent change took place in the firm. By the agreement, on the dissolution the stock-in-trade belonged to the continuing partner, who afterwards became bankrupt. The stock-in-trade was sold by his assignees as his separate property, and the retired partner, though cognizant of the fact, made no objection or claim. On the retired partner becoming bankrupt:—Held, that the stock-in-trade was not in the reputed ownership of the two, but ought to be administered as the separate estate of the continuing partner. *Wood, Ex parte*, 1 De Gex, 134.

**Death of Partner—Securities given to continuing Partners for Debt to old Firm.**—[If one of four partners dies, and the surviving partners compromise, and obtain securities for a debt due to the original firm, and become bankrupts, the securities are, by reputed ownership, distributable amongst the creditors of the three. *Taylor, Ex parte*, 1 Mont. 240.

If goods are purchased and paid for by a firm of four, on the joint account of themselves and two other firms, and one member of the firm of four dies, and the goods are in the possession of one of the two firms: upon the bankruptcy of the survivors the goods do not pass by reputed ownership to the assignees of the survivor. *Id.*

If a firm consigns goods to Hayti, which, after the death of one member, are returned, and a bill of lading from Hayti is sent to the holder of a bill of exchange dishonoured by the partnership, and the goods remain in the West India Docks, they, upon the bankruptcy of the survivors, are not in their reputed ownership. *Id.*

If a firm is possessed, as mortgagees, of a real estate, which, after the death of one member, remains in the possession of the survivors, it is not in their reputed ownership. *Id.*

**Property affected by Trust.**—[A father and son carried on business in partnership, under articles which provided that the machinery employed in the business should not form part of the capital, but should belong to the father. The father died, having by his will appointed his wife, his son, and his son-in-law executors and trustees. He authorized his trustees to continue his business, either alone or in conjunction with any person or persons, and to employ the capital employed in it in carrying it on, and also to employ in it any money, part of his general estate. After his death the widow and the son continued to carry on the business until they became bankrupt. The son-in-law took no part in the business, though he knew that it was being continued:—Held, that as the carrying on of the business by two only of the trustees was not authorized by the will, the machinery was not converted into assets of the new firm, and that consequently the unpaid creditors of the old firm were entitled to such of the machinery as re-



mained in specie at the date of the bankruptcy of the new firm. *Butcher, Ex parte, Mellor, In re*, 13 Ch. D. 465; 42 L. T. 299; 28 W. R. 484—C. A. Affirming, *S. C.*, 28 W. R. 186. See also *Manchester Bank, Ex parte, Mellor, In re*, 12 Ch. D. 917; 48 L. J., Bk. 94; 40 L. T. 723.

Held, also, that the creditors of the new firm were not entitled to the machinery on the ground that it had remained in the order and disposition of the new firm with the consent of the creditors of the old firm. *Ib.*

**Dissolution of Partnership—Debts.**—A dissolution of partnership was advertised in the Gazette, and a circular sent to the creditors in the name of the dissolved firm, requesting debtors to the firm to pay their debts to one partner:—Held, that the notice was insufficient to take the debts out of the reputed ownership of the firm. *Sprague or Brewster, Ex parte, 4 De G., Mac. & G. 866; 22 L. J., Bk. 62.*

The plant and stock-in-trade were taken possession of by the same partner, and used in his separate trade after the dissolution:—Held, that it was in his separate reputed ownership. *Ib.*

**—Fund appropriated for Special Purpose.**—At the death of one of two partners, a considerable balance belonging to the partnership was in the hands of their bankers, a specific portion of which the surviving partner drew out, and handed over to sureties for the completion of a previous arrangement for the purposes of the partnership, upon the understanding that, if the arrangement was not carried into effect, the money should be returned. The arrangement was not completed, and the surviving partner became bankrupt. The money still remaining in the hands of the trustees:—Held, that the money belonged to the joint estate of the two partners, and not to the separate estate of the surviving partner. *Leaf, Ex parte, 4 Deac. 287; 1 Mont. & Chit. 662; 4 Jur. 28.*

**Taking in new Partner.**—J. C. S. and W. S., carrying on business as brewers, in co-partnership, admitted W. as a dormant partner. It was stipulated by deed that the stock and effects of the old firm, including the plant, and book debts, should form part of the capital stock of the new co-partnership; that W. should be paid 10 per cent. on the capital advanced by him, and should not otherwise interfere. The business was carried on, as before, in the names of J. C. S. and W. S. only, until the new firm became bankrupt. Upon the petition of several creditors of the old firm, some of whom had notice of the dormant partner:—Held, that all the personal chattels of the new firm were within the order and disposition of J. C. S. and W. S., and ought to be administered in the bankruptcy as the separate estate of the two. *Jennings, Ex parte, 1 Mont. 45.*

**Change of Partners—New Firm carrying on different Trade to old.**—S. & O. assigned all their stocks and effects to trustees for the benefit of their creditors, and dissolved their partnership. S. continued on the same premises and carried on a different branch of trade, and soon afterwards took in H. as a partner. Part of the stock of S. & O. which had been assigned to trustees was a quantity of New Zealand flax,

which remained unsold upon the premises, but was separately warehoused and kept distinct from the stock of the new partnership, and was not adapted for the new manufacture carried on by S. & H. A separate fiat sued out against H., and six months afterwards a joint fiat against S. & O.:—Held, that the assignees of S. & O. were entitled to the flax, and that the clause of order and disposition did not apply to such a state of circumstances. *Vardon, Ex parte, 2 Mont., D. & D. 694.*

**Death of Partner—Survivor left Executor.]**

—A. authorized the sale of his share in a brewery to B., his surviving partner, whom he appointed one of his executors. B. conceiving that he had duly become the purchaser, carried on the business until his death, and it was subsequently carried on by C., his executor. Afterwards the sale was set aside, and the estate of A. became entitled to share in the profits made subsequent to A.'s death. C. afterwards became bankrupt, having the whole trade property in his possession:—Held, that the property was not within his order and disposition. *Stocken v. Dawson, 9 Beav. 239. Affirmed, 17 L. J., Ch. 282.*

**—Executor entering Partnership.]**

B., as trustee and executor of his father's will, became entitled to one half-share in a distillery business lately carried on in partnership between his father and another. In pursuance of a provision in the will, B. continued the partnership business, and afterwards purchased the interest of the beneficiaries under the will, and executed mortgages to secure the purchase-money, by one of which, dated September, 1872, B. assigned all his beneficial interest under his father's will as a security for payment of the money due, and by the same deed charged all his share and interest in the distillery partnership, and in the good-will of the business, with the repayment of the money due. New articles of partnership were then entered into between B. and the old partner, in which the former appeared as the owner of one-half the business. In June, 1877, B. was adjudicated bankrupt, and his share in the partnership had since been sold to the other partner:—Held, as between B.'s trustee in bankruptcy and the mortgagee, that the mortgage of B.'s share and interest in the partnership was a charge upon a chose in action, and as such was not affected by the Bankruptcy Act, 1869, s. 15, or by the Bills of Sale Act, 1854. *Bainbridge, In re, Fletcher, Ex parte, 8 Ch. D. 218; 47 L. J., Bk. 70; 38 L. T. 229; 26 W. R. 439.*

Held, also, that to bring partnership goods within the order and disposition clause, they must have been in the sole and absolute possession of the bankrupt; and that, as the mortgage of B.'s share had not acquired the right to take possession of any of the partnership property, B. was not in possession with the consent of the true owner. *Ib.*

**Partnership Articles—Proviso in Event of Bankruptcy of Partner.]**—A provision in a deed of partnership, that, in the event of the bankruptcy or insolvency of a partner, his share in a mining lease (forming part of the partnership property) shall go over to his co-partners, is void, as being in fraud of the bankrupt laws. *Wattmore v. Mason, 2 Johns. & H. 204; 31 L. J.,*

Ch. 433; 8 Jur., N. S. 278; 5 L. T. 631; 10 W. R. 168.

#### k. Evidence as to Ownership.

**Reputation in Neighbourhood.**]—In an action of trover by assignees of a bankrupt for a rick of bark, of which he was the reputed owner, a witness may be asked what was the reputation of the neighbourhood as to whom the rick belonged to at the time of the bankruptcy, and if it appears that the bankrupt had exercised repeated acts of ownership over it previously to that time, the action will lie. *Oliver v. Bartlett*, 3 Moore, 592; 1 B. & B. 269.

In an action by assignees of a bankrupt, claiming property which he was alleged to have had in his possession, order and disposition, as the reputed owner at the time of his bankruptcy, it was competent for the defendant who had paid a valid consideration for the property to give in evidence a contrary reputation, and to resist the claim under 21 Jac. 1, c. 19, s. 11, upon those grounds. *Gurr v. Rutton*, Holt, 327.

**Conduct of Bankrupt.**]—Upon a question whether A., after executing a conveyance of property to trustees for the benefit of his wife, had the disposition of the property; evidence of his making an assignment of it is not admissible against the trustees, unless they were privy to it, or unless the property was delivered, and the assignment acted upon. *Meyer v. Sefton*, 2 Stark, 274.

**Declarations by Bankrupt.**]—In trover against assignees for goods claimed by them as belonging to the bankrupt, or as being in his order and disposition at the time of his bankruptcy, with the consent of the true owner, they offered in evidence declarations made by the bankrupt before his bankruptcy, as to the goods, in the absence of the plaintiff, in order to show an exercise of dominion over them as owner. This evidence having been rejected, and the jury having found for the plaintiff, the court sent the cause down for a new trial. *Sharpe v. Mewsholme*, 8 Scott, 21; 5 Bing. N. C. 713; 3 Jur. 581.

**Assignees of Goods allowing Assignor to trade for their Benefit—Estoppel.**]—A., a horse-dealer and jobber, assigned all his stock in trade to trustees for the benefit of his creditors, until all his debts should be paid off, to hold on certain trusts, that so long as A. should observe the orders of the trustees, he was to be allowed to carry on and conduct the business subject to their orders, but that they should have the power to determine his possession on his failing to observe their orders; that all moneys received in the business were to be paid to the account of the trustees, and all moneys paid by their cheques; and that A. was to receive a weekly salary. The creditors also advanced a sum of money to carry on the business. The business was carried on by A. for some time, his name being over the door at the place of business, and he had dealings with various persons as if he carried on the business on his own account; but, on his neglecting to observe the orders of the trustees, they determined his right to carry on the business, and he admitted in writing that they had a right to

VOL. I.

and did assume the possession of the stock in trade. The trustees thereupon gave notice to the parties who had some of the horses, part of the stock in trade, that they belonged to them. Two days after this notice A. committed an act of bankruptcy. On an interpleader issue to try whose horses these were:—Held, that the trustees, by allowing A. to carry on the business in his own name, were not estopped from denying the horses were A.'s; and that the horses were not in the possession, order and disposition of the bankrupt at the time of the bankruptcy, within 6 Geo. 4, c. 16, s. 72. *Price v. Groom*, 2 Ex. 542; 17 L. J., Ex. 346.

**Person dealing with Goods by Bankrupt's orders—Estoppel.**]—M., the owner of goods, put C. into possession of them, who remained so until after the death of the owner, who died intestate. After M.'s death the defendant sold the goods by the desire and as the property of C., who had previously committed an act of bankruptcy of which the defendant was cognizant. The intestate's goods had not been administered, and the ordinary had not claimed them. In an action by the assignees of C. for the conversion of the goods:—Held, that the defendant was not entitled to set up the right of the ordinary to the goods, and therefore that the defendant could not insist that the property was not shewn to have been in the order and disposition of the bankrupt with the consent of the true owner. *White v. Mullett*, 6 Ex. 713; 20 L. J., Ex. 291.

#### 1. Order for Sale by Court of Bankruptcy.

**Under 12 & 13 Vict. c. 106, s. 125.**]—Goods in the order and disposition of a bankrupt, as reputed owner, do not pass to his assignees under 12 & 13 Vict. c. 106, s. 141, but in order to vest the property in such goods in the assignees or other person, the Court of Bankruptcy must make an order under s. 125. *Heslop v. Baker*, 6 Ex. 740; 20 L. J., Ex. 350; 15 Jur. 684.

**Order must be Specific.**]—An order by a commissioner for the sale of goods in the possession, order or disposition of a bankrupt as reputed owner, must be specific as to the goods to which it is to apply (although it may be made on an ex parte application). *Quartermaine v. Bittles-ton*, 13 C. B. 133; 22 L. J., C. P. 105; 17 Jur. 281.

An order is sufficient if it specifies the goods ordered to be sold, without referring by name to the persons supposed to be the true owners of such goods. *Freshney v. Carriek*, 1 H. & N. 653; 26 L. J., Ex. 129.

An order was made by a county court judge for the sale of all the goods of a bankrupt in and about his premises, called the Cross Keys. The bankrupt had on his premises, with the consent of the true owner, certain goods, of which the bankrupt was the reputed owner:—Held, that the order sufficiently described the goods to be sold, though it did not state the name of the true owner. *Fielding v. Lee*, 18 C. B., N. S. 499; 34 L. J., C. P. 143; 11 Jur., N. S. 323; 12 L. T. 25; 13 W. R. 462.

**Made ex parte.**]—An order made by the Court of Bankruptcy for sale of goods, as in the re-

I 1

puted ownership of a bankrupt, is *ex parte*. *Mather v. Lay*, 2 Johns. & H. 374.

Seemingly, it cannot be appealed against by the true owner. *Ib.* But see next Case.

The Court of Chancery has jurisdiction (notwithstanding such order) to restrain a sale, and determine the rights of the parties. *Ib.*

An application by the true owner to the Court of Bankruptcy for a stay of proceedings, is not a bar to a subsequent bill for an injunction to stay a sale. *Ib.*

**Appeal by True Owner.**—An order is not final and conclusive against the true owner. *Graham v. Furber*, 14 C. B. 134; 2 C. L. R. 10; 23 L. J., C. P. 10; 18 Jur. 61.

**Relation of Trustee's Title.**—By the order vesting the property in the assignees or vendee of the goods, their title has relation back to the act of bankruptcy, in the same way as the title of the assignees has by the general assignment. *Heaslop v. Baker*, 8 Ex. 411; 22 L. J., Ex. 333.

**Authority to bring Action.**—The usual order by the Court of Bankruptcy, authorizing the bankruptcy assignee to bring an action for the recovery of a debt, was not an order for the sale and disposal of the property for the benefit of the bankrupt's creditors within 12 & 13 Vict. c. 106, s. 125. *Cooke v. Hemming*, 3 L. R., C. P. 334; 37 L. J., C. P. 179; 18 L. T. 772; 16 W. R. 903.

**Evidence of Reputed Ownership.**—Mortgages of a cargo on board a ship on the coast of Africa, sent no notice of their security to the captain till two months after the date of the mortgage, during all which time, and more, the ship was lying off that coast, nor was any notice received by the captain till after the mortgagor had become bankrupt:—Held, that affidavits of these facts, and of there having been opportunities of earlier communication with the vessel, constituted a sufficient *prima facie* case for an application *ex parte* for an order for sale of the cargo, as being in the reputed ownership of the bankrupt, with the consent of the true owner. *Lucas, Ex parte*, 3 De G. & J. 113.

## XI. PROOF OF DEBTS.

### 1. GENERAL PRINCIPLE.

The object of the Bankruptcy Act, 1869, is to set the bankrupt free from every contract of every description, which he entered into prior to his bankruptcy, and to enable the other parties to such contracts to prove against the estate for what they could have recovered at law in an action for breach of contract against the bankrupt. *Llynvi Coal and Iron Company, Ex parte, Hyde, In re*, 7 L. R., Ch. 28; 41 L. J., Bk. 5; 25 L. T. 609; 20 W. R. 105.

**Voluntary Obligations.**—By the Bankruptcy Act, 1869, s. 32, all debts provable under the bankruptcy, after those to which priority is given by that section, are to be paid *pari passu*; and therefore the rule of equity that creditors by specialty who are mere volunteers are not entitled to compete with creditors on simple contract for valuable consideration is no longer applicable. *Stewart, In re, Pottinger, Ex parte*, 8 Ch. D. 621;

47 L. J., Bk. 43; 38 L. T. 432; 26 W. R. 648—C. A.

### 2. NATURE OF DEBT.

**Moral Obligation.**—A. died intestate and insolvent, having abstained from making a provision by will for his daughters, in consequence of a promise from his son to pay an annuity of 50*l.* to each of them while single, and 500*l.* to each upon her marriage; but it did not appear what the nature or amount of the provision was which A. abstained from making:—Held, upon the bankruptcy of the son, that this promise, though morally, was not legally binding upon the son, and that it did not constitute a debt provable under the fiat. *Mudie, Ex parte*, 6 Jur. 1093.

**Illegal—Scotch Bank Notes in England.**—A., being agent of and also partner in the Leith Banking Company, opened an office at Carlisle, and circulated there promissory notes, drawn by the company's cashier in Scotland, and made payable to the bearer on demand at the company's office in Leith:—Held, this was in violation of the statutes passed for the protection of the Bank of England, and that a debt formed of notes so issued could not be proved under a commission of bankruptcy. *Randleson, Ex parte*, 1 Mont. & Mac. 86.

**Contraband Goods.**—A seller abroad of contraband goods is entitled to prove, unless he is a participator in smuggling them. *Cacalierre, Ex parte*, 2 Glyn & J. 227.

**Trading with Enemy.**—A debt arising out of a contract to convey British goods to a market in an enemy's country, cannot be proved under a commission after peace has been established between that country and Great Britain. *Schmalding, Ex parte*, Buck. 93.

**Broker acting as Merchant.**—A proof may be made of a debt to a broker of the city of London, arising out of a transaction in which he acted as a merchant, although in contravention of his duty in his office and the bond given by him. *Dyster, Ex parte*, 2 Rose, 349; 1 Mer. 155.

**Illegal Insurance.**—A bill was indorsed to a broker in consideration of the money paid by him in effecting insurances, one of which was illegal; the acceptor becoming bankrupt, the petition of the indorsee to prove as to what arose upon the illegal insurance was dismissed. *Mather, Ex parte*, 3 Ves. jun. 373.

**Gaming Transactions—Stock Exchange Bargains.**—A debt arising out of a loan transaction or bargain contract on the Stock Exchange, between the members, is not a gambling transaction, and may be proved for on the bankruptcy of one of the parties. *Phillips, Ex parte*, 2 De G., F. & J. 634; 30 L. J., Bk. 1; 6 Jur., N. S. 1273; 3 L. T. 516; 9 W. R. 131.

**Coursing with Greyhounds.**—Where a steward of a coursing club, who had collected subscriptions and other contributions from the members, which he was bound to hand over to the treasurer, became bankrupt:—Held, that the treasurer might prove for the amount. Held, also

that, though one of the purposes to which the fund was to be applied was to provide stakes for running matches with greyhounds, this afforded no objection to the proof, under the statutes for prevention of gaming. *King, Ex parte*, 2 Deac. 23.

—**Money lent to pay Bets.**—Money lent to pay a lost bet is not "money knowingly advanced for gaming or betting" within 5 & 6 Will. 4, c. 41, s. 1, and the lender will be admitted to prove in the bankruptcy of the borrower for money so lent. *Pyke, Ex parte, Lister, In re*, 8 Ch. D. 754; 47 L. J., Bk. 100; 38 L. T. 923; 26 W. R. 806—C. A.

**Inducing Parties to Trust Debtor.**—[A., an innkeeper, assigned the premises and furniture to B., as his successor in the inn, and placed his son, who was a minor, with B., at a yearly salary in the first instance, but upon the understanding that he was afterwards to be taken in as partner. The licence was transferred to B. and A.'s son jointly, and B. became bankrupt, after contracting a large debt with A., the proof of which was rejected by the commissioners, on the ground that A. concealed his son's minority, and thus induced parties to trust the bankrupt, who had no capital:—Held, that the commissioners were not justified in rejecting the proof. *Archer, Ex parte*, 2 Mont., D. & D. 784.]

**Debts arising from a Felony.**—[If one of three partners obtains by forgery a sum from the sale of stock, which he, in fraud of his partners, pays into the banking-house, and withdraws it, it is provable against the joint estate by the stock proprietor, although he has not prosecuted or given evidence against the convicted felon. *Boland, Ex parte*, 1 Mont. & Mac. 315.]

Where an actuary embezzled various sums, rendering forty indictments necessary, and became bankrupt, and five indictments were preferred, which failed from technical reasons which would apply to any other indictment, the proof was allowed for the whole sum embezzled. *Jones, Ex parte*, 2 Mont. & Ayr. 193; 3 Deac. & Chit. 525.

A proof, resting on a felony, cannot be made till after a prosecution, except where conviction is hopeless. *Ib.*

A servant acknowledged that he had misapplied sums received from his master's debtors, and gave his master a warrant of attorney for securing the amount by instalments, the master treating his conduct as a mere breach of trust; after which the servant became bankrupt:—Held, that the master could not prove for the amount until he had prosecuted the bankrupt for the felony. *Elliot, Ex parte*, 3 Mont. & Ayr. 110, 123; 2 Deac. 172.

A. committed a forgery upon a banking company (B.), was prosecuted by them, and a true bill found against him by the grand jury. At the same assizes A. was tried upon another indictment for forgery upon another banking company (C.), to which he pleaded guilty, and received sentence of penal servitude. The judge directed B.'s indictment, to which A. had pleaded not guilty, to stand over, as justice was satisfied by the sentence already passed upon A. Previously to the conviction A. had assigned all his estate for the benefit of his creditors:—Held, that the banking company (B.) was entitled to prove as creditors

of A. under this assignment for the amount paid by them upon the forged cheque, and that they had not forfeited their rights by abstaining from pressing for an actual conviction upon the indictment preferred by them. *Dudley and West, Bromwich Banking Company v. Spittle*, 1 Johns. & H. 14; 2 L. T. 47; 8 W. R. 351.

A bankrupt, who was a banker's clerk, having absconded on the 16th of March, 1877, defalcations to the extent of a few hundred pounds were being discovered, when on the 24th of the same month the bankers received from the bankrupt a letter confessing thefts to the amount of 7,852l. 19s. Instructions were given on the 26th, in consequence of which a warrant for his apprehension was, on the 28th, placed in the hands of a detective, who failed to find him in England. Conversations on the 19th and again on the 22nd of March, between a partner of the bank and relatives of the bankrupt, were deposed to. In the course of the former the partner said, "My advice is, that he should get out of the country to America, or elsewhere;" and on the latter occasion an offer having been made by the bankrupt's wife that the bankrupt should return and throw himself on the mercy of the bank, the partner said, "No, if he did that, we should be obliged to prosecute him; if he were abroad I don't suppose we should trouble further for him." After the conversation on the 19th, one of the relatives who was present had an interview with the bankrupt in this country, since which he had disappeared. The registrar of the county court having refused to admit to proof a claim of the bankers for 7,852l. 19s.:—Held, that there was not proof of such negligence on the part of the bankers to bring the criminal to justice as disentitled them to prove for the amount stolen; and appeal allowed. *Turquand, Ex parte, Shepherd, In re*, 9 Ch. D. 704. Affirmed sub nom. *Ball, Ex parte, Shepherd, In re*, next case.

Per James and Bramwell, L. JJ.:—Even if a person injured by a felony is debarred from proving in the bankruptcy of the felon in respect of the injury until he has prosecuted the felon, the obligation to prosecute does not extend to his trustee in bankruptcy, though the injured person himself tendered his proof before his own bankruptcy. *Ball, Ex parte, Shepherd, In re*, 10 Ch. D. 667; 48 L. J., Bk. 57; 40 L. T. 141; 27 W. R. 563; 14 Cox, C. C. 237—C. A.

Per Baggallay, L. J.:—A person who has been injured by a felony is not allowed by the policy of the law to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice. And the trustee in bankruptcy of the injured person stands in no better position than he himself. *Ib.*

But this rule does not apply where the offender has escaped from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence. *Ib.*

Bankers allowed a customer to overdraw his current account on his depositing with them as security for the overdraft some bills of exchange drawn by him upon, and purporting to be accepted by, a third person. After the customer had overdrawn his account the bankers discovered that the acceptances were forgeries. They then communicated with the customer, and ultimately gave up the forged acceptances to him, receiving from him in exchange joint and several promissory notes of himself and his father. The custo-

mer was afterwards adjudicated a bankrupt. The notes were not paid at maturity:—Held, that, though the bankers had not prosecuted the bankrupt for the felony, and whether they had or had not agreed not to prosecute him, they were entitled to prove in the bankruptcy for the balance due to them upon the bankrupt's current account. *Lealie, Ex parte, Guerrier, In re*, 20 Ch. D. 131; 51 L. J., Ch. 689; 46 L. T. 548; 30 W. R. 344; 15 Cox, C. C. 125—C. A.

**Statute of Limitations.**—After a commission has issued, the Statute of Limitations does not affect debts not previously barred. *Ross, Ex parte*, 2 Glyn & J. 46, 330.

A. and B. made a joint promissory note, ten years after the date of which B. executed an assignment of his property, in trust for his creditors, under which a dividend was paid to the holder of the note. A. became bankrupt:—Held, that the payment of the dividend under B.'s assignment, being after the Statute of Limitations had already run, did not revive the debt as against A., so as to enable the holder to prove on the note under the fiat against A. *Woodward, Ex parte*, 3 Deac. 294.

If a debt which is barred under a commission is revived prior to a second, it is provable under the latter. *Roberts v. Morgan*, 2 Esp. 736.

**Acknowledgment in Writing—Bill of Exchange.**—A bill of exchange was given by a bankrupt to a creditor, in consideration of an advance of money made more than six years before the bill was given. Five years after proof was made upon the bill, and dividends had been received upon it, the commissioners ordered the proof to be expunged, on the ground that the bill was not such an acknowledgment in writing of the debt as took the case out of the Statute of Limitations:—Held, that the bill was sufficient for that purpose, and, consequently, that the proof must be restored. *Wilson, Ex parte*, 1 Mont., D. & D. 586.

**Payment on Account.**—A debtor, in 1831, agreed with his creditor to pay him a composition of five shillings in the pound upon the amount of his debt, by instalments. The first instalment was paid; when the creditor agreed to give the debtor a release in full, on his paying the balance of the composition. The debtor made default in payment of the balance; but in February, 1839, being pressed for the payment of the demand of the creditor, he made a payment of 100*l.*, in part of the balance of the composition, and required a receipt as for a composition of five shillings in the pound upon the balance of account owing by him. The creditor acknowledged the payment of the 100*l.*, but declined signing a receipt in this form. In September, 1839, the debtor became bankrupt:—Held, that the agreement for the composition did not preclude the creditor from proving for the balance of the original debt, and that it was not barred by the Statute of Limitations. *Bateson, Ex parte*, 1 Mont., D. & D. 289.

A debtor, one of whose debts had been contracted more than six years, had joined in executing a deed of inspectorship, reciting that he was indebted to divers persons, and assigning his business and effects to inspectors who were to realise and pay his creditors by instalments. The deed provided that if the debtor should be adjudi-

cated a bankrupt, or if execution should issue against him (which event happened), the inspectors might declare the deed at an end, and the creditors might sue for their debts, any instalments that had been paid being taken as part payment. A schedule of the debts verified by the debtor's affidavit was filed, and a small dividend paid under the deed to the creditors. A proof being tendered for the debt on the debtor's subsequent bankruptcy:—Held, that neither the execution of the deed, nor the filing of the schedule, nor the payment of the dividend was sufficient to take the case out of the Statute of Limitations, and that the proof must be rejected. *Topping, Ex parte*, 34 L. J., Bk. 44; 12 L. T. 787; 13 W. R. 1025.

**Scotch Sequestration.**—A sequestration in a foreign country does not suspend the running of time prescribed by the Statute of Limitations; and therefore a creditor under a Scotch sequestration issued in 1836 was not allowed to prove his debt against the estate of his debtor, who had subsequently set up business in London, had become embarrassed, and filed a petition in bankruptcy, in 1860. *Kidd, Ex parte*, 7 Jur., N. S. 613; 4 L. T. 334.

**Ca. sa.—Death of Plaintiff—Discharge from Prison.**—A creditor, having, before the bankruptcy of his debtor, taken him in execution, died shortly before the issuing of the fiat; and the bankrupt, eight months after the issuing of the fiat, obtained a judge's order for his discharge, on the ground that the action abated by the death of the plaintiff, the plaintiff's executrix interfering in no way whatever to oppose the discharge:—Held, that the discharge was not an extinguishment of the debt, and that the executrix could prove. *Goodman, Ex parte*, 3 Deac. 631; 1 Mont. & Chit. 151.

**Debt scheduled under Insolvent Act.**—A creditor, whose debt is inserted by his debtor in his schedule, on taking the benefit of the Insolvent Act, may prove for the balance due to him under a subsequent fiat in bankruptcy issued against his debtor, and is entitled to receive dividends *pari passu* with the other creditors of the bankrupt, without any reference to the sources from which the whole divisible fund is derived. *Fenwick, Ex parte*, 2 Deac. 27.

**Release of one Joint Debtor.**—Proof under the bankruptcy of one joint debtor, after receiving a composition from the other, was expunged, the release to one being a release to both. *Slater, Ex parte*, 6 Ves. 146.

**By his Bankruptcy.**—The bankruptcy and certificate of one of several joint grantors of an annuity and covenantors for payment, discharge the bankrupt, but not his co-defendants. *Barter v. Nicholls*, 4 Taunt. 90; 2 Rose, 111.

**Payable at a future Day.**—The 7 Geo. 1. c. 31, s. 1, was confined to written securities. *Parslow v. Dearlove*, 4 East, 438; 1 Smith, 281; 5 Esp. 78. And see *Hoskins v. Despercy*, 9 East, 498; 6 Esp. 58.

And the statute extended to all personal securities for a valuable consideration, where the time of payment was certain though future. *Pattison v. Bankes*, Cowp. 543.

A bond for the payment of an annuity for a term of years was within the statute. *Ib.*

A bond payable by instalments given in consideration that the obligee would marry and settle a small estate upon a servant woman, and also maintain a bastard of the obligor, was within the 7 Geo. 1, c. 31, and might be proved under a commission of bankruptcy against the obligor. *Cottrell, Ex parte*, Cowp. 742. And see *Brooks v. Lloyd*, 1 T. R. 17.

Where it was agreed, upon a loan to the bankrupt, bearing interest, that six months' notice should be given before repayment was required, the debt is provable, though no notice was given before the bankruptcy. *Downman, Ex parte*, 2 Glyn & J. 241; *S. P.*, contra, *Downman, Ex parte*, 2 Glyn & J. 85; *Minet, Ex parte*, 14 Ves. 189.

Moneys were advanced by E. to the bankrupt, secured by a note, whereby the bankrupt promised to pay, after three months' notice, the moneys advanced, with interest at 5 per cent. Two years' interest had been paid before the commission, but no notice had been given:—Held, that E. was entitled to prove for the principal moneys, and interest up to the commission. *Elgar, Ex parte*, 2 Glyn & J. 1.

The drawer of a bill which had been accepted and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate, inasmuch as such debt is made provable under his commission, by 7 Geo. 1, c. 31. *Starey v. Barns*, 7 East, 435; 3 Smith, 441.

**Payable by Instalments—Before 24 & 25 Viet. c. 134, s. 151.**—A defendant against whom a fiat issued on the 19th April, 1839, and who obtained his certificate on the 6th August, 1839, gave the following undertaking to the plaintiff on the 17th November, 1838:—"In consideration of your discharging B. out of custody (who had been taken under a ca. sa. at the suit of the plaintiff), I undertake he shall pay the debt due to you by four yearly instalments, the first to be paid on the 17th May, 1839:—"Held, that the certificate was a bar to an action for the two first instalments, because B. having been discharged from the debt, this was an original undertaking on the defendant's part to pay by the hand of B. *Lane v. Burghart*, 1 G. & D. 311; 1 Q. B. 993; 6 Jur. 155.

Held, in another action upon the same undertaking, that the certificate was no bar to an action against the bankrupt for the third instalment due on the 17th May, 1840—first, because, inasmuch as B. continued liable as the plaintiff's debtor by virtue of the warrant of attorney executed by him before his discharge, and the undertaking was given with reference to B.'s liability, and as a collateral guarantee for the payment of the instalment secured by the warrant of attorney, and as no instalment became due before the fiat, there was no debt due from the bankrupt at the date of the fiat that could have been proved under it. *S. C.*, 4 Scott, N. R. 287; 3 M. & G. 597.

**Debts Compounded for—Bankruptcy of Debtor before Final Instalment.**—Where a composition was made between a debtor and his creditors to pay them 9s. in the pound, by four instalments, with a proviso that, in case the composition should not be duly paid them, the release should

be null and void; and the debtor paid three instalments, and became bankrupt before the time for payment of the fourth:—Held, that the creditors were not remitted to their original debt, but entitled to a proof only for the amount of the remaining instalments. *Peele, Ex parte*, 1 Rose, 435; *S. P.*, *Vere, Ex parte*, 1 Rose, 281.

— **After act of Bankruptcy.**—By a deed of composition entered into by the bankrupt with his creditors, dated September 5, 1831, he agreed to pay them 10s. in the pound, by two instalments of 5s. each; in consideration of which the creditors covenanted to release him from his debts, as soon as both the instalments were paid. This deed was executed by the major part of the creditors. After the payment of the first instalment, on the 31st October, 1831, a commission issued on an act of bankruptcy committed in June, 1831:—Held, that the creditors who had received the first instalments were entitled to prove for the residue of their debts, without refunding the amount of the instalments. *Wood, Ex parte*, 2 Deac. & Chit. 508.

— **Fraudulent Arrangement with one Creditor.**—An insolvent compounded with her creditors for 13s. 6d. in the pound, but promised to pay one of her creditors the whole of his debt, in order to induce him to sign the composition deed. After paying him in full, she contracted a fresh debt with him, and then became bankrupt:—Held, that the payments made to the creditor above the composition of 13s. 6d. in the pound, were fraudulent and void, and that the creditor could not prove for the amount of his fresh debt contracted with the bankrupt, without first deducting these payments. *Minton, Ex parte*, 3 Deac. & Chit. 688.

— **Security for Payment—Right to Retain.**—A creditor having agreed to accept a composition for his debt, took bills for the amount of the composition, and a bond was also assigned to him as part security for the composition. The composition deed contained a clause, that in default in payment of the instalments, the composition should fall to the ground. Default was made, and subsequently a fiat issued:—Held, that the creditor might prove the balance of the original debt, and also retain the bond. *Reay, Ex parte*, 4 Deac. & Chit. 525; 2 Mont. & Ayr. 33.

— **Failure to pay Composition.**—A debtor, in 1831, agreed with his creditor to pay him a composition of 5s. in the pound upon the amount of his debt, by instalments. The first instalment was paid; when the creditor agreed to give the debtor a release in full, on his paying the balance of the composition. The debtor made default in payment of the balance; but, in February, 1839, being pressed for the payment "of the demand" of the creditor, he made a payment of 100l. in part of the balance of the composition, and required a receipt as "for a composition of 5s. in the pound upon the balance of account owing by him." The creditor acknowledged the payment of the 100l., but declined signing a receipt in this form. In September, 1839, the debtor became bankrupt:—Held, that the agreement for the composition did not preclude the creditor from proving for the balance of the

original debt. *Batson, Ex parte*, 1 Mont., D. & D. 289.

### 3. DEBTS ENTITLED TO PRIORITY.

#### a. Assessed Taxes and Parochial Rates.

One year's parochial rates due at the time of the bankruptcy, may be paid in full. *Saberton, In re*, 9 L. T. 267.

#### b. Debts due by Officers of Friendly Societies and Savings Banks.

**Treasurer retaining Debt due to himself out of advance made to his Debtor.**—The treasurer of a friendly society, having a debt due to him from a person who offered a security, took a security in the name of the society, and retained the amount of his debt out of the society's moneys in his hands. Some time afterwards he became a bankrupt, having in the meanwhile debited himself annually in his accounts with the society with the interest of the amount for which the security was taken. The security proved insufficient, and was not of the description, or taken in the manner required by the Friendly Societies Act:—Held, that the omission on the part of the society to take steps for setting aside the transaction and calling in the money before the bankruptcy did not deprive it of the statutory right to be paid in full before the other creditors. *Burge, Ex parte*, 1 Mont., D. & D. 540; 5 Jur. 346.

**Bankers not officers.**—By the rules of a friendly society it was provided; that the treasurer retaining upwards of 10l. more than seven days after he was required to pay it over should be excluded the society; and that a particular firm should be the bankers of the society, with power for a general meeting to appoint other bankers:—Held, that the bankers for the time being were not officers, so as upon their bankruptcy to entitle the society to payment in full. *Harris, Ex parte*, 1 De Gex, 162; 14 L. J., Bk. 25.

The trustees of a friendly society were in the habit of paying money into the bank of W. & Co. at N., in order that W. & Co. might at once transmit it to their London bankers, to be paid by them into the Bank of England. A sum was paid into the bank of W. & Co. for the above purpose, but before it was transmitted to London, W. & Co. became bankrupt:—Held, that W. & Co. had not moneys in their hands by virtue of their office or employment, within the 4 & 5 Will. 4, c. 40, s. 12. *Whipham, Ex parte*, 3 Mont., D. & D. 564; 13 L. J., Bk. 8; 8 Jur. 204.

By the rules of a friendly society it was provided that there should be appointed a treasurer or treasurers, in whose hands should be deposited all the cash belonging to the society, until the same should be placed out at interest; and that as soon as a sufficient sum should be collected, it should (after leaving in the club box a sufficient sum to pay the sick and other expenses of the society) be deposited in the hands of the treasurer or treasurers of the society, and that the clerk and two stewards should take the same to the bank. No formal appointment of treasurer was made, but the moneys of the society were paid into a bank:—Held, that the bankers were not employed as officers of the society

so as to entitle the society upon their bankruptcy to payment in full. *Oxford, Ex parte*, 1 De G., Mac. & G. 483; 21 L. J., Bk. 31; 16 Jur. 851.

**Loan by Society to Treasurer.**—If money is intrusted to the treasurer of a friendly society, for which he is to pay interest, and another sum for which he is not to pay interest, and he enters into a statutable bond, as treasurer, for the whole sum, the society, upon the bankruptcy of the treasurer, is entitled to full payment within the 4 & 5 Will. 4, c. 40, s. 12, and no part is to be treated as a loan to him in his private character. *Ray, Ex parte*, 1 Mont. & Chit. 50; 3 Deac. 537.

**Building Society.**—A benefit building society, established under 6 & 7 Will. 4, c. 32, is not entitled, on the bankruptcy of its treasurer, to priority over the other creditors. *Bailey, Ex parte*, 5 De G., Mac. & G. 380; 23 L. J., Bk. 36; 18 Jur. 988.

**Savings Bank—Evidence.**—A savings bank, not within 9 Geo. 4, c. 92, is not entitled to the benefit given by 3 & 4 Will. 4, c. 14, s. 28. *Haynes, Ex parte*, 3 Mont., D. & D. 663; 13 L. J., Bk. 12; 8 Jur. 791.

The certificate of the barrister appointed under that act, that the rules of the savings bank are in conformity with the act is not conclusive evidence of the fact. *Id.*

**Fiat against Treasurer and his Partner—Joint Estate.**—Where a joint fiat issues against the treasurer of a savings bank and his partner in trade, the trustees can claim only a priority of payment of any debt owing by him out of his separate estate, and have no claim whatever against the joint estate, although the separate estate may prove insufficient to satisfy the debt. *Appach, Ex parte*, 1 Mont., D. & D. 83.

A firm was, from 1816 down to the time of their bankruptcy, employed by a savings bank carried on under 9 Geo. 4, c. 92, and 3 & 4 Will. 4, c. 14, as the bankers of the institution, the account of which with the firm was headed in the books of the latter—"Dr. —. Savings Bank, Cr." In 1818, L., one of the bankrupts, became a partner in the firm, and was soon afterwards appointed to the office of treasurer to the savings bank; but upon that event no alteration was made in the heading of the account in the books of the firm, and the payments and receipts between the savings bank and the firm were continued to be made in the names of the trustees of the savings bank, and in the manner usual between bankers and their customers. Certain monthly returns, however, which the trustees of the savings bank, in pursuance of 9 Geo. 4, c. 92, were in the habit of making to the Commissioners for the Reduction of the National Debt, for many years contained acknowledgments by L. in the following terms:—"Remaining in my hands, £—, J. L., treasurer." The sum for which the last of such acknowledgments was signed, together with the interest allowed upon it by the firm, being in the bank at the time of the bankruptcy:—Held, that the trustees of the savings bank were entitled to be paid in full out of the separate estate of L. the whole of such sum and interest, in priority to the other creditors of L.

*Riddell, Ex parte*, 3 Mont., D. & D. 80 ; 12 L. J., Bk. 19 ; 7 Jur. 21.

**Committee—Cashier.**—A linendraper was appointed actuary and cashier of a savings bank, the rules of which provided that one or more members of the committee should attend at the cashier's shop to receive the deposits. The committee failed to attend, and permitted the deposits to be received by the cashier :—Held, upon his bankruptcy, that they were not moneys in his hands by virtue of his office, and could not be claimed in full by the savings bank. *Fleet, Ex parte*, 4 De G. & S. 52 ; 19 L. J., Bk. 10 ; 14 Jur. 685.

**Priority affects all Assets.**—Under the Friendly Societies Act, 1875, s. 15, sub-s. 7, the trustees of the society are entitled to preferential payment out of the estate of a bankrupt treasurer in respect of money received by him by virtue of his office notwithstanding the fact that the debtor's assets consist only of stock-in-trade, furniture, and other property, which cannot be considered as specifically belonging to the society. *Edmonds, Ex parte, Atkins, In re*, 51 L. J., Ch. 406 ; 46 L. T. 240 ; 30 W. R. 432.

#### c. Wages and Salaries.

**Who are Servants.**—The guard of a stage coach, hired at weekly wages, is not a servant. *Skinner, Ex parte*, 1 Mont. & Bligh, 417 ; 3 Deac. and Chit. 332.

Weekly labourers and workmen employed as excavators and bricklayers are not servants. *Crawfoot, Ex parte*, 1 Mont. 270.

**Length of Hiring.**—It is not requisite to prove a hiring for a year certain, but it must be something more than a mere hiring by the week. *Collier, Ex parte*, 4 Deac. & Chit. 520 ; 2 Mont. & Ayr. 29.

If a clerk and foreman was engaged at a weekly salary, and to have two suits of clothes per annum, it was a yearly hiring within the section. *Humphreys, Ex parte*, 1 Mont. & Bligh, 413 ; 3 Deac. & Chit. 114.

**Piece Work.**—The workmen of a coachmaker, who worked by the piece, and received a specific sum for each job, under separate and distinct contracts, and where there was no hiring for a specific time, are not servants within the act. *Grellier, Ex parte*, 1 Mont. 264.

**Annual Salary.**—A person engaged as traveller at an annual salary is a servant or clerk within the act. *Neale, Ex parte*, 1 Mont. & Mac. 194.

**Mate of Vessel.**—The mate of a vessel, hired by the master, who was also one of the owners, was a servant within 6 Geo. 4, c. 16, s. 48. *Homborg, Ex parte*, 2 Mont., D. & D. 642 ; 6 Jur. 898.

**Teachers paid by the Lesson.**—A music master attending a school twice a week, and being paid at the rate of 2s. 6d. an hour for the time during which he was occupied ; and a drill sergeant attending twice a week, and being paid at the rate of 4s. a lesson, are not clerks or servants, labourers or workmen, within the Bank-

ruptcy Act, 1869, s. 32, sub-s. 2, so as to be entitled to payment of their salary or wages in full. *Walter, Ex parte, Heath, In re*, 15 L. R., Eq. 412 ; 42 L. J., Bk. 49 ; 21 W. R. 523.

**Persons employed by Servants.**—A coal proprietor employed colliers, to whom the work was let off at so much per score baskets, and each collier had a drawer attached to him, whom he brought when he was himself hired. The colliers were not hired unless the managers approved of the drawers, or unless, in case of disapproval, the colliers took drawers provided for them by the managers. The colliers paid the drawers out of their earnings, according to an agreement between them (in which the coal proprietor took no part), and discharged the drawers as they thought fit, without interference on the part of the proprietor, except that the latter might discharge the collier if he unjustly discharged the drawer, and that both collier and drawer might be discharged for transgressing the rules of the mine. Upon the proprietor becoming bankrupt, and the colliers' wages being in arrear :—Held, that the drawers were not servants of the coal proprietors so as to be entitled to payment in full of half a year's wages. *Ball, Ex parte*, 3 De G., Mac. & G. 155 ; 22 L. J., Bk. 27 ; 17 Jur. 198.

A miner who is employed to get ironstone out of a mine, and for which he is paid by the yard or by the ton, and who has under him to assist in the work other men for whose wages he alone is responsible, but who is bound to conform to the regulations in force at the mine, by which he is obliged to work himself a stated number of hours per day and is subject to be dismissed at a moment's notice for misconduct, and cannot leave or absent himself without the consent of the manager, is a "labourer or workman" within the Bankruptcy Act, 1869, s. 32, sub-s. 2. *Allsop, Ex parte, Disney, In re*, 32 L. T. 433.

**Clerk or Partner.**—In June, 1844, A. entered the service of B., as book-keeper and cashier, and so continued until December, 1848, without coming to any agreement as to the amount of his salary. It was stated by A. that in December, 1848, it was agreed between him and B., that the salary should be at the rate of 250l. a-year, from June, 1844, and that the reason that such arrangement was not made before was, that B. was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which A. expected to be paid. B. became bankrupt in February, 1849 :—Held, that A. was a clerk, and not a partner, and was entitled to prove for his salary. *Hickin, Ex parte*, 3 De G. & S. 662 ; 19 L. J., Bk. 8 ; 14 Jur. 405.

A trader borrowed 550l. under an agreement, by which the lender was to become his clerk, at a salary of 220l. 10s. a-year. The trader agreed to produce his accounts and balance sheet to the lender, who was to get in the debts, and alone to draw cheques on the banking account. If the balance was in the trader's favour at any time, he might draw the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. On the trader becoming bankrupt :—Held, first, that the lender was a clerk entitled to three months' salary in full under 5 & 6 Vict.



c. 122, s. 28. *Harris, Ex parte*, De Gex, 165; 14 L. J., Bk. 26; 9 Jur. 497.

**Absence from Business.]**—Held, secondly, that the circumstance of the clerk having been absent from business, owing to ill health, for the three months immediately preceding the bankruptcy with the bankrupt's sanction, did not take away his right. *Ib.*

**Throwing up Employment.]**—A clerk voluntarily quitting the bankrupt's service nine months previously to the fiat, through the approaching insolvency of the bankrupt and his decreasing business, the trade going on in the meantime, and he obtaining employment elsewhere, is not entitled to six months' wages in full, especially when he has allowed the first and final dividend to be declared before making his claim. *Gee, Ex parte*, 3 Deac. 563; 1 Mon. & Chit. 99.

A clerk who voluntarily left an insolvent master was not within 6 Geo. 4, c. 16, s. 48, as to wages. *Bennett, Ex parte*, 3 Mont. & Ayr. 669.

**Bankrupt not a Trader during whole Employment.]**—A clerk who had served more than six months is entitled to the allowance, although the bankrupt was not, in fact, a trader for more than two months out of the six. *Gough, Ex parte*, 3 Deac. & Chit. 189.

**Salary in lieu of Notice.]**—Where clerks or servants claim to be paid in full, the court will include an allowance for notice according to the custom of the trade or profession. *Jennings, Ex parte*, 7 L. T. 601.

**Contracts not Dissolved.]**—The contracts of a trader with his clerks and his servants are not dissolved by the issuing of a commission of bankruptcy against him: therefore the clerk of a trader against whom a commission issues, may, after the bankrupt has obtained his certificate, recover his salary for the whole year. *Thomas v. Williams*, 3 N. & M. 545; 1 A. & E.

**Right to Immediate Payment.]**—Proofs were made against the estate of a liquidating debtor in respect of sums due for wages and salaries, entitled to priority under the Bankruptcy Act, 1869, s. 32. The trustee deposed that he intended to prosecute the debtor under the Debtors Act, 1869, and that he desired to examine him as to his affairs, and claimed the right to retain the funds in his hands, which were small to meet costs:—Held, that the preferential creditors were entitled to immediate payment. *Powis, Ex parte, Bowen, In re*, 17 L. R., Eq. 130; 43 L. J., Bk. 24; 29 L. T. 654; 22 W. R. 218.

**Composition.]**—32 & 33 Vict. c. 71, s. 32, sub-s. 2, does not apply in the case of a composition. *Walter, Ex parte, Heath, In re*, 15 L. R., Eq. 412; 42 L. J., Bk. 49; 21 W. R. 523.

#### 4. ANNUITIES.

**Annuity until Loan paid off.]**—On a loan transaction between a debtor and a creditor, it was arranged that the creditor should, in addition to interest, be paid an annuity so long as any money remained owing in respect of the loan. The annuity was secured by a bond in a penalty and by mortgage. The creditor proved against the estate

for the money due on the loan, and afterwards tendered a proof in respect of the annuity, or for the penalty mentioned in the bond:—Held, that the annuity was merely in the nature of increased interest, and was not a subject of proof. *Robinson, Ex parte*, 31 L. J., Bk. 12; 6 L. T. 143; 10 W. R. 360.

**Annuity by way of Interest—Security for Loan.]**—B. contracted for a loan of 7,000*l.* at 9*l.* per cent. by way of annuity, and by the annuity deed covenanted to pay annually 924*l.*, which was the amount of the interest, together with the premiums on the assurances of his life for 7,000*l.* The deed also contained a covenant by B. to do what was necessary to enable V. the lender, if he thought fit, to insure B.'s life, and a proviso that any part, not less than one-seventh part, of the annuity might be redeemed on payment of 1,000*l.* for every seventh part redeemed; and that, on redemption of the whole, V. should assign to B. any policies effected by V. on B.'s life. B. became bankrupt:—Held, that V. might prove for the full value of the annuity without giving up the policies effected by him. *Farnish, Ex parte*, 1 Mont., D. & D. 514; 5 Jur. 489.

**Annuity—Warrant of Attorney as further Security.]**—A. and B., for a valuable consideration paid to them, joined with C. as their surety in granting an annuity to D., and the three jointly, and any two of them separately, covenanted that the three, or some or one of them, should well and truly pay the annuity. A warrant of attorney of even date with the deed was also given by the three as a collateral security, and it was thereby declared that the judgment to be entered up on the warrant of attorney, should be considered as a further security to D. A. and B. afterwards became bankrupts:—Held, 1st, that D. might prove against the estate of A. and B. for the value of the annuity; 2nd, that the covenant to pay the annuity was not merged in the judgment. *Pennell, Ex parte*, 2 Mont., D. & D. 273; 5 Jur. 899.

**Annuity in Reversion.]**—A bankrupt, previously to his marriage, became bound to trustees in the penal sum of 3,000*l.*, conditioned for payment to them by his executors of an annuity of 150*l.* in case his intended wife should survive him, in trust for her use and benefit. The bankrupt and his wife were both living:—Held, that the trustees could prove for the value of the annuity, under 6 Geo. 4, c. 16, s. 54, although it was not an annuity in possession. *Broadley, Ex parte*, 2 Mont., D. & D. 524; 6 Jur. 200.

**Annuity of Uncertain Amount.]**—A trader upon his daughter's marriage covenanted to pay, so long as the intended husband and wife, or any issue of the marriage, entitled under the provisions of the settlement, should live, such a sum as, with the annual produce of any property which might be received as therein mentioned, would amount to 150*l.*:—Held, that the payments of the annuity becoming due after the issuing of a fiat against the trader could not be proved. *Evans, Ex parte*, 3 De G. & S. 561; 13 Jur. 183.

By a settlement of the 14th July, 1841, in contemplation of a marriage between A. and B., C. covenanted to pay to the trustees, so long as A. and B., or either of them, or any issue of the in-

tended marriage, should be living, an annuity of such an amount as would, either alone, in the meantime, and until any real or personal estate should devolve upon or vest in A. and B.'s right, or any issue of the marriage, under the settlement of her father and mother, or otherwise, or together with the annual produce to arise from any such real or personal estate, after any such devolution or vesting should take place, make up an annuity of 150*l.*, payable half-yearly. The marriage took place. No real or personal estate had devolved upon or become vested in A. and B. in right of the latter, or in any issue of them. On the 24th October, 1842, a fiat issued against C., under which he was declared bankrupt, and under which he obtained his certificate on the 6th March, 1843. The trustees proved against C.'s estate, on the 25th March, 1843, for 105*l.*, being partly for arrears due at the time of the bankruptcy, and partly for a proportionate part of the current half year, up to the time of tendering the proof. They at the same time tendered a proof for the value of the annuity as a contingent debt, but such proof was rejected, on the ground that the contingencies were such that the value of the annuity could not be ascertained. The instalments of the annuity accruing after the date of the proof down to the 21st September, 1848, amounted to 823*l.* 16*s.* 8*d.*, on account of which C. had, since his bankruptcy, made payments amounting to 120*l.* In February, 1849, the trustees petitioned to be admitted as creditors for the remaining 703*l.* 16*s.* 8*d.*, and to receive dividends thereon, not disturbing former dividends :—Held, that the trustees were not entitled to prove against the estate of C. in respect of such subsequent instalments. *Foster, In re*, 9 C. B. 422; 19 L. J., C. P. 274; 14 Jur. 814.

**Deed of Separation.]**—By a deed of separation a husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future cohabitation by mutual consent :—Held, not an annuity provable under 12 & 13 Vict. c. 106, s. 175, nor a liability to pay money under 24 & 25 Vict. c. 134, s. 154. *Mudge v. Rowan*, 3 L. R., Ex. 85; 37 L. J., Ex. 79; 17 L. T. 576; 16 W. R. 403.

By deed of separation between husband and wife, he covenanted with a trustee that he would every year during the joint lives of himself and his wife pay to the trustee for the wife to her separate use such sum as together with the dividends and interest or other income to arise from certain Bank 3 per Cent. Annuities, or from other funds settled or which might be settled to her separate use, and which might be received by her, would make one clear annuity or yearly sum of 200*l.*, to commence on the 11th January, 1854, and to be paid by four even and equal quarterly payments, provided that if they should at any time thereafter cohabit as man and wife, that then and thenceforth the annuity should cease. On the 29th September, 1854, and while they continued to live separate, the husband became bankrupt :—Held, that the annual sum so covenanted to be paid for the separate use of his wife, was not an annuity within 12 & 13 Vict. c. 106, s. 175. *Parker v. Ince*, 4 H. & N. 53; 28 L. J. Ex. 189; 32 L. T. 279; 7 W. R. 201.

**Consideration for Annuity.]**—The giving up of a business in consideration of an annuity is not such a consideration as can be valued under 6

Geo. 4, c. 16, s. 54, that section being confined to money considerations. *Saxe, Ex parte*, 2 Deac. & Chit. 172; 1 Mont. & Bligh. 134.

**Annuity during Joint Lives.]**—An annuity was given by a father on his daughter's marriage, by a letter to the intended husband, in these words, viz. :—"I promise you, until it is convenient to me to do something better for you, to allow my daughter 100*l.* a year, which you can have as you may require :"—Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation was provable. *Annandale, Ex parte*, 4 Deac. & Chit. 511; 2 Mont. & Ayr. 19.

**Annuity charged on Sums payable during Continuance of a Lease.]**—A. and B. having a lease of salt works, the bankrupt undertook the manufacture of the salt; and it was provided that the contract should subsist for the term granted by the lease, wanting three months; but that if there should be a failure of brine for ten days successively, the bankrupt was to be exonerated from his liability to manufacture the salt, to a proportionate extent. The bankrupt afterwards granted an annuity, charging it on the sums payable from A. and B. for the manufacture of the salt :—Held, that notwithstanding the possibility of the discontinuance of the salt contract, and of the forfeiture of the lease, the annuity was capable of valuation. *Perratt, Ex parte*, 1 Deac. 696.

**Where Notice required before enforcing Arrears of Annuity.]**—A. granted an annuity to C., and A., with B. as his surety, jointly and severally covenanted to pay the annuity, provided that if default should be made in payment of the annuity by A., C. would give notice in writing for so much of the annuity as might be in arrear, twenty-one days previous to the adoption of any measures against B. to enforce the payment of the arrears; B. became bankrupt before any default was made by A. in the payment of the annuity :—Held, that C. could not prove for the value of the annuity under 6 Geo. 4, c. 16, s. 54. *Marks, Ex parte*, 3 Deac. 133.

**Dissolution of Partnership.]**—On the dissolution of a partnership between two tailors, it was agreed that one should continue the business, and by the deed of dissolution he covenanted to pay the retiring partner an annuity of 120*l.* for his life, the retiring partner covenanting on his part not to carry on the business of a tailor within one hundred miles of his former place of business, and it was agreed that for any breach of that covenant the annuity should cease and determine, and the covenant to pay it should become null and void. The continuing partner subsequently failed, and filed a petition for liquidation by arrangement :—Held, that the retiring partner's claim in respect of his annuity was provable under the Bankruptcy Act, 1869, s. 31, and that it was not open to the debtor to have the value of the annuity assessed by a jury, as he had submitted the matter in the first instance to the registrar. *Jackson, Ex parte, Jackson, In re*, 27 L. T. 696; 20 W. R. 1022—L. J.

**Annuity—Omission to Secure—Penalty or Liquidated Damages.]**—An action was by con-

sent referred, and the arbitrator awarded and ordered that the defendant in the action should pay to the plaintiff an annuity of 1,200*l.* a year for life, and that, in order to secure the annuity, the defendant should, within two months, purchase and convey to trustees, on behalf of the plaintiff, a government annuity of 1,200*l.* a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of 100*l.* should become due and payable by the defendant to the plaintiff on the last day of the second month, and a like sum on the last day of each successive month, until such annuity should be legally secured; and the award added: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same." No annuity, as directed by the award, having ever been purchased; the plaintiff having been adjudicated a bankrupt; the defendant having died; and the 1,200*l.* a year and 100*l.* a month having been regularly paid to the plaintiff and her assignees up to the defendant's death, but not since; upon claim by the assignees to prove against the defendant's estate for the payments due in respect of the annuity, and of the monthly payments accrued due since his death:—Held, that the 100*l.* a month, though called a penalty, was not to be regarded strictly as such; and that the assignees were entitled to prove for the arrears both of the annuity and the 100*l.* a month. *Parfitt v. Chambre, D'Alteyrac, Ex parte*, 15 L. R., Eq. 36; 42 L. J., Ch. 6; 27 L. T. 750; 21 W. R. 50.

**Annuity during Widowhood.**—A widow was entitled under the will of her husband to an annuity during her life or widowhood, and it was charged upon property bequeathed by him to his sons, and was further secured by the joint and several bond of the sons. The sons filed a liquidation petition:—Held, that the value of the contingency of the widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. *Blakemore, Ex parte*, 5 Ch. D. 372; 46 L. J., Bk. 118; 36 L. T. 783; 25 W. R. 488—C. A.

**Annuity during Joint Lives.**—A man went through the ceremony of marriage with a sister of his deceased wife, and lived with her as his wife. They afterwards separated, and a separation deed in the ordinary form was executed, in which she was described as his wife, and he covenanted with the trustees of the deed to pay her an annuity for their joint lives. There was a proviso that, if the parties should live together again by mutual consent, the deed should become void. The annuity was paid for twelve years, and then the man became bankrupt:—Held, that the value of the future payments of the annuity was capable of estimation, and was provable in the bankruptcy. As the parties never could legally live together as husband and wife, the proviso, making the deed void in the event of their doing so, must be disregarded. *Naden, Ex parte, Wood, In re*, 9 L. R., Ch. 670; 43 L. J., Bk. 121; 30 L. T. 743; 22 W. R. 936. Affirming, 30 L. T. 575; 22 W. R. 768.

**Death of Annuitant—Dividend paid greater than Annuity—Right to Excess.**—A bankrupt had covenanted to pay a life annuity to trustees for the benefit of his wife. The annuity was valued, and proof was made by the trustees for the amount thus ascertained, and a dividend was paid to them. The wife died, and the dividend which the trustees had received exceeded the amount of the payments of the annuity which the bankrupt would have had to make if he had remained solvent:—Held (reversing the decision of the registrar), that the trustees could not be called upon to refund the excess of the dividend above the payments of the annuity which accrued due during the wife's life. *Bates, Ex parte, Pannell, In re*, 11 Ch. D. 914; 48 L. J., Bk. 113; 41 L. T. 263; 27 W. R. 927—C. A.

**Annuity payable to Wife under Separation Deed.**—By a separation deed between a husband and wife the husband covenanted with trustees to pay to them an annuity of 350*l.*, during the joint lives of himself and his wife, for her benefit. The annuity was made determinable in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of anything done, committed, or suffered by the other party after the date of the deed. The annuity was to be proportionally diminished in the event of the wife becoming entitled to any income independent of the husband exceeding 350*l.* a year. After the execution of the deed the husband filed a liquidation petition:—Held, that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation. *Neal, Ex parte, Bates, In re*, 14 Ch. D. 579; 43 L. T. 264; 28 W. R. 875—C. A.

**Annuity to cease in certain Event.**—An annuity deed provided, that if the annuitant refused, neglected, failed or became incapable of performing the stipulations contained in it, the annuity was to cease; that the annuitant should use his best endeavours to preserve, extend and promote the success of a certain business, and not impede its success by any act, neglect, omission or default; that he should perform such services and duties as certain persons should reasonably require; that he should not carry on a certain business during a certain time and within a certain area; and that all disputes should be referred to arbitration:—Held, that such annuity was not capable of valuation under 12 & 13 Vict. c. 106, s. 175, and therefore not barred by a deed of assignment made by the grantor for the benefit of his creditors. *Brett v. Jackson*, 4 L. R., C. P. 259; 38 L. J., C. P. 139; 19 L. T., 790; 17 W. R. 532.

**Bankruptcy of Surety for Payment of Annuity.**—The instalments of an annuity, for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, provable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. N. C. 162; 2 Scott, 266; 1 Hodges, 225; S. C., 1 Mont. & Bligh, 219; 2 Deac. & Chit. 126.

Where it appears on the face of a bond to secure an annuity that one of the joint and several obligors is in fact a surety only for the other, he is to be looked upon as a surety and

not as a principal in all questions under the bankrupt laws, consequently his bankruptcy and certificates will not discharge him from liability to pay arrears of the annuity accruing due since his bankruptcy and unpaid by the principal. *White v. Corbett*, 1 El. & El. 692; 28 L. J., Q. B. 228; 5 Jur., N. S. 407—Ex. Ch.

An annuity deed recited that A. had agreed to grant an annuity, and that B. was to join as surety. It contained a joint covenant by A. and B. to pay the annuity, and also a proviso, that in case of default by A., the grantee should not take any steps against B. till he had given him twenty-one days' notice of A.'s default. On the bankruptcy of B., without any default by A. :—Held, no proof could be made under 6 Geo. 4, c. 16, s. 54. *Marks, Ex parte*, 3 Mont. & Ayr. 521; 2 Jur. 398.

**Statute of Limitations.**—Declaration, on the obligatory part only, upon two bonds, dated in 1828 and 1829. Pleas, first, that the causes of action did not accrue within twenty years; and secondly, that before action, the defendant became bankrupt, and that the causes of action accrued before such bankruptcy. Replication, joining issue on the first plea, and, to the second plea, that the causes of action did accrue within twenty years. The plaintiff then set out the bonds and the conditions. The first bond stated that M. and the defendant bound themselves, and each of them to the plaintiff in 300*l*. The condition (after reciting that M. had agreed with the plaintiff for the sale to him for 150*l*. of an annuity of 20*l*. to be paid to the plaintiff, during the joint and several lives of the plaintiff and his wife, and the survivor; that M. had requested the defendant to join in and execute the bond, which he had agreed to do, for securing the regular payment of the annuity; and that the 150*l*. had been paid to M.) was for payment of the annuity by M. or the defendant, by equal half-yearly payments during the joint and several lives of the plaintiff and his wife, and of the survivor, and a proportionate part in case of the survivor dying between the days of payment. The second bond and condition were similarly framed for the payment by and to the same parties, of an annuity of 10*l*. The plaintiff then suggested that, in 1851, two and a half years' arrears were due in respect of each annuity, and were still unpaid. At the trial, it appeared that the defendant had become bankrupt in 1836; that M. had paid the annuities half-yearly down to 1848, but never till after the day of payment fixed by the condition, so that there had been breaches of the conditions twenty years before action, and before the bankruptcy; and that the arrears suggested by the plaintiff were still due. The plaintiff had not attempted to prove as an annuity creditor under the defendant's bankruptcy :—Held, that a new cause of action arose upon each successive breach of the condition; that, on the record, as it stood, the plaintiff was entitled to prove, at the trial, breaches within twenty years; and that, on such proof, he was entitled to a verdict upon the issue on the Statute of Limitations. *Amott v. Holden*, 18 Q. B. 593; 22 L. J., Q. B. 14; 17 Jur. 318.

Held, also, by Lord Campbell, C. J., and Erle, J., dissentiente Wightman, J., that the defendant's liability under the bonds and conditions was that of a surety only; that M. was the principal, and grantor of the annuity; that

the plaintiff, therefore, could not have proved under the defendant's bankruptcy, in respect either of the penalties, or of the breaches of condition committed before the bankruptcy; and that consequently the matter pleaded and proved was no bar to the action. *Ib*.

**Mode of Valuation.**—In valuing an annuity the altered state of health of the annuitant cannot be taken into consideration. *Fisher, Ex parte*, 2 Glyn & J. 102.

Where the consideration is not money, but property, the price paid by the grantee for that property is not the criterion of value, provided such value is altered by accidental circumstances, whether general or local, or by improvement of the property. *Ib*.

The state of the money market is not a circumstance which can affect the rule. *Webb, Ex parte*, 2 Glyn & J. 29.

If an annuity is granted in consideration of the relinquishment of a business, the creditor is entitled to prove for the market value, without reference to the original consideration given, or the lapse of time since the grant. *Save, Ex parte*, 1 Mont. & Bligh, 134; 2 Deac. & Chit. 172.

An annuity given for a term of years, the consideration for which was the good-will of a business, may be valued. *Scholes, Ex parte*, 1 Mont., D. & D. 384; 4 Jur. 1189.

**Assessment of Value by Jury.**—The trustee in liquidation is entitled, if he desires it, to have the value assessed by a jury. *Neal, Ex parte, Bates, In re*, 14 Ch. D. 579; 43 L. T. 264; 28 W. R. 875—C. A.

**Sale of Security for Payment of Annuity.**—The commissioners are not authorized to order a sale of an estate on which an annuity is charged, for payment of the value of the annuity. *Delves, In re*, 1 Mont. 492. And see *Slack, Ex parte*, 1 Glyn & J. 346.

An annuity creditor who has a policy of insurance cannot prove without a sale of the policy. *Tierney, Ex parte*, 1 Mont. 78.

Where the grantor of an annuity secured by real property becomes a bankrupt, and arrears of the annuity become due after the bankruptcy, the real security will, on the petition of the grantee, be ordered to be sold, and the produce applied in satisfaction of so much of the arrears and value of the annuity as the same would extend to satisfy, and the grantee be allowed to prove the residue under the commission. *Key, Ex parte*, 1 Madd. 426.

## 5. APPRENTICE FEES.

An articulated clerk to an attorney and solicitor was not an apprentice within the 6 Geo. 4, c. 16, s. 49. *Prideaux, Ex parte*, 3 Mylne & C. 327; 2 Jur. 366; reversing the decision of the Court of Review, 3 Mont. & Ayr. 516; but see *St. Pancras v. Clapham*, 2 El. & El. 742.

But in another case it was held, that an articulated clerk to an attorney was an apprentice, and, as such, entitled to a return of a reasonable portion of the premium upon his master becoming bankrupt as a scrivener. *Fussell, Ex parte*, 2 Deac. 158; 3 Mont. & Ayr. 67.

Where an agreement of apprenticeship is concluded, and the apprentice fee is paid, and the

apprentice is actually serving under the concluded agreement, and the execution of the indenture has not taken place from mere inattention, the father is entitled to a return of part of the fee. *Haynes, Ex parte*, 2 Glyn & J. 122.

#### 6. AWARDS.

An award is not conclusive evidence of a debt. Proof upon an award made after the act of bankruptcy was expunged, and an account directed before the commissioners. *Kemshcad, Ex parte*, 1 Rose, 149.

See further, JUDGMENTS, *post*.

#### 7. BARRISTERS' FEES.

A conveyancing counsel was allowed to prove in respect of fees which the bankrupt, a solicitor, had actually and specifically received from the clients before his bankruptcy. *Hall, In re*, 2 Jur., N. S. 1076.

#### 8. BILLS AND NOTES.

##### Instruments Inchoate at time of Bankruptcy.]

—Proof admitted on an acceptance which had been in blank at the date of the bankruptcy, and had been filled up afterwards. *Bartlett, Ex parte*, 3 De G. & J. 378.

In July, 1846, the defendant having been arrested under a ca. sa., in order to obtain his discharge gave to the attorney of the execution creditor 5*l.*, and a blank promissory note stamp, with his name written on it. In 1851 the defendant obtained a certificate in bankruptcy, and in 1852 the attorney filled up the blank stamped paper by making it a promissory note for 24*l.* 18*s.* 6*d.*, at one month's date, and indorsed it to the plaintiff for value:—Held, first, that it was properly left to the jury to say whether the stamped paper was filled up within a reasonable time, considering the circumstances of the defendant and his ability to pay the note. *Temple v. Pullen*, 8 Ex. 389; 22 L. J., Ex. 151.

Held, secondly, that there was no claim provable under the fiat, and consequently the certificate was no bar to an action on the note. *Ib.*

**Guarantor of Honour.]**—A bankrupt had, in consideration of the payment of a sum of money to him by the vendors of goods, guaranteed the payment of the purchase-money by the purchasers according to the contract of purchase, viz., by the due honour of a bill of exchange accepted by the purchasers. The bill did not fall due till after the fiat issued against the guarantor. On its being dishonoured:—Held, that the vendors were entitled to prove. *Brook, Ex parte*, 6 De G., Mac. & G. 771.

**Bills given as Deposit for Performance of Contract.]**—An agreement was entered into for the purchase of 4,000 tons of iron rails, at 12*l.* 12*s.* 6*d.* per ton, according to a section, to be delivered by 1st November, 1846; and 11,500*l.* was to be paid by the purchaser by way of deposit. According to the custom of the trade, this deposit was to be retained by the seller as a security against any damages from the non-performance of the contract. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bankrupt. On the bills becoming

due, they were dishonoured:—Held, that the vendors were entitled to prove upon two of the bills remaining in their hands. *Bolokow, Ex parte*, 3 De G. & S. 656.

**Payable with Interest after Notice.]**—Where a note payable with interest twelve months after notice was expressed to be for value received, and the maker became bankrupt before any notice was given:—Held, that the payee might prove it under the commission. *Clayton v. Gosling*, 5 B. & C. 360; 8 D. & R. 110.

**Acquired after Bankruptcy.]**—A bill or note having been indorsed after the bankruptcy of the acceptor, the indorsee can only prove such debt as the indorser could have proved at the time of the bankruptcy. *Deey, Ex parte*, 2 Cox, 423.

Notes bought up after the bankruptcy of the maker, cannot be proved unless it is shewn that the persons from whom they were purchased were individually entitled to a proof, in respect of the notes. *Rogers, Ex parte*, Buck, 490.

**Unaccepted Drafts on Debtor.]**—A. sends B., as his agent, to America to purchase cotton, and authorizes him to draw bills on A., and to sell and discount the same, and with the proceeds to pay for the cotton. B. accordingly draws a bill on A. for 3,000*l.* in favour of R., who discounts for B., and afterwards negotiates it to third persons. B. applies the proceeds of the bill in payment of the cotton, which is shipped off to A., at Liverpool; but before the arrival of the cotton, or the presentation of the bill for acceptance, A. becomes bankrupt, and the cotton is sold by the assignees, and the proceeds applied for the benefit of the estate:—Held, that these circumstances did not amount to a virtual acceptance of the bill by A., and that a subsequent indorsee for value could not prove the amount of it against A.'s estate. *Bolton, Ex parte*, 2 Deac. 537; 3 Mont. & Ayr. 367.

**Bills to be Paid out of Specific Funds.]**—If a party takes bills for the price of goods, and it is agreed that the bills are to be paid out of the proceeds, and the acceptors become bankrupt, the indorsers of the bills, without notice of the agreement, are entitled to the benefit of it. *Prescott, Ex parte*, 1 Mont. & Ayr. 316.

**Exchange of Paper.]**—Where there was cross paper dishonoured on each side, and both parties were bankrupts, the proof, as between the two estates, was confined to the cash balance with regard to the dishonoured bills. *Earle, Ex parte*, 5 Ves. 833.

In such case, no proof can be made in respect of the bad paper, or the excess of damage eventually sustained on that account. *Walker, Ex parte*, 4 Ves. 373.

A. draws a bill on B., payable to his own order, which B. accepts, and B. draws a bill on A., payable to the order of B., which A. accepts, for their mutual accommodation; both bills are payable at the same time, have the same dates, and contain the same sums: one is a good consideration for the other, and neither is an indemnity; so that, if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently to an action brought on it, his bankruptcy may be pleaded. *Rolfe v.*

*Caslon*, 2 H. Bl. 570. And see *Stacey v. Barns*, 7 East, 435; 3 Smith, 441.

Where A. and B. were bankrupts, proof was allowed in respect of a cash balance due from A. to B., but the dividends were retained to reimburse the estate of A. what it should overpay upon a distinct transaction on an advance of bills from A. to B., some of which were dishonoured. *Metcalfe, Ex parte*, 11 Ves. 404.

K. & Co. sent to A. five bills drawn by them on D. & S., and received from him in return his acceptances for the precise amount, which they discounted with their own bankers; but none of which being paid by A. (who became bankrupt before they became due), they were proved by the holders under K. & Co.'s commission. A. having negotiated the five bills sent him by K. & Co.:—Held, that A. having become bankrupt, his assignee could not prove them under K. & Co.'s commission. *Solarte, Ex parte*, 2 Deac. & Chit. 261; 1 Mont. & Ayr. 270.

A. & B. exchange their acceptances of various bills drawn upon them respectively by C., and all three become bankrupt before any of the bills fall due. The acceptances of A. are negotiated by the drawer, C., and are proved by the holders under each commission, who receive dividends on their respective proofs:—Held, that A.'s assignees might prove the amount of B.'s acceptances, under B.'s commission, subject to a retention of the dividends, until it was ascertained what each estate would pay on the whole of their liabilities. *Solarte, Ex parte*, 3 Deac. & Chit. 419.

The defendants gave the plaintiff their own bills, accepted by third persons, in exchange for acceptances of other bills drawn by them upon him, the different sets of which tallied in the gross amount (except as mentioned, &c.), but no stress was laid at the time on these trifling differences:—Held, that the transaction being that of an absolute exchange of securities, each party was confined to his remedy on those securities; and that the law would not raise an implied promise in the defendants, who had become bankrupts, to repay to the plaintiff the amount on the balance of his acceptances, paid after such bankruptcy. *Butler v. Buttivant*, 3 East, 72.

Six persons were in partnership as bankers, under two firms, and J. and W. J., two of them, carried on a distinct trade; and G. accepted a bill for J. and W. J., and, in exchange, they delivered to him, at the same time, a bill to the same amount, drawn and accepted by the six, but not endorsed by J. and W. J.:—Held, that it was a purchase by G., and that, having paid his acceptance, and the bill he received being dishonoured, he was entitled to prove the amount against J. and W. J. *Hustler, Ex parte*, Buck, 171; 1 Glyn & J. 9; 3 Madd. 117.

Where, by agreement between the plaintiffs, bankers at Carlisle, and the defendants, bankers at Newcastle, the plaintiffs were weekly to send to the defendants all their own notes, and the notes of certain other banking houses; and the defendants were in exchange to return to the plaintiffs their own notes, and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs; at a certain date:—Held, that the notes so sent by the plaintiffs to the defendants constituted a debt against them which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short

return, and gave no bill for the balance, such balance remained as a debt against them, which was provable by the plaintiffs under a commission issued against the defendants on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due. *Forster v. Surtees*, 12 East, 605.

Two bankrupts had large mercantile dealings with P., and at the time of the bankruptcy they owed him a cash balance of 11,000*l*. Bills had, however, been accepted by the bankrupts and negotiated by P. in part payment of the balance, and these bills had been proved by the holders against the bankrupt's estate. The bills had been accepted by P. in favour of the bankrupts for an independent consideration which had failed, and these bills also had been discounted. P.'s estate was also in liquidation, and his trustee claimed to prove for the whole amount of the cash balance:—Held, that he could only prove for the difference between the cash balance and the amount of the bills given in part payment. *Macredie, Ex parte, Charles, In re*, 8 L. R., Ch. 535; 42 L. J., Bk. 90; 28 L. T. 827; 21 W. R. 328, 535. Compare, *Cuma, Ex parte*, 9 L. R., Ch. 689.

The rule that when there are cross-acceptances between two houses, both of which become bankrupt, there can be no proof as between the two estates in respect of the bad paper, only applies where the acceptances given by the one party are the consideration for the acceptances given by the other. *Ib*.

**By Drawer against Indorsee without consideration.**—Where a sum of money being due from A. to B., C., by B.'s request, and for his accommodation, drew a bill of exchange on A. for the amount, which A. accepted, and C. indorsed the bill and gave it to B., who indorsed and negotiated it: B. having subsequently become bankrupt:—Held, that the amount of the bill, which was dishonoured, and paid by C., was provable by him under the fiat, and, therefore, that his right of action against B. was barred by the certificate. *Haigh v. Jackson*, 3 M. & W. 598.

**By Indorser against Accommodation Acceptor.**—Where the plaintiff lent his indorsement upon a bill at the desire of the drawer; but without any privity with the defendant (the acceptor), who had himself no consideration at the time for such acceptance; and the day before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of the indorsee:—Held, that the bill was provable as a debt under the commission. *Houle v. Baxter*, 3 East, 177.

**Taking up for Honour.**—W. claimed to prove against a bankrupt's estate for a bill of exchange which he had taken up for the honour of the acceptor. The bankrupt was not a party to the bill, and it was not protested. By agreement between W. and the assignees, the right to prove was referred to arbitration, but without the leave of the court, as required by 12 & 13 Vict. c. 106, s. 153. The arbitrator decided against the right to prove. The claimant insisted upon such right, notwithstanding the award. The commissioner, however, refused to admit the proof:—Held, that although the award was not made, pursuant to the statute, W., having agreed to the arbitra-

apprentice is actually serving under the concluded agreement, and the execution of the indenture has not taken place from mere inattention, the father is entitled to a return of part of the fee. *Haynes, Ex parte*, 2 Glyn & J. 122.

#### 6. AWARDS.

An award is not conclusive evidence of a debt. Proof upon an award made after the act of bankruptcy was expunged, and an account directed before the commissioners. *Kemshead, Ex parte*, 1 Rose, 149.

See further, JUDGMENTS, *post*.

#### 7. BARRISTERS' FEES.

A conveyancing counsel was allowed to prove in respect of fees which the bankrupt, a solicitor, had actually and specifically received from the clients before his bankruptcy. *Hall, In re*, 2 Jur., N. S. 1076.

#### 8. BILLS AND NOTES.

##### Instruments Inchoate at time of Bankruptcy.]

—Proof admitted on an acceptance which had been in blank at the date of the bankruptcy, and had been filled up afterwards. *Bartlett, Ex parte*, 3 De G. & J. 378.

In July, 1846, the defendant having been arrested under a ca. sa., in order to obtain his discharge gave to the attorney of the execution creditor 5*l.*, and a blank promissory note stamp, with his name written on it. In 1851 the defendant obtained a certificate in bankruptcy, and in 1852 the attorney filled up the blank stamped paper by making it a promissory note for 24*l.* 18*s.* 6*d.*, at one month's date, and indorsed it to the plaintiff for value:—Held, first, that it was properly left to the jury to say whether the stamped paper was filled up within a reasonable time, considering the circumstances of the defendant and his ability to pay the note. *Temple v. Pullen*, 8 Ex. 389; 22 L. J., Ex. 151.

Held, secondly, that there was no claim provable under the fiat, and consequently the certificate was no bar to an action on the note. *Id.*

**Guarantor of Honour.]**—A bankrupt had, in consideration of the payment of a sum of money to him by the vendors of goods, guaranteed the payment of the purchase-money by the purchasers according to the contract of purchase, viz., by the due honour of a bill of exchange accepted by the purchasers. The bill did not fall due till after the fiat issued against the guarantor. On its being dishonoured:—Held, that the vendors were entitled to prove. *Brook, Ex parte*, 6 De G., Mac. & G. 771.

**Bills given as Deposit for Performance of Contract.]**—An agreement was entered into for the purchase of 4,000 tons of iron rails, at 12*l.* 12*s.* 6*d.* per ton, according to a section, to be delivered by 1st November, 1846; and 11,500*l.* was to be paid by the purchaser by way of deposit. According to the custom of the trade, this deposit was to be retained by the seller as a security against any damages from the non-performance of the contract. The deposit was paid in bills of exchange. In June, 1846, the purchaser became bankrupt. On the bills becoming

due, they were dishonoured:—Held, that the vendors were entitled to prove upon two of the bills remaining in their hands. *Bolekow, Ex parte*, 3 De G. & S. 656.

**Payable with Interest after Notice.]**—Where a note payable with interest twelve months after notice was expressed to be for value received, and the maker became bankrupt before any notice was given:—Held, that the payee might prove it under the commission. *Clayton v. Gosling*, 5 B. & C. 360; 8 D. & R. 110.

**Acquired after Bankruptcy.]**—A bill or note having been indorsed after the bankruptcy of the acceptor, the indorsee can only prove such debt as the indorser could have proved at the time of the bankruptcy. *Dey, Ex parte*, 2 Cox, 423.

Notes bought up after the bankruptcy of the maker, cannot be proved unless it is shewn that the persons from whom they were purchased were individually entitled to a proof, in respect of the notes. *Rogers, Ex parte*, Buck, 490.

**Unaccepted Drafts on Debtor.]**—A. sends B., as his agent, to America to purchase cotton, and authorizes him to draw bills on A., and to sell and discount the same, and with the proceeds to pay for the cotton. B. accordingly draws a bill on A. for 3,000*l.* in favour of R., who discounts for B., and afterwards negotiates it to third persons. B. applies the proceeds of the bill in payment of the cotton, which is shipped off to A., at Liverpool; but before the arrival of the cotton, or the presentation of the bill for acceptance, A. becomes bankrupt, and the cotton is sold by the assignees, and the proceeds applied for the benefit of the estate:—Held, that these circumstances did not amount to a virtual acceptance of the bill by A., and that a subsequent indorsee for value could not prove the amount of it against A.'s estate. *Bolton, Ex parte*, 2 Deac. 537; 3 Mont. & Ayr. 367.

**Bills to be Paid out of Specific Funds.]**—If a party takes bills for the price of goods, and it is agreed that the bills are to be paid out of the proceeds, and the acceptors become bankrupt, the indorsers of the bills, without notice of the agreement, are entitled to the benefit of it. *Prescott, Ex parte*, 1 Mont. & Ayr. 316.

**Exchange of Paper.]**—Where there was cross paper dishonoured on each side, and both parties were bankrupts, the proof, as between the two estates, was confined to the cash balance with regard to the dishonoured bills. *Earle, Ex parte*, 5 Ves. 833.

In such case, no proof can be made in respect of the bad paper, or the excess of damage eventually sustained on that account. *Walker, Ex parte*, 4 Ves. 373.

A. draws a bill on B., payable to his own order, which B. accepts, and B. draws a bill on A., payable to the order of B., which A. accepts, for their mutual accommodation; both bills are payable at the same time, have the same dates, and contain the same sums: one is a good consideration for the other, and neither is an indemnity; so that, if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently to an action brought on it, his bankruptcy may be pleaded. *Rolfe v.*

*Cuslon*, 2 H. Bl. 570. And see *Starey v. Barnes*, 7 East, 435; 3 Smith, 441.

Where A. and B. were bankrupts, proof was allowed in respect of a cash balance due from A. to B., but the dividends were retained to reimburse the estate of A. what it should overpay upon a distinct transaction on an advance of bills from A. to B., some of which were dishonoured. *Metcalfe, Ex parte*, 11 Ves. 404.

K. & Co. sent to A. five bills drawn by them on D. & S., and received from him in return his acceptances for the precise amount, which they discounted with their own bankers; but none of which being paid by A. (who became bankrupt before they became due), they were proved by the holders under K. & Co.'s commission. A. having negotiated the five bills sent him by K. & Co.:—Held, that A. having become bankrupt, his assignee could not prove them under K. & Co.'s commission. *Solarte, Ex parte*, 2 Deac. & Chit. 261; 1 Mont. & Ayr. 270.

A. & B. exchange their acceptances of various bills drawn upon them respectively by C., and all three become bankrupt before any of the bills fall due. The acceptances of A. are negotiated by the drawer, C., and are proved by the holders under each commission, who receive dividends on their respective proofs:—Held, that A.'s assignees might prove the amount of B.'s acceptances, under B.'s commission, subject to a retention of the dividends, until it was ascertained what each estate would pay on the whole of their liabilities. *Solarte, Ex parte*, 3 Deac. & Chit. 419.

The defendants gave the plaintiff their own bills, accepted by third persons, in exchange for acceptances of other bills drawn by them upon him, the different sets of which tallied in the gross amount (except as mentioned, &c.), but no stress was laid at the time on these trifling differences:—Held, that the transaction being that of an absolute exchange of securities, each party was confined to his remedy on those securities; and that the law would not raise an implied promise in the defendants, who had become bankrupts, to repay to the plaintiff the amount on the balance of his acceptances, paid after such bankruptcy. *Butler v. Buttivant*, 3 East, 72.

Six persons were in partnership as bankers, under two firms, and J. and W. J., two of them, carried on a distinct trade; and G. accepted a bill for J. and W. J., and, in exchange, they delivered to him, at the same time, a bill to the same amount, drawn and accepted by the six, but not endorsed by J. and W. J.:—Held, that it was a purchase by G., and that, having paid his acceptance, and the bill he received being dishonoured, he was entitled to prove the amount against J. and W. J. *Hustler, Ex parte*, Buck, 171; 1 Glyn & J. 9; 3 Madd. 117.

Where, by agreement between the plaintiffs, bankers at Carlisle, and the defendants, bankers at Newcastle, the plaintiffs were weekly to send to the defendants all their own notes, and the notes of certain other banking houses; and the defendants were in exchange to return to the plaintiffs their own notes, and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs; at a certain date:—Held, that the notes so sent by the plaintiffs to the defendants constituted a debt against them which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short

return, and gave no bill for the balance, such balance remained as a debt against them, which was provable by the plaintiffs under a commission issued against the defendants on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due. *Forster v. Surtees*, 12 East, 605.

Two bankrupts had large mercantile dealings with P., and at the time of the bankruptcy they owed him a cash balance of 11,000*l*. Bills had, however, been accepted by the bankrupts and negotiated by P. in part payment of the balance, and these bills had been proved by the holders against the bankrupt's estate. The bills had been accepted by P. in favour of the bankrupts for an independent consideration which had failed, and these bills also had been discounted. P.'s estate was also in liquidation, and his trustee claimed to prove for the whole amount of the cash balance:—Held, that he could only prove for the difference between the cash balance and the amount of the bills given in part payment. *Macredie, Ex parte, Charles, In re*, 8 L. R., Ch. 535; 42 L. J., Bk. 90; 28 L. T. 827; 21 W. R. 328, 535. Compare, *Cama, Ex parte*, 9 L. R., Ch. 689.

The rule that when there are cross-acceptances between two houses, both of which become bankrupt, there can be no proof as between the two estates in respect of the bad paper, only applies where the acceptances given by the one party are the consideration for the acceptances given by the other. *1b*.

**By Drawer against Indorsee without consideration.**—Where a sum of money being due from A. to B., C., by B.'s request, and for his accommodation, drew a bill of exchange on A. for the amount, which A. accepted, and C. indorsed the bill and gave it to B., who indorsed and negotiated it: B. having subsequently become bankrupt:—Held, that the amount of the bill, which was dishonoured, and paid by C., was provable by him under the fiat, and, therefore, that his right of action against B. was barred by the certificate. *Huish v. Jackson*, 3 M. & W. 598.

**By Indorser against Accommodation Acceptor.**—Where the plaintiff lent his indorsement upon a bill at the desire of the drawer; but without any privity with the defendant (the acceptor), who had himself no consideration at the time for such acceptance; and the day before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of the indorsee:—Held, that the bill was provable as a debt under the commission. *Houle v. Baxter*, 3 East, 177.

**Taking up for Honour.**—W. claimed to prove against a bankrupt's estate for a bill of exchange which he had taken up for the honour of the acceptor. The bankrupt was not a party to the bill, and it was not protested. By agreement between W. and the assignees, the right to prove was referred to arbitration, but without the leave of the court, as required by 12 & 13 Vict. c. 106, s. 153. The arbitrator decided against the right to prove. The claimant insisted upon such right, notwithstanding the award. The commissioner, however, refused to admit the proof:—Held, that although the award was not made, pursuant to the statute, W., having agreed to the arbitra-



tion, and not having taken any objection to the validity of the submission before the commissioner, was bound by it. *Wyld, Ex parte*, 2 De G. F. & J. 642; 30 L. J., Bk. 10; 7 Jur., N. S. 294; 3 L. T. 934; 9 W. R. 421.

Independently of the award, the claim was well founded, and at the time of the bankruptcy he was entitled to prove for the amount of the bill. *Id.*

**Bona Fide Holder of Bill accepted for Specific Purpose.**—A bankrupt having accepted a bill for 200*l.* which had been negotiated by the drawer, and finding shortly before it fell due that he should be unable to pay it, persuaded the drawer to draw another bill on him for 220*l.*, and to get it discounted, in order that he might take up the first bill. The drawer discounted the bill for 220*l.* with A., but instead of applying the proceeds to pay off the first bill, appropriated them to his own use, and the holder of the first bill proved the amount of it under the fiat:—Held, that A., who had no knowledge of the circumstances under which the second bill was given, or of the breach of trust committed by the drawer, was not prevented from proving the amount of such second bill. *Samuel, Ex parte*, 2 Mont., D. & D. 384.

**Buying Bills at Undervalue.**—Bills of exchange were drawn by S., who was the London agent for the firm of G. & Co., and accepted by them; the drawer and acceptors were at the time in a position of hopeless insolvency and contemplating bankruptcy. The bills were then offered for discount to J., who retained them for some time in his hands and made inquiries, whereby he ascertained that the acceptors would be unable to pay the bills in full, as they were in difficulties, but that they were possessed of assets, and that there was a fair prospect of his being able to obtain payment of part of the amount; he did not make any inquiry as to the solvency of the drawer; he then gave 200*l.* for the bills, which were of the nominal value of 1,727*l.* in all; one of them, for 227*l.*, falling due within a month; the firm of G. & Co. soon afterwards filed a petition for liquidation and were adjudicated bankrupts; J. then sought to prove for the whole nominal amount of the bills:—Held, that the circumstances affected J. with notice, that the bills were concocted in fraud of the creditors of G. & Co., and that consequently J. could not prove for more than the amount actually given by him for the bills. *Jones v. Gordon*, 2 App. Cas. 616; 47 L. J., Bk. 1; 37 L. T. 477; 26 W. R. 172. Affirming, *S. C.* nom. *Gomersall, In re*, 1 Ch. D. 137; 45 L. J., Bk. 1; 33 L. T. 483; 24 W. R. 257.

**When lost.**—Proof was allowed in respect of a bill alleged to be lost, but the most extensive indemnity was ordered to be given. *Greenway, Ex parte*, 6 Ves. 812.

A bill having been, in mistake for another bill, sent by the holders to the bankrupts before the bankruptcy, and retained by them, was lost: proof was, under the circumstances, allowed, without the production of the bill, and without security or indemnity. *Webster, Ex parte*, 1 De Gex, 414; 11 Jur. 136.

**Transferred without Indorsement.**—A person giving cash for a bill or note without the indorse-

ment of the person from whom he takes it, cannot prove it under his bankruptcy. *Shuttleworth, Ex parte*, 3 Ves. 368; *S. P.*, *Harrison, Ex parte*, 2 Bro. C. C. 615.

Unindorsed bills, given by the bankrupt, must be sold, and the holder may prove for the residue. *Smith, Ex parte*, 2 Cox, 209.

An agent applied to a banking company, on several occasions, to discount bills drawn by his principal, and at the commencement of these transactions informed the company who the drawers and acceptors were, and inquired whether the company would discount a bill without requiring the agent to indorse it. The company agreed to do so in this and other instances; but upon some of the bills required and obtained the agent's indorsement. The acceptances turned out to have been forged by the principal, of which fact the agent was wholly ignorant. On the agent becoming bankrupt, and there being nothing to shew that he had not handed over the proceeds of the bills to the principal, or that those proceeds were in such a position that they could be recalled:—Held, that the company could not prove upon the bills which the agent had not indorsed. *Bird, Ex parte*, 4 De G. & S. 273; 20 L. J., Bk. 16; 15 Jur. 894.

**Indorsement of Promissory Note after Application to register Resolutions.**—A bona fide holder for value of a promissory note procured the indorsement after tender of his proof but before the application to register resolutions in a liquidation:—Held, that the time of the indorsement was immaterial, and that the holder was entitled to prove in the liquidation. *Pike, Ex parte, Eslick, In re*, 40 L. T. 529.

**Double Insolvency—Rights of Holder.**—Where part of the account between two mercantile houses which have become bankrupt, consists of bills that may be proved against both estates, there can be no proof in respect of bills as between the two houses, unless there is a surplus after satisfying the holders of the bills. *Rawson, Ex parte*, Jacob, 274.

**Indorser against Acceptor.**—If an acceptor of a bill, not due, becomes bankrupt, and the indorser is afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission; and if the acceptor afterwards obtains his certificate, he will be discharged from the debt. *Joseph v. Orme*, 2 N. R. 180.

**Joint and Several Promissory Notes—Bankruptcy of one maker.**—One of several makers of a joint and several promissory note in favour of a third party, having paid the debt secured by the note, may not prove upon the note against some of the co-makers under their bankruptcy. His remedy is by way of contribution from each of his co-contractors pro proportione. *Schenk, Ex parte*, 10 L. T. 44.

**Bankruptcy of Indorser—Notice of Dishonour.**—Where an indorser of a bill becomes bankrupt before it falls due, notice of its dishonour, if occurring before the choice of assignees, must be given to the bankrupt, if after such choice, to the assignees, to enable the holder to prove. *Chapple, Ex parte*, 3 Mont. & Ayr. 493; 3 Deac. 218.

A bill was dishonoured after the drawer had been adjudicated a bankrupt, and a trustee had been appointed. The holder, being aware of the bankruptcy, but not knowing of the appointment of the trustee, gave notice of dishonour to the bankrupt, and not to the trustee:—Held, that the notice was sufficient, and that the holder was entitled to prove in the bankruptcy in respect of the bill. *Baker, Ex parte, Bellman, In re*, 4 Ch. D. 795; 46 L. J., Bk. 60; 36 L. T. 339; 25 W. R. 454—C. A.

Semble, that where a creditor proves under a fiat for a debt due on bills of exchange of which the bankrupt is the drawer, it is not necessary for him to aver in his deposition, that the bills were duly presented, and that notice of their dishonour was given to the bankrupt. *Fletcher v. Manning*, 1 C. & K. 350.

**Pledge of Bills and Notes.**—The pledgee of a bill or note (though for part only), may prove the whole amount. *Crossley, Ex parte*, 3 Bro. C. C. 237.

**Other Cases.**—The holder of notes payable in cash or Bank of England notes, who did not receive them immediately from the maker, is not entitled to prove the amount as for money had and received against the estate of the maker. *Davison, Ex parte*, Buck, 31; *S. P., Imeson, Ex parte*, 2 Rose, 225.

**Holder may be compelled to Prove against Acceptor.**—The holder of a bill may be compelled to prove against the acceptor, for the benefit of the drawer. *Wright v. Simpson*, 6 Ves. 734.

**Amount.**—Where proof upon a bill of exchange accepted by a bankrupt is made, deductions must be made for all the previous payments on account by other parties to the bill, and the proof can only stand for the amount actually due at the time of the bankruptcy. *Dunne, In re*, 7 Ir. Ch. Rep. 285.

The holder of a bill of exchange who has received from the drawer sums of money in part payment of it, is not entitled to prove against the estate of the bankrupt acceptor for the full amount of the bill, but only for what remains due upon it after deducting all the sums paid in respect of it by the drawer before the proof is tendered, whether such payments were made before or after the bankruptcy. *Taylor, or Taylor, Ex parte*, 1 De G. & J. 302; 26 L. J., Bk. 58; 3 Jur., N. S. 753.

Where A., at the request of B., and upon the security of a bill from him for the amount, delivered goods to C., and such goods were afterwards partly paid for by C., and then B. became bankrupt:—Held, that A. could only prove, as against the estate of B., the sum remaining due for the goods, and not the full amount of the bill. *Reader, Ex parte*, Buck, 381.

**Expenses of Protest and Re-Exchange.**—A drawer in Louisiana of bills of exchange upon acceptors in London is entitled to prove, under a deed of arrangement executed by the latter, upon their becoming insolvent, to their creditors, not only for the amount of the bills, but also for 10% per cent. upon that amount, in lieu of re-exchange, which by the law of Louisiana, he had been obliged to pay to the holders of the bills on

their return dishonoured and protested for non-payment in Louisiana. *Walker v. Hamilton*, 1 De G., F. & J. 602.

The costs arising from the protests of bills can be proved under a commission only when incurred antecedent to the act of bankruptcy, not to the issuing of the commission. *Moore, Ex parte*, 2 Bro. C. C. 597.

## 9. BONDS.

**Cancellation by one of Joint Obligees.**—The cancellation of a bond by an obligee, on an agreement between her and the obligor, without the consent of her co-obligee, does not affect the latter's right of proof on the bond against the obligor's estate. *Smith, Ex parte*, 7 Jur. 864.

**Bond under 1 & 2 Vict. c. 110, s. 8.**—Action on a bond under 1 & 2 Vict. c. 110, s. 8, given by a defendant and others, his partners in trade:—Held, that the bankruptcy and certificate of the defendant and his partners, after the action in which the judgment was obtained, but before judgment, furnished no answer to an action upon the bond; the demand arising thereon not being a debt (contingent or otherwise) provable under the fiat, by virtue of any of the provisions of the 6 Geo. 4, c. 16. *Hinton v. Acraman*, 2 C. B. 367; 3 D. & L. 426; 15 L. J., C. P. 52; 10 Jur. 203.

**Void Provision in Bond.**—A man on his marriage gave a bond, conditioned for payment of 1,000*l.*, with interest. By a settlement of even date it was declared that the trustees should, during his life, or until he should become bankrupt or insolvent, allow him to retain in his hands the 1,000*l.*, or such part of it as he should think fit. In 1826 he became bankrupt. The trustees, in 1827, proved for the 1,000*l.*, but the commissioners expunged the proof, and the trustees did not take any steps to have a value set upon the bond as for a sum payable on the bankrupt's death, and to be allowed to prove for the amount of the valuation. In 1860, the bankrupt being dead, and fresh assets having come in, the trustees applied again to prove for the whole amount:—Held, that although the provision for calling in the money on bankruptcy was void, the debt was valid as a debt payable upon the death of the bankrupt, and that proof of it ought to be allowed, not disturbing former dividends. *Boddam, Ex parte*, 2 De G., F. & J. 625.

Held, that the decision in 1827 was not a judgment against the claim, the debt not being then payable, and no attempt having been made to prove for it on the footing of its being payable in futuro. *Id.*

**Antenuptial Settlement — Post-obit.**—Where the condition of a post-obit bond, given by way of antenuptial settlement, had been broken, proof was ordered to be admitted for the whole amount secured. *Griffiths, Ex parte*, 1 De Gex, 597.

**Bond for Sum less than Debt—Accord and Satisfaction.**—A. was indebted to B. & Co. in 20,000*l.* on a banking account. B. & Co. agreed, that, if A. and C. would give a bond for paying 10,000*l.* by yearly instalments of 1,000*l.*, paying interest on any instalments in arrear, the debt

should be considered as reduced to 10,000*l.* and cancelled. The bond was given. Before one instalment became due both B. & Co. and A. became bankrupt. The assignees of B. & Co. claimed to prove for the whole 20,000*l.* and interest:—Held, that, as an additional debtor was introduced, and as the bond contemplated the falling into arrear of the instalments, and as none of the particulars of the agreement were reduced into writing, the old debt must be considered to have been intended to be satisfied by the bond, and the proof must be rejected. *Hernaman, Ex parte*, 17 L. J., Bk. 17; 12 Jur. 643.

**Bond conditioned to Pay after Demand.**—A bond conditioned for the payment of a sum to the executors of the obligee, and interest in the meantime to him, on certain days or within twenty days after demand, is not provable under a commission against the obligor, though no interest has been paid, and there has been no demand, for the bond was forfeited only on neglect to pay after demand. *Winter v. Mousely*, 2 B. & A. 802. And see *Parker v. Ramsbotham*, 5 D. & R. 138; 3 B. & C. 257.

A covenant to pay a sum of money when requested by A., or after his death by the covenantee, with interest in the meantime, creates a present debt which may be proved for. *Stone, Ex parte, Welck, In re*, 8 L. R., Ch. 914; 42 L. J., Bk. 73.

A debtor, before his bankruptcy, covenanted to pay a sum of money which was due to his father, to a trustee to whom the father assigned it; and trusts were declared of the money, under which the debtor took a reversionary interest:—Held, that the trustee of the settlement could prove for the whole amount without deducting the debtor's interest. *Ib.*

A sum covenanted by a husband to be paid when demanded by the trustees on the request of the wife, is, if demanded before the bankruptcy, provable. *Brenchley, Ex parte*, 2 Glyn & J. 174.

Where parties jointly indebted enter into a covenant by which they promise on demand jointly and severally to pay, but expressly stipulate that the demand shall be in writing and sent by post to a particular place, and no demand is made previously to the bankruptcy, the debt is not provable against the separate estate of the respective parties. *Flintoff, Ex parte*, 3 M., D. & D. 726; 8 Jur. 766.

A., B. & C. being bankers in co-partnership, were appointed treasurers of a corporate body, and executed a joint and several bond in a penalty of 20,000*l.*, conditioned for the performance by them of various duties as treasurers, and especially that they would, "when thereunto required by the company," pay all balances in their hands. A commission issued against A., B. & C., who had at the time a large balance in their hands as treasurers, but no demand under the bond having been made by the company before the bankruptcy:—Held, that there was not a sufficient breach of the condition to constitute a debt provable against the separate estates of the bankrupts. *Lancaster Canal Company, Ex parte*, 1 Mont. 27.

**Bond conditioned to settle Money on Wife after Marriage.**—A bond is provable, given by the bankrupt in consideration of his wife's fortune, that he, his heirs, &c., would, within three months from the marriage, on receiving notice

from the trustees, pay them 1,000*l.*, to be held on the trusts of the marriage settlement, though no notice was given before the bankruptcy. *Hopper, Ex parte*, 1 Mont. & Ayr. 395.

By an ante-nuptial settlement, a trader covenanted with the trustees of it to pay them 3,000*l.* out of the first capital moneys, or real or capital personal estate, or capitalized income, of or to which he should be or become possessed or in anywise entitled after the solemnization of the marriage within six months after he should have become so possessed or entitled. The trader was at the time possessed of stock in trade and effects exceeding in value 3,000*l.*, and so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bankrupt after the expiration of the six months:—Held, that the event contemplated by the covenant had happened before the bankruptcy, and that there was a breach of the covenant entitling the trustees to prove. *Ecans, Ex parte*, 2 De G., Mac. & G. 948; 22 L. J., Bk. 5.

**Voluntary Bonds.**—Voluntary bonds, though given under a strong moral obligation, as a marriage contracted, and property received as a husband, by a man having a wife living at the time, are not provable, being void as against creditors. *Gilham v. Locke*, 9 Ves. 613.

—**Bond given in Substitution for.**—A voluntary bond, though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design, as by an insolvent to substitute a valid for an invalid security against creditors; and therefore such substituted bond may be proved. *Berry, Ex parte*, 19 Ves. 218.

A partner in a bank gave a bond to his sister, in performance, as it was alleged, of a promise voluntarily made to their father on his deathbed. The sister died, having specifically bequeathed the sum secured by the bond. The bankrupt gave the legatees fresh bonds for sums amounting together to the sum secured by the original bond, in consideration of the delivery up of that instrument. Six years afterwards, the partners in the bank, including the obligor, became bankrupt; at the times of both the transactions, the firm must have been insolvent, and the obligor must have then known or suspected this to have been the case; but the transactions were entered into fairly, and without reference to this circumstance. There was no evidence, however, of any notice or suspicion on the part of the obligees:—Held, that they were entitled to prove upon the bonds. *Hoskins, Ex parte*, 3 De G. & S. 549; 18 L. J., Bk. 11; 13 Jur. 114.

**Bonds of Indemnity.**—Where there is a bond of indemnity, and the petitioners have paid part before bankruptcy and part after, they may prove the whole. *Cockshot, Ex parte*, 3 Bro. C. C. 502.

Where a bankrupt had given an indemnity bond to the sheriff, and the amount of damage was not ascertained, the court directed a claim to be entered. *Marshall, Ex parte*, 1 Mont. & Bligh, 242; 3 Deac. & Chit. 120; 2 Deac. & Chit. 589; 1 Mont. & Ayr. 118, 145; 1 Mont. & Bligh, 242.

**Appropriation of Dividends.**—Where one of

two obligors in a joint and several bond became bankrupt, and the obligee having, by several dividends, been paid 20s. in the pound upon the amount of principal and interest due at the rate of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the co-obligor who had died:—Held, that the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend, and the surplus, if any, in reduction of the principal. *Bower v. Morris*, 1 Craig & Ph. 351.

#### 10. CALLS.

**Calls—Surrender of Shares.]**—A railway company proving against the estate of a bankrupt for calls must, according to the universal principle in bankruptcy, deduct the price or value of the shares from the amount of their claim, or give up the shares for the benefit of the creditors of the bankrupt. *Jennings, In re*, 1 Ir. Ch. Rep. 236.

**—Deed of Settlement of Company.]**—By the deed of settlement of a company, the shareholders covenanted to pay the calls on their shares; and it was stipulated that no assignees of bankrupts should be entitled to become shareholders in respect of the shares held by a bankrupt shareholder in the capital of the company, but that such assignees should be entitled to sell the same upon proof of the bankruptcy, and of their title as assignees; and a general power was given to the directors to make calls on the holders of shares other than the bankrupt shareholders:—Held, that the bankruptcy of a shareholder was an answer to an action for calls made and due after his certificate, although the assignees had not availed themselves of the power of sale, and the bankrupt still remained the nominal holder of the shares. *Wylam Steam Fuel Company v. Street*, 10 Ex. 849; 3 C. L. R. 880; 24 L. J., Ex. 208.

**Future Calls.]**—A shareholder in a trading company became bankrupt. The company continued, for a year subsequent to the bankruptcy, to carry on its business, and then stopped; and its affairs were ordered to be wound up. By the company's deed of settlement, the assignees of any bankrupt shareholder were authorized to sell his shares. The assignees of this bankrupt shareholder did not avail themselves of this provision. The master placed the names of the assignees upon the list of contributories as liable in respect of the bankrupt's estate up to the bankruptcy, on which the assignees disclaimed. The master then placed the name of the bankrupt, who was certificated, upon the list as liable in respect of calls made subsequent to his bankruptcy:—Held, that shares in a joint-stock partnership were not property, as the shares in an incorporated company, but that they were an interest determinable on bankruptcy, and that the bankrupt's name ought not to be put on the list in respect of the subsequent calls. *Greenshield's case*, 5 De G. & S. 599; 21 L. J., Ch. 733; 16 Jur. 517.

The liability of a shareholder of a company to pay future calls is not a liability to pay money on a contingency within 12 & 13 Vict. c. 186, s. 178.

VOL. I.

and consequently such shareholder's bankruptcy is no bar to an action for a call made subsequently to such bankruptcy. *General Discount Company v. Stokes*, 17 C. B., N. S. 765; 34 L. J., C. P. 25; 10 Jur., N. S. 1205; 11 L. T. 423; 13 W. R. 138; *S. P., South Staffordshire Railway Company v. Burnside*, 5 Ex. 129; 6 Railw. Cas. 611; 20 L. J., Ex. 120.

Future calls are not a liability the present value of which is provable under s. 154 of the Bankruptcy Act, 1861. *Hastie, Ex parte*, 7 L. R., Eq. 3; 38 L. J., Ch. 43; 17 W. R. 152.

**Contributories.]**—The amount of a call made upon a contributory under the Winding-up Act of 1848, before his bankruptcy, might be proved against his separate estate by the official manager, although all the debts of the company are not paid, for which the contributory is liable. *Brown, Ex parte*, 3 De G. & S. 590; 19 L. J., Bk. 4; 13 Jur. 978.

A. was a shareholder in a banking company, which stopped payment. He became bankrupt, and before he obtained his certificate, an order for the winding up of the affairs of the company was obtained, and subsequently he obtained his certificate. The commissioner declined to permit the official manager to prove for the amount of calls on the bankrupt's shares; but the court held that, under ss. 14 and 30 of the Winding-up Act of 1849, the official manager was entitled to go in and prove for the amount of calls in competition with his separate creditors. *Nicholas, Ex parte*, 2 De G., Mac. & G. 271; 21 L. J., Bk. 64; 17 Jur. 6.

After the bankrupt has been settled upon the list of contributories, the liquidators may prove against his estate for the estimated value of future calls in respect of the shares held by him in the company which is being wound up, but the court will reserve liberty to the assignees to institute inquiry, and call upon the liquidators to shew in what way the estimate was arrived at. *Gibbons, Ex parte*, 11 L. T. 752.

A shareholder in a company under the Companies Act, 1862, was adjudicated a bankrupt, and after the adjudication a call was made upon him which subsequently became due. After the call became due, but before he obtained his order of discharge, the company went into liquidation. An action having been brought by the company against him for the call before the commencement of the proceedings in liquidation, and judgment having been obtained in default of appearance:—Held, that the call was not a debt provable, and that the judgment, therefore, ought not to be set aside. *City Discount Company v. Lloyd*, 24 L. T. 512; 20 W. R. 22.

The liability of a past member of a company in liquidation, who is placed on the B. list of contributories, is capable of being proved as a debt under the bankruptcy of such contributory if the bankruptcy takes place after the commencement of the winding-up; and the bankrupt, on obtaining his discharge, is entitled to be removed from the list of contributories. The fact that the B. list is not made out till after the adjudication of bankruptcy makes no difference. *Land Credit Company of Ireland, In re, McEwen's case*, 6 L. R., Ch. 582; 40 L. J., Ch. 341; 24 L. T. 654; 19 W. R. 738.

The same doctrine is applicable to a Scotch sequestration as to an English bankruptcy. *1b.*

See further, post, COMPANY (Winding-up).

K K

## 11. CONTINGENT DEBTS AND LIABILITIES.

### Loan of Securities to be replaced on Demand.]

—A customer of a banking firm, whose practice it was to receive deposits, at their banking-house, of boxes of securities belonging to their customers, for safe custody, lent part of the securities contained in his box to the firm, upon an undertaking to replace them in three months, or sooner if required; and he afterwards lent other part of such securities to W., one of the partners in the firm, on his own separate account, other securities being on both occasions deposited by the borrowers, according to agreement, in pledge for those which were borrowed. After the expiration of three months from the time of the first loan, the firm, with the consent of the customer, deposited other securities in the box, in exchange for those first pledged, and afterwards became bankrupt, when it appeared that the customer had been regularly credited in the books of the firm with interest on all the securities borrowed, but that W. had, without the knowledge either of his co-partners or the customer, abstracted the securities pledged by himself upon the second loan, and had applied the proceeds to his own individual use:—Held, that the value of the securities lent to the firm was not a contingent debt within 6 Geo. 4, c. 16, s. 56, and that, as there had been no demand for their replacement before the bankruptcy, the customer had no provable debt in respect thereof, either against the joint estate or any of the separate estates. *Eyre, Ex parte*, 1 Ph. 227; 3 Mont., D. & D. 12; 12 L. J., Ch. 266; 7 Jur. 162.

**Agreement to buy Ship on her Arrival.]**—A. agreed to sell to B., for 4,000*l.*, a ship employed on a distant voyage, when she should arrive at her port of discharge in the United Kingdom; and B. agreed, within one month after her arrival, or within such further time as should be necessary for effecting the repairs and discharging the cargo, on the execution of a bill of sale of the vessel, to deliver to A. two promissory notes for the amount of the purchase-money; in default of which A. might sell the ship and keep the proceeds in part of the purchase-money, B. undertaking to pay to A. any deficiency within one calendar month after such sale; and in case the vessel should be lost, the agreement was to be void. On the 27th of March the ship arrived, before which time B. became bankrupt. On the 31st of March, A. gave notice of her arrival to the assignees, who declined to complete the contract; and A. sold the ship for 2,833*l.*:—Held, that this agreement amounted to a contract on the part of B. to pay a certain sum on a contingency, liable to be reduced on another contingency; and that A. could prove for the balance of the 4,000*l.* after deducting the amount of the proceeds of the ship. *Harrison, Ex parte*, 3 Mont., D. & D. 350; 10 Jur. 166.

**Principal and Surety.]**—A covenant by sureties that the principal debtor would pay a debt by three yearly instalments is on the principal debtor becoming bankrupt after payment of the first, and before the time for payment of the second instalment, a contingent liability properly the subject of a claim under 12 & 13 Vict. c. 106, s. 178. *Barwis, Ex parte*, 6 De G., Mac. & G. 762; 25 L. J., Bk. 10; 2 Jur., N. S. 5.

A., in consideration of 1*l.* 10*s.* 7*d.* received of B., undertook, in writing, to make himself liable for the due payment of a note upon which H. was then indebted to B., and B. thereupon consented to furnish H. with more goods; and then A., before the note was due, became bankrupt:—Held, that A.'s undertaking was intended as a collateral engagement only, in case H. should not pay the note when due; consequently, as it rested on a contingency whether it would ever become a debt or not, it could not be proved under A.'s commission. *Adney, Ex parte*, Cowp. 460. See *Hoffman v. Foudrinier*, 5 M. & S. 21.

### Consent by Defendant to Order of Reference.]

—Where a defendant to an action for injury to property caused by the explosion of his steam-engine, consented at the trial to an order of reference, and the award was not made till after his bankruptcy:—Held, that the defendant had not before the bankruptcy contracted a liability to pay money upon a contingency within 12 & 13 Vict. c. 106, s. 178. *Todd, Ex parte*, 6 De G., Mac. & G. 744; 24 L. J., Bk. 20; 1 Jur., N. S. 897.

**Agreements to restore Premises to original State.]**—Ten years ago, A. let to B. as tenant from year to year, premises adjoining other premises occupied by B. About seven years ago A. permitted B. to make a communication through the party-wall, and to make alterations, upon condition that B. should, at the termination of his tenancy, restore the premises to their original state. In April, 1855, B. became bankrupt, and, on the 17th of May, B. gave notice to A. that he would deliver up possession of the premises, the assignees having declined to take them:—Held, that the damages resulting from the non-compliance with the condition upon which the permission to alter was given, did not constitute a liability to pay money upon a contingency within 12 & 13 Vict. c. 106, s. 178. *Maples v. Pepper*, 18 C. B. 177; 25 L. J., C. P. 243; 2 Jur., N. S. 739.

**Money payable at various Times on various Contingencies.]**—A demand arising upon an undertaking which creates a liability to pay money at several different periods, if several contingencies shall happen at those several periods, is not a demand provable under 12 & 13 Vict. c. 106, s. 178. *Warburg v. Tucker*, 5 El. & Bl. 384; 24 L. J., Q. B. 317; 1 Jur., N. S. 871; 16 C. B. 418, n. *S. P.*, *Young v. Winter*, 16 C. B. 401; 24 L. J., C. P. 214; 1 Jur., N. S. 960.

### Guarantee terminable by Notice in Writing.]

—In July, 1850, B. gave C. a guarantee (continuing) for 200*l.* for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of this guarantee, and a balance, exceeding 200*l.*, was due in respect thereof. In June, 1853, B. became bankrupt, and duly obtained his certificate:—Held, that B.'s liability upon this guarantee was not a contingent liability within 12 & 13 Vict. c. 106, s. 178, and consequently that his certificate was no bar to a claim in respect of goods supplied to D. after the bankruptcy of B. *Boyd v. Robins*, 5 C. B., N. S. 597; 23 L. J., C. P. 73; 5 Jur., N. S. 915; 7 W. R. 78.—Ex. Ch.

**Promissory Note—Joint Makers.]**—The liability of one of two makers of a promissory note, who have signed as sureties for a third maker, to contribution, upon the contingency of the co-surety paying the note in default of the principal, is, before the note arrives at maturity, a liability to pay money upon a contingency which shall not have happened within 12 & 13 Vict. c. 106, s. 178, and the demand in respect of such liability is, therefore, provable under that section, against the estate of the bankrupt co-surety, when the contingency has happened. *Adkins v. Farrington*, 5 H. & N. 586; 29 L. J., Ex. 345; 2 L. T. 287.

**Marriage Settlement—Default of Issue.]**—By a marriage settlement, S. covenanted to cause 4,000*l.* to be paid to his wife's trustees within twelve months after his own decease, in trust to pay her the interest for her life in case she survived him, and afterwards the principal to their children; but, if they had no children, to the survivor of them, S. and his wife, his or her executors or administrators. —Held, that this was a debt on a contingency, provable under a commission against S. within the 6 Geo. 4, c. 16, s. 56, and that the valuation should be the present worth of 4,000*l.* payable twelve months after the death of the bankrupt. *Tindall, Ex parte*, 1 M. & Scott, 607; 8 Bing. 402; 1 Mont. 462; 1 Mont. & Mac. 415; 1 Deac. & Chit. 291.

**Deed of Separation—Allowance to Wife while living Apart.]**—By a deed of separation between husband and wife, the husband covenanted that he would every year during the joint lives of himself and his wife pay to a trustee for her, to her separate use, such sum as, together with the dividends and interest or other income to arise from 948*l.* 6*s.* 4*d.* Three per Cent. Annuities, or from other funds settled or which might be settled to her separate use and which might be received by her, would make one clear annuity of 200*l.*, such annuity to commence from the 11th of January, 1854, and to be paid by four even and equal quarterly payments; provided, if he and his wife should at any time thereafter cohabit as man and wife, that thenceforth the annuity should cease. On the 29th of September, 1854, and while he and his wife continued to live separate, he became bankrupt. —Held, that the annual sum, so covenanted to be paid for the separate use of his wife, was not a debt payable upon a contingency, within s. 177 of 12 & 13 Vict. c. 106, or a liability to pay money upon a contingency within s. 178, and consequently his certificate was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy. *Parker v. Ince*, 4 H. & N. 53; 28 L. J., Ex. 189; 32 L. T., O. S. 279; 7 W. R. 201.

**Bond to pay Plaintiff's Costs if Unsuccessful.]**—A surety entered into a bond in a penal sum, with the condition that if he should pay to the plaintiff such costs as he should in due course of law be liable to pay in case the verdict should pass for the defendant in an action pending, which had been brought by C. in the name of the plaintiff, such costs to be first taxed in the usual manner, the bond was to be void. The action mentioned in the condition was a scire facias on a judgment obtained by the plaintiff, and which had been assigned to C. by H., since

deceased, of whom the plaintiff was executor. The action was tried at the Spring Assizes, in 1848, when a verdict was found for the defendant. In Easter Term a rule nisi for a new trial was obtained. On the 14th of November following, a fiat issued against the defendant. In Hilary Term, 1849, the rule for the new trial was discharged. On the 29th of May the defendant obtained his certificate, and on the 22nd of August the costs were taxed:—Held, that, at the time the fiat issued, the defendant's liability under the bond was a mere contingent liability, and not a contingent debt, within 6 Geo. 4, c. 16, s. 56; and therefore that the plaintiff's claim for the costs was not barred by the certificate. *Hankin v. Bennett*, 8 Ex. 107; 21 L. J., Ex. 326.

**Goods Bought for future Delivery—Bankruptcy of Purchaser.]**—B. & Co. employed Messrs. W., who were metal brokers, to purchase iron for them, to be delivered and paid for at a future day. Messrs. W., as the custom of the trade was, entered into contracts for the purchase of the iron, without disclosing the names of their principals. Before the day for delivery and payment arrived an adjudication against B. & Co. took place, and the assignees having declined to complete the contract, Messrs. W. completed the purchase on their own account, and resold the iron at a loss, and carried in a proof against the bankrupt estate for the amount of the loss so sustained:—Held, that the claim could not be supported either as a liability to pay money on a contingency, under 12 & 13 Vict. c. 106, s. 178, or as a debt payable upon a contingency, under s. 177, nor could it be sustained as a demand in the nature of damages, to which the bankrupts were liable at the time of the adjudication, under 24 & 25 Vict. c. 134, s. 153, and the proof was therefore disallowed. *Kempson, Ex parte*, 34 L. J., Bk. 21; 11 Jur., N. S. 165; 11 L. T. 723; 13 W. R. 418.

**Administration Bond.]**—An administration bond, forfeited before the bankruptcy of the administrator, is not provable under 12 & 13 Vict. c. 106, s. 178, and consequently a certificate under that act is no bar to an action on the bond. *Marchman v. Brookes or Hughes*, 2 H. & C. 908; 9 L. T. 726.

**Premiums on Policy of Insurance.]**—A covenant to pay recurring premiums on a life policy is an absolute covenant, and does not constitute a liability to pay money upon a contingency, within 12 & 13 Vict. c. 106, s. 178. The only contingency being that of the continuance of the life assured, it is an absolute covenant to pay, not upon, but until, the happening of a certain event, so that the contingency specified does not create, but puts an end to, the liability. *Mitcalfe v. Hanson*, 1 L. R., H. L. 242; 35 L. J., Q. B. 225.

The statute contemplated only one single liability arising upon one contingency, and that cannot apply to a liability to make periodical payments, nor is there any provision in the statute which gives such a liability the character of an annuity. *Id.*

**Indemnity Calls.]**—A defendant, having transferred into the plaintiff's name shares in a mine conducted on the cost-book principle as security

for a debt, covenanted with him to indemnify him from all calls which might be made upon such shares, and all charges, liabilities, and costs that might attach to the said shares. The defendant became bankrupt, and the plaintiff was afterwards compelled to pay in respect of such shares certain debts of the mine which accrued before the bankruptcy:—Held, in an action on this covenant for not indemnifying the plaintiff against such payment, that the defendant's liability was not to pay money upon a contingency within 12 & 13 Vict. c. 106, s. 178, nor did the plaintiff stand in the position of surety for the defendant within the meaning of s. 173; and that therefore his bankruptcy was no bar to the action. *Betteley v. Stainsby*, 2 L. R., C. P. 568; 36 L. J., C. P. 293; 16 L. T. 701; 15 W. R. 1047.

—**Retiring Partner.**—A partner, continuing the business, took an assignment of all the stock, and covenanted to indemnify the retiring partner from the debts then owing from the partnership. The continuing partner became bankrupt, and obtained his certificate; and subsequently an action was commenced against the retiring partner, upon an acceptance of the partnership. Judgment was obtained against him, and he paid the debt and costs:—Held, that an action would not lie against the bankrupt upon the covenant, since, under 49 Geo. 3, c. 121, s. 8, the retiring partner might, on his liability, have resorted to and proved his debt under the commission, and was therefore barred by the certificate. *Wood v. Dodgson*, 1 Rose, 47; 2 M. & S. 195.

—**Stakeholder.**—A contract of indemnity does not create a liability to pay money upon a contingency within the meaning of the 12 & 13 Vict. c. 106, s. 178, because the contracting party is not in such a case necessarily made liable by the contract itself to pay a sum of money. *Wiseman, Es. parte. Kelson, In re*, 7 L. R., Ch. 35; 25 L. T. 545; 20 W. R. 138—L. J.

K. & Co. having made a claim to bills of exchange, which were in the hands of W. as stakeholder, he handed them over to K. & Co. they giving him a guarantee to save and keep him harmless and indemnified from and against all claims and demands which might be made against him for the bills, and from and against all costs and damages which he might sustain in consequence of handing over the bills; and further, that if proceedings were taken against him in respect of the bills, K. & Co. would save him harmless and keep indemnified from all costs and damages by reason of such proceedings, and that if he was ordered in such proceedings to give security, or bring money into court, K. & Co. would procure such security, or provide him with the money to be paid into court, as the case might be. An adverse claimant brought an action against him for the bills, which action K. & Co. defended by their own attorney, until they executed a deed of inspectorship, which was registered under the Bankruptcy Act, 1861, and under which deed all creditors might prove who could have proved under an adjudication of bankruptcy of the same date. After this, judgment was recovered in the action against him:—Held, that he was not a creditor who could have proved in bankruptcy under the Bankruptcy Act, 1861, s. 153, for that the contract did not contain any warranty of the title of K. & Co. to the bills, nor any undertaking to pay their amount as soon as a valid claim was

made against him for them, but only an undertaking that he should not sustain any loss or expense in respect of them, and that as K. & Co. had defended the action up to the date of the deed of inspectorship, the contract had not up to that time been broken. *Ib.*

Held, also, that the contract was not a contract to pay money upon a contingency, so as to give a right of proof under the Bankruptcy Act, 1849, s. 178. *Ib.*

—**Undertaking to replace Consols.**—In January, 1866, a company lent a sum in consols to be deposited by the promoters of a bill then before parliament; and the two plaintiffs, the defendant, and three others entered into an undertaking with the company, that, if the bill was thrown out the consols should be returned, and if it passed, an equal amount of stock should be transferred to the company, and that a sum, in the nature of interest on the value of the consols at the time they were lent, from the end of six months to the date of the transfer, should be paid to the company. In April, 1866, the defendant was adjudged bankrupt; and in July he obtained his order of discharge. In August the bill was passed, but the consols were not transferred to the company till May, 1867, and the plaintiffs were compelled in June, 1867, to pay under the undertaking 500*l.* as the interest. An action having been brought by the plaintiffs to recover contribution from the defendant of one-sixth of the 500*l.*, the defendant pleaded his discharge:—Held, that as the liability under the undertaking depended on an uncertain event, viz., the date at which the consols should be transferred, the amount of liability was not capable of being ascertained; and the claim was therefore not a debt provable under 12 & 13 Vict. c. 106, s. 178, nor under 24 & 25 Vict. c. 134, s. 154; and the defendant was therefore not discharged. *Cary v. Dawson*, 4 L. R., Q. B. 568; 38 L. J., Q. B. 300; 21 L. T. 23; 17 W. R. 916; 10 B. & S. 663.

—**Covenant to obtain Transfer of Consols.**—A bond for 1,000*l.*, after reciting that the obligor had assigned to the obligee 1,100*l.* consols, to which the obligor's wife was entitled upon the death of her mother, and that the obligor's wife might survive her husband and might refuse to confirm the assignment, or the obligee might, through the obligor's default or otherwise, never realize the benefit of the assignment, was conditioned for avoidance if, within six months after the mother's death, the obligee should obtain the transfer of the consols, or the trustees should transfer the consols to the obligee. The mother died, and more than six months after the obligee sued the obligor on the bond. He pleaded his bankruptcy and discharge under the Act of 1861, obtained before any breach of the condition and before six months after the death of the mother:—Held, that the action was not barred by the bankruptcy and discharge, since the obligee could not have proved under the bankruptcy, either for "a debt payable on a contingency" within the 12 & 13 Vict. c. 106, s. 177, or for "a liability to pay money on a contingency" within s. 178. *Acot v. Thomas*, 6 L. R., Ex. 312; 40 L. J., Ex. 186; 24 L. T. 668; 19 W. R. 1148.

—**Company Winding up—Successive Holders of Shares.**—The plaintiff, a holder of shares in a

company, transferred them to the defendant, who transferred them to M. The company was ordered to be wound up, and a call of 40*l.* a share was made on the contributories in class A., being the existing members, amongst whom M. was placed; these, including M., being unable to pay, the plaintiff and the defendant were placed upon the list of contributories in class B. as past members, and the defendant was ordered in March, 1869, to pay a call of 40*l.* per share. The defendant had executed a deed of inspectorship under the Bankruptcy Act, 1861, s. 192, which was duly registered in December, 1867. The liquidator of the company proved for the amount of calls against the defendant's estate, but no part was paid; and the plaintiff having paid a sum in compromise of the money remaining due on the shares, sued the defendant for the amount:—Held, that the defendant was liable to indemnify the plaintiff against calls made after the defendant had transferred his interest to M.; and that the claim of the plaintiff was not provable under the Bankruptcy Act, 1861, s. 153, and the defendant's deed therefore afforded no defence. *Killock v. Enthoven*, 9 L. R., Q. B. 241; 43 L. J., Q. B. 90; 22 W. R. 322—Ex. Ch. Affirming, 8 L. R., Q. B. 458; 21 W. R. 944.

A claim by the transferor of shares in a company, to be indemnified out of the estate of his bankrupt transferee against calls made on the transferor after the transfer, is not a debt provable under the Bankruptcy Act, 1861, ss. 153 and 154; and a plea of an inspectorship deed under s. 192 is no defence to a creditors' suit in equity to administer the estate of the transferee. *Holmes v. Symons*, 13 L. R., Eq. 66; 41 L. J., Ch. 59; 25 L. T. 628; 20 W. R. 125. An appeal against this decision was compromised; 20 W. R. 921.

**Annuity so long as Annuitant did not carry on Trade near certain Place.]**—On the dissolution of a partnership in the business of tailors between J. and R., J., who continued the business, covenanted to pay R. an annuity of 120*l.* for his life, and R. covenanted not to carry on the business of a tailor within 100 miles from the old place of business, and it was agreed that for any breach of this covenant by him the life annuity should thereupon cease and determine, and the covenant to pay it become null and void, as and by way of liquidated damages to J. J. paid the annuity punctually for some years, until he got into difficulties, and he then presented a petition for liquidation by arrangement, and his creditors agreed to accept a composition:—Held, that the claim of R. in respect of his annuity was capable of being fairly estimated and was provable in the liquidation proceedings. *Jackson, Ex parte Jackson, In re*, 27 L. T. 696; 20 W. R. 1023—L. J.

**Bond for Costs and Damages in Admiralty Suit.]**—A debtor filed a petition under s. 126 of the Bankruptcy Act, 1869, to obtain an arrangement, and inserted in his statement the name and address of a creditor, describing a certain sum of money as due to him; the creditor claimed a larger sum, obtained the allowance of it, signed a composition deed (the composition being payable in one month from the registration of the deed), and received the composition agreed to by the creditors. While this arrangement was being made, a suit in the Court of Admiralty

was proceeding against the debtor, in which suit the creditor had given a bond, as surety for the debtor, for the payment of any costs and damages found due in that suit. The liability on this bond was in no way referred to in the debtor's statutory statement. After the composition had been completed, and the composition had been paid, the admiralty suit was decided against the debtor, and, on default by the debtor, the creditor was called on to pay the amount secured by the bond:—Held, that, under these circumstances, an action for money paid under the admiralty bond was maintainable against the debtor, no mention of the bond having been made in the statutory statement, and such payment, therefore, not being affected by the provisions of ss. 31 and 126 of the Bankruptcy Act. *Breslau v. Brown*, 3 App. Cas. 672; 47 L. J., C. P. 729; 39 L. T. 67; 26 W. R. 536. Affirming, nom. *Wilson v. Breslau*, 2 C. P. D. 314; 46 L. J., C. P. 593; 37 L. T. 24; 25 W. R. 818.

**Bankruptcy of Non-trader prior to 1869—Discharge—Contingent Liability.]**—Under the bankruptcy law which prevailed in 1862 a contingent liability was not provable in the bankruptcy of a non-trader, and was not therefore affected by the discharge of the bankrupt; consequently, in a case coming under that law, the liability will operate at any time subsequent to the discharge. B., a spinster and a non-trader, by deed made in 1861, assigned by way of mortgage all her life interest in a certain fund, over which she had also an absolute power of appointment by will, and further covenanted with the mortgagee that she would exercise the power in his favour, and would not do, &c., any act whereby her will should be revoked, or in anywise affected. She duly made her will according to the covenant, and subsequently, namely, in 1862, became a bankrupt; and, after obtaining her discharge, made another will revoking the former will, and bequeathing the fund to her executors. She died in 1880, and the last-mentioned will was duly proved:—Held, that since the case must be governed by the law as existing at the bankruptcy, and since the liability on the covenant was not a debt provable, and therefore not released by the discharge under ss. 177, 178 of the Bankruptcy Act, 1849 (which were not repealed by the Bankruptcy Act, 1861), an action would lie against the executors of B. for damages for breach of the covenant. *Robinson v. Ommanney*, 23 Ch. D. 285; 52 L. J., Ch. 440; 49 L. T. 19; 31 W. R. 525—C.A. Affirming, 21 Ch. D. 780; 51 L. J., Ch. 894; 47 L. T. 78; 30 W. R. 939.

## 12. COSTS.

**In Actions.]—See post, JUDGMENTS.**

**Costs due to Bankrupt's Solicitor—Signed Bill unnecessary.]**—An attorney may prove his bill under a commission of bankruptcy without delivering a signed bill. *Eicke v. Nokes, Moo. & M.* 303.

**Bill of Exchange accepted in Settlement—Taxation.]**—Where solicitors had delivered their bill of costs in September, 1850, and after a reduction had been agreed upon, the client accepted a bill of exchange for the amount so



reduced:—Held, on the bill being dishonoured and the client becoming bankrupt in May, 1851, that the bill of exchange constituted a provable debt without the bill of costs being taxed. *Webb, Ex parte*, 4 De G. & Sm. 366.

**Taxation of Bill—Registrar.]**—A solicitor who tenders a proof in the bankruptcy of his client, in respect of costs due to him by the client, is not entitled to insist on having his bill referred for taxation to the taxing master, but the registrar has jurisdiction to determine the amount due, availing himself, if necessary, of the advice of the taxing master. *Dillon, Ex parte, Woods, In re*, 13 Ch. D. 318; 42 L. T. 160; 28 W. R. 402—C. A.

### 13. DAMAGES.

**Unliquidated Damages in respect of Contracts—Before 24 & 25 Vict. c. 134, s. 153.]**—If the damages be contingent and uncertain, they cannot be proved under a commission. *Banister v. Scott*, 6 T. R. 489. And see *Parker v. Norton*, 6 T. R. 695.

**Sale of Goods—Failure to Accept.]**—Damages arising from a breach of contract to accept goods at a certain price on a certain day were not provable. *Green v. Bicknell*, 3 N. & P. 634; 8 A. & E. 701; 1 W., W. & H. 504.

If a trader agreed to purchase goods, to be delivered on a future day, which had not arrived when the commission issued, the difference between the value of the goods and the purchase-money was not provable. *Boorman v. Nash*, 9 B. & C. 145.

Where a person who had contracted for a certain quantity of oil, to be delivered to him at a future day at a certain price, became bankrupt before that day arrived, and obtained his certificate:—Held, that he was nevertheless liable to an action for not accepting and paying for the oil, and that the proper measure of damage was the difference between the price which he had contracted to pay for the oil and the market price at the time when the contract was broken. *Id.*

**Charterparty—Failure to provide Cargo.]**

—By a charterparty between A., charterer, and B., owner, it was agreed that a ship of 310 tons burden should proceed to Ichaboe, and there take in from A. a full cargo of guano and other merchandize, and therewith laden should return and discharge her cargo, for which A. agreed to pay freight at the rate of 4l. 10s. for every ton delivered, and agreed to provide a full cargo; and A. & B. mutually bound themselves in a penalty of 1,800l. for the performance of the contract. A. having committed a breach by not providing a cargo, and a fiat in bankruptcy having subsequently issued against him:—Held, that any claim which B. might have against A. for such breach of contract was in the nature of unliquidated damages, and was not therefore provable as a debt or demand under the fiat. *Woolley v. Smith*, 4 D. & L. 469; 3 C. B. 610; 16 L. J., C. P. 81; 11 Jur. 310.

**Penalties.]**—A bankrupt undertook to supply a creditor who was under pecuniary engagements for him, with five pieces of cloth per week, or to forfeit and pay 10l. per piece as

liquidated penalty for every piece deficient. The bankrupt made such frequent default in the regular supply of the cloth that he incurred penalties to the amount of 3,870l., which the creditor claimed to prove, although no specific damage was alleged to have been sustained by the non-performance of the agreement, and the only balance really due to him was 48l. 18s. 6d.:—Held, that this was a claim for unliquidated damages, founded on a penalty, and was therefore not the subject of proof. *Maclean, Ex parte*, 2 Mont., D. & D. 564; 6 Jur. 609.

**Indemnity.]**—If a person undertakes, with A., to settle with certain bankers a balance due to them on an acceptance of A.'s, but he neglects to take up the bill, and he gives to A. a new undertaking to deliver up to him his acceptance within a month, or gives him a bond of indemnity, but does not perform either, and the bankers sue A., and pending a rule for a new trial, the person becomes a bankrupt, the certificate is not a bar to an action by A. *Yallop v. Ebers*, 1 B. & Ad. 698.

A collateral, independent and express covenant, by the assignee of a lease to indemnify the lessor, was not discharged by the assignee's becoming bankrupt. *Mayor v. Steward*, 4 Burr, 2439.

**Sale of Goods—Covenant of Title.]**—Where B. sold a ship to A., with a covenant that he had a good title, though in fact he had none, and B. afterwards became a bankrupt, and A. sustained damage by paying the value of the ship to the true owner:—Held, in an action on the covenant by A. against B., stating the special damage, that B.'s certificate was no bar. *Hammond v. Toulmin*, 7 T. R. 612.

**Under 24 & 25 Vict. c. 134, s. 153.]**—This section is limited to cases where there is a cause of action actually accrued, or a demand enforceable against the bankrupt, at the time of adjudication. *Mendel, Ex parte*, 1 De G., J. & S. 330; 33 L. J., Bk. 14; 10 Jur., N. S. 189; 9 L. T. 793; 12 W. R. 451.

Therefore a claim in respect of a contract made in July to deliver a quantity of oil at a certain price, in the course of the following month of January, is not one in respect of which a creditor is entitled to prove under a trust-deed, dated the 30th January, for unliquidated damages, inasmuch as, at the date of the deed, and until the end of the month, there had been no breach of the contract. *Id.*

A declaration was, upon an indenture, made the 16th August, 1861, between Clifton, since deceased, and the defendant, of the one part, and the plaintiff, of the other part, whereby Clifton and the defendant covenanted to pay the premiums upon a policy of assurance upon the life of Clifton, which had been deposited with the plaintiff, until the payment of a bond therein mentioned. The plaintiff alleged that, although the bond had not been paid, both Clifton and the defendant had neglected to pay any of the premiums upon the policy from the date of the indenture. The defendant pleaded a deed of the 21st June, 1869, under the Bankruptcy Amendment Act, 1868, between himself, two inspectors, and the creditors, who would be entitled to prove under an adjudication of bankruptcy against him, founded on a petition filed

upon the day of the date of the deed, upon an act of bankruptcy committed upon the day of the date thereof. The plea merely stated that it was agreed by the deed that the provisions therein contained should operate and have the same force and effect as an order of discharge under the Bankruptcy Act, 1861, and might be so pleaded in bar of every action commenced by any creditor of defendant, and with the same effect as an order of discharge under that Act, in case the defendant had been adjudicated bankrupt. The plea then averred the performance of all conditions precedent, and that at the time of the execution of the deed the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to within the true intent and meaning of the Bankruptcy Act, 1861:—Held, that the plea was no answer to the action. *Solomon v. Isaacs*, 27 L. T. 624—Ex. Ch.

— **Covenant of Title—Liability Immediate.]**

—A liability in respect of a breach of covenants of title, contained in a purchase-deed, arises immediately upon the execution of the deed; therefore, where the bankruptcy of the vendor occurred after the execution of the purchase-deed, but before the amount of damage sustained by the purchaser was ascertained, the latter is entitled to prove for the amount. *Elmes, Ex parte*, 33 L. J., Bk. 23; 10 L. T. 314; 12 W. R. 778.

A., a solicitor, mortgaged lands to his client, B., for 1,000*l.*, and sent him a parcel of deeds purporting to comprise the deeds of the mortgaged property, but retained those relating to a part. That part he afterwards sold to C. for 600*l.*, and entered into covenants for title. A. absconded, and was afterwards made bankrupt. C. then discovered the prior mortgage, and B. also for the first time discovered that the deeds were missing, and were in C.'s possession. B. filed a bill against C., and obtained a decree that C. should redeem him or be foreclosed. C. appealed, but the decree was affirmed. C. paid off the mortgage, interest, and costs, and tendered a proof in A.'s bankruptcy for the amount:—Held, that he was entitled to prove for the principal and interest, and for the costs of the suit, except those of the rehearing. *Id.*

— **Sale of Cargo—Neglect of Buyer to name Port of Delivery—Damages—Demurrage.]**—A. contracted to sell to B. a cargo, deliverable at a port to be named by the buyer on or before the ship's arrival at a port of call; demurrage by neglect of buyer in giving sailing orders to be paid by him. Upon the arrival of the ship at the port of call being notified by A., B. stated that he could not meet his engagements; and three days afterwards B. committed an act of bankruptcy. A. subsequently sold the cargo at a loss, and sought to prove against B.'s estate for the difference:—Held, that the neglect of B. to name a port of delivery, and the statement of his inability to meet his engagements, did not amount to a breach of the contract at the date of the act of bankruptcy, as the time for the performance of the contract to accept the cargo, i.e., the arrival of the ship at her port of delivery, had not then arrived, and proof for damages for breach of contract refused accordingly, but proof for demurrage incurred before the act of bankruptcy was allowed. *Halliday, Ex parte*, 2 De

G., J. & S. 312; 12 Jur., N. S. 817; 12 L. T. 624; 13 W. R. 908.

— **Broker—Bankruptcy of Principal—Re-sale—Damages.]**—W. & Co., who were iron brokers, contracted to purchase iron on behalf of B. According to the custom of the trade, the names of the brokers only appeared in the contract as the buyers. B. became bankrupt before the day appointed by the contract for the payment of the purchase-money; and the assignees having refused to accept the iron, the broker resold it, and sought to prove against the estate of the bankrupt for the difference between the amount paid for the iron and the sum it realized on the re-sale:—Held, that no proof could be made under the above section, because at the time of the adjudication the bankrupt was not liable for any demand for damages, or in the nature of damages. *Kempson, Ex parte*, 34 L. J., Bk. 21; 11 Jur., N. S. 165; 11 L. T. 723; 13 W. R. 418.

— **Sub-Tenant paying Money to release Goods Distained by superior Landlord.]**—The defendant occupied as tenant to P. a warehouse at a yearly rent, and the plaintiff became his sub-tenant of one of the rooms. The defendant's rent being in arrear, P. lawfully distained the goods in the warehouse, including goods of the plaintiff. To obtain the release of his goods the plaintiff paid P. 15*l.* After this the defendant was adjudged a bankrupt on his own petition, and obtained his order of discharge. The plaintiff then sued the defendant for the damage which he had sustained:—Held, that he was not "liable, by reason of any contract or promise, to a demand in the nature of damages" at the suit of the plaintiff, within 24 & 25 Vict. c. 134, s. 153, and that the plaintiff's claim was therefore not provable under the bankruptcy, and not barred by the order of discharge. *Johnson v. Shafte*, 4 L. R., Q. B. 700; 38 L. J., Q. B. 318; 20 L. T. 909; 17 W. R. 1098.

— **Bankrupt Vendor—Failure to Deliver—Measure of Damages.]**—A manufacturer of iron contracted, in May, 1871, to sell to a company 150 tons of iron at a specified price per ton, delivery to be twenty tons per month. The deliveries were not duly made under the contract. In January, 1872, the vendor filed a petition for liquidation by arrangement. At that time a considerable quantity of iron remained to be delivered, and the market price of iron had risen very much. It appeared that in some cases the company had bought iron in the market to supply the deficiency in the monthly deliveries. It did not appear that any actual request had been made by the vendor for the postponement of the deliveries:—Held, that the company could prove in the liquidation only for the differences between the contract price of the iron and the market prices of the days when the respective deficient deliveries were made. *Llan-samlet Tin Plate Company, Ex parte, Voss, In re*, 16 L. R., Eq. 145.

— **Agreement to provide Steam Power—Damages.]**—H. entered into a written agreement with S. and A. that he would supply them with steam power for any looms that might be put up in their weaving-shed for a term of twenty-one years from August, 1858, at a fixed

annual rent per loom, payable in advance. In 1865, they assigned their weaving-shed and the benefit of the agreement to W. In 1871, H. mortgaged his mill, which contained the steam power; and in 1872 he filed a petition for liquidation by arrangement, under which a trustee was appointed. The mortgagee then took possession of the mill and repudiated the agreement. W. was, in consequence, obliged to obtain steam power for his looms at a much higher cost; and he claimed to prove in the liquidation for the injury which he had sustained:—Held, first, that although the agreement for the supply of steam power might be put an end to at the commencement of any year by the owners of the weaving-shed discontinuing to work any looms, the agreement was not unilateral, and could be sued on at law. *Waters, Ex parte, Hoyle, In re*, 8 L. R., Ch. 562; 28 L. T. 757; 21 W. R. 554.

Held, secondly, that the damages sustained by the owner of the weaving-shed were such as could be fairly estimated, and that W. was entitled to prove for them in the liquidation. *Id.*

**Building Contract—Bankruptcy of Contractor—Penalty.**—A contract for the erection of buildings provided that they should be completed by the 25th of December, and that in default thereof the contractors should forfeit to the employer 10l. per week for every week after that date during which the buildings should remain unfinished; also that, if the contractors were prevented by bankruptcy or any other cause from completing, the employer might rescind, and that the moneys then already paid should be considered the full value of the works executed. There were various other stipulations, and a final provision that, in case the contract should not be in all things duly performed by the contractors, they should pay to the employer 1,000l., as and for liquidated damages. Before the 25th of December the contractors filed a liquidation petition. Their trustees carried on the works for a time, and then abandoned the contract. Another builder was employed to complete the works, which were not finished till long after the 25th of December:—Held, that the 1,000l. was in the nature of a penalty, and that the employer was entitled to prove in the liquidation only for the actual damage he had sustained by the delay in the completion of the works. *Newman, In re, Capper, Ex parte*, 4 Ch. D. 724; 46 L. J., Bk. 57; 35 L. T. 718; 25 W. R. 244—C. A. Reversing, 46 L. J., Bk. 6; 35 L. T. 558; 25 W. R. 100.

— **Covenant to Assign after-acquired Chattels.**—A debtor by a bill of sale assigned for value to a creditor certain specified chattels at his place of business, "and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof." The debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy:—Held, that the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign, for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order of discharge. Whether the same rule applies to a

covenant in a marriage settlement to settle future property, *quære*. *Collyer v. Isaacs*, 19 Ch. D. 342; 51 L. J., Ch. 14; 45 L. T. 567; 30 W. R. 70—C. A.

**When Proof to be made—Second Proof in Absence of Fraud after Release of Trustee.**—The lessee of a house and premises, having filed a liquidation petition early in August, 1881, the trustee on the 24th November following disclaimed the lease. The lessor tendered a proof on the 14th December in respect of rent and dilapidations for 117l. 14s. 4d., which was admitted, and also claimed unliquidated damages sustained by reason of the disclaimer, but named no amount. At a meeting of the creditors held on the 6th January, 1882, a dividend of 1s. 6d. in the pound was declared payable on the 20th, and at the same meeting a resolution was passed to release the trustee as from that day. The lessor on the 4th March sent in a second proof for 309l. 7s. 6d., in respect of unliquidated damages, and claimed to be paid the dividend thereon:—Held, that in the absence of fraud the remedy of the lessor was by an action at law outside the bankruptcy, inasmuch as if any default had been made by the trustee, his liability for such default had been discharged by the release, and no fraud was alleged against him. *Barnard, Ex parte, Gill, In re*, 46 L. T. 824.

Semble, a creditor, who with full knowledge of his rights neglects to assert them until after the estate has been fully administered and the trustee released, comes too late to prove for unliquidated damages and claim a dividend thereon. *Id.*

**Liquidated Damages in respect of Contracts—Covenant to Insure.**—Saw-mill proprietors, employed by a timber merchant to saw timber for him, agreed to keep it insured from damage by fire, and to pay him the value of it if it should be burned. A fire having taken place, the timber was burned, and its quantity and quality were not in dispute, but the price had not been agreed upon before the sawyers became bankrupt:—Held, that the value of the timber constituted a provable debt. *Bateman, Ex parte*, 8 De G., Mac. & G. 263; 25 L. J., Bk. 19; 2 Jur., N. S. 265; *S. P., Harrison, Ex parte*, 26 L. J., Bk. 30; 3 Jur., N. S. 228—L. J.

**Amount Determinable without a Jury.**—Where a creditor has a debt which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved under the commission. *Utterson v. Vernon*, 3 T. R. 539.

**Promissory Notes given to compromise Action of Tort.**—Proof was allowed on promissory notes given for liquidated damages by compromise of an action for seduction per quod servitium amisit. *Mumford, Ex parte*, 15 Ves. 289.

**Unliquidated Damages in respect of Torts—Trove or Assumpsit—Election.**—Bankruptcy is no bar to an action of trove, though the conversion happened before the bankruptcy; and where a plaintiff has an election to bring trove or assumpsit, he may bring the former, though the bankruptcy would be a bar to the latter. *Parker v. Norton*, 6 T. R. 695.

**Fraud.**—In a case of fraud by a bankrupt, a party is not bound to prove his debt under the commission, but he may waive the contract, and sue for the tort. *Parker v. Crole*, 2 M. & P. 150; 5 Bing. 63.

**Misrepresentation.**—To a declaration alleging that the defendant had been guilty of a fraudulent misrepresentation, whereby the plaintiff had been induced to advance 2,000*l.*, and thereby sustained loss, and was made bankrupt, and suffered inconvenience, and was injured in character, a plea that the loss was pecuniary, and that the bankruptcy was after the accruing of the cause of action, covers the whole cause of action. *Hodgson v. Sidney*, 1 L. R., Ex. 313; 35 L. J., Ex. 182; 12 Jur., N. S. 694; 14 L. T. 624; 14 W. R. 923.

**Selling contrary to Orders.**—Bankruptcy and certificate are no bar to an action in tort against a broker for selling out stock contrary to orders. *Ib.*

If the owner of bank stock gives to a stock-broker a power of attorney to sell, with orders not to sell without directions, and the broker sells the stock without the knowledge of the owner, and conceals the sale till a commission issues against him, his certificate is not a bar to an action in tort. *Ib.*

**Company—Promoter—Secret Agreement.**—Under a secret agreement between the vendors of a mine and G., a financial agent, who was promoting and afterwards formed a company for its purchase, G. received from the vendors part of the purchase-money without the knowledge of the company. In an action by the company to make G. liable for the amount of the secret profit he had so made, a specific sum was found due from him to the company upon that footing. G. then presented a petition for liquidation, and his creditors passed a resolution for liquidation of his affairs by arrangement; a trustee was appointed of his estate, and he obtained his certificate of discharge:—Held, that the company were to be at liberty to go in and prove against G.'s estate as creditors for the sum found due from him in the action, it not being a "demand in the nature of unliquidated damages arising otherwise than by reason of a contract." *Emma Silver Mining Company v. Grant*, 17 Ch. D. 122; 50 L. J., Ch. 440; 29 W. R. 481.

Held, also, that the debt so due from G. was incurred by "fraud" and also "breach of trust" within s. 49 of the Bankruptcy Act, 1869, and that, accordingly, G. was not released from such debt by his discharge; and he was thereupon ordered personally to pay the debt to the company, or so much thereof as should not be received by the company under the liquidation. *Ib.*

**Infringement of Patent—Account of Profits.**—Where a patentee is entitled to recover the amount of profits made by infringing his patent, the amount of those profits is not recoverable in the nature of damages, but as money had and received to his use; and he is therefore not prevented by the 31st section of the Bankruptcy Act of 1869 from proving in the bankruptcy of the infringer for the amount of those profits. *Watson v. Holliday*, 52 L. J., Ch. 543; 48 L. T.

545; 31 W. R. 536—C. A. Affirming, 20 Ch. D. 780; 51 L. J., Ch. 906; 46 L. T. 878; 30 W. R. 747.

#### 14. GUARANTEES.

**Under old Law.**—A claim, under a guarantee, for a sum certain when due is provable as a debt, and before it is due it is provable as a debt due on a contingency under 6 Geo. 4, c. 16, s. 56. *Willis, In re*, 4 Ex. 530; 19 L. J., Ex. 30; 13 Jur. 1032.

A. & Co. wrote a letter to B. in the following terms:—"We hereby become bound to guarantee to you all current obligations and engagements in your hands to which C. may be a party, and all his future obligations and engagements that may come into your hands." After the date of this letter, B. discounted bills for C., and A. and Co. became bankrupt:—Held, that under this guarantee B. was entitled to prove against the estate of the bankrupts the debt incurred in respect of discounting the bills. *Littlejohn, Ex parte*, 3 Mont., D. & D. 182; 12 L. J., Bk. 31; 7 Jur. 474.

**Release of principal Debtor.**—A. and B. gave a joint and several promissory note to C., A. being principal and B. surety. A. afterwards executed a deed of assignment for the benefit of his creditors, which deed contained a release by the creditors, without any reservation of their remedies against the sureties. C. executed this deed with the privity and approbation of B. and on the understanding that his remedies against B. were not to be prejudiced. C. and two others, who, with him, were trustees of the deed, were the only creditors who executed it; and A. was soon afterwards adjudged bankrupt, the execution of the deed being the act of bankruptcy. A few days after the execution of the deed, B. committed an act of bankruptcy, and was adjudged bankrupt:—Held, that C. was entitled to prove on the note against the estate of B. *Harvey, Ex parte*, 4 De G., Mac. & G. 881; 1 Bk. & Ins. R. 220; 23 L. J., Bk. 26.

**Bond not Forfeited before Bankruptcy of Surety.**—If a bond by a principal and surety has not been forfeited before the bankruptcy of the surety, the debt is not barred by the certificate. *Alsop v. Price*, 1 Dong. 160.

**Bond, when Forfeited.**—A bond executed by the defendant, as surety for J., March 1st, 1832, was conditioned for payment of 5*l.* interest on a principal sum of 200*l.*, on the 1st March, 1833; 5*l.* on the 1st March, 1834, and 205*l.* on the 1st March, 1835. The first year's interest was not paid till March 30th, 1833. In June, 1833, the defendant became bankrupt:—Held, that the bond had been forfeited, and was therefore provable under his commission, and consequently that his certificate was a bar to the action. *Skinners' Company v. Jones*, 3 Bing. N. C. 481; 4 Scott, 271.

A. B. in consideration of one per cent., guaranteed to C. D. & Sons the payment of one half of the price of certain bales of wool purchased by W. & E., who had given their acceptance at eight months for the full amount to C. D. & Sons. W. & E. and A. B. severally became bankrupt. A. B. had not obtained his certificate, and no dividend had been declared when the bill was dishonoured. A proof by C. D. against

the estate of A. B. for the amount guaranteed, was allowed. *Crook, Ex parte*, 17 L. J., Bk. 8; 12 Jur. 411.

A liability as surety in a bastardy bond is not discharged by the surety's bankruptcy and certificate. *St. Martin (Overseers) v. Warren*, 1 B. & A. 491; 2 Stark. 188.

#### 15. INTEREST ON DEBTS.

**Interest Stops at Date of Fiat.]**—Interest on a debt stops at the date of the fiat; and a creditor cannot apply his security in the first place in payment of subsequent interest and then prove for his debt, which he otherwise might, namely, his original debt and interest up to the date of the fiat; but must, in the absence of a contract entitling him thereto, apply the security in reduction of the provable debt. *Pollard, Ex parte*, 4 Jur. 1018.

**Bond—Interest up to Amount of Penalty.]**—Where proof is in respect of a debt secured by a bond, the rule is, that a specialty creditor cannot have interest beyond the penalty contained in his security, but up to the penalty of the bond he will be entitled to interest at the rate secured by the bond. *Day, Ex parte*, 9 L. T. 350.

For interest beyond the penalty he may come in with creditors whose debts do not carry interest. *Ib.*

**Purchase-money Chargeable on Property Bought.]**—If, upon the sale of an estate, the vendor covenants that on payment of the purchase-money he will grant, sell and convey, and the vendee covenants to pay the purchase-money on or before a day certain, or whenever a good title should be tendered to him; and it is agreed that the vendee, on or before the day named for payment, may require the purchase-money to remain a charge upon the premises, so that, upon the completion of the conveyance by the vendor, the vendee should execute to him a proper mortgage, for securing the purchase-money, with interest; but if the interest should be in arrear for thirty days, the vendee should be considered as a tenant to the vendor, from the date thereof, at a yearly rent, with power to the vendor to distrain as for rent reserved by lease, to the end that the interest and costs should be fully satisfied; and the vendee requires the purchase-money to remain charge, and he is let into possession, and receives the rents; and the vendee becomes bankrupt and, half a year's interest being in arrear for more than thirty days, the vendor distrains on the tenants, and the assignees satisfy the distress; and the vendee obtains his certificate, and the vendor brings an action against the bankrupt, to recover interest accrued subsequently to the certificate; the certificate is a bar, as the claim for interest was provable. *Hope v. Booth*, 1 B. & Ad. 498.

**Equitable Mortgage.]**—The language of the orders of the Court of Bankruptcy must be construed with reference to the settled rules of the court; and it being the settled practice of the court, that where a security consists of an equitable mortgage, and the mortgagee after a bankruptcy presents a petition for the realization of the security, he is not entitled to any interest subsequent to the date of the fiat:—Held, that where securities by way of equitable mortgage

comprised joint property of bankrupt partners, separate property of one partner, and property of a stranger, and the mortgagees being joint and separate creditors elected to prove against the separate estates, an order made on their petition and directing an account of principal and interest due to them without express limitation of the calculation of the interest to interest due at the date of the fiat, did not entitle them to a calculation of, or to retain out of the proceeds of the securities, interest subsequent to the date of the fiat. *Lubbock, Ex parte, Flood, In re*, 4 De G., J. & S. 516; 32 L. J., Bk. 58; 9 Jur., N. S. 854; 8 L. T. 474.

**Loan Repayable by fixed Sums for both Principal and Interest.]**—A loan society advanced 250l. to B. upon terms of his paying to the society 550l. in respect of the loan and interest by monthly instalments. B. having paid several instalments to a considerable amount filed his petition. At the first meeting the society claimed to prove for 313l. 10s. 6d. as the balance due to them:—Held, that the society was entitled to prove for the full amount claimed upon the ground that the original debt was a certain sum of 550l., and consequently did not come within the rule, by which all interest is made to cease at the date of the bankruptcy. *Cockburn, Ex parte, Lundy, In re*, 39 L. T. 362—C. A.

**Mortgage to Building Society—Principal and Interest payable by Monthly Instalments.]**—A mortgage to a building society provided that the loan, with a premium and interest on the advance, should be paid in equal monthly instalments during a term of twelve years, and that each monthly instalment, when paid, should be applied (1) in payment of the interest due at the time of payment; (2) in payment of the premium till the whole should be discharged; and (3) in payment of the principal. Two years after the execution of the mortgage, the mortgagor filed a liquidation petition, and the society claimed to prove in the liquidation for the total amount of the monthly instalments which remained due under the deed, less the amount at which they valued their security:—Held, that, as to so much of the sum claimed as represented interest payable subsequently to the filing of the liquidation petition, the proof must be rejected. *Bath, Ex parte, Phillips, In re*, 22 Ch. D. 450; 48 L. T. 293; 31 W. R. 281—C. A.

**Inspectorship Deed under Act of 1861—Appropriation of ascertained Value of Securities.]**—A debtor executed an inspectorship deed under the Bankruptcy Act, 1861. A judge in Chancery ascertained the value of the securities held by the secured creditors, which value the creditors were to take in discharge of their debts, and to be allowed to prove for the deficiency:—Held, that the rule in bankruptcy prevailed, and that the value so ascertained must go in reduction of the principal and interest due to the secured creditors at the date of the inspectorship deed, and to be proved for by the creditors, and could not be applied by the creditors in the first place towards payment of interest accrued on their debts since the date of the inspectorship. *Sewis, In re*, 7 L. R., Ch. 760; 42 L. J., Bk. 14; 27 L. T. 466; 20 W. R. 1027.

**Proof by Bill Brokers for Interest on Amount paid under Guarantee.]**—It being proved to be the common and almost invariable practice of bill brokers in the city of London not to indorse each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to the bankers a general guarantee for all bills which they re-discount with them :—Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee, and are also entitled to prove against the estate of the acceptor for interest upon the amount which they have paid under their guarantee. *Bishop, Ex parte, Fox, In re*, 15 Ch. D. 400; 50 L. J., Ch. 18; 43 L. T. 165; 29 W. R. 144—C. A.

**In Case of Surplus.]**—Interest, in case of a surplus, is to be calculated on the whole debt up to the first dividend, then upon the principal money unpaid, after deducting the amount of the dividend, up to the second dividend, and so on. *Haynes, Ex parte*, 2 Glyn & J. 123.

**Effect of Receipt.]**—Interest out of a surplus is given to a judgment creditor, from the date of the commission to the time when the principal sums were paid, notwithstanding the securities were at the time delivered up to the assignees, with receipts in full indorsed on them, the creditors apprehending the estates would not produce a surplus, which proved to be a mistake. *Day, Ex parte*, 2 Rose, 148.

**Surety.]**—A surety, paying after bankruptcy to a creditor who has proved, can only stand in his place, upon the bankrupt's estate; and, in case of a surplus, can claim no interest which the creditor could not have claimed. *Houston, Ex parte*, 2 Glyn & J. 36.

**Partners.]**—A separate creditor is not entitled to interest from the surplus, until joint creditors have been paid in full. *Minchin, Ex parte*, 2 Glyn & J. 287; *S. P., Clarke, Ex parte*, 4 Vea. 677.

When there is a surplus upon an estate of three, which is indebted to two, the creditors of the three are entitled to interest before the surplus is carried to the estate of the two. *Ogle, Ex parte*, 1 Mont. 350.

#### 16. JUDGMENTS, ORDERS, AND DECREES.

**Power to impeach Verdict.]**—A verdict is only *prima facie* evidence of a debt, which the creditors or the bankrupt are at liberty to impeach, and into the circumstances of which, if impeached, the commissioners are bound to inquire. *Butterfield, Ex parte*, 1 Rose, 198.

**Power of Court to go behind Judgment.]**—The Court of Bankruptcy will go behind a judg-

ment or a compromise, and refuse to admit a proof founded upon it, if it can see that the original claim was not a *bona fide* one, but was made for purposes of extortion, the claimant knowing that he had no legal claim, but being aware of circumstances affecting the character of the defendant which would prevent the latter from submitting to a cross-examination. *Banner, Ex parte, Blyth, In re*, 17 Ch. D. 480; 44 L. T. 908; 30 W. R. 24—C. A.

A plaintiff recovered judgment by default, the defendant having at the time an equitable defence to the action, upon which the Court of Chancery, upon an application, would have granted an injunction to restrain the action. The defendant having afterwards become bankrupt :—Held, that the jurisdiction in bankruptcy, being both legal and equitable, the court would not admit a proof tendered by the plaintiff upon the judgment. *Mudie, Ex parte*, 6 Jur. 1093.

A debtor, in failing circumstances, for his own purposes, caused judgment to be entered up against himself upon a warrant of attorney executed by him in favour of a creditor, who was ignorant both of the execution of the warrant of attorney and of the judgment being entered up until long afterwards. Upon the bankruptcy of the debtor :—Held, that the creditor was not entitled to prove in respect of the judgment for the purpose of avoiding his debts being barred by the Statute of Limitations. *Rorie, Ex parte*, 2 Mont., D. & D. 631; 6 Jur. 897.

**Value in Detinue.]**—When a verdict in an action has been obtained for 100*l.* in default of delivery of a chattel to the plaintiff, he cannot, before issuing execution, be considered as a creditor of the defendant for the 100*l.* *Scarth, In re*, 10 L. R., Ch. 234; 44 L. J., Bk. 29; 31 L. T. 73; 23 W. R. 153.

**Damages against Co-Respondent.]**—Damages awarded in the Divorce Court by the verdict of a jury against a co-respondent are provable as a debt within the Bankruptcy Act, 1869, s. 31. *Langridge, Ex parte, Graham, In re*, 19 W. R. 951. See also *Muirhead, Ex parte*, 2 Ch. D. 22; 45 L. J., Bk. 65; 33 L. T. 303; 24 W. R. 351—C. A.

**Alimony.]**—A wife may not prove against her husband's estate for arrears of alimony payable to her under an order of the Divorce Court. *Rice, Ex parte*, 10 L. T. 103; *S. P., Dickens v. Dickens*, 31 L. J., Mat. Cas. 183.

**Interlocutory Costs.]**—Interlocutory costs payable under an order of *Nisi Prius*, by a defendant previous to his bankruptcy, are provable, and therefore the certificate is a discharge from them, although an attachment has been obtained before the certificate is allowed. *Jacobs v. Phillips*, 2 D. P. C. 716; 1 C., M. & R. 195; 7 Tyr. 652.

**Costs—Rule of Courts.]**—A defendant compromised an action for libel, by agreeing to apologize, and pay the plaintiff's costs. The apology was made, and a rule of court obtained, ordering the defendant to pay the costs. On default made, an attachment issued, and he was committed. While in custody he became bankrupt, and obtained his certificate :—Held, that the sum named in the rule of court was a debt

which might have been proved under the commission, and that the bankrupt was entitled to be discharged out of custody. *Riley v. Byrne*, 2 B. & Ad. 779.

— **Judge's Order.**—A plaintiff in an action obtained a judge's order for payment of the debt and costs on a particular day, in default of which he was to be at liberty to sign judgment; but the defendant not being able to pay the debt at the time specified, the plaintiff extended the time of payment, before the expiration of which the defendant became bankrupt, and the costs were not taxed until after his bankruptcy:—Held, that the plaintiff could prove for the amount of the taxed costs, as well as for the principal sum. *Ferris, Ex parte*, 2 Mont., D. & D. 746; 6 Jur. 1070.

**Judgment before Bankruptcy.**—Where a bill of exchange was dishonoured by the acceptor, and actions were brought by the holder against the drawer as well as the acceptor, and the former became bankrupt after judgment signed and a reference to the master to see what was due and to tax costs, and afterwards the acceptor paid the amount due on the bill:—Held, that the holder could prove for the costs. *Cocks, Ex parte*, De Gex, 466; 11 Jur. 270.

— **Unregistered Judgment—Promise not to Register—Nudum pactum.**—Two creditors had entered up judgment against a trader on a warrant of attorney, but had not registered it according to 1 & 2 Vict. c. 110. They attended a meeting for investigating the affairs of the trader, and were there informed by a solicitor, who attended on behalf of the general creditors, that he had in his pocket the means of preventing them from obtaining any preference. The solicitor had with him at the time a declaration of insolvency which he had previously obtained from the trader. Having made this statement, he inquired (as he deposed) of the judgment creditors whether they intended to seek any preference by means of their judgment, and received an answer from them in the negative, but he purposely abstained from mentioning registration. On the investigation taking place, it had appeared that the trader had freehold property of considerable value, and the further investigation was adjourned to an appointed day. The solicitor forebore to file the declaration of insolvency, but the judgment creditors registered their judgment a few days after that of the meeting. On the trader becoming bankrupt some months afterwards:—Held, that the judgment creditors had not precluded themselves from registering their judgment, and that the promise made by them (if any) was nudum pactum, and one into which they had been drawn, and not a representation acted upon by another party by which they were equitably bound. *Boyle, Ex parte*, 3 De G., Mac. & G. 515; 22 L. J., Bk. 78; 17 Jur. 979.

**Verdict before and Judgment after Bankruptcy.**—A judgment for damages and costs in assumpsit, was a debt contracted within 46 Geo. 3, c. 135, s. 2, and provable, though final judgment was not entered up until after the commission issued. *Birch, Ex parte*, 7 D. & R. 436; 4 B. & C. 880.

Where in an action upon a contract, the verdict

is before, and the judgment after the bankruptcy, the costs are provable. *Poucher, Ex parte*, 1 Glyn & J. 385.

— **Costs in Action for Tort.**—But not where, in an action of tort for words of the plaintiff in his trade, the defendant became bankrupt between verdict and judgment. *Longford v. Ellis*, 1 H. Bl. 29, n.

— **Costs.**—A creditor who obtains a verdict before commission against a bankrupt, is entitled to prove for his costs, as well as his debt, under the commission, though judgment was not signed till after the commission issued. *Aylett v. Harford*, 2 W. Bl. 1317.

— **Bankruptcy of Plaintiff.**—A defendant's costs, where although the verdict is given before, the judgment is not obtained until after the plaintiff has become bankrupt, are not provable under such bankruptcy. *Oxlade v. North-Eastern Railway Company*, 33 L. J., C. P. 171.

— **Judgment after Act of Bankruptcy and before Commission.**—Where a verdict is obtained before the act of bankruptcy, and final judgment signed afterwards, but before the issuing of a commission, the debt is provable. *Robinson v. Vale*, 4 D. & R. 430; 2 B. & C. 762.

— **Action of Tort—Award.**—In an action for damages for a tort, a verdict was taken, subject to the award of an arbitrator, and the defendant became bankrupt between the verdict and the award:—Held, that execution could not be issued on the judgment, either for the damages or costs; because the plaintiff might, under the commission, have proved the damages recovered by the production of the record. *Beeston v. White*, 7 Price, 209.

— **Award—Costs.**—Where a cause and all matters in difference were referred at Nisi Prius to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter; and between the time of making the order of reference and taxing costs, and signing judgment, the plaintiff became bankrupt:—Held, that the amount of the taxed costs did not constitute a debt provable under the commission, that he was not discharged as to that debt by his certificate. *Haswell v. Thorngood*, 7 B. & C. 705.

In an action to recover the balance upon an account current, a verdict for the plaintiff was taken by consent, subject to a reference to an arbitrator, who was empowered to direct that a verdict should be entered for the plaintiff or the defendant, and the costs were to abide the result of the award. After the award, which was in favour of the plaintiff, and before judgment, the defendant committed an act of bankruptcy, of which notice was given to the plaintiff in the action, but judgment was nevertheless entered up upon the award. On the defendant being adjudicated a bankrupt:—Held, that the amount for which judgment was entered up, with interest and costs, constituted a provable debt. *Harding, Ex parte*, 5 De G., Mac. & G. 367.

A. brought an action against B. for the balance of an account current. A verdict was taken by consent for 100,000*l.*, subject to a reference to

an arbitrator, who was to have power to direct a verdict to be entered for either party. After six years the arbitrator made an award in A.'s favour for 11,000*l*. Four days after the award was made, and before judgment had been signed and costs taxed, B. committed an act of bankruptcy, and gave notice of it to A. A. caused judgment to be entered up. B. was adjudged bankrupt, and A. claimed to prove for the sum awarded, with interest and costs:—Held, that A. was entitled to prove for the debt, interest and costs, as a liquidated sum, though judgment had not been signed until after notice of the act of bankruptcy; for that the award must not only be referred to and considered as standing in place of the verdict, but as something more, and therefore as establishing a provable debt, until it was shewn that it could be set aside at law. *Thorntwaite, Ex parte*, 1 Bank. & Ins. R. 254; 23 L. J., Bk. 22; 18 Jur. 760.

**Damages in Actions of Tort.**—Damages recovered in an action of tort are not, under the Bankruptcy Act, 1869, s. 31, provable in the bankruptcy of the defendant, unless judgment is signed before the adjudication. *Newman, In re, Brooke, Ex parte*, 3 Ch. D. 494; 25 W. R. 261—C. A.

If judgment is not signed till after the adjudication, even though the verdict was obtained before, the bankrupt is not discharged from the liability. *Id.*

**Nonsuit—Plaintiff Bankrupt.**—If a plaintiff becomes a bankrupt after he is nonsuited, and before the taxation of costs, the costs of the nonsuit are a debt provable under the commission. *Hurst v. Mead*, 5 T. R. 365.

So, if he becomes bankrupt before judgment of nonsuit signed. *Watts v. Hart*, 1 B. & P. 134.

**Costs not Taxed at Date of Adjudication.**—A claim for costs is a debt provable under the Bankruptcy Act, 1869, s. 31, although the costs may not have been taxed at the date of the adjudication. *Peacock, Ex parte, Duffield, In re*, 8 L. R., Ch. 628; 42 L. J., Bk. 78; 28 L. T. 830; 21 W. R. 755.

**Both Verdict and Judgment after Bankruptcy.**—If the verdict, as well as the judgment, is after the bankruptcy, the costs are not provable. *Pouchier, Ex parte*, 1 Glyn & J. 385.

Where a debt arises before bankruptcy, but a verdict is obtained and costs taxed after, the costs are considered as part of the original debt, and the certificate extends to both, because both are provable. *Lewis v. Piercy*, 1 H. B. 29.

Where a defendant became bankrupt between plea and verdict, in an action on a bail-bond, and obtained his certificate after final judgment:—Held, that the debt should have been proved, and that the certificate was a discharge from both debt and costs. *Dimsdale v. Eames*, 4 Moore, 350; 2 B. & B. 8.

**Ejectment—Action for Mesne Profits.**—Where, after a recovery in ejectment, and before an action for mesne profits, the defendant became bankrupt, and the jury did not include the costs of the ejectment in their verdict on executing a writ of inquiry in the action for mesne profits, the court refused to set aside the inquisition, because the plaintiff might have proved the costs

as a debt under the defendant's commission of bankruptcy. *Gulliver v. Drinkwater*, 2 T. R. 261.

**Divorce—Wife's Costs of abandoned Suit.**—C., having instituted a suit in the Ecclesiastical Court against his wife for a divorce, upon the ground of adultery, subsequently became bankrupt, and abandoned the suit:—Held, that the costs incurred up to the bankruptcy by the wife's proctor constituted a debt provable on C.'s separate estate. *Moore, Ex parte*, 1 De Gex, 173; 14 L. J., Bk. 19; 9 Jur. 604.

**Practice on Proof.**—A judgment and execution creditor who abandons his judgment and execution, claiming only to prove as for a simple contract debt, need not produce, for the purposes of proof, an office copy of the judgment. *Spiller, Ex parte*, 5 Jur. 659.

Where a plaintiff proves after judgment for his debt, under proceedings in bankruptcy against the defendant, it is unnecessary to enter a suggestion of such proof upon the roll. *Sainter v. Ferguson*, 7 D. & L. 301; 8 C. B. 619.

#### 17. LEASES DISCLAIMED BY TRUSTEE.

**By Landlord.**—Where the trustee disclaims an onerous agreement to take a lease for a term of years which the bankrupt had entered into, the landlord is entitled to prove against the estate for the present value of the difference between the letting value of the premises and the rent payable under the agreement. *Lynri Coal and Iron Company, Ex parte, Hyde, In re*, 7 L. R., Ch. 28; 41 L. J., Bk. 5; 25 L. T. 609; 20 W. R. 105.

**— Damages on Disclaimer of Lease for determinable Term.**—A lease of a house for twenty-one years, at a rent of 130*l*. a year, was determinable by the lessee at the end of the first seven or fourteen years of the term on his giving six months' previous notice in writing to the lessor, and paying the rent and performing the covenants up to the day of the term being determined. Near the end of the sixth year of the term the lessee filed a liquidation petition. The trustee in the liquidation disclaimed the lease. There was evidence that the house could only be let at a diminished rent:—Held, that the lessor was entitled to prove in the liquidation for the diminution in the rent up to the end of the seventh year of the term, and the amount necessary to put the house in repair. *Blake, Ex parte, McEwan, In re*, 11 Ch. D. 572; 40 L. T. 859; 27 W. R. 901—C. A.

**— Lease of Partnership Premises to Partners as Joint Tenants—Joint and Several Covenant to pay Rent.**—When the trustee in bankruptcy of partners disclaims a lease of premises used by the partners for partnership purposes, but which was granted to the partners as joint tenants, they entering into a joint and several covenant to pay the rent, s. 23 of the Bankruptcy Act, 1869, gives the lessor a right to prove against the separate estate of each partner for the injury caused to him by the disclaimer. *Corbett, Ex parte, Shand, In re*, 14 Ch. D. 122; 49 L. J., Bk. 74; 42 L. T. 164; 28 W. R. 569—C. A.

**— On Covenants in Lease.**—By a covenant in the lease the landlord agreed, at the end or



other the sooner determination of the term, to pay and allow to the tenant for (inter alia) the hay and straw grown in the last year, which should be left for the incoming tenant, at a feed price. Certain other farming covenants in the lease had been admittedly broken by the tenant:—Held, that, by reason of the operation of the disclaimer by the trustee, the lease must be considered as at an end for all purposes; and that therefore the landlord must pay for the hay and straw at the market price:—Held, also, that the landlord could not be entitled to damages in respect of breaches of the covenants in the lease. *Dyke, Ex parte Morrish, In re*, 22 Ch. D. 410; 52 L. J., Ch. 570; 48 L. T. 903; 31 W. R. 278—C. A. Affirming, 47 L. T. 26; 30 W. R. 952.

**By Under-Lessee.**—If the underlease is made at a rent less than the rent reserved by the original lease, the under-lessee is, after the disclaimer, entitled to prove in the bankruptcy for the value of the difference between the two rents. *Walton, Ex parte Levy, In re*, 17 Ch. D. 746; 50 L. J., Ch. 657; 45 L. T. 1; 30 W. R. 395—C. A.

#### 18. PAROCHIAL RATES.

One year's parochial rates due at the date of the bankruptcy may be paid in full. *Saberton, In re*, 9 L. T. 267.

A sum assessed by way of poor rate was a claim or demand provable under a commission of bankruptcy under 5 & 6 Vict. c. 122, s. 7; and a certificate was, therefore, a bar to any subsequent proceedings under 43 Eliz. c. 2, to levy the amount by distress and sale of the bankrupt's goods. *Burwash, Ex parte*, 1 L. M. & P. 60; 19 L. J. M. C. 115.

#### 19. PERIODICAL PAYMENTS.

**Before 24 & 25 Vict. c. 134.**—Bankruptcy during the currency of a quarter and subsequent certificate were no bar to an action by a schoolmaster for board and tuition of the bankrupt's son under a quarterly contract, the demand not being a debt not payable at the time of the bankruptcy within 12 & 13 Vict. c. 106, s. 172, or a liability to pay money upon a contingency, within s. 178. *Hopkins v. Thomas*, 7 C. B., N. S. 711; 29 L. J., C. P. 187; 6 Jur., N. S. 301; 8 W. R. 262.

School money for the education of a son, payable half-yearly, is not a debt due until the end of the half-year, so as to be provable under a commission against the parent who becomes bankrupt a few days before the end of the half-year, though he had, just before his bankruptcy, taken his son home for the holidays, the contract not being thereby put an end to; and consequently the bankrupt's certificate was no bar to an action for the half-year's education. *Parslow v. Dearlove*, 4 East, 438; 1 Smith, 281; 3 Esp. 78.

Bankruptcy is not a discharge of a promise to allow a weekly sum for the support of an illegitimate child; but if any arrears accrued before the bankruptcy, the certificate will be a discharge as to such arrears. *Millen v. Whittenbury*, 1 Camp. 428.

#### 20. PREMIUMS UPON POLICIES OF INSURANCE.

**Before 24 & 25 Vict. c. 134.**—A trader covenanted by an ante-nuptial settlement to pay the premiums on certain assigned policies on his life; or, if he failed to do so, to repay to the trustees the amount which they should pay in respect of the premiums. On his becoming bankrupt:—Held, that the trustees could not prove for the amount required by the offices to be paid to keep up the policies during the remainder of his life. *Whitmore, In re*, 3 De G. & S. 565; 13 Jur. 185, n.

A. being indebted to B. assigned to him a policy on his life, and covenanted to pay the annual premiums, and in case he did not, and B. should pay them, he would repay him the amount with interest, on demand. A. afterwards became bankrupt and obtained his certificate. A premium accruing due after the bankruptcy, and being unpaid by A., and B. having paid it, and not being repaid:—Held, that A. was not discharged, by virtue of 12 & 13 Vict. c. 106, ss. 178, 200, from liability for the breach of the first of these covenants, but that he was discharged quoad the breach of the second covenant. *Yong v. Winter*, 16 C. B. 401; 24 L. J., C. P. 214; 1 Jur., N. S. 960; *S. P.*, *Toppin v. Field*, 4 Q. B. 386; 3 G. & D. 340; 12 L. J., Q. B. 148; 7 Jur. 257.

The defendant, being indebted to the plaintiff, assigned to him, as security, an insurance on the defendant's life, and an insurance on the life of his wife, and covenanted to pay the premiums. The plaintiff sued the defendant on this covenant, assigning as a breach that he had not paid the premiums. The defendant pleaded his bankruptcy and certificate, averring that they had occurred after the execution of the deed, but not that they had occurred after the breach had taken place:—Held, that the plea was no answer to the claim, the claim not being in respect of, nor a liability to pay the money upon, a contingency within 12 & 13 Vict. c. 106, s. 178. *Warburg v. Tucker*, El. Bl. & El. 914; 28 L. J. Q. B. 56; 4 Jur., N. S. 1142—Ex. Ch. Affirming, 5 El. & Bl. 384; 24 L. J., Q. B. 317; 1 Jur., N. S. 871. *S. P.*, *Mitcalfe v. Hanson*, 1 L. R., H. L. Cas. 242; 35 L. J., Q. B. 225.

**Principal and Surety.**—A surety, who has covenanted to pay premiums due on a policy of insurance in the event of his principal not doing so, cannot maintain an action against his principal for premiums paid after the principal has obtained his certificate under the above section. *Saunders v. Best*, 17 C. B., N. S. 731; 10 Jur., N. S. 1204; 11 L. T. 421; 13 W. R. 160.

#### 21. RENT.

**Under old Law.**—Before the statute a certificate discharged a bankrupt from an action on the reddendum in a lease, whether the rent accrued due before or after the bankruptcy. *Wadham v. Marlowe*, 2 Chit. 600; 4 Dougl. 54; 1 H. Bl. 437, n.; 1 T. R. 91; 8 East, 314, n. And see *Gill v. Scrivens*, 7 T. R. 27.

But the bankruptcy of the lessee could not be pleaded in bar of an action of covenant for rent. *Mills v. Auriol*, 1 H. Bl. 433; 4 T. R. 94.

A parol lease was within 6 Geo. 4, c. 16, s. 75.

*Hopton, Ex parte*, 2 Mont., D. & D. 347; 5 Jur. 804.

**Distress before Bankruptcy—Right to Retain.]**

—A landlord levied a distress for rent, and, before he sold, the tenant was adjudicated bankrupt, and then the sale took place under the distress. The commissioner decided that the landlord was only entitled to retain one year's rent; but, on appeal,—Held, that the landlord was, under the 3 & 4 Will. 4, c. 27, s. 42 (the Statute of Limitations), entitled to six years' rent out of the proceeds of the sale. *Bayly, Ex parte*, 22 L. J., Bk. 26.

A landlord having distrained and levied for four years' rent on the 11th October, 1861, the tenant, a non-trader, was adjudicated a bankrupt on his own petition on the 17th October, 1861, under 24 & 25 Vict. c. 134, ss. 86, 87. In March, 1861, he had committed a previous act of bankruptcy, he being then a trader:—Held, that the landlord was entitled to the whole of the rent, and was not limited to one year's rent only by 12 & 13 Vict. c. 106, s. 129, for the act of bankruptcy mentioned therein means one to which the title of the assignees could relate, and that their title could not relate to the act of bankruptcy in March. *Paull v. Best*, 3 B. & S. 537; 32 L. J., Q. B. 96; 7 L. T. 738.

**12 & 13 Vict. c. 106, s. 129, does not affect Right to Distrain Goods of a Third Party.]**—A.,

being tenant from year to year to B. of a mill, at the rent of 1,400*l.*, payable quarterly, assigned to C. the machinery and effects in the mill, by way of mortgage, to secure 14,900*l.*, with a power of entering and taking possession of the machinery and effects, and of selling the same in default of payment. In July, 1856, C. took possession of the machinery and effects, and afterwards A. became bankrupt. At the time of the bankruptcy 1,948*l.* was due from A. to B. for rent of the mill, including the quarter's rent due on the 16th July, 1856. After A. had become bankrupt, and while the machinery and effects remained in the possession of C., B. gave notice to C. that he intended to distrain for the 1,948*l.*; and C., for the purpose of preventing the distress, paid B. 1,306*l.* (the amount of one year's rent, deducting the property tax). On the 5th September, 1856, an order was made that the assignees of A. should elect to accept or decline the tenancy of the mill, and they declined it; but neither A. nor C., nor the assignees ever offered to surrender the possession of the mill to B., and C. continued in possession of the mill, machinery and effects until the same were sold:—Held, first, that 12 & 13 Vict. c. 106, s. 129, by which no distress for rent levied upon the goods or effects of any bankrupt shall be available for more than one year's rent, did not prevent B. from distraining for more than a year's rent due on the 16th July, 1856, as the machinery and effects had ceased to be the goods of the bankrupt, and the object of the section was to protect the property of the creditors. *Brocklehurst v. Lowe*, 7 El. & Bl. 176; 26 L. J., Q. B. 107; 3 Jur., N. S. 436.

Held, secondly, that the tenancy not having been put an end to on the 16th October, 1856, the machinery and effects were liable to be distrained for the quarter's rent then due. *Ib.*

**Distress after Act of Bankruptcy—Protected Transaction.]**—A landlord may distrain for rent

after an act of bankruptcy; therefore, money paid to him by a bankrupt tenant to avoid a threatened distress, is a protected payment; and cannot be recovered back by the assignees. *Stevenson v. Wood*, 5 Esp. 200. And see *Maror v. Croome*, 8 Moore, 171; 2 Bing. 261.

**Replevin—Retorno habendo—Action against Assignees.]**—If goods are distrained for rent,

and replevied by the tenant, and afterwards (the tenant becoming a bankrupt) they are sold by the assignees, the landlord succeeding in the replevin, and obtaining a retorno habendo, cannot recover the amount of the rent against the assignees as money had and received. *Boddyll v. Jones*, 4 Doug. 52.

**Liability of Assignees.]**—When a bankrupt holds under a lease, rendering rent, the assignees are not liable for rent becoming due after the bankruptcy, if they have never taken possession of the premises occupied by the bankrupt. *Bowdillon v. Dalton*, 1 Esp. 223; Peake, 238.

The assignees of a bankrupt having entered into the possession of land in the middle of a quarter, which the bankrupt had agreed to take upon a building lease, upon the terms of paying the rent half-yearly:—Held, that an action for use and occupation would lie against them for the whole year, though they had not occupied during all the time. *Gibson v. Courthope*, 1 D. & R. 205.

**Paying out Distress on Property.]**—A person who has paid off a distress on a bankrupt's property, and made other payments after adjudication whereby the estate is benefited, and the creditors have the advantage thereof, is entitled to be repaid the same before the creditors receive any dividend out of the estate. *Kennard, Ex parte, Humphreys, In re*, 21 L. T. 684.

## 22. STOCK CONTRACTS.

The amount due for damages for breach of a covenant to replace stock in a railway company on a given day is provable under the bankruptcy of the covenantor, as a demand within 12 & 13 Vict. c. 106, s. 165. *Beteley v. Stainby*, 12 C. B., N. S. 477; 31 L. J., C. P. 307; 9 Jur., N. S. 440; 6 L. T. 893.

So, also, the amount of damages sustained by a breach of a covenant to indemnify against the payment of calls on mining shares assigned as security for the replacement of such stock. *Ib.*

But the discharge of an insolvent under the 1 & 2 Vict. c. 110, did not release him from a claim for unpaid damages for not redelivering mining shares, pursuant to a contract for that purpose. *Owen v. Routh*, 14 C. B. 327; 23 L. J., C. P. 105; 18 Jur. 356.

See further, CONTINGENT DEBTS AND LIABILITIES, ante.

## 23. BY AND AGAINST PARTICULAR PERSONS.

### a. Against Assignees of a Bankrupt.

#### Right of Creditor of original Bankrupt.]

—If an assignee who has received effects becomes bankrupt, a creditor under the commission in which he was assignee, but who proved his debt after the bankruptcy of the assignee, is not en-

titled to any proof under the assignee's commission. *Stonehouse, Ex parte*, Buck, 531.

At a dividend meeting under a commission against A., a claim was entered on behalf of B., and a sum ordered to be appropriated in the hands of C., the sole assignee, to answer eventually the amount of the several sums proved and claimed; but before the claim of B. was perfected into a proof, C. misapplied the money so placed in his hands, and became bankrupt:—Held, that B. was not entitled to recover from the estate of A. his proportion of the sum appropriated in the hands of C., and misapplied by him. *Grant, Ex parte*, 1 Mont. & Mac. 77.

**Co-Assignees of Bankrupt.]**—Two of three assignees became bankrupt; the solvent assignee paid a debt due from the three to the estate:—Held, that he was entitled to prove a third of the debt against each of the other assignees' estates. *Hunter, Ex parte*, Buck, 552.

Two assignees, one solvent, the other a bankrupt with a partnership to which he had advanced money which he had as assignee, the solvent assignee cannot prove this under the joint commission, there being no contract with him. *Apsay, Ex parte*, 3 Bro. C. C. 265.

**Assignee buying Bankrupt's Goods.]**—An assignee having purchased goods at a sale under the commission, became bankrupt:—Ordered, that such of the goods that remained in specie should be redelivered, and that what he had resold should be proved as a debt. *Spong, Ex parte*, 1 Rose, 133.

#### b. By Bankrupt as Trustee for Others.

**Not to receive Dividends.]**—A bankrupt trustee allowed to prove, but not to receive trust dividends. *Strettell, Ex parte*, 1 Mont. & Chit. 165.

The court ordered a bankrupt executor to prove against his own estate, and the assignees to pay the dividends into the hands of the accountant-general, to the credit of a cause pending for the administration of assets. *Coleman, Ex parte*, 2 Deac. & Chit. 584.

A bankrupt cannot be heard on a petition to prove, pro or con; and, if served, must be paid his costs of appearance. *Fairman, Ex parte*, 4 Mont. & Chit. 125.

An executor bankrupt cannot, without an order of the court, prove under his own commission, in respect of a debt due from him to the testator's estate. *Shaw, Ex parte*, 1 Glyn & J. 127.

Petition by an executor, who had become bankrupt, for liberty to prove a debt against his own estate, in the character of executor. *Snowlton, Ex parte*, 12 L. J., Bk. 37.

An executor and trustee having committed a devastavit, is precluded from proving under his bankruptcy. *Moody, Ex parte*, 2 Rose, 413.

Where a bankrupt is executor, and money of his testator comes to the hands of his assignees, he shall be admitted a creditor for that money; but the dividends shall be paid into the bank, for the use of the creditors of the deceased. *Leeks, Ex parte*, 2 Bro. C. C. 596.

Where a bankrupt and another are executors of a creditor of the bankrupt, the court will permit the other executor to prove the debt, though

there is a suit depending in the ecclesiastical court as to the executorship. *Shakeshaft, Ex parte*, 3 Bro. C. C. 198.

One of three executors becoming bankrupt, the others may prove against his estate for a debt due to the testator. *Brown, Ex parte*, 1 Deac. & Chit. 119.

Where a trustee indebted to the trust becomes bankrupt, it is his duty to prove the debt; and if he neglects so to do, he is liable for the loss, notwithstanding his certificate. *Orrett v. Corser*, 21 Beav. 52.

#### c. Bankers.

**Omission to Transfer from one Account to another—Set-off.]**—Bankers stopped payment, being indebted to A., on his separate account, and creditors of A. & B., on their joint account. A. assigned the credit to A. & B., and gave notice to the bankers to transfer it accordingly, which they neglected to do. Afterwards the bankers committed an act of bankruptcy, and were declared bankrupts:—Held, that, in equity, A. and B. were not entitled to set off the two debts. *Watts v. Christie*, 11 Beav. 546; 18 L. J., Ch. 173; 13 Jur. 244, 845.

**Shares lent to Bankers.]**—Upon a loan of 28,000*l.* Cuba bonds by a customer to his bankers, the latter engaged to replace them at or within the expiration of three months, if he should require them to do so, and to deposit other securities for the performance of this engagement. After the expiration of the three months, without any requisition on the part of the customer, the customer consented to an exchange of other securities for those deposited by the bankers without any new stipulation as to the period of redemption, and the bankers afterwards became bankrupts:—Held, that the time for replacing the Cuba bonds became indefinite, and that the bankers were not bound to replace them until requested to do so; and that no such request having been made by the customer before their bankruptcy, the customer had no right to prove for the amount of the bonds under the fiat. *Eyre, Ex parte*, 3 Mont., D. & D. 12; 1 Ph. 227; 12 L. J., Ch. 266; 7 Jur. 162.

#### Securities deposited with Bankers—Tortious Act of one Partner.]

—A customer deposited a box containing various securities with his bankers for safe custody, and afterwards granted a loan of a portion of such securities to one of the partners in the banking-house for his own private purposes, upon his depositing in the box railway shares to secure the replacing of the securities thus lent. This partner afterwards, for his own purposes, and without the knowledge of the customer, subtracted the railway shares, and substituted others of less value:—Held, that, as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm was not answerable for this tortious act of their partner for his own benefit, and, consequently, that the customer had no right of proof against the joint estate for the amount of the difference between the value of the shares subtracted and those that were substituted. *Id.*

Held, also, that the partners were not chargeable with any loss occasioned by this subtraction of the shares, on the ground of negligence; and that even if they were, it would be a claim

for unliquidated damages, and, therefore, not provable against the joint estate. *Tb.*

**Payment in Full—Securities given to Banker for Collection.]**—A customer, having at the time a balance in his favour at his bankers, indorsed generally a bill of exchange for 50*l.*, which he deposited with them, together with a cheque for 7*l.*, being at the time credited by 57*l.* in his account with the bank. He also sent to them a bank post bill for 48*l.* 9*s.* 10*d.* inclosed in a letter, directing them to place it to his account. Before the bill of exchange became due, a fiat issued against the bankers:—Held, that the customer was entitled to be paid in full the amount of the bill of exchange which had been received by the assignees under the fiat, on the bill becoming due; and that he was also entitled to the bank post bill, or to the amount thereof, if received. *Atkins, Ex parte*, 3 Mont., D. & D. 103; 12 L. J., Bk. 28; 7 Jur. 95.

**—Dealings between Banks.]**—Customers draw cheques on their bankers, with whom their accounts are already overdrawn, and pay away the cheques, which come to the hands of other bankers. The second bankers remit to the first the cheques in a printed circular, desiring the amount of them to be paid to the London correspondents of the second bankers. Notwithstanding this circular, the custom between the bankers is to pay one another's cheques, so far as circumstances permit, by remittances of notes of the bankers sending the cheques directly to those bankers; the understanding being, however, that the cheques should be paid on the day on which they are received, or the day following, either by such remittances, or by remittances according to the directions of the circular. The first bankers give the second credit in their books for the amount of the cheques, but become bankrupt three days after receiving them, and without having made any payment or remittance in respect of them, knowing at the time of receiving the cheques that bankruptcy was inevitable. The assignees obtain payment from the customers of the full amount of the cheques:—Held, that the second bankers were entitled to payment in full of the same amount out of the bankrupt's estate. *Cole, Ex parte*, 3 Mont., D. & D. 189.

**Bankers or Trustees.]**—A trustee permitted the trust fund, as the moneys were from time to time realized, to be paid into the hands of certain bankers, who had knowledge of the trusts. One of the partners, without the assent of the trustee, dealt with a portion of the fund, by investing it on mortgage:—Held, that the bankers were not jointly and separately liable in the character of trustees, but that they only incurred a liability as between banker and customer, and that, on the bankruptcy of the bankers, the trustee could only prove, against their joint estate, for such balance as was in their hands at the time of the bankruptcy. *Burton, Ex parte*, 3 Mont., D. & D. 364.

**Bankers Members of a Bankrupt Firm—Right to Prove.]**—Two of the members of an iron company carried on a distinct trade as bankers, but were not the ordinary bankers of the company. They made advances, at interest, to the company for relieving it when it was in a

state of deficiency and pressure, and without taking or asking for any security, and under such circumstances as to lead to the inference that the advances would not have been made had not the bankers been partners in the company. On the company becoming bankrupt, and there being no evidence, except such as was furnished by the transaction itself, that the character of a banking transaction belonged to it:—Held, that the advances, though made in fact by bankers, were not made by them in their character of bankers, and were not consequently dealings between trade and trade, giving a right of proof against the estate of the company, the use of the facilities afforded by a trade not being necessarily a use of them in the trade itself. *Williams, Ex parte*, 3 Mont., D. & D. 433.

#### d. Creditors having Notice of Act of Bankruptcy.

A person having notice of facts from which a court or jury would infer that an act of bankruptcy had been committed, must be considered as having notice that an act of bankruptcy has been committed, notwithstanding his oath that he did not in fact draw the inference. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

A creditor who receives notice of his debtor's intention to commit an act of bankruptcy is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such notice. *Wright, In re, Arnold, Ex parte*, 3 Ch. D. 707; 45 L. J., Bk. 130; 35 L. T. 21; 24 W. R. 977—C. A.

A firm executed a bill of sale to A. of machinery, and covenanted to insure and keep it insured from loss by fire in some office to be approved of by A. during the continuance of the security, and in default with liberty to him to insure, and charge the premiums on his security. The insurance was effected in the names of the firm, and the machinery was afterwards destroyed by fire. On the day of the fire the firm assigned all their property to trustees for the benefit of their creditors. The assignment, which was intended to operate under the Bankruptcy Act, 1861, was executed by the several partners and the trustees, but was destroyed before its execution by any creditor. A. gave notice of his claim to the insurance office, having previously had notice of the deed of assignment and of its destruction. The firm afterwards became bankrupt:—Held, that the benefit of the policy did not pass to A. under the covenant to insure, and that the execution of the assignment was an act of bankruptcy, and A., having had notice, could not claim against the assignees in bankruptcy. *Lees v. Whiteley*, 2 L. R., Eq. 143; 35 L. J., Ch. 412; 14 L. T. 472; 14 W. R., 534.

B. filed a petition for liquidation on the 19th of October, 1874. A composition was resolved upon, and G. guaranteed the payment of the third instalment. Default was made by B., and G. had to pay the third instalment. On the 14th of October, 1875, B. was adjudicated bankrupt. G. sent in a proof in the bankruptcy for the amount he had paid under his guarantee. The trustee rejected the proof on the ground that G. had had notice of an act of bankruptcy available for adjudication prior to the time when the debt had been contracted; but the registrar admitted the

proof :—Held, that the words in s. 31, "notice of an act of bankruptcy available for adjudication," mean notice of an act of bankruptcy available for the making of the adjudication under which the proof was tendered. As the act of bankruptcy had been in this case committed more than six months prior to the adjudication, it was not so available, and the proof must be admitted. *Bedell; In re, Crosbie, Ex parte*, 7 Ch. D. 123; 47 L. J., Bk. 19; 37 L. T. 583; 26 W. R. 119—C. A.

In s. 31 of the Bankruptcy Act, 1869, which provides that "no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by him subsequently to the date of his so having notice," the words "available for adjudication" mean available for adjudication at the date of the order of adjudication. *Id.*

The words "notice of an act of bankruptcy available for adjudication," in ss. 31, 94, and 95 of the Bankruptcy Act, 1869, bear the same meaning, viz., notice of an act of bankruptcy available for the making of the adjudication under which the proof is tendered. *Bedell, In re, Gilbey, Ex parte*, 8 Ch. D. 248; 47 L. J., Bk. 49; 26 W. R. 768—C. A.

#### e. Infants.

**By Infant Partner.**—An infant paid, by means of borrowed money, a premium on entering into a partnership, and before he became of age disaffirmed the contract :—Held, that he could not have recovered back the premium had his partners remained solvent, and therefore he could not prove for it under their bankruptcy. *Taylor, Ex parte*, 8 De G., Mac. & G. 254; 25 L. J., Bk. 35; 2 Jur., N. S. 220.

**Against Infant—Fraudulent Representation of Full Age.**—Where an infant had obtained a loan on a representation, which he knew to be false, that he was of age :—Held, that a proof for the loan was properly admitted in bankruptcy. *Unity Joint Stock Mutual Banking Association, Ex parte, King, In re*, 3 De G. & J. 63; 27 L. J., Bk. 33; 4 Jur., N. S. 1257.

Where an ordinary proof had been at first admitted in such case, without the circumstances of the bankrupt's infancy and of the fraudulent representations having been adverted to :—Held, that the question ought not to be brought before the court in the first instance on appeal from an order expunging the proof. *Id.*

**Mode of Proof.**—The guardian of an infant may prove on his behalf. *Maltby, Ex parte*, 1 Rose, 387.

#### f. Legatees.

A pecuniary legatee is entitled to be paid in full out of a dividend payable on a proof made in respect of a devastavit committed by a bankrupt, who is executor and residuary legatee. *Turner, Ex parte*, 2 Mont., D. & D. 613; 6 Jur. 840.

Executors paid the legacies bequeathed to infants to their father, who invested them on colonial securities, and made large profits and became bankrupt :—Held, that the legatees were entitled to have proof made upon the whole

amount of the profits. *Montefiore, Ex parte*, De Gex, 171.

A feme covert, petitioning by her next friend, permitted to prove the value of a legacy of stock bequeathed to her separate use, but transferred into the name of her husband, who sold it out, and became bankrupt, and a trustee appointed to receive the dividends. *Wells, Ex parte*, 2 Mont., D. & D. 504.

Where an executor under the will of a creditor of a bankrupt firm, declines to make proof against the estate, on the ground that he is ignorant of the circumstances under which the debt accrued, the court will allow proof by the residuary legatees under the will, subject to a direction for payment of the dividend to the executor. *Caldwell, Ex parte*, 13 W. R. 952.

#### g. By and against Partners.

##### i. Joint Estate and Separate Estate.

**Joint.**—C. entered into an agreement with R., that R. should buy and sell goods on behalf of C., and that the business should be carried on as R. and Co., R. being paid by a salary and a percentage on profits. The business was managed by R., but C. had bought goods for it. Each became bankrupt :—Held, that the book debts and stock-in-trade of R. and Co. were joint estate of the two. *Rowland, In re*, 1 L. R., Ch. 421.

**Separate.**—C. and M., who carried on business as ship chandlers, each applied in his own name for certain shares in a shipowner's company. Each paid the application and allotment money on the shares allotted to him, and the shares were registered in the names of the partners severally. Each partner drew upon the partnership funds for the payment of calls upon the shares, and the amounts so drawn were debited in the books of the firm to the individual partners, and opposite to these entries in the books of the firm each partner signed his initials in red ink. The dividends on the shares were, however, carried to the profit-and-loss account of the firm. The holding of ships or shares in shipowning companies formed no part of the business of the firm, but it appeared that the partners had purchased the shares under the impression that the possession of them would be the means of introducing custom and business to the partnership. C. became bankrupt and M. claimed the shares standing in C.'s name, as joint estate of the firm :—Held, that the entries in the books of the firm amounted to a statement in writing signed by the partners that the shares were to be separate and not joint estate, and that the mode of dealing with the dividends was not contradictory to that statement, inasmuch as the effect of it was the same as if the partners (who each held an equal number of the shares) had been separately credited with the dividends. *Bolland, Ex parte, Clint, In re*, 29 L. T. 625—L. J.

**Joint Property ceasing to be such—Change of Members of Partnership.**—A., B. & C. agreed to dissolve partnership, and that A. should receive 550*l.* in discharge of his share in the concern, of which the sum of 50*l.* was agreed to be paid at the date of the agreement, and the remaining 500*l.* by five bills payable at future dates. Separate fiats were subsequently issued against A., B. & C., and the stock and effects, which

originally belonged to the firm of the three, were taken possession of and sold by the assignee under the separate fiat against B.:—Held, that the agreement of dissolution of the partnership was executed, and not executory; and that the joint creditors of A., B. & C. had no lien on such stock and effects for the payment of the debts owing to them at the time of A.'s retiring from the partnership. *Clarkson, Ex parte*, 4 Deac. & Chit. 56.

On a dissolution of partnership, the partnership stock and effects were assigned to the continuing partner on condition of his indemnifying the retiring partner against the debts of the firm. Three years afterwards the continuing partner became bankrupt:—Held, that a creditor on a joint guarantee given by the firm was entitled to prove against the separate estate of the bankrupt, the evidence adduced by the assignees of the existence of joint assets of the firm not being considered sufficiently clear. *Burdakin, Ex parte*, 2 Mont., D. & D. 704; 6 Jur. 977.

A consignment was made by one firm to another through a third, who made an advance to the first on an agreement for a lien upon the return proceeds. The proceeds were accordingly remitted to them, but before their arrival the consignors had dissolved partnership, and separate fiats had issued against each of them. By the dissolution deed it was agreed, that a portion of the partnership credits should belong to and a portion of the partnership debts should be paid by one of the partners, to whom, in pursuance of this agreement, the assignee of the other partner transferred all his interest in the return proceeds:—Held, that this interest constituted a separate and not a joint estate. *Birley, Ex parte*, 2 Mont., D. & D. 354.

Three partners, A., B. & C., dissolved their partnership, when C. executed a regular assignment of the partnership effects to A. & B., and notice of the dissolution appeared in the Gazette. A. & B. continued the business in the same firm until their bankruptcy, which was more than a twelvemonth after the dissolution and assignment:—Held, that a joint creditor of A. B. & C. could not prove against the estate of A. & B. *Gurney, Ex parte*, 2 Mont., D. & D. 541; 13 L. J., Bk. 17; 6 Jur. 630.

A covenant by two continuing partners with a third, who had retired, to pay the debts of the partnership, gives no right of proof to the creditors of that partnership in competition with the creditors of the two, nor entitles them to any lien upon the partnership effects assigned to the two in consideration of such covenant. *Id.*

A. and B. agreed to dissolve their partnership from a particular day, and published a notice to that effect in the Gazette, stating that the debts due to and by the firm would be received and paid by A. No assignment was executed of the partnership effects, but they were left in the possession of A., who continued to carry on the business in the partnership firm. Four months after the dissolution, a joint fiat issued against A. and B.:—Held, that the partnership property was not converted into the separate property of A., but was distributable among the joint creditors of A. and B. *Cooper, Ex parte*, 1 Mont., D. & D. 358; 5 Jur. 10.

Upon the dissolution of partnership between two persons, the former, who was the retiring partner, assigned all his interest in the partnership estate and effects to the latter, who, on his

part, covenanted with the former to pay all the debts and liabilities of the partnership within twenty-four months from the time of the dissolution. Separate fiats having afterwards issued against them:—Held, that certain debts incurred to them, when in partnership, and which were outstanding at the time the fiats were issued, were the joint estate of the partnership, and as such distributable amongst their joint creditors. *Hawtrey, Ex parte*, 7 Jur. 71.

Soon after the commencement of a partnership between H. and W. it was discovered that H. had drawn a large sum from the account of the partnership at the bankers' and applied the money to his own purposes. Thereupon the partnership was dissolved, and H. assigned his share of the assets to W., in order that the money misappropriated might in the first place be restored, and the assets realized for the benefit of the two, according to their respective interests. After the dissolution both W. and H. became bankrupts:—Held, that the assignment by H. converted his former joint estate into the separate estate of W. *Walker, Ex parte*, 31 L. J., Bk. 29; 6 L. T. 631; 10 W. R. 655.

By a partnership deed it was stipulated that A. and B. should be partners in the profits of the business, the capital of which belonged to A.; and that on the death of A. the partnership should be dissolved, and B.'s share of profits should thenceforth belong to A.'s representatives, and that his representatives should thenceforth carry on the business, and that B. should receive from them his share of the profits up to A.'s death. A. died during the partnership, having appointed B. his executor. B. carried on the trade for fourteen months, and then filed a petition for liquidation. Part of the stock-in-trade which existed at A.'s death still remained in specie, but the greater part had been disposed of by B. in the course of the business, and fresh stock-in-trade bought by him:—Held, that the partnership deed had not the effect of converting the stock-in-trade into separate estate of A., but that so much of the present assets as had been in existence at A.'s death was applicable as joint estate to pay the joint creditors of the firm, and so much as had been bought since A.'s death was applicable as separate estate of B. *Morley, Ex parte, White, In re*, 8 L. R., Ch. 1026; 43 L. J., Bk. 28; 29 L. T. 442; 21 W. R. 940.

D. carried on business in partnership for a term with W. and W. jun., under articles providing that D. should be a partner in the profits, but not in the capital, and should not be required to bring in any capital. After allowing interest at 5l. per cent. on the capital, which belonged solely to W., the net profits were to be divided half-yearly in certain shares. At the expiration of the term D.'s interest in the concern was to cease. If D. died during the term his representatives were to receive nothing more than a proportionate part of his share of the profits of the current half-year for the period up to his death, such proportionate part to be ascertained, not by a fresh stock-taking, but according to the average of the last two preceding half-yearly stock-takings. D. died. Afterwards W. died, and the business was carried on by W. jun., who was also executor of W., and who afterwards went into liquidation. There were at this time assets existing in specie which belonged to the business during the partnership between the three:—Held, that D.'s right to be indemnified

out of the assets against the debts of the firm had not been taken away; that the assets remaining in specie were therefore primarily applicable to payment of the joint debts of D., W., and W. jun., and that those joint creditors, therefore, could not come against the separate estate of W. jun., till his separate creditors had been paid in full. *Dear, Ex parte, White, In re*, 1 Ch. D. 514; 45 L. J., Bk. 22; 34 L. T. 631; 24 W. R. 525—C. A.

Four brothers were in business together as cotton spinners. By articles of partnership it was agreed that accounts and balance-sheets should be taken half-yearly, and that in case of death of either of the partners the capital of the deceased partner should not be withdrawn from the business, but that the amount should be ascertained at the succeeding half-yearly stock taking, and should remain secured by promissory notes at interest in the business, half for three and the other half for five years from his death. Two of the partners died within a few months of each other, and within a year from the death of the one who last died, the two surviving partners filed a petition for liquidation. Part of the assets consisted of machinery which had belonged to all four partners. On a question raised on a special case to decide whether the machinery belonged to the creditors of the four in priority to the other creditors:—Held, that the creditors of the four had no priority, but that the assets must be distributed amongst all the creditors rateably. *Furness, Ex parte, Simpson, In re*, 43 L. J., Bk. 43; 30 L. T. 134; 22 W. R. 439. Affirmed, 43 L. J., Bk. 147; 30 L. T. 448. *S. C.*, nom. *Satterthwaite, Ex parte*, 9 L. R., Ch. 572; 22 W. R. 697.

**Separate Property becoming Joint.]**—A. carried on the business of a grocer separately, and also that of an iron founder in partnership with B.; after thus trading for four years, he sold off the stock of the grocery business, and retired wholly from that trade, investing the proceeds in the iron foundry business, which, with the exception of a small sum brought in by B., constituted the whole capital of the partnership. A joint fiat was issued against A. and B., sixteen months after A. had retired from his separate grocery trade:—Held, that the creditors of A. in the grocery trade could not prove against the joint estate of A. and B. *Graham, Ex parte*, 2 Mont., D. & D. 781.

A wine merchant carrying on business under the firm of J. R. & Co., announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of J. R. sen. & Co.; but, as between the uncle and nephew, the latter received a salary only, and did not participate in the capital, profits or losses of the concern. On both becoming bankrupt:—Held, that a creditor who supplied goods to the firm might prove against the separate estate of the uncle. *Arbouin, Ex parte*, 1 De Gex, 359.

P., having dissolved a former partnership with H. and C., continued the business alone under the style of P., Son and Co., his own name alone being placed over the shop front. He employed his son to assist him in the management of the business, and authorized him to sign cheques and to order goods in the name of the firm, his intention being to take his son into partnership if the business prospered; but no partnership

was in fact entered into between the father and the son. Ultimately P. and his son were jointly adjudicated bankrupts as ostensible partners. Of fifty-seven creditors who proved in the bankruptcy two deposed that the son had been held out to them as a partner by the father, and eight others deposed that they had always believed the son to be a partner:—Held, that there had been a sufficient holding out of the son as a partner to convert the assets of the business, which were originally the separate estate of the father, into joint estate of him and his son, so far as the creditors were concerned. *Hayman, Ex parte, Palsford, In re*, 8 Ch. D. 11; 47 L. J., Bk. 54; 38 L. T. 238; 26 W. R. 597—C. A.

Held, also, that the doctrine of reputed ownership applied, and that the assets were distributable among the creditors of the firm as being in the apparent possession and reputed ownership of the firm with the consent of the true owner. *Id.*

## ii. Character of Debts.

**Joint and Several.]**—A creditor of one partner on bond for money which came to the use of the partnership, may prove against the joint or separate fund. *Cloues, Ex parte*, 2 Bro. C. C. 595.

The partner in business of a trustee, having actual notice of the trusts, concurred with the trustee in unauthorized dealings with the trust fund, the object and effect of such dealings being to give him a joint possession of the fund:—Held, that the amount of the fund was thereby rendered not only a joint debt of the two, but also the separate debt of each. *Poulson, Ex parte*, 9 Jur. 262.

A creditor without notice of a dormant partner has an option to consider himself a joint or separate creditor. *Hodgkinson, Ex parte*, 19 Ves. 294.

The creditors of an old firm, who had notice that a dormant partner had been admitted, are entitled to prove their debts *pari passu* with the other creditors of the old firm. *Chuck, Ex parte*, 1 Mont. & Bligh. 457; 8 Bing. 469; 1 M. & Scott, 615.

A. employed B. & C. as his stock-brokers, and, for the more convenient transfer, allowed stock belonging to him to stand in the name of B. alone; B., without the consent or knowledge of A., sold his stock, and paid the produce into the partnership funds of B. & C. B. & C. afterwards having become bankrupts:—Held, that A. was entitled to prove against the separate estate of B., or against the joint estate, as he should think proper. *Turner, Ex parte*, 1 Mont. & Mac. 255.

**— Guarantee by Firm and individual Members.]**—A firm of S. & Co. consisted of three partners, F., R. and N., and carried on business in London. Another firm of N. & Co. consisted of five partners, F., R., N., H. and M., and carried on business in India. In September, 1872, N. & Co., applied by letter to a bank for a credit, agreeing to deliver to the bank as security "the personal obligation of this firm and individual partners, and a guarantee by S. & Co." The bank granted the credit, and under it N. & Co. received large advances. In February, 1874, a letter was addressed to the bank, signed by S. & Co. and also by F., R. and N., saying, "We hereby guarantee you payment of all sums which are or may at any time become due to you by N. & Co.,

under the credit applied for in September, 1872, and granted by you." This letter and the signature of S. & Co. to it, were written by F., and he had negotiated the original transaction with the bank. S. & Co. filed a liquidation petition, and N. & Co. stopped payment, a large sum being due to the bank under the credit:—Held, that the letter of February, 1874, pledged to the bank the joint liability of the firm of S. & Co., and also the separate liability of each of the three partners who signed it, and that the bank were entitled to prove against the separate estate of F. for the amount due to them by N. & Co. under the credit. *Harding, Ex parte, Smith, In re*, 12 Ch. D. 557; 48 L. J., Bk. 115; 41 L. T. 517; 28 W. R. 158—C. A.

Where a partnership debt has been incurred by means of a fraud on the part of the partners, the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners. *Adamson, Ex parte, Collie, In re*, 8 Ch. D. 807; 47 L. J., Bk. 103; 38 L. T. 917; 26 W. R. 890—C. A.

Held, by Bramwell, L. J., that in such a case, judgment not having been recovered against the partners, there is no right to prove against the separate estates. *Id.*

Where two partners in New South Wales, where the general law of bankruptcy is that which obtained in England before the Bankruptcy Act of 1849, had joined with third parties as sureties for the debt of another, not a member, of the firm, in a bond which rendered them and each of them and any two, three, or four of them jointly and severally liable:—Held, the firm being bankrupt, that the bond creditors were entitled to prove against the partnership estate *pari passu* with the partnership creditors. *Hoare v. Oriental Bank Corporation*, 2 App. Cas. 589; 37 L. T. 173; 12 W. R. 757—P. C.

**Joint.]**—Commissioners under a lighting act, being authorized to appoint a treasurer by writing under their hands and seals, instead of appointing one in the form prescribed by the act, merely nominated F. as treasurer, who was a partner in a banking-house; F. did not receive or pay any moneys as treasurer, but the collector received all the moneys, and paid the amount into the banking-house by authority of the commissioners, who drew cheques upon F. individually as treasurer, which were not presented to him but to the bankers. The account in the pass-book was kept between the bankers and the commissioners, and this account was from time to time signed and allowed by them. The bankers became bankrupt, having a large sum in their hands belonging to the commissioners:—Held, that the commissioners could not prove for the amount against the separate estate of F., but could only come in as creditors against the joint estate of the firm. *Dobinson, Ex parte*, 2 Deac. 341.

Where two of a firm of bankers had drawn out a balance standing to the account of customers in the character of executors, and had invested it in the names of themselves and two trustees, upon an unauthorized security:—Held, on the bankruptcy of the bankers, not to be a case for double proof against the joint estate and the separate estates of the two parties. *Barnewell, Ex parte*, 6 De G., Mac. & G. 795.

The treasurer of a union lodged the union moneys to his account as treasurer at a bank in which he was a partner. The partners assigned their property to trustees, to be administered as in bankruptcy. The guardians of the union called on his sureties to pay the balance due from him, and they paid it. The sureties then received a dividend, on a proof made in the treasurer's name, against the joint estate. After this they claimed to prove against his separate estate:—Held, that the claim must be rejected, without prejudice to any application to expunge the joint proof, and substitute a proof against the separate estate. *Carne, Ex parte*, 3 L. R., Ch. 463.

Where parties are indebted jointly, and enter into a covenant by which they promise on demand, jointly, and severally, to pay, no demand is necessary in order to entitle the creditor to proceed severally against the parties; but where it was expressly stipulated by three partners, that, until a demand was made, an existing debt should remain a joint debt, and no demand was made previously to the bankruptcy, the debt is provable against the joint estate, but not against the separate estates of the three. *Fairlie, Ex parte*, 1 Mont. 17.

A note was issued by a bank in this form:—"I promise to pay the bearer, on demand, 5l., for A., B., C., and D. Signed A." A., B., C., and D. being partners in the bank:—Held, that the holder had not a right of separate action against A., and that on the bankruptcy of the firm he had not a right of proof against the separate estate of A. *Buckley, Ex parte*, 1 Ph. 562; 15 L. J., Bk. 3; 9 Jur. 931; 14 M. & W. 469; *Hall v. Smith*, 1 B. & C. 407, overruled.

R. M., who carried on business in partnership with J. C., J. P. and T. S., as bankers, signed one of the notes of the bank in this form:—"I promise to pay, &c., for J. C., R. M., J. P. and T. S. —R. M." On the firm becoming bankrupt:—Held, that the holders could not prove on this note against the separate estate of R. M. *Clarke, In re*, 1 Ph. 562; 9 Jur. 931; De Gex, 153; 3 Mont., D. & D. 736; *S. C.*, 14 M. & W. 469; 8 Jur. 919.

A. & B., who were partners, and C., as their surety, gave a joint and several promissory note to D., by which they jointly and severally promised to pay to D. the amount of a partnership debt due from A. & B. The note was signed by A. and B., not as individuals, but in their partnership firm, and by C. the surety:—Held, that this note could not be treated as the several note of each one of the three, but as the several note only of the surety, and the joint note of A. & B.; and that, on the bankruptcy of A., who had survived his partner, B., the holder of the note, could only rank as creditor against the joint estate. *Wilson, Ex parte*, 3 Mont., D. & D. 57.

Two of six partners, who had given a confidential clerk a general authority in writing to sign bills and notes on behalf of the firm, directed the clerk to sign four promissory notes in the name of the firm, payable respectively to one or the other of the two partners, who claimed to be creditors of the aggregate firm, in respect of an excess of capital advanced by them for the purposes of the partnership. The two partners afterwards indorsed the notes to a separate creditor for a private debt of one of the two:—Held, that although, as between these two partners and the other members of the firm, the notes were un-



justifiably created and possessed by the two, yet, in the absence of all fraud or connivance in the transaction by the party to whom the notes were indorsed, the firm of the six was liable for the amount; and that, on the bankruptcy of the firm, the holder of the notes had a right to prove the amount of them against the joint estate. *Bushell, Ex parte*, 3 Mont., D. & D. 615; 8 Jur. 937.

One partner borrowed money for partnership purposes upon shares which he engaged to assign as security, but did not; a bill for the amount borrowed was accepted by the firm:—Held, that a proof on the bill by the drawers could be made against the firm only, though the partner might be liable to an action of damages for non-fulfilment of his engagement. *Raleigh, Ex parte*, 3 Deac. 160; 3 Mont. & Ayr. 670.

One of two partners accepted bills for a previous partnership liability, after his copartner had committed an act of bankruptcy:—Held, that these bills were, in the hands of a bona fide holder, provable against the joint estate under a subsequent commission issued against both partners. *Robinson, Ex parte*, 3 Deac. & Chit. 376.

**Severals.**—If a creditor draws a bill upon a firm for his separate debt due from one partner, which is accepted by that partner in the name of the firm, the creditor cannot prove against the joint estate without shewing the assent of the other partner to the firm being liable. *Thorpe, Ex parte*, 3 Mont. & Ayr. 716.

K., a partner in the firm of R., K., and M., fraudulently concocted bills of exchange, to which he affixed the name of the firm as drawers and indorsees, followed by his own individual name. The bills were, at his instance, discounted by his private bankers, and the money applied to his own use:—Held, on the bankruptcy of the firm, that the bank had no right of proof against the joint estate. *Darlington and Stockton Banking Company, Ex parte*, 34 L. J., Bk. 10; 11 Jur., N. S. 122; 11 L. T., 661; 13 W. R. 353.

Although a partner may have full authority to deal with the partnership assets, and to draw, accept and indorse bills of exchange, it is the duty of persons having dealings with him, when they have reason to believe that a particular act is being done in the partnership name for the private benefit of the partner, to ascertain the extent of his authority, otherwise the persons so dealing with him must depend on the right and title of the partner, or on circumstances sufficient to repel the presumption of fraud. *Id.*

A. & B. were in partnership, B. being a secret partner, and A. on the partnership account drew bills in his own name on B., which were accepted by him:—Held, on the bankruptcy of A. & B., that the holder of these bills, who was ignorant of this partnership, was not entitled to prove them against the joint estate of A. & B., and the separate estate of B., but that he was entitled to prove them against the separate estates of A. & B.:—Held, too, that the holder, having proved against the joint estate, might, after a declaration of dividend on the joint estate, retire from that proof, and prove against the separate estates. *Husband, Ex parte*, 2 Glyn & J. 4; 5 Mad. 419.

A. & B. were partners. B. to obtain capital for the business, borrowed money, and for security entered into a bond, in which C. and D. became his sureties for the repayment of the money and

interest, and also effected and deposited with the lenders a policy of insurance on his life. One of the conditions of the bond was, that the money should be repayable on either B., C., or D. becoming bankrupt. The two partners entered into a deed of covenant to indemnify C. and D., the sureties, from all loss by reason of their entering into the bond. A. and B. became bankrupt, and C. and D. were called on for payment of the whole money, which C. paid, together with interest and expenses:—Held, that C. was not entitled to prove for the money as a creditor on the joint estate. *Meyer, Ex parte*, 12 Jur. 447.

A. & B., as joint executors, carried on their testator's trade in co-partnership, for the benefit of his family; and it was arranged between them, that A. should alone draw and accept bills, and manage the cash transactions. A. having refused to accept any more bills drawn by H. and D. B., unknown to A., authorized her son to accept them; and A. and B. afterwards became bankrupt:—Held, that the holders of these bills could not prove them against the joint estate. *Holdsworth, Ex parte*, 1 Mont., D. & D. 475.

A. survived B., his partner, and continued the business in the same firm of A. & B. At the time of B.'s death, a large balance was owing by them to their bankers, to whom A., some time after B.'s death, indorsed several bills in the partnership firm of A. & B.:—Held, that it could not be inferred from this circumstance alone that the bills were so indorsed upon a partnership transaction of A. & B., and that the bankers might prove the amount of the bills against the separate estate of A. *Wilson, Ex parte*, 3 Mont., D. & D. 57.

— **Lease of Partnership Premises to Partners as Joint Tenants—Joint and Several Covenant to pay Rent—Disclaimer of Lease by Trustee.**—When the trustee in bankruptcy of partners disclaims a lease of premises used by the partners for partnership purposes, but which was granted to the partners as joint tenants, they entering into a joint and several covenant to pay the rent, s. 23 of the Bankruptcy Act, 1869, gives the lessor a right to prove against the separate estate of each partner for the injury caused to him by the disclaimer. *Corbett, Ex parte, Shand, In re*, 14 Ch. D. 122; 49 L. J., Bk. 74; 42 L. T. 164; 28 W. R. 569—C. A.

Whether a right is given to prove also against the joint estate of the partners, *quære*. *Id.*

### iii. Change of Character of Debts.

**Joint and Several into Joint—Judgment.**—B. and C., being indebted to A., gave a joint and several bond; A. took as part of the same security a joint warrant of attorney, and entered up a joint judgment; B. and C. became bankrupts:—Held, that the bond was merged in the judgment, and that A. could only prove against the joint estate of B. and C. *Christie, Ex parte*, 2 Deac. & Chit. 155; 1 Mont. & Bligh, 352; S. P., *Gallie, In re*, 9 Ir. Ch. Rep. 188.

— **Taking joint Security.**—A debt on a joint and several bond is not changed into a joint debt by the creditor taking a joint security. *Hay, Ex parte*, 15 Ves. 4.

**Joint and Several into Several—Composition**

**Deed.**—A. and B., who carried on business in copartnership, assigned their partnership property upon trust for the benefit of their creditors, and it was by such assignment provided that it should not prejudice or affect the rights of the creditors against the separate estates of A. and B. Prior to the date of the assignment A. and B. had given their joint and several promissory note to C. for 1,500*l.*, and C. signed the deed of assignment in respect of a sum of 2,755*l.*, which included the 1,500*l.* A. was afterwards adjudged bankrupt:—Held, that C. was entitled to prove against the separate estate of A. for the amount due on the promissory note. *Thornton, Ex parte*, 3 De G. & J. 454; 28 L. J., Bk. 4; 5 Jur., N. S. 212; 32 L. T., O. S. 1537; 7 W. R. 70—L. J.

**Joint into Separate.**—Judgment of outlawry against two of three joint debtors does not make the debt a separate one, as against the third debtor, and it cannot be proved under his separate commission. *Dunlop, Ex parte*, Buck, 253.

**Judgment.**—Two partners acting by one of them bought goods, and afterwards the vendor, with notice of the partnership, brought an action, and recovered judgment against the one partner alone, and issued execution, which was however defeated by an adjudication against him, followed by an adjudication against his partner:—Held, that the original debt was merged in the judgment, and that there could be no proof upon it against the joint estate. *Higgins, Ex parte*, 3 De G. & J. 33; 27 L. J., Bk. 27; 4 Jur., N. S. 595.

**Dissolution of Partnership.**—A. and B. dissolved their partnership, when B. assigned all the joint property to A., among which were debts due to the firm to the amount of 60*l.*, but no notice of assignment was given to the debtors. A. and B. severally became bankrupt:—Held, that a joint creditor, who had proved under the separate fiat against A., was entitled to receive dividends on his proof. *Taylor, Ex parte*, 2 Mont., D. & D. 753.

By deed, the stock and effects of a partnership were assigned to the continuing partner, who covenanted to pay the joint debts. The partners became bankrupts:—Held, that the joint creditors not having, previous to the bankruptcy, accepted the continuing partner as their sole debtor, had not an election to prove against the separate estate of the continuing partner. *Freeman, Ex parte*, Buck, 471.

**Taking separate Security.**—A. and B. being jointly indebted to C., B. became bankrupt; but the joint effects, not being more than equal to the payment of the partnership debts, were left in the possession of A., who afterwards made an arrangement with C. for the payment of his debt by instalments, and, as a further security, handed over the deeds of some leasehold property to which he was separately entitled, for the purpose of preparing an assignment. A. paid only some of the instalments, and a separate fiat afterwards issued against him:—Held, that this was no evidence of the conversion of the joint debt of A. and B. into the separate debt of A., and that C. could therefore only prove against the joint estate. *Smith, Ex parte*, 1 Mont., D. & D. 165.

**Separate into Joint.**—A parol agreement is sufficient to convert a separate into a joint debt, such an agreement not being a promise to answer the debt of another within the Statute of Frauds, but the creation of a new debt in consideration of the former being extinguished. *Lane, Ex parte*, De Gex, 300; 16 L. J., Bk. 4; 10 Jur. 382.

**Positive Agreement—Money applied to Partnership Purposes.**—In order to entitle a creditor to prove on the joint estate of a partnership firm, for a debt which was originally the separate debt of one of the partners, there must be either a positive agreement to adopt the debt as that of the firm, or facts from which the court will be justified in deducing an agreement or consent to the adoption. It is not sufficient that the money lent to one partner has been ultimately applied to the purposes of the firm. *Ferrar, In re*, 2 Ir. Ch. Rep. 11.

**On Consolidation of Estates.**—A. was copartner with B., C. and D. as bankers, and was partner in another banking firm, with B. and C. A. died, and E. was admitted a partner in the first bank alone. The two firms became bankrupt, and under an order of the court the estates of the two firms were consolidated. A creditor of the first bank in A.'s lifetime received a dividend out of the consolidated estate:—Held, that A.'s estate was not thereby released. *Harris v. Farwell*, 13 Beav. 403; 15 L. J., Ch. 185.

**Taking joint Security.**—A joint note of A. and B. is given for goods sold to A. only, and a receipt given as for money paid. A joint commission issued against A. and B. The seller may still prove his debt for goods sold against the separate estate of A. *Seddon, Ex parte*, 2 Cox, 49.

**Trader taking a Partner.**—A New York house accepted bills for the accommodation of a Virginia house on an agreement for reimbursement entered into by a London merchant, the correspondent of the Virginia house. Afterwards the London merchant entered into partnership, and by letter desired the New York house to consider all credits, advices and instructions then in force from him as extending to the new firm, and to transfer any balances due to or from him to the new firm. The New York house replied that they would make up and transfer to the new firm the open accounts in joint exchange transactions, but that they hoped to have the account current made up before they carried the old account to the new firm. They afterwards paid the accommodation bills and drew on the new firm for the amount. The new firm became bankrupt:—Held, that, under the circumstances, these separate liability was discharged, and that the New York house were only joint creditors. *Jackson, Ex parte*, 2 Mont., D. & D. 146.

A sole trader, indebted by bond, took in a nominal partner, but without fraud, and two years after the partnership failed; a separate debt was not permitted to be proved under the joint commission, unless there was something, as payment of interest by both, to make the partnership liable, for which very little would be sufficient. *Jackson, Ex parte*, 1 Ves. jun. 131.

A trader, being indebted to a lunatic in the amount of the purchase-money of a business, and the machinery and stock-in-trade, after carrying

on the business alone for some time, entered into partnership under an agreement, by which the stock-in-trade and property of the sole business were to belong to the firm, which was to take upon itself the liabilities of the sole business. The firm rendered an annual account in its own name in respect of the debt to the committee of the lunatic, who made no objection to this form of the account:—Held, on the firm becoming bankrupt, that the committee was not entitled to prove against the joint estate. *Parker, Ex parte*, 2 Mont., D. & D. 511; 6 Jur. 541.

T. & Co. had been in the habit of sending cotton yarn to N. as N. & Co. upon the terms, not in writing, that N. should subject the material to such process as he chose, and sell the improved product to whatever customers at whatever credit he chose. A list of prices accompanied the goods so sent, and at the end of one month N. rendered an account of the quantity of yarn which he had sold, and at the end of another month he had to pay T. & Co. for the quantity so reported the previous month, according to the price list above mentioned. This payment was sometimes made by bills drawn by N.'s customers, and on such bills T. & Co. charged discount. These relations still continuing to subsist between N. and T. & Co., N. entered into partnership with J. as N., J. & Co. N. kept no separate banking account, but paid all moneys received in respect of cotton transactions into the firm banking account, and when cheques were given by N. in payment to T. & Co., they were signed N., J. & Co. A deed of arrangement having been entered into by N., J. & Co. with their creditors, T. & Co. sought to prove against the joint estate for the balance standing to the credit of N. in the firm account of N., J. & Co. as being derived from the sale of cotton supplied by them to N. as above, and added by him to the partnership fund, with full notice of the facts on the part of the rest of the firm:—Held, that such proof was not admissible against the joint estate, the relation between T. & Co. and N. being that of vendors and purchaser, and not that of principal and agent, so as to impress upon the moneys any trust in favour of T. & Co. *Towle v. White*, 29 L. T. 78; 21 W. R. 465—H. L.

**Release of Debts—Ostensible Partner.**—In consideration that the Halifax Bank would open a banking account with A. and B., and make advances to them, B. guaranteed the payment of the balance, which upon the closing of such account should be due to the bank from A. and B. individually or in partnership to the extent of 1,000*l.* No partnership at any time existed between A. & B., but when the guarantee was given, B. represented to the bank that he was a partner with A., but did not wish his name to be disclosed. A. traded under the name of A. & Co. for about two years, and then became bankrupt. The bank proved against A.'s estate for the whole amount due upon the balance of account. Subsequently B. paid the bank 1,000*l.* under his guarantee and received a receipt "in discharge of all claims against him in reference to the guarantee, or in connexion with A. & Co." The trustee of A.'s estate having rejected the proof by the bank upon the ground that the release to B. operated also to release A.:—Held, that B. must be taken to have been an actual partner with A., but that the receipt did not

operate to release B., so as to preclude the bank from maintaining a proof against A.'s estate. *Good, Ex parte, Armitage, In re*, 5 Ch. D. 46; 46 L. J., Bk. 65; 36 L. T. 338; 25 W. R. 422—C. A.

**Release by Will of Debts.**—A testator bequeathed to B., his executors, administrators and assigns, all debts due to him at the time of his death, and directed his trustees to deliver up to B. all securities held by him for such debts, and also, when required by B., to execute a release to him from all such debts. At the testator's death, B. owed him a debt of 50*l.*, and B. and his partner G. owed him 2,600*l.* secured, as to 2,300*l.*, by their joint and several promissory notes, and as to 300*l.* by their joint promissory note. On B. and G. filing a liquidation petition:—Held, that the release in the will did not operate so as to release the partnership debt, and that the executors were entitled to prove in the liquidation for the 2,600*l.* against the joint estate, and for the 2,300*l.* against the separate estate of B. *Bennett & Glave, In re, Kirk, Ex parte*, 5 Ch. D. 800; 46 L. J., Bk. 101; 36 L. T. 431; 25 W. R. 598—C. A.

**Change of Members of Firm—Novation.**—Slight circumstances are sufficient to prove a contract between creditors of a dissolved firm and the continuing partners, that the debt due from the dissolved firm shall become debts due from the new firm. *Chaninell, Ex parte*, 3 De G., F. & J. 752.

Therefore, when a new firm, consisting of two of the partners of a dissolved firm of three, sent a circular to the creditors of the three, stating that the debts of the three would be paid by the two, and creditors of the three sent to the two accounts debiting them with debts due from the three:—Held, that the creditors were entitled to prove not only these, but the other debts of the three against the two. *Id.*

R. F. and R., partners in business, and dealing with F., S. & Co., took T. and S., clerks in their employment, into partnership with them. The partnership was constituted by deed to continue for three years, and a balance-sheet, shewing the liabilities and assets of the existing firm, was drawn up, and admitted by all the partners. The new firm continued to trade, up to the period of its insolvency, upon the same footing and with the same books as the old firm, no distinction being made in their payments or balances, or between the debts or assets of the new, or what was the old firm. F., S. & Co. continued to deal with the new as they had done with the old firm. R., F. and R. having become insolvent, F., S. & Co., creditors to a large amount, proved against the estate of the new firm. R. and B., also creditors of the new firm, proved against their estate, and sought to expunge the proof of F., S. & Co., on the ground that their debt, having accrued previously to the new partners being taken in, was due from the old, and not from the new, firm:—Held, that there was sufficient proof in the dealings and transactions of the several parties to shew that the new firm, on its formation, adopted the liabilities of the old firm, and that F., S. & Co. had consented to accept the liability of the new firm, and to discharge the old firm, their original debtors. *Bank of Australasia v. Flower*, 1 L. R., P. C. 27; 35 L. J., P. C. 13; 12 Jur., N. S. 345; 14 L. T. 144; 14 W. R. 467.

Previously to 1872, A. and B. were partners as

bankers. In that year they took in two new partners. Very shortly after the partners were taken in A. died. In 1874 B. died. In 1875 the bank went into liquidation. The bank was in the habit of issuing deposit receipts to customers who left money with them. When the account on deposit was altered the note was changed. The depositors at the time of the bankruptcy all proved against the estate of the two surviving partners for the amount of their claims, but those who had deposits prior to the admission of the new partners desired to prove against the estate of A. Three test cases were taken : one in which the deposit receipt had not been changed since the new partners had been admitted. Another where the note had been changed and the account increased. Another where the note had been changed and the account diminished. All the depositors had received interest from the new partners :—Held, that in all three cases there had been complete novation, and that therefore the depositors were not entitled to prove against A.'s estate. *Bilborough v. Holmes*, 5 Ch. D. 255; 46 L. J., Ch. 446; 35 L. T. 75; 25 W. R. 297.

#### iv. Against what Estate.

**Generally.**—Separate estate is to be distributed amongst separate creditors, and joint estate amongst joint creditors. Where there is a surplus after payment of joint debts, separate creditors are permitted to prove against such surplus for the amount of their separate debts. *Day*, *Ex parte*, 9 L. T. 350.

A partnership debt may be proved under a separate commission. *Hodgson*, *Ex parte*, 2 Bro. C. C. 5. *But see next case.*

**Joint Creditors.**—Joint creditors are not permitted to prove against the separate estate, where there is a joint property, however trifling in amount. *Peake*, *Ex parte*, 2 Rose, 54.

Where there was a joint estate to the amount of 13*l.* :—Held, that the joint creditors could not receive dividends from the separate estate until all the separate creditors were paid in full, although it did not appear that after payment of costs any part of the 13*l.* would remain for distribution. *Kennedy*, *Ex parte*, 2 De G., Mac. & G. 228.

On a dissolution of partnership, the retiring partner sold the concern, with the partnership property, to the other, but some of the partnership property remained in the partnership names, and in the order and disposition of both. They afterwards became bankrupts, and separate commissions issued against them. There being property outstanding in the partnership names, the joint creditors could not prove under the separate commission against the retiring partner. *Harris*, *Ex parte*, 1 Madd. 583.

Where one of two partners died and the other soon afterwards became bankrupt, the joint estate being administered in bankruptcy, and the separate of the solvent partner in chancery :—Held, that the joint creditors who were part paid in bankruptcy were not entitled to prove against the separate estate of the solvent partner *pari passu* with the creditors of the solvent partner. *Lodge v. Pritchard*, 4 Giff. 295; 9 Jur., N. S. 932; 8 L. T. 722; 11 W. R. 1086. Affirmed, 32 L. J., Ch. 775; 9 L. T. 107—L. J.

— **No joint Estate.**—Joint creditors admitted to prove their debts on the separate estate of one partner, there being no joint estate. *Hayden*, *Ex parte*, 1 Bro. C. C. 454; *S. P.*, *Machell*, *Ex parte*, 2 Ves. & B. 216.

A joint creditor can prove against the separate estate where there is no joint estate and no solvent partner, notwithstanding the estate of a deceased partner may be solvent. *Bannerman*, *Ex parte*, 3 Deac. 476; 1 Mont. & Chit. 573.

— **Joint Debtors not Partners.**—A. and B., not being partners, gave a joint note for securing the debt of B. B. afterwards became bankrupt. The creditor may prove for the joint debt, notwithstanding the solvency of A. The rule that a joint debt cannot be proved against the separate estate of one debtor, while the co-debtor remains solvent, only applies to the case where the co-debtors are partners. *Buckingham*, *Ex parte*, 4 Jur. 612.

— **Co-contractors.**—The rule, that a joint debt cannot be proved against the estate of a bankrupt partner, as long as there is a solvent partner, applies to co-contractors. *Field*, *Ex parte*, 3 Mont., D. & D. 95; 12 L. J., Bk. 27; 7 Jur. 382.

— **Suing out a separate Fiat.**—The rule, that a joint creditor suing out a separate fiat should receive dividends on his joint debt out of the separate estate *pari passu* with the separate creditors, applies to a case where, besides the joint debt, there is due to the joint creditor from the bankrupt a separate debt of sufficient amount to support a fiat. *Burnett v. Blake*, 2 Mont., D. & D. 357; 6 Jur. 331.

— **Suing out Commission against Surviving Partner—Co-nominee.**—Where a joint creditor sues out a commission against A., as surviving partner of B., he can claim only against the joint estate. *Barned and Mosley*, *Ex parte*, 1 Glyn & J. 309.

— **Partnership comprising minor Partnership.**—A., B. & C. carried on trade in partnership, and A. & B. were partners in a distinct trade, and became bankrupt; D. being a creditor of the three for goods sold and delivered, could not prove his debt against the joint estate of the two, but was admitted to prove against the separate estate of each. *Clegg*, *Ex parte*, 2 Cox, 372.

A., B. and C., who were in partnership, were joint owners of a ship with D., the managing owner, who contracted a debt with E. for goods supplied for the use of the ship. A., B. and C. became bankrupts :—Held, that E. could not prove against their joint estate, but only against the separate estate of each of the bankrupts. *Benson*, *Ex parte*, 2 Mont., D. & D. 750.

— **Right to Surplus of Separate Estate.**—Joint creditors are entitled to the surplus estate of individual partners after payment of their separate debts. *Grant*, *Ex parte*, 10 L. T. 276; 12 W. R. 690.

Joint creditors are entitled to priority of payment out of the surplus of the separate estate, which surplus is divisible amongst that class of creditors before the bankrupt is entitled to his allowance. *Id.*

Upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it. *Bank of Australasia v. Flower*, 1 L. R., P. C. 27; 35 L. J., P. C. 13; 12 Jur., N. S. 345; 14 L. T. 144; 14 W. R. 467.

— **Before Interest paid to Separate Creditors.**—Joint creditors who have proved under a separate fiat, are entitled to receive a dividend on their proofs out of the surplus of the separate estate, before the separate creditors are paid interest on their debts. *Wood, Ex parte*, 2 Mont., D. & D. 283; 5 Jur. 1115.

A creditor whose proof is admitted against both the separate estates of two bankrupts who have been partners is not entitled to receive any dividend in respect of interest accrued on his debt subsequently to the date of the adjudication, until the joint creditors have been paid the principal of their debts in full. *Findlay, Ex parte, Collie, In re*, 17 Ch. D. 334; 50 L. J., Ch. 696; 45 L. T. 61; 29 W. R. 857—C. A.

— **When Proof allowed against Separate Estate for Purposes of Voting.**—A testator indebted on bond devised his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brought an action against the bankrupt and the other devisees, and recovered a joint judgment against them:—Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Pearse, Ex parte*, 2 Deac. & Chit. 451.

There is no difference between a banking company under 7 Geo. 4, c. 46, and an ordinary partnership, as regards the effect of 6 Geo. 4, c. 16, s. 62; and a creditor of the company may prove against the separate estate of an individual member, for the purpose of the latter section. *Marston, Ex parte*, 1 Mont. & Chit. 576; 3 Jur. 1079; 4 Deac. 191.

A banking company, under 7 Geo. 4, c. 46, though individual members become bankrupt, is still a subsisting partnership for the purposes of 6 Geo. 4, c. 16, s. 62. *Ib.*

Where a debt of 27,620*l.* 19*s.* 10*d.* was due from the bankrupts at the bankruptcy to their bankers on a balance of account, and such balance was covered by joint promissory notes of the bankrupts to the extent of 18,000*l.*, and also by mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for the payment of the whole balance; and part of the debt to the amount of 17,000*l.* had been permitted to be proved by the bankers against the joint estate, on their petition, for the purpose of their commanding the choice of assignees:—Held, that the bankers were entitled to a proof of the 18,000*l.* against the joint estate, and to prove the residue against the separate estate of one of the bankrupts. *Ladbroke, Ex parte*, 2 Glyn & J. 81.

**Joint Creditor holding Separate Security.**—A creditor of two partners was also a creditor of one of the partners separately, and the title-deeds of the separate estate of that partner were deposited with him to secure both the joint and the sepa-

rate debts. The two partners filed a joint liquidation petition, and the partner, whose separate estate was mortgaged, also filed a separate liquidation petition. The security having been realized:—Held, that the creditor was entitled to apportion the produce of the realization between his joint and separate debts in whatever way was most for his advantage, and that, to enable him to exercise this option, he was entitled to apply to the court, under the Bankruptcy Act, 1869, s. 104, to have a dividend on the joint estate declared before the declaration of a dividend on the separate estate. *Dickin, Ex parte, Foster, In re*, 20 L. R., Eq. 767; 44 L. J., Bk. 113; 32 L. T. 37; 24 W. R. 221.

A firm consisting of two partners entered into a joint and several covenant for the payment of the balance of their current account with a bank, and one of the partners deposited with the bank, as a collateral security for the account, a sum of 8,750*l.*, arising from the sale of part of his separate estate. That amount was deposited upon condition that it should not be applied in payment of the current account of the firm with the bank until after the expiration of twelve months' notice of demand for payment, and subject thereto it was to remain the separate property of the depositor. The firm became bankrupt upon the 18th of April, 1882, and the bank gave notice of demand on the 19th of May. Upon the 17th of October, the bank tendered a proof for 17,093*l.* 19*s.*, the total amount due from the firm upon their current account, without deducting the sum of 8,750*l.* deposited with them:—Held, that there was no such mutual dealing between the bank and the depositor as to give rise to any right of set-off under the 39th section of the Bankruptcy Act, 1869, and that consequently the bank were entitled to prove against the joint estate, and for the full amount due upon the current account. *Caldicott, Ex parte, Hart, In re*, 48 L. T. 910.

**Shares in Bank belonging to two in Name of one Partner.**—By the articles of association of a bank it was provided that the shares of every shareholder should be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any call, or as a debt or liability to the bank from him alone, or jointly with any other person. At the commencement of the bankruptcy of two partners some shares in the bank stood in the name of A., one of the two. The shares were in fact partnership property, though the bank did not know that any one but A. was interested in them. The partners owed the bank a large debt for moneys advanced to them. The whole of this debt had been contracted since the shares (which were originally the property of A. alone) had become partnership property:—Held, that the bank's security was on the joint estate, and that they could only prove against that estate for the balance of their debt, after deducting the value of the shares. *Collie, In re. Manchester and County Bank, Ex parte*, 3 Ch. D. 481; 45 L. J., Bk. 149; 35 L. T. 23; 24 W. R. 1035—C. A.

*See further, post, SECURED CREDITORS.*

**Trader settling Portion of Profits on Wife.**—A trader at Brighton married a widow who was

entitled to three-fourths of the profits of a London business. He afterwards bought the remaining one-fourth of the London business, and covenanted with a trustee that three-fourths of the profits of the London business should be for the separate use of the wife. A resolution was duly made for liquidation of the affairs of the trader:—Held, that the assets of the London business were first to be applied in payment of the creditors of the London business, and that only the surplus would go to the general creditors. *Childs, In re, New, Ex parte*, 9 L. R., Ch. 508; 43 L. J., Bk. 89; 30 L. T. 447.

A liquidating debtor, at the date of filing his petition, was carrying on a trade at Brighton in his own name, and a completely distinct trade under another name in London. Three-fourths of the profits of the London business were settled upon his wife for her separate use, free from his debts. The other fourth of the profits belonged to him. The Brighton business was hopelessly insolvent:—Held, that the assets of the two businesses constituted distinct estates, the one the separate estate of the debtor, the other the joint estate of him and the trustee of the settlement, and that accordingly the ordinary rule in bankruptcy for the payment of the joint and separate creditors out of the debtor's joint and separate estates respectively would apply, and the London creditors were entitled to be paid the full amount of their debts out of the assets of the London business before the separate creditors of the debtor received anything out of that estate. *Ib.*

#### v. Election by Creditors.

**Joint and several Creditors must Elect.**—If A. and B., joint traders, become bankrupt, and there are joint and separate commissions taken out against them, and A. and B., before the bankruptcy, become jointly and severally bound to C., C. may choose under which commission he will come, but he cannot come under both. *Rowlandson, Ex parte*, 3 P. Wms. 405.

A creditor by a joint and several bond must elect whether he will go against the joint or separate estate; but is not bound by taking a joint security. *Hay, Ex parte*, 15 Ves. 4.

**Right after Proving against one only.**—A petitioning creditor under a first commission, which was separate against one of three partners, being a joint creditor, was entitled to his election under a second commission, which was joint against two of the firm, to prove against the joint or separate estate. *Smith, Ex parte*, 1 Glyn & J. 256.

**Right after Judgment against one.**—A creditor brought an action against one of three joint debtors, two of whom were out of the jurisdiction, and obtained judgment. The creditor afterwards issued a fiat against the debtor against whom he had so recovered. Distinct accounts were directed to be kept of the joint estate of the three debtors. The creditor endeavoured to transfer his proof from the separate to the joint estate, but was refused permission by the commissioner. Upon an appeal, the creditor agreeing to abandon or withdraw the proof made against the separate estate, the court declared he was entitled to make such proof as he would be entitled to make if the action had not been brought

and the judgment had not been obtained. *Jones, Ex parte*, 20 L. J., Bk. 35; 15 Jur. 214.

**When to be made.**—A creditor under a joint and several bond may prove against both the joint and separate estate, but must make his election before a dividend. *Bentley, Ex parte*, 2 Cox, 288.

A creditor who has a right to elect between a joint and separate estate, must make his election before a dividend is declared of the estate against which he has proved. His election is gone if he does any act in the character in which he has proved. *Husband, Ex parte*, 5 Madd. 419; 2 Glyn & J. 4.

**Right to alter Proof after Election.**—Creditors having proved under a joint commission, upon a joint and several obligation, but not having received a dividend, were permitted to waive their proof and to prove against the separate estate, not disturbing any dividend previously made. *Bielby, Ex parte*, 13 Ves. 70.

A., carrying on business on his separate account, and also in partnership with B., gave a bill of exchange, drawn by himself, to the order of A. and B., and indorsed by them. A separate commission issued against A., B. died, and the holder of the bill proved it under A.'s commission; having afterwards learnt that distinct accounts were to be kept of the estates of A. and B., he applied to be at liberty to prove against the joint estates of A. and B., in addition to his proof against the separate estate of A.:—Ordered, that he should be at liberty either to retain his present proof, or to withdraw it, and prove against the joint estate. *Masson, Ex parte*, 1 Rose, 159.

A joint and separate creditor who has proved against the joint estate is not permitted without special grounds to retire from his proof, and prove against the separate estate. *Dixon, Ex parte*, 2 Mont., D. & D. 312.

A creditor holding bills of A. and B., secretly partners, using the one his name as drawer, and the other as acceptor, proved them first against the separate estate of A. under a separate fiat, then also against the joint estate of A. and B.; then he received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged. Subsequently one proof was expunged accordingly:—Held, that by receiving the dividend he had not made his election to abide by his separate proof; but on refunding the dividend, he might elect to come in under the joint fiat. *Law, Ex parte*, 3 Deac. 541; 1 Mont. & Chit. 111.

A joint creditor sued out two separate commissions; under one he proved against the joint estate and received a dividend, at which time he was ignorant of his right to prove against the separate estate of the other:—Held, that he had not conclusively elected to prove as a joint creditor, but that, refunding the dividend with interest, he might prove as a separate creditor. *Bolton, Ex parte*, Buck, 7; 2 Rose, 389.

When a creditor has such a right of election he does not lose it merely because he has proved and received dividend. But he may change his election on refunding the dividend which he has received, with interest at 4 per cent., though he cannot disturb any dividend already paid. *Adamson, Ex parte, Collicie, In re*, 8 Ch. D. 807;

Upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it. *Bank of Australasia v. Flower*, 1 L. R., P. C. 27; 35 L. J., P. C. 13; 12 Jur., N. S. 345; 14 L. T. 144; 14 W. R. 467.

— **Before Interest paid to Separate Creditors.**—Joint creditors who have proved under a separate fiat, are entitled to receive a dividend on their proofs out of the surplus of the separate estate, before the separate creditors are paid interest on their debts. *Wood, Ex parte*, 2 Mont., D. & D. 283; 5 Jur. 1115.

A creditor whose proof is admitted against both the separate estates of two bankrupts who have been partners is not entitled to receive any dividend in respect of interest accrued on his debt subsequently to the date of the adjudication, until the joint creditors have been paid the principal of their debts in full. *Findlay, Ex parte, Collie, In re*, 17 Ch. D. 334; 50 L. J., Ch. 696; 45 L. T. 61; 29 W. R. 857—C. A.

— **When Proof allowed against Separate Estate for Purposes of Voting.**—A testator indebted on bond devised his real estate to the bankrupt and two other trustees, for payment of his debts. The bond creditor, after the testator's death, brought an action against the bankrupt and the other devisees, and recovered a joint judgment against them:—Held, that he could not prove under the separate commission against the bankrupt, even for the purpose of voting in the choice of assignees. *Pearse, Ex parte*, 2 Deac. & Chit. 451.

There is no difference between a banking company under 7 Geo. 4, c. 46, and an ordinary partnership, as regards the effect of 6 Geo. 4, c. 16, s. 62; and a creditor of the company may prove against the separate estate of an individual member, for the purpose of the latter section. *Marston, Ex parte*, 1 Mont. & Chit. 576; 3 Jur. 1079; 4 Deac. 191.

A banking company, under 7 Geo. 4, c. 46, though individual members become bankrupt, is still a subsisting partnership for the purposes of 6 Geo. 4, c. 16, s. 62. *Id.*

Where a debt of 27,620*l.* 1*9s.* 10*d.* was due from the bankrupts at the bankruptcy to their bankers on a balance of account, and such balance was covered by joint promissory notes of the bankrupts to the extent of 18,000*l.*, and also by mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for the payment of the whole balance; and part of the debt to the amount of 17,000*l.* had been permitted to be proved by the bankers against the joint estate, on their petition, for the purpose of their commanding the choice of assignees:—Held, that the bankers were entitled to a proof of the 18,000*l.* against the joint estate, and to prove the residue against the separate estate of one of the bankrupts. *Ladbroke, Ex parte*, 2 Glyn & J. 81.

**Joint Creditor holding Separate Security.**—A creditor of two partners was also a creditor of one of the partners separately, and the title-deeds of the separate estate of that partner were deposited with him to secure both the joint and the sepa-

rate debts. The two partners filed a joint liquidation petition, and the partner, whose separate estate was mortgaged, also filed a separate liquidation petition. The security having been realized:—Held, that the creditor was entitled to apportion the produce of the realization between his joint and separate debts in whatever way was most for his advantage, and that, to enable him to exercise this option, he was entitled to apply to the court, under the Bankruptcy Act, 1869, s. 104, to have a dividend on the joint estate declared before the declaration of a dividend on the separate estate. *Dickin, Ex parte, Foster, In re*, 20 L. R., Eq. 767; 44 L. J., Bk. 113; 32 L. T. 37; 24 W. R. 221.

A firm consisting of two partners entered into a joint and several covenant for the payment of the balance of their current account with a bank, and one of the partners deposited with the bank, as a collateral security for the account, a sum of 8,750*l.*, arising from the sale of part of his separate estate. That amount was deposited upon condition that it should not be applied in payment of the current account of the firm with the bank until after the expiration of twelve months' notice of demand for payment, and subject thereto it was to remain the separate property of the depositor. The firm became bankrupt upon the 18th of April, 1882, and the bank gave notice of demand on the 19th of May. Upon the 17th of October, the bank tendered a proof for 17,093*l.* 1*9s.*, the total amount due from the firm upon their current account, without deducting the sum of 8,750*l.* deposited with them:—Held, that there was no such mutual dealing between the bank and the depositor as to give rise to any right of set-off under the 39th section of the Bankruptcy Act, 1869, and that consequently the bank were entitled to prove against the joint estate, and for the full amount due upon the current account. *Caldicott, Ex parte, Hart, In re*, 48 L. T. 910.

**Shares in Bank belonging to two in Name of one Partner.**—By the articles of association of a bank it was provided that the shares of every shareholder should be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any call, or as a debt or liability to the bank from him alone, or jointly with any other person. At the commencement of the bankruptcy of two partners some shares in the bank stood in the name of A., one of the two. The shares were in fact partnership property, though the bank did not know that any one but A. was interested in them. The partners owed the bank a large debt for moneys advanced to them. The whole of this debt had been contracted since the shares (which were originally the property of A. alone) had become partnership property:—Held, that the bank's security was on the joint estate, and that they could only prove against that estate for the balance of their debt, after deducting the value of the shares. *Collie, In re, Manchester and County Bank, Ex parte*, 3 Ch. D. 481; 43 L. J., Bk. 149; 35 L. T. 23; 24 W. R. 1035—C. A.

See further, post, SECURED CREDITORS.

**Trader settling Portion of Profits on Wife.**—A trader at Brighton married a widow who was

entitled to three-fourths of the profits of a London business. He afterwards bought the remaining one-fourth of the London business, and covenanted with a trustee that three-fourths of the profits of the London business should be for the separate use of the wife. A resolution was duly made for liquidation of the affairs of the trader:—Held, that the assets of the London business were first to be applied in payment of the creditors of the London business, and that only the surplus would go to the general creditors. *Childs, In re, New, Ex parte*, 9 L. R., Ch. 508; 43 L. J., Bk. 89; 30 L. T. 447.

A liquidating debtor, at the date of filing his petition, was carrying on a trade at Brighton in his own name, and a completely distinct trade under another name in London. Three-fourths of the profits of the London business were settled upon his wife for her separate use, free from his debts. The other fourth of the profits belonged to him. The Brighton business was hopelessly insolvent:—Held, that the assets of the two businesses constituted distinct estates, the one the separate estate of the debtor, the other the joint estate of him and the trustee of the settlement, and that accordingly the ordinary rule in bankruptcy for the payment of the joint and separate creditors out of the debtor's joint and separate estates respectively would apply, and the London creditors were entitled to be paid the full amount of their debts out of the assets of the London business before the separate creditors of the debtor received anything out of that estate. *Id.*

#### v. Election by Creditors.

**Joint and several Creditors must Elect.]**—If A. and B., joint traders, become bankrupt, and there are joint and separate commissions taken out against them, and A. and B., before the bankruptcy, become jointly and severally bound to C., C. may choose under which commission he will come, but he cannot come under both. *Rowlandson, Ex parte*, 3 P. Wms. 405.

A creditor by a joint and several bond must elect whether he will go against the joint or separate estate; but is not bound by taking a joint security. *Hay, Ex parte*, 15 Ves. 4.

**Right after Proving against one only.]**—A petitioning creditor under a first commission, which was separate against one of three partners, being a joint creditor, was entitled to his election under a second commission, which was joint against two of the firm, to prove against the joint or separate estate. *Smith, Ex parte*, 1 Glyn & J. 256.

**Right after Judgment against one.]**—A creditor brought an action against one of three joint debtors, two of whom were out of the jurisdiction, and obtained judgment. The creditor afterwards issued a fiat against the debtor against whom he had so recovered. Distinct accounts were directed to be kept of the joint estate of the three debtors. The creditor endeavoured to transfer his proof from the separate to the joint estate, but was refused permission by the commissioner. Upon an appeal, the creditor agreeing to abandon or withdraw the proof made against the separate estate, the court declared he was entitled to make such proof as he would be entitled to make if the action had not been brought

and the judgment had not been obtained. *Jones, Ex parte*, 20 L. J., Bk. 35; 15 Jur. 214.

**When to be made.]**—A creditor under a joint and several bond may prove against both the joint and separate estate, but must make his election before a dividend. *Bentley, Ex parte*, 2 Cox, 288.

A creditor who has a right to elect between a joint and separate estate, must make his election before a dividend is declared of the estate against which he has proved. His election is gone if he does any act in the character in which he has proved. *Husband, Ex parte*, 5 Madd. 419; 2 Glyn & J. 4.

**Right to alter Proof after Election.]**—Creditors having proved under a joint commission, upon a joint and several obligation, but not having received a dividend, were permitted to waive their proof and to prove against the separate estate, not disturbing any dividend previously made. *Bielby, Ex parte*, 13 Ves. 70.

A., carrying on business on his separate account, and also in partnership with B., gave a bill of exchange, drawn by himself, to the order of A. and B., and indorsed by them. A separate commission issued against A., B. died, and the holder of the bill proved it under A.'s commission; having afterwards learnt that distinct accounts were to be kept of the estates of A. and B., he applied to be at liberty to prove against the joint estates of A. and B., in addition to his proof against the separate estate of A.:—Ordered, that he should be at liberty either to retain his present proof, or to withdraw it, and prove against the joint estate. *Masson, Ex parte*, 1 Rose, 159.

A joint and separate creditor who has proved against the joint estate is not permitted without special grounds to retire from his proof, and prove against the separate estate. *Dixon, Ex parte*, 2 Mont., D. & D. 312.

A creditor holding bills of A. and B., secretly partners, using the one his name as drawer, and the other as acceptor, proved them first against the separate estate of A. under a separate fiat, then also against the joint estate of A. and B.; then he received a dividend out of the separate estate, it being at that time intimated to him that one proof must be expunged. Subsequently one proof was expunged accordingly:—Held, that by receiving the dividend he had not made his election to abide by his separate proof; but on refunding the dividend, he might elect to come in under the joint fiat. *Law, Ex parte*, 3 Deac. 541; 1 Mont. & Chit. 111.

A joint creditor sued out two separate commissions; under one he proved against the joint estate and received a dividend, at which time he was ignorant of his right to prove against the separate estate of the other:—Held, that he had not conclusively elected to prove as a joint creditor, but that, refunding the dividend with interest, he might prove as a separate creditor. *Bolton, Ex parte*, Buck, 7; 2 Rose, 389.

When a creditor has such a right of election he does not lose it merely because he has proved and received dividend. But he may change his election on refunding the dividend which he has received, with interest at 4 per cent., though he cannot disturb any dividend already paid. *Adamson, Ex parte, Collie, In re*, 8 Ch. D. 807;



respect of the excess of capital advanced by him. On the widow dying, and the surviving partners becoming bankrupt :—Held, that there could be no right of proof on behalf of the testator's estate against the joint estate of the surviving partners, in respect of this debt. *Thompson, Ex parte*, 2 Mont., D. & D. 761.

A testator directed that it should be lawful for his wife to retain in her hands, and employ, any sum not exceeding 6,000*l.*, in carrying on the trades in which he might be engaged at his decease, and he appointed his wife and son executrix and executor. The widow carried on the testator's trade, taking the son into partnership, and the moneys received were placed with the bankers to their joint account :—Held, on their bankruptcy, that the employment of 6,000*l.* of the assets in the trade so carried on was authorized by the will, and gave no right of proof in competition with the other creditors, and that the circumstance of the son being taken into partnership made no difference. *Butterfield, Ex parte*, De Gex, 570 ; 17 L. J., Bk. 10 ; 11 Jur. 955.

**Share retained in Business without Authority.**—Three persons carried on business in partnership without any articles of partnership. The profits were divided between them in equal shares. After the death of one of them, the survivors continued to carry on the business, retaining in it, without any authority, the deceased partner's share of the capital, and dividing the profits of the business between themselves equally. They afterwards filed a liquidation petition. There were still some joint debts of the partnership of the three remaining unpaid :—Held, that the administratrix of the deceased partner could not prove in the liquidation in competition with his creditors in respect of his share of the capital. *Blythe, Ex parte, Blythe, In re*, 16 Ch. D. 620 ; 29 W. R. 900.

If an executor, who is directed to carry on his testator's partnership trade, exceeds his authority, by employing the assets in his trade to an extent not warranted by the will, and the surviving partner and the executor become bankrupt, the excess of the assets so employed may be proved by the executor under their commission. *Richardson, Ex parte*, Buck, 202, 421 ; 3 Madd. 138.

**Rule not to be Narrowed.**—The rule which prevents a partner from proving against the joint estate of the partnership for a private debt while there are joint debts unpaid, is a rule of general application, and such application is not to be narrowed by considerations as to what would be its precise effect in individual instances. *Nanson v. Gordon*, 1 App. Cas. 195 ; 45 L. J., Bk. 89 ; 34 L. T. 401 ; 24 W. R. 740—H. L.

The rule applies in a case where the partner had died before the bankruptcy, his share had been taken by the other partners under the provisions of the partnership deed, and the money due in respect of it had not been paid to his executors at the time of the bankruptcy. *Ib.*

Five persons carried on a partnership business under articles whereby it was agreed that any partner might retire upon twelve months' notice to the others, and that upon the retirement or death of any partner, his share should be taken at a valuation by the surviving partners, who

should pay for it by instalments. One partner died, one afterwards retired, and the remaining three filed a petition for liquidation. There were debts of the partnership which were contracted during the lifetime of the deceased partner. The separate estate of such partner was alleged to be solvent, both as regarded these debts and the claims of several creditors. The executors of the deceased partner claimed to prove in the liquidation for the unpaid instalments of the value of his share, with interest :—Held, that the proof was inadmissible, as being in competition with the joint creditors. *Ib.*

**Partner taking up Notes of Firm.**—A partner who, after getting his certificate, had taken up the notes of the firm, was permitted to prove against the joint estate. *Atkins, Ex parte*, Buck, 479.

#### viii. By one Partner against another.

**Not until Joint Debts paid.**—A partner cannot prove or claim until the joint debts are paid. *Ellis, Ex parte*, 2 Glyn & J. 312 ; *S. P., Carter, Ex parte*, 2 Glyn & J. 233.

A solvent partner cannot prove against the estate of his co-partner, so long as there are joint creditors unpaid, although the joint estate is ample to pay the joint creditors. *Bass, Ex parte*, 36 L. J., Bk. 39.

**Distinct Firms.**—Partners constituting distinct firms may prove against each other ; but in a partnership of two, one carrying on business separately, as they are both liable to the same joint debts, the solvent partner is not entitled to prove, under the bankruptcy of his co-partner, a debt for goods sold by his distinct house to the firm, until the joint creditors have been satisfied. *Adams, Ex parte*, 1 Rose, 305.

**On indemnifying Joint Estate.**—A solvent partner is entitled to prove against the estate of a bankrupt co-partner the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying the bankrupt's estate against them. *Taylor, Ex parte*, 2 Rose, 175.

A partner cannot prove against his co-partner upon indemnifying the joint estate. *Moore, Ex parte*, 2 Glyn & J. 166.

**Money given to be applied in Payment of Joint Debts.**—Money paid by one partner to another, before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, and not in fact so applied, is provable by the solvent partner as a debt under the commission, although the solvent partner was not called upon to repay the debt until after the bankruptcy. *Wright v. Hunter*, 1 East, 20 ; 5 Ves. 792.

**Agreement to Share Profits.**—An agreement to share the profits of a member of a firm constitutes a debt provable against the member for the share. *Dodson, Ex parte*, 1 Mont. & Mac. 445.

**Amount Provable against Co-partners.**—If a solvent partner pays all the joint debts, his proof against the separate estates of his partners will

be limited to the amount of their respective shares of the joint debts so paid; and if their estates are not sufficient to pay 20s. in the pound, the solvent partner will not be allowed to prove for the deficiency of each estate against the estate of the other. *Watson, Ex parte*, Buck, 449; 4 Madd. 477.

If a commission issues against three, and the joint estate is insufficient, and one partner pays the deficiency from his private estate, and there is a surplus on the separate estate of each of the others, the partner who paid the deficiency is entitled to such surplus before interest is paid to the separate creditors. *Riz, Ex parte*, 1 Mont. 237.

Under a separate commission against one of two partners, the bankrupt, having paid 20s. in the pound to all his creditors, obtained an order for the payment of the surplus to him, and the same was accordingly paid to him:—Held, that his partner was entitled to apply by petition for an account of such surplus, and for payment of his proportion of it, and that the court had jurisdiction to make the order required. *Lanfear, Ex parte*, 1 Rose, 442.

Under a separate commission, the joint property is administered as if both partners were bankrupts, viz., in satisfaction of the joint debts, in the first instance, in order to ascertain the surplus, which alone constitutes the separate interest. *Everett v. Backhouse*, 10 Ves. 98.

A joint commission issued against A. & B., A. being a dormant partner; the joint creditors resorted to the separate estate of B., thereby diminishing that separate estate, and exonerating the joint estate of A. & B., so as to produce a surplus of it:—Held, that the separate creditors of B. had a lien upon that surplus to the extent which their funds had been diminished by the resort of the joint creditors. *Reid, Ex parte*, 1 Rose, 84.

Where a man is a partner in separate firms, each of which becomes bankrupt, the surplus of his separate estate will be applied in discharging the joint debts of the firms, in proportion to the whole amount of debts proved against each firm respectively. *Franklyn, Ex parte*, Buck, 332.

**Object of Rule—When relaxed.**—The court refused to relax the rule in bankruptcy, that on the bankruptcy of a firm there cannot be a proof on behalf of the estate of one partner against the estate of another, until all the joint debts are paid, although, in the circumstances of the case, and having regard to the amounts of the estates, the result of relaxing the rule would have been to increase the proving estate to such an extent that it would have yielded a larger surplus to the joint estate than would arise from the estate sought to be proved against if the rule were observed and the proof excluded. *Collinge, Ex parte, Holdsworth, In re*, 4 De G., J. & S. 533.

The rule in question enures for the benefit of the separate creditors as well as of the joint creditors. *Id.*

A firm of two became bankrupt, one partner being indebted to the other. The debt arose from a contract apart from the co-partnership, and was in existence at the time of the adjudication. It was admitted that there could not be any surplus of the debtor-partner's estate for the joint creditors, whether the debt was allowed to be proved against that estate by the creditor-partner or not:—Held, to be a proper case for

relaxing the general rule, and that the creditor-partner might prove against the debtor-partner's estate, and it was so ordered, with a declaration that the proof must be subject to be expunged, and the dividend refunded, if any surplus of the debtor-partner's should arise for the benefit of the joint creditors. *Topping, Ex parte, Levy, In re*, 4 De G., J. & S. 551; 34 L. J., Bk. 13; 11 Jur., N. S. 210; 12 L. T. 3; 13 W. R. 445.

**Executor of Deceased sole Partner—Appropriation of Partnership Funds.**—H., a banker, took into partnership K., a country gentleman unacquainted with banking, who was not bound to bring in any capital or to attend to the business. K. did not acquaint himself with the accounts, though he occasionally came to the bank. H. from time to time fraudulently drew large sums out of the bank, and employed them in losing speculations on the Stock Exchange, concealing the overdrawings by means of fictitious entries in the books of the bank. K. never drew out anything. On the death of H. the bank was found utterly insolvent, and K. was adjudicated bankrupt. A decree was made for the administration of the estate of H., under which the trustee in bankruptcy of K. claimed to prove for what was due from H. for moneys thus fraudulently drawn out:—Held, that he was entitled to prove. *Lacey v. Hill, Lacey v. Hill*, 4 Ch. D. 537—C. A. Affirmed, sub nom. *Read v. Bailey*, 3 App. Cas. 94; 47 L. J., Ch. 161; 37 L. T. 510; 26 W. R. 223.

A father and his son carried on business in partnership. The whole capital belonged to the father, the son having only an interest in the profits. The father died, and thereupon under the provisions of the partnership deed the partnership was dissolved, and all the profits became the property of the father. The father appointed the son his executor, and the son in that character received moneys belonging to the father's separate estate and employed them without any authority in the business. A suit was afterwards instituted to administer the father's estate, and the son filed a liquidation petition:—Held, that the receiver appointed in the suit could prove in the son's liquidation for the moneys thus received by the son as executor and misapplied. *Westcott, Ex parte, White, In re*, 9 L. R., Ch. 626; 43 L. J., Bk. 119; 30 L. T. 739; 22 W. R. 813.

**By Person held out as Partner.**—A trader was alleged to have represented to some few of his creditors, but not to the main body of them, with the tacit acquiescence of C., that C. was in partnership with him. On his bankruptcy, C. claimed to prove against the estate:—Held, that there was no representation sufficient to constitute an ostensible partnership, and that the proof must be allowed. *Wright, In re, Sheen, Ex parte*, 6 Ch. D. 235; 37 L. T. 451; 26 W. R. 195—C. A.

**Retired Partner.**—A retired partner, with a covenant of indemnity against the debts, in consideration of assigning his share of the property, was admitted, under a commission against the remaining partner, to prove a joint debt paid by him, indemnifying the joint estate. *Ogilby, Ex parte*, 3 Ves. & B. 133; 2 Rose, 177.

Upon the death of one of three partners his

executors carried on the business with the survivor for a year, and then dissolved, the two continuing partners giving them a bond for the balance due to them; and more than six years afterwards the two became bankrupt:—Held, that the executors might prove the amount of the bond against the joint estate. *Hall, Ex parte*, 3 Deac. 125.

In 1818, A., B., C., and D. dissolved partnership as bankers, by deed, by which it was agreed that A. and B. should retire, and the business be carried on in future by C. and D.; C. and D. covenanted to indemnify A. and B. against all outstanding demands. In 1825, C. died, and a commission issued against D. A. having been obliged to pay certain partnership debts which C. and D. had undertaken to indemnify him against:—Held, that he might prove under the commission for the amount so paid, although he knew the firm to have been insolvent at the time of the dissolution in 1818. *Carpenter, Ex parte*, 1 Mont. & Mac. 1.

On the dissolution of the partnership of A. and B., the former, in consideration of the joint bond of B. and his brother, transferred and released to B. all his estate and interest in the partnership. B. became bankrupt. A. sought to prove for the amount of the bond against the separate estate for the benefit of the joint creditors of the late firm:—Held, that the proof could not be admitted, as its admission would be contrary to the rule, that so long as there are joint debts, and a possibility of those joint debts being brought upon the separate estate, a partner who is liable for those joint debts cannot make any claim against the separate estate, because by possibility he may come into competition with his own joint creditors. *Cullinge, Ex parte*, 33 L. J., Bk. 9; 9 Jur., N. S. 1212; 9 L. T. 309; 12 W. R. 30.

**Loans to Trader under 28 & 29 Vict. c. 86.]**—By an agreement in writing, M. agreed to advance to T., for the purposes of his business, an amount not exceeding 1,000*l.* upon the terms that he should receive 40 per cent. of the net profits of his business, and it was provided that M. should be at liberty to cancel the agreement and withdraw his capital at any time by drawing bills on T. for the amount. The agreement was cancelled by mutual consent, and M. drew bills on T., which the latter accepted for the amount due under the agreement, but before the bills were paid T. became bankrupt. Both before and after the cancellation of the written agreement M. made other advances to T. on a verbal agreement that 10 per cent. interest should be paid thereon by T.:—Held, that M. was not entitled to prove against T.'s estate for the amount of the bills till all the other creditors of the bankrupt had been satisfied. *Mills, Ex parte, Tew, In re*, 8 L. R., Ch. 569; 28 L. T. 606; 21 W. R. 557.

Held, also, that the Partnership Law Amendment Act, 1865 (28 & 29 Vict. c. 86), did not apply to the other advances made by M. to T. at 10 per cent. interest, and that he was entitled to prove for them against T.'s estate. *Ib.*

The effect of s. 5 of Bovill's Act is to prevent the lender of money to a trader, on the terms of receiving a share of the profits of his business, from proving for the loan in the bankruptcy of the borrower in competition with any of his creditors—not merely those creditors whose debts were contracted in relation to the business in

respect of which the loan was made, or while that business was being carried on, but any of the creditors who are entitled to prove in the bankruptcy. Till all the other creditors have been paid in full, such a lender is not entitled to prove for any purpose whatever. *Taylor, Ex parte, Grason, In re*, 12 Ch. D. 366; 41 L. T. 6; 28 W. R. 205—C. A.

In 1871 a loan was made to a trader, on the terms of the lender receiving half the profits of the business. In 1872, the trader being then insolvent, assigned all his property to a trustee, on trust for sale, and out of the proceeds of sale to pay the lender a small sum, then to pay his creditors (other than the lender) in full, and afterwards to pay the lender the balance of his loan, with interest at 10 per cent. The lender was a party to this deed. The trustee realized the property, and paid the creditors (other than the lender) a dividend of 6*s.* in the pound. This exhausted the proceeds of sale, and the lender received nothing beyond the small payment made to him in the first instance. In 1875 all the creditors released the trustee, but they expressly reserved their rights against the trader. In 1879 the trader filed a liquidation petition:—Held, that the arrangement of 1872 did not, under the circumstances, amount to a repayment of the loan and a relending of the money on new terms, and that, consequently, the lender could not prove in the liquidation in competition with the other creditors. *Ib.*

**—Mortgage given as Security.]**—The lender of money to a trader at the rate of interest varying with profits, who also takes a mortgage to secure his loan, is not, in the event of the bankruptcy of the borrower, deprived by 28 & 29 Vict. c. 86, Partnership Law Amendment Act, 1865 (Bovill's Act), of any of his ordinary rights as a mortgagee. *Shiel, Ex parte, Lonergan, In re*, 4 Ch. D. 789; 46 L. J., Bk. 62; 36 L. T. 270; 25 W. R. 420—C. A.

A sum of 2,000*l.* was lent to a trader on the security of a mortgage of his business premises and of the goodwill of the business. The mortgage deed provided that, in lieu of interest on the loan, the borrower should pay to the lender half-yearly, during the continuance of the loan, such a sum as should be equal to half the net profits of the business during the preceding half-year. Three years after receiving the loan the trader filed a petition for liquidation of his affairs by arrangement. The whole of the 2000*l.* remained due. The trustee in the liquidation claimed to be entitled under s. 5 of the 28 & 29 Vict. c. 86, to sell the mortgaged property free from the mortgage, and applied to the Court of Bankruptcy for an order that the lender should concur in assigning the property to a purchaser free from the mortgage:—Held, that s. 5 only prevented the lender from recovering his debt in competition with the other creditors, and did not prevent him from retaining the benefit of his mortgage. *Ib.*

#### ix. Inspectors.

One member of a firm was adjudicated bankrupt under the Act of 1861, the others being out of the jurisdiction, and there was no joint adjudication. The joint creditors proved debts to many times the amount of the separate debts, and appointed as assignees one joint creditor and

the nominee of another. Separate estate was got in to an amount sufficient for payment of a dividend on the separate debts; but no joint estate had been got in. A separate creditor, with the assent of nearly all the other separate creditors, applied for an order that a meeting of separate creditors might be held for appointing an inspector to protect their interests:—Held, that the acts of 1849 and 1861 had not taken away the power of appointing such an inspector, and that the separate creditors ought to be at liberty to appoint one; but that he must not take any step without the sanction of the registrar. *Melbourn, Ex parte*, 6 L. R., Ch. 835; 40 L. J., Bk. 56; 25 L. T. 368; 19 W. R. 1073.

#### h. Secured Creditors.

##### i. Generally.

**Appropriation of Securities to Particular Debts.**—The general doctrine is, that a creditor holding a security is entitled to apply it in discharge of whatever liability of a bankrupt debtor he may think fit. *Johnson, Ex parte*, 3 De G., Mac. & G. 218; 22 L. J., Bk. 65.

A creditor holding securities not specifically appropriated to any particular debts may apply them in discharge of whatever liabilities of the bankrupt he may think fit, and prove in respect of any debts for which he has no security; but he can neither prove nor vote in respect of any secured debt, unless he has first realized his security and it has proved deficient, or unless he has put a value upon it; and, until proof is made in respect of such debts, he cannot participate in any intermediate dividend that may be made of the bankrupt's estate. *Greer, In re*, 11 Ir. R., Eq. 502.

Where bankers, with the knowledge of an act of bankruptcy committed by their customer, took a guarantee from a surety on his behalf, to secure to a given amount all sums then or thereafter to become due from the customer, but the surety had no notice of the act of bankruptcy, and afterwards paid to the bankers the full sum for which he was guarantee, without specifying to which portion of the bankers' debt the payment was to be applied:—Held, that such payment was to go in reduction of that portion of the bankers' debt which was provable under the fiat, and not of that which was not provable. *Sharp, Ex parte*, 3 Mont., D. & D. 490; 8 Jur. 1012.

**Debt not Provable before Valuation or Realization of Security—Declaration of Dividend—Reservation of Dividend by Trustee.**—Until a secured creditor of a bankrupt or liquidating debtor has valued or realized his security he has no debt provable in respect of which the trustee is bound to make any reserve on declaring a dividend. *Good, Ex parte, Lee, In re*, 14 Ch. D. 82; 49 L. J., Bk. 49; 42 L. T. 450; 28 W. R. 553—C. A. Reversing 41 L. T. 660; 28 W. R. 278.

If, by reason of any special circumstances, a secured creditor is prevented from realizing his security before a dividend is declared by the trustee, the court has power under s. 72 to give such directions as may be proper to prevent any injustice being done. *Id.*

Per Cotton, L. J.: Rule 136 applies only to the case of a secured creditor who desires to value instead of realizing his security, and even then it only gives the trustee, if he is dissatisfied with

the value stated by the creditor, a power indirectly to compel the realization of the security, by refusing to admit the creditor's proof till he has realized his security. *Id.*

Sect. 31 does not enable the trustee to make an estimate of the ultimate balance which may be due to a secured creditor who has not valued or realized his security. *Id.*

#### Security taken on eve of Petition being Filed.]

—A debt assigned on the eve of filing a petition, to creditors who know the debtor's position, to secure a present advance, can only be held by the assignees as security for the amount actually advanced. *Winter, Ex parte, Softley, In re*, 20 L. R., Eq. 746; 44 L. J., Bk. 107; 32 L. T. 62; 24 W. R. 68.

#### Security by Bills and Hypothecation of Debts—

**Bills must be taken up by Creditor.**—A loan was secured by bills of exchange drawn by the lender upon the borrower, and accepted by him, and also by the hypothecation to the lender of debts due to the borrower, notice of the hypothecation being given to the debtors. The lender discounted the bills with his bankers. Afterwards the borrower filed a liquidation petition, and the bankers proved in the liquidation for the full amount of the bills. By an arrangement between the trustee and the lender (made without prejudice to his rights), the trustee collected the hypothecated debts, but refused to pay them over to the lender unless he would take up the bills:—Held (without deciding in the absence of the bankers whether their proof ought to be reduced by the amount of the hypothecated debts), that the lender was not entitled to receive the amount of the hypothecated debts unless he took up the bills, but that the amount should be applied in discharging the lender's liability upon the bills. *Mann, Ex parte, Kattengell, In re*, 5 Ch. D. 367; 46 L. J., Bk. 107; 36 L. T. 840—C. A.

#### Composition—Right to rely on Securities.]

In the case of a composition with creditors, nothing short of a clear and express contract to give up his securities can preclude a creditor relying on them. *Pim, In re*, 7 L. R., Ir. 458.

#### Cost of Mortgagee's Unsuccessful Defence on Title to part of Mortgaged Property.]

—A bankrupt had, before his bankruptcy, obtained advances from a bank on the security of the deposit with them of the dock warrants of a quantity of tobacco, which he represented to be his own property. After the adjudication it was discovered that fifty bales of the tobacco did not belong to him, but that he had sold them and had received the purchase-money; the purchaser having left the dock warrants relating to them with him to enable him to clear them as the purchaser should require them. After the adjudication the purchaser of the fifty bales sued the bank, and recovered from them as damages the sum which he had paid for the fifty bales, together with his costs of the action, and the judgment was affirmed by the Court of Appeal. The bank afterwards tendered a proof in the bankruptcy for the balance of their debt beyond the value of their security:—Held, that, in estimating their value, they were entitled to bring into account the costs (their own as well as the plaintiffs) of the action, but not the costs of the appeal. *Carr, Ex parte, Hofmann, In re*, 11 Ch. D. 62; 48

L. J., Bk. 69; 40 L. T. 299; 27 W. R. 435—C. A.

**Proof for Balance of Debt.**—After the decision of the appeal, the bank sold the fifty bales for less than the purchaser had paid the bankrupt for them:—Held, that there being no evidence that this loss had arisen from any default on the part of the bank, they were entitled to bring that loss into account in estimating the value of their security. *Id.*

**Excess Realized over Assessed Value.**—A secured creditor who, after the first meeting under a liquidation, proves for the balance of his debt less the assessed value of his security, is bound to pay over to the trustee any excess realized from the security beyond the assessed value; and this although the trustee does not object to the assessment or offer to redeem. *King, Ex parte, Palethorpe. In re, 20 L. R., Eq. 273; 44 L. J., Bk. 92; 32 L. T. 505; 23 W. R. 681.*

Under a liquidation a secured creditor valued his security, a policy of assurance for 1,200*l.* upon the life of the debtor, at 200*l.*, the then surrender value of the policy, and proved for the balance of his debt for the purpose of receiving a dividend. The trustee accepted the valuation and admitted the proof, and the policy, which the trustee had no intention of redeeming, was retained by the creditor. The debtor died before the close of the liquidation and the assurance company paid to the creditor the amount secured by the policy, which was insufficient to satisfy all the moneys due to him from the debtor:—Held, that the trustee was entitled to the balance of the money received by the creditor after deducting the amount at which he had valued his security and the premiums paid by him to keep it on foot. *Id.*

**Partners.**—A security for a separate demand does not extend to a joint demand. *Frean & Morrice, Ex parte. 2 Glyn & J. 246.*

— **Valuation of Proof for Joint Debt—Close of Composition—Action for Redemption of Security—Claim to Retain separate Security.**—B. & Co. were creditors of a partnership for 200,400*l.*, for which they held a security comprising joint property of the firm and also separate property of one of the partners. The firm being in difficulties, the joint creditors agreed to accept a composition, and B. & Co. valued their security at 800*l.*, and proved and received the composition upon the balance. Subsequently they received from their security more than 800*l.* and interest from the date of valuation. Four years after the close of the composition the debtors brought an action to redeem their security. B. & Co. claimed to retain the security on the separate property until they had received payment in full of their claim, on the ground that they need not have deducted the separate property:—Held, by Jessel, M. R., that B. & Co. having received 800*l.* from the security and accepted the composition on the balance, their whole debt was discharged, and they could not retain the separate security. This decision was affirmed on appeal, on the ground that although B. & Co. need not have deducted the value of the separate security, yet, inasmuch as the composition had been fixed, and the whole proceeding in the composition had been taken and completed upon the footing of

the valuation of the compound security at 800*l.*, it was too late to upset the transaction. *Couldery v. Bartrum, 19 Ch. D. 394; 51 L. J., Ch. 265; 45 L. T. 689; 30 W. R. 141—C. A.*

Held, that leave to amend the proof could not now be given, whatever might have been the case had a proper application for that purpose been made during the pendency of the composition proceedings. *Id.*

**Failure of Security.**—B. became insolvent in 1827. His mother held a security on a contingent interest of his expectant on her death, which interest would fail if he died in her lifetime. She did not prove in the insolvency, but retained her security, and the assignee sold the equity of redemption, which was purchased by a trustee for persons of whom the mother was one. In 1857 B. died in his mother's lifetime, so that the security failed. The mother died in 1864, and in 1866, further assets having unexpectedly come in, the personal representative of the mother claimed to prove, and the proof was admitted by the commissioner:—Held, that the proof had been rightly admitted. *Peake, Ex parte, Brodie. In re, 2 L. R., Ch. 453; 15 W. R. 702; 16 L. T. 511.*

## ii. Who are Secured Creditors.

**Judgment Creditors—Garnishees.**—A judgment creditor, H., having by leave of a judge proceeded against a garnishee, who was an auctioneer. P. had sent him goods for sale for ready money, not to be removed until payment. The auctioneer sold them on those terms, stated in the conditions of sale, and received part of the price from some of the purchasers; but H., who had purchased part, took them away without payment, and without the consent of the auctioneer or of P. H. refused to pay, offering to set off a debt due to him from P.; this was declined. H., having obtained judgment against P., obtained an order to attach the price of the goods remaining in the auctioneer's hands, under 17 & 18 Vict. c. 125, s. 61, which was served on the garnishee. On the same day, but after the service, P. became bankrupt. His assignees claimed the money from the garnishee, and also demanded payment from H. of the price of the goods taken away by him:—Held, that the service of the order bound the debt, so as to render the judgment creditor a creditor having security for his debt, within 12 & 13 Vict. c. 106, s. 184, but did not give a lien, so as to bring him within the exception in that section: and, consequently, that the judgment creditor could not prevail against the assignees. *Holmes v. Tutton, 5 El. & Bl. 65; 24 L. J., Q. B. 346; 1 Jur., N. S. 975.*

A garnishee was ordered, under 17 & 18 Vict. c. 125, s. 63, to pay a plaintiff's judgment-debt forthwith, or execution to issue. The order was served and payment demanded, but subsequently, and before payment or execution, the judgment debtor became bankrupt:—Held, that the plaintiff was only a creditor having security for his debt within 12 & 13 Vict. c. 106, s. 184, that such security was not such a lien as was protected by the exception in that section, and that he was not entitled to the amount of his judgment debt in the garnishee's hands as against the assignees in bankruptcy of the judgment debtor. *Tilbury v. Brown, 6 Jur., N. S. 1151; 3 L. T. 380; 9 W. R. 147.*

—**Sequestration of Benefice.**—A sequestration, issued by a judgment creditor of a beneficed clergyman who becomes bankrupt, is entitled to priority over a subsequent sequestration issued by his assignees under the bankruptcy, notwithstanding that the first of such sequestrations was not published until after the commission of the act of bankruptcy. *Hopkins v. Clark*, 4 B. & S. 836; 33 L. J., Q. B. 93; 10 Jur., N. S. 439; 12 W. R. 370. Affirmed, 5 B. & S. 753; 33 L. J., Q. B. 334; 10 Jur., N. S. 1071; 12 W. R. 1029—*Ex. Ch.*

The judgment creditor in such case is not a creditor having security for his debt, within 12 & 13 Vict. c. 106, s. 184. *Id.*

—**Foreign Attachments.**—Property attached in Jersey, being by the laws of that island vested in the creditor attaching, upon confirmation by the court of the island, in case of a bankruptcy:—Held, that the creditors attaching were entitled to hold the property attached, and to prove for the residue, where the act of bankruptcy was subsequent to the completion of the judicial act, whether on the same or any other day. *D'Obree, Ex parte*, 8 Ves. 82.

A creditor in England, and subject to the bankrupt laws, having attached the bankrupt's estate abroad, must restore it. *Benfield v. Solomons*, 9 Ves. 80.

—**Mayor's Court.**—A creditor who has served a writ of foreign attachment in an action in the Mayor's Court, but has not obtained judgment in the action before the commencement of the bankruptcy or liquidation of his debtor, is not "a creditor holding security on the property of the debtor" within the meaning of s. 12 of the Bankruptcy Act, 1869. *Lery v. Lovell*, 14 Ch. D. 234; 49 L. J., Ch. 305; 42 L. T. 242; 28 W. R. 602—C. A.

—**Tolzey Court of Bristol.**—An attachment of the goods of the defendant in an action of debt in the Tolzey Court of Bristol is only a process to compel the appearance of the defendant, and does not make the plaintiff a secured creditor within the meaning of sect. 16, sub-s. 5, of the Bankruptcy Act, 1869. The effect of an attachment in the Tolzey Court being the same as that of a foreign attachment under the custom of the Mayor's Court of London. *Sear, Ex parte, Price, In re*, 17 Ch. D. 74; 44 L. T. 887—C. A.

—**Conditional Acceptance of Bill of Exchange.**—R. & Co. consigned goods to H. for sale, drew bills on him which they indorsed to B., to whom they handed the bills of lading as a security, and wrote to H. asking him to accept the bills as against the goods. H. gave an acceptance: "Accepted payable at the I. Bank on the delivery up of the bills of lading." At the time when the bills became payable the affairs of H. were in course of liquidation by arrangement:—Held, that the conditional acceptance made the security of B. virtually a security on the property of H., and that B. could not prove against the estate of H. without deducting the value of the security. *Brett, Ex parte, Howe, In re*, 6 L. R., Ch. 838; 40 L. J., Bk. 54; 25 L. T. 252; 19 W. R. 1101.

—**Mortgage of Bills of Exchange.**—A Bombay firm drew bills upon a London firm, who ac-

cepted them against certain consignments. The Bombay firm pledged the bills and shipping documents with a bank under a letter of hypothecation to which the London firm was not a party. The Bombay and London firms both became bankrupt. The bank thereupon sold the goods, and sought to prove against the estate of the London firm for the balance due after deducting the proceeds of sale less one-half per cent. broker's commission, and two and a-half per cent. merchant's commission:—Held, that the London firm was not bound by the terms of the letter of hypothecation, that the bank was in the position of a mortgagee or pledgee of the goods, and was entitled only to deduct from the purchase-money the bare expense of realization, namely the broker's commission, and to prove for the balance of the bills after deducting the proceeds of the goods, less the broker's commission. *Oriental Bank Corporation, Ex parte, Haumann, In re*, 30 L. T. 803—L. J.

### iii. When Value of Security must be Deducted.

A bankrupt's property pledged must be sold, and the excess proved as a debt. *Twoood, Ex parte*, 19 Ves. 231.

A creditor, who has obtained goods of his debtor just before bankruptcy, cannot prove for the residue without accounting for the goods so obtained. *Smith, Ex parte*, 3 Bro. C. C. 46.

A claim or proof cannot be resisted because the creditor has property belonging to the estate in his possession; that is only a ground to restrain payment of the dividends. *Dobson, Ex parte*, 1 Mont. & Ayr. 666; 4 Deac. & Chit. 69.

The mere circumstance of a creditor coming in under the commission to prove or claim a debt, only gives the court jurisdiction as to the proof or claim, and not over any property in his possession of which he claims the legal ownership. *Id.*

A vendor of teas who retains them in his hands, a deposit in part payment being made, and the residue to be paid on a prompt day, will, upon default in payment upon the prompt day, be entitled to resell such portions as remain in his hands, and to prove against the estate of the former purchaser for the difference, if he has in the meantime become bankrupt. *Moffatt, Ex parte*, 4 Jur. 659; 1 Mont., D. & D. 282.

A composition creditor, who receives an assignment of a debt as a security for the composition, is not, when the old debt revives, entitled to retain the debt on a question of proof. *Ellis, Ex parte*, 2 Mont. & Ayr. 370.

A creditor, to whom a bankrupt has made an assignment to secure a debt, with interest, cannot, without giving up the security, prove upon a promissory note, part of the consideration for which consists of arrears of interest upon the secured debt. *Clark, Ex parte*, 1 Mont., D. & D. 622.

A security given by the bankrupt to a creditor on an expectancy, as next of kin, in the event of a person dying intestate, must be noticed by the creditor in his proof. *M'Turk, Ex parte*, 2 Deac. 58; 3 Mont. & Ayr. 1.

If a creditor, who has an additional security for his debt, takes the bankrupt's acceptances, it is his duty, when he proves the debt, to state that fact; and where a creditor had not done so, the proof was ordered to be expunged, with liberty for him to go again before the commis-

sioners and tender his proof. *Hossack, Ex parte*, Buck, 390.

When on the bankruptcy or liquidation of a mortgagor, a first mortgagee elects to give up his security altogether, and to prove for the whole of his mortgage debt, the security so given up does not merge in the equity of redemption for the benefit of a second mortgagee, but is available in the hands of the trustee in the bankruptcy or liquidation for the benefit of the general creditors. *Cracknall v. Janson*, 6 Ch. D. 735; 46 L. J., Ch. 652; 37 L. T. 118; 25 W. R. 904.

A mortgagee having given up his mortgage, and proved under a commission against the mortgagor, is not allowed to retract. *Downes, Ex parte*, 18 Ves. 290; 1 Rose, 96.

A creditor who proves his whole debt, and exhibits a mortgage for part, and receives a dividend, forfeits the mortgage. *Eddington, Ex parte*, 1 Mont. 72.

A debt cannot be expunged because a creditor holds a security not disclosed on proving; so doing is an election to abandon his lien thereon. *Rolfe, Ex parte*, 3 Mont. & Ayr. 305.

**Lease to Bankrupt and former Partner.**—The rule as to what securities a secured creditor of a bankrupt is bound to value and deduct on proving against the bankrupt's estate, explained. Two partners, who were interested in equal shares in the business of the partnership, dissolved partnership. They had carried on business at some mills, of which they held a lease, granted to them, their executors, administrators and assigns. On the dissolution, the partnership assets, other than the lease and the fixtures, were divided equally between the two partners. It was agreed that one of them should be entitled to carry on the business for seven years on his own account, and that he should pay the debts of the firm and indemnify the retiring partner against them. The retiring partner lent the other the value of his moiety of the partnership assets (other than the lease and fixtures) and granted him a lease for seven years of his moiety of the mills and fixtures. The original lease was deposited by the continuing and the retiring partners with the bankers of the former, as security for the balance which might for the time being be due from him to them, it being expressly provided that the retiring partner should be liable to the bankers only as a surety for the other. The continuing partner, before the end of the seven years, filed a liquidation petition:—Held, that, as to a moiety of the lease and fixtures, the bankers' security was upon the separate estate of the liquidating debtor, and that, before proving in the liquidation for the balance due to them by him, they must deduct a moiety of the value of the lease and fixtures. *West Riding Union Banking Company, Ex parte, Turner, In re*, 19 Ch. D. 105; 45 L. T. 546; 30 W. R. 239—C. A.

**Bills of Exchange.**—C., a factor, accepted bills drawn by A. and B., his principals, under an agreement that the proceeds of goods sent to him as factor should be security for payment of the bills: such bills were paid by A. and B. to their bankers, who knew of the agreement; A. and B., and C. became bankrupt, and the bills were dishonoured:—Held, that the bankers might have the proceeds of the goods applied in payment of the bills, and prove for the balance

remaining due against both estates. Having proved the full debt makes no difference; it must be expunged pro tanto. *Hobhouse, Ex parte*, 3 Mont. & Ayr. 269.

**Shares in Company—Partners.**—Where shares in a company stood in the separate names of two partners, and the company's deed provided that no shares should be held jointly, but the partners agreed that the shares should be partnership property, the company cannot prove a joint debt against the partners without deducting the amount of such shares as they hold as security. *Connell, Ex parte*, 3 Mont. & Ayr. 581; 3 Deac. 201.

**Proof without deducting Security—Effect.**—A secured creditor who proves his debt under a liquidation petition, without deducting the value of his security, cannot, after a composition has been accepted, be allowed to set up his security. *Balbinnie, In re, Jameson. Ex parte*, 3 Ch. D. 488; 35 L. T. 533—C. A.

A judgment creditor delivered a *fi. fa.* to the sheriff before the debtor filed a liquidation petition, but no seizure was made until after the creditors had resolved to accept a composition, the resolutions had been registered, and the debtor had paid the amount of the composition to a trustee appointed by the creditors:—Held, that the execution creditor was not a creditor holding a security at the time when the composition became binding, and that he could not enforce his writ against the debtor's goods afterwards. *Id.*

**Election.**—A plaintiff recovered judgment in an action of detainee. The defendant became bankrupt, and the plaintiff, his judgment being still unsatisfied, carried in a claim for the full amount of the judgment debt, but his claim was neither admitted nor rejected, and he never voted at any meeting of the creditors:—Held, that he had not by this elected to give up his property in the subject-matter of the action of detainee. *Ware, In re, Drake, Ex parte*, 5 Ch. D. 866; 46 L. J., Bk. 105; 36 L. T. 677; 25 W. R. 641—C. A.

**Omitting Security by Mistake.**—Semble, that a secured creditor, who by mistake has omitted from his proof of debt a part of his security, will not necessarily be held to have forfeited that part, but may be allowed to rectify his proof. *Bagshaw, Ex parte, Ker, In re*, 13 Ch. D. 304; 41 L. T. 743; 28 W. R. 403—C. A.

Where parties have proved their debts on the footing of holding no security, they will not generally be permitted to withdraw their proof and set up a security; but ignorance of the existence of a security may be ground for granting relief to a party who has so proved. *Grugeon v. Gerrard*, 4 Y. & C. 119.

A creditor who had proved a debt, and voted in respect of it, subsequently discovered that he had omitted to state and value a certain mortgage security. He obtained leave to withdraw his proof and file an amended one upon certain conditions. Having appealed against the order, and the appeal having been dismissed, no further steps were taken by the creditor. The trustees in the bankruptcy obtained an order declaring that they were entitled to the proceeds of the mortgage security which had been omitted from the original proof:—Held (reversing the decision

of the court below), that the matter was not res judicata, and that as there had been a bona fide mistake on the part of the proving creditor in the omission of his mortgage security, he was entitled to have it rectified and to amend his proof. *Whitton, Ex parte, Graves, In re*, 43 L. T. 480.

**Proof of Debt without Valuing the Security—Whether Surety Discharged.**—The defendant became surety for the payment of a debt of 400*l.*, owing from P. to the plaintiff; and by agreement between the parties, P. handed over a policy of insurance on his life to the plaintiff as collateral security. P. afterwards became bankrupt, and at that time two of the premiums on the policy remained unpaid, and the policy had lapsed. The plaintiff proved in B.'s bankruptcy for the full amount of her debt, stating in her proof that she held the policy as collateral security, but putting no value on it. The policy was afterwards given up to the trustee in bankruptcy for the benefit of the creditors, and the insurance company agreed to reinstate it. The plaintiff sued the defendant, as surety, for the amount of P.'s debt, and at the trial the plaintiff's counsel agreed to credit the defendant with 32*l.*, being the admitted value of the policy when reinstated:—Held (affirming the judgment of Field, J.), that the defendant's position as a surety was not altered so as to discharge him from liability, by reason of the course the plaintiff had pursued in the bankruptcy, as the policy was valueless when she sent in her proof. *Rainbow v. Juggins*, 5 Q. B. D. 422; 49 L. J., Q. B. 718; 43 L. T. 346; 29 W. R. 130—C. A. Affirming 5 Q. B. D. 138; 49 L. J., Q. B. 353; 42 L. T. 88; 28 W. R. 428.

Held, also, that, if the policy was of value when the plaintiff proved in the bankruptcy, and if she exercised her option, under the bankruptcy law, of handing over her security to the trustee, and proving for the whole amount of her debt, the defendant was not thereby wholly discharged from liability as a surety, but only to the extent of the value of the policy. *Id.*

**Creditor not bound by Debtor's Estimate of Security.**—A secured creditor is in no way bound by a compounding debtor's estimate of the value of his security. *Hodgkinson, Ex parte, Bestwick, In re*, 1 Ch. D. 702; 45 L. J., Bk. 78; 34 L. T. 73. Affirmed, 2 Ch. D. 485; 45 L. J., Bk. 148; 34 L. T. 784; 24 W. R. 938—C. A.

He is entitled to abstain from proving his debt, or taking any part in the composition proceedings, and, when he has realised his security, he may claim from the debtor payment of the composition upon the balance which may then remain unsatisfied of the debt. *Id.*

#### iv. When Value of Security need not be Deducted.

**Security given by Third Persons.**—The deduction of a security is never made in bankruptcy, except when it is the property of the bankrupt. *Parr, Ex parte*, 1 Rose, 76; 18 Ves. 65.

Security is not to go in reduction of proof, unless the property of the estate against which the proof is ordered. *Adams, Ex parte*, 3 Mont. & Ayr. 265.

Creditors having securities of third persons to a greater amount than the debt, may prove and receive dividends upon the full amount of the se-

curities, to the extent of 20*s.* in the pound upon the actual debt. *Bloxham, Ex parte*, 6 Ves. 449, 800.

A creditor has a right to prove, and avail himself of all collateral securities from third persons, to the extent of 20*s.* in the pound; therefore, where bills are drawn and accepted by the same persons as constituting distinct firms, proof may be made against the acceptor, without deducting the value of a security from the drawer. *Parr, Ex parte*, 18 Ves. 65; 1 Rose, 76.

A bankrupt, previously to the commission against him, procured persons to assign an interest in copyhold premises, as a security to a creditor of his. The creditor may prove under the commission, without delivering up such security. *Goodman, Ex parte*, 3 Madd. 373.

**Security by Bankrupt and Wife.**—Where a bankrupt and his wife executed a power of appointment of the wife's estate to a creditor as a security for a debt due from the bankrupt:—Held, that the creditor might prove for the whole debt without giving up the security, it being incumbent on him to recover what he could from the bankrupt's estate before he resorted to the property of the wife. *Hedderley, Ex parte*, 2 Mont., D. & D. 487.

**Partners—Separate Security.**—W. and T., partners, being indebted to A. in 10,000*l.* on bills, T. alone assigned to A. certain securities to secure the 10,000*l.*, under which 8,414*l.* was received. On the bankruptcy of W. and T.:—Held, that A. might prove for 10,000*l.*, without deducting the 8,414*l.* from the proof. *Adams, Ex parte*, 3 Mont. & Ayr. 157.

A creditor, having a joint and several security for his debt, is not entitled to double proof against the joint and separate estates, although his debt is secured by two independent instruments. *Hill, Ex parte*, 2 Deac. 249.

A joint creditor, having separate security from one of his co-debtors, was admitted to prove his debt against the joint estate, without surrender or sale of his security. *Peacock, Ex parte*, 2 Glyn & J. 27.

An equitable mortgagee of one partner for a debt due from the other, may prove his whole debt against the separate estate of that partner, and retain his security against the first. *Rogers, Ex parte*, 1 Deac. & Chit. 38.

A joint creditor took an equitable mortgage from one of two partners, as a security for his debt; after which that partner died, and the other became bankrupt:—Held, that the creditor might prove the amount of his debt without the previous sale of his security. *Bowden, Ex parte*, 1 Deac. & Chit. 135.

A. and B., co-partners, executed a mortgage upon their joint property, for securing payment of a sum of money due by them to C; and by the mortgage deed they entered into a joint and several covenant for payment of the debt to C. Upon the bankruptcy of A. and B.:—Held, that C. was entitled to prove his debt against the separate estates of A. and B. respectively, without giving up his joint security. *Sheppard, Ex parte*, 3 Jur. 1147; 2 Mont., D. & D. 204.

A creditor, whose debt was secured by the joint and several covenants of two partners in trade, and also by a mortgage on part of the joint property, admitted to prove his debt against the separate estate of each without surrendering or



realizing his mortgage security. *Plummer, In re*, 1 Ph. 56.

One of three partners deposited with a joint creditor a bond belonging to himself, to secure the partnership debt:—Held, on the bankruptcy of the partners, that the creditor could prove the amount of his debt against the joint estate, without giving up the bond. *Halifax, Ex parte*, 1 Mont., D. & D. 544.

Property belonging to a member of a firm was charged by him in favour of a bank for securing his own private debts to the bank, and also those of the firm. Each partner in the firm having gone into liquidation, the bank realized the security, deducted the private debt of the owner out of the proceeds of sale, and carried over the residue to a suspense account:—Held, that the bank was not prevented from proving for their whole debt against the joint estate. *Watson, Ex parte, Walker, In re*, 42 L. T. 516; 28 W. R. 632.

**Parties to Bill of Exchange.**—A depository has a right to avail himself of his pledge to its utmost extent in point of proof, and to his fullest and most complete indemnity at the time of proving. Thus, a creditor, with whom a bill of exchange had been deposited as a security, first proved his debt against the estate of the drawee, his principal debtor, and thereby and by other means reduced his debt to 14*l*. Subsequently to that, the acceptor became bankrupt; under his commission he was entitled to prove, not only the 14*l*., but all the interest upon his debt at the time of making that proof to the complete liquidation of the account in respect of which he held the bill as a security. *Martin, Ex parte*, 1 Rose, 87.

When a bill of exchange, accepted for the accommodation of the drawer, is deposited by him as security for a debt less than the amount of the bill, the holder is entitled to prove in the bankruptcy of the acceptor for the full amount of the bill, though he cannot receive dividends in excess of the debt due to him by the drawer. *Newton, Ex parte, Griffin, Ex parte, Bunyard, In re*, 16 Ch. D. 330; 50 L. J., Ch. 484; 44 L. T. 232; 29 W. R. 407—C. A.

A. owed B. 227*l*., and to secure the amount deposited with him bills to the amount of 1,158*l*., drawn by A. and accepted by C. A. and C. both became bankrupt:—Held, that B. might prove the full amount of the bills under the fiat against C., but not to receive dividends beyond 227*l*. *Phillips, Ex parte*, 1 Mont., D. & D. 232.

A firm in Charleston applied to a firm in Liverpool to raise the necessary funds for the purchase of cotton in America for sale in England, at the risk of certain speculators for whom they acted, and the Liverpool firm applied to an English bank for an advance for that purpose. An arrangement was accordingly made, under which the Charleston firm drew upon an American branch of the bank for the amount required, purchased the cotton, consigned it to the Liverpool firm, drew bills upon that firm, and indorsed them to the bank. At the same time the cotton was consigned to the Liverpool firm, who accepted the bills drawn upon them by the Charleston firm, and the bills of lading were endorsed by the Charleston firm to the bank as security for their advance. Afterwards the Liverpool and Charleston firms became insolvent. The value of the cotton was insufficient to cover the acceptances of the Liverpool firm:—Held, that the trans-

action was a joint adventure of the Charleston and Liverpool firms, and that they were jointly interested in the cotton, and consequently that the bank could prove against the estate of the Liverpool firm for the sum advanced without giving up their security. *English and American Bank, Ex parte*, 4 L. R., Ch. 49; 19 L. T. 302.

**Bills of Exchange held by Banker pending Discount.**—Bills of exchange indorsed by a customer to his banker in order that they may be discounted and held by the banker "pending discount," i.e., pending enquiries as to the solvency of the acceptors, the banker meanwhile making some advances to the customer on the credit of the bills, are not securities, which the banker, in proving in the customer's bankruptcy for the amount due to him by the customer, is bound to value. The banker is entitled to prove for the full amount due to him, and also to recover what he can from the other parties to the bills, provided that he does not receive in the whole more than 20*s*. in the pound. *Schafeld, Ex parte, Firth, In re*, 12 Ch. D. 337; 48 L. J., Bk. 122; 40 L. T. 823; 27 W. R. 925—C. A.

**Equitable Mortgage.**—An equitable mortgagee of an estate of which a bankrupt is legally the owner may prove, without giving up his security, if the estate which is subject to the mortgage is so encumbered, that the bankrupt would have no beneficial interest in it if the mortgage was removed. *Turner, Ex parte*, 3 Mont., D. & D. 576.

A partnership, consisting of a father and son, was dissolved. The father equitably mortgaged an estate of his own to secure a debt due from the son separately, and afterwards died indebted, jointly with his son, to an amount more than sufficient to exhaust his assets, including the mortgaged estate, even if the mortgage were removed. The estate descended to the son, who became bankrupt:—Held, that the mortgagee might prove and keep his security. *Id*.

**Cross Securities.**—When a man had borrowed money upon the guarantee of a surety, and the surety held a security from the borrower, on the bankruptcy of the borrower the principal creditor was allowed to prove his debt without regard to the security. *Yewdall, In re, Braithwaite, Ex parte*, 46 L. J., Bk. 87; 36 L. T. 520; 25 W. R. 635. Affirmed, 46 L. J., Bk. 109; 36 L. T. 841; 25 W. R. 741—C. A.

A bank, carrying on business in Bombay and London, sold to C. & Sons, of Bombay, their acceptances for 25,000*l*., payable in London three and four months after sight. In payment, C. & Sons gave the bank bills 20,000*l*., drawn on C. & Co., payable six months after sight, and 5,000*l*. in cash, together with a further sum, by way of discount, in respect of the difference of times when the bills became due. C. & Co. accepted the bills drawn on them, and C. & Sons indorsed to C. & Co. the bank's acceptances for 25,000*l*. The bank being unable to meet some of their acceptances, gave C. & Co. a security for payment. Subsequently the bank became insolvent, and was ordered to be wound up. Both C. & Co. and C. & Sons executed assignments for benefit of their creditors. All the acceptances of C. & Co. had been dealt with by the bank, and were in the hands of third parties, but C. & Co. were the holders of the bank's acceptances to the ex-

tent of 19,000*l*. The representatives of C. & Co., acting on the erroneous assumption that the bank held their acceptances for 20,000*l*., sent in a claim in the winding-up of the bank for 5,000*l*. only. Subsequently, upon discovering the fact that the bank had parted with all their acceptances, they claimed to be admitted to prove to the full amount of 19,000*l*. They had in the meantime realized their security:—Held, that the representatives of C. & Co., as indorsees for value, were entitled to prove against the bank in respect of the acceptances held by them; and that since the claim for 5,000*l*. had been made on an assumption of facts shewn to be erroneous by the affidavit made in support of it, the case should be treated as if the claim for the whole 19,000*l*. had been made at the time when the original claim for 5,000*l*. was carried in, and that being before C. & Co. had realized their security, they were entitled to retain the amount so realized as well as to prove for the whole amount in the winding-up. *London, Bombay and Mediterranean Bank, In re, Cama, Ex parte*, 9 L. R., Ch. 686; 43 L. J., Ch. 683; 31 L. T. 234; 22 W. R. 809.

**Guarantees.**—A banker permitted a customer to overdraw his account upon having a limited guarantee from a surety, which provided that all dividends, compositions, and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to and secure any ultimate balance that should remain due to the bank. The customer, when indebted to the bank more than the amount of the guarantee, compounded with his creditors, and the surety paid the amount of his guarantee:—Held, that the bank was entitled to receive dividends upon the full amount of their debt until by means of such dividends and the amount received under the guarantee they should have been paid the whole sum due. *Midland Banking Company v. Chambers*, 7 L. R., Eq. 179; 19 L. T. 548; 17 W. R. 156. Affirmed, 4 L. R., Ch. 398; 38 L. J., Ch. 478; 20 L. T. 346; 17 W. R. 598.

A bank held the guarantee of B. for their debtor's account, whereby it was provided that "the guarantee should extend to the repayment of all moneys which should at any time be due from the debtor to the bank, and should be a continuing guarantee to the extent of 800*l*. . . " and "that the guarantee should not be considered as wholly or partially satisfied by the payment or liquidation at any time or times thereafter of any sums for the time being due, but should extend to and be a security for every and all future sum or sums of money at any time due to the bank thereon notwithstanding any such payment or liquidation;" and "that all dividends, compositions, and payments should be taken or applied as payments in gross, and that the guarantee should apply to secure any ultimate balance due to the bank." The debtor having filed a petition for liquidation, B. paid 800*l*., the amount of his guarantee, to the bank. Upon a question whether the bank, or B., was entitled to prove for the 800*l*. :—Held, that B. having by the guarantee contracted himself out of his original right, in favour of the bank, the latter was entitled to prove for the whole amount of their debt, including the 800*l*. paid by B. *Midland Banking Company, Ex parte, Sellers, In re*, 38 L. T. 395.

**Agreement between Surety and Creditor that Receipt of Dividends in Bankruptcy shall not diminish Liability of Surety to pay in Full.]**

—A customer gave to his bankers, as a security for the balance which might from time to time be due from him to them, the joint and several bond for 1,000*l*. of himself and a surety, the liability of the surety being expressly limited to 500*l*. There was a proviso in the bond that any dividends received by the bankers in the bankruptcy of the customer should not, so far as concerned the surety, go in discharge of his liability; but the bankers should notwithstanding be entitled to recover on the bond against the surety to the full extent of 500*l*., or so much thereof as should, together with the dividends, amount to 20*s*. in the pound on the debt due by the customer to the bankers. The customer filed a liquidation petition, and the bankers proved for the debt due to them. Afterwards the surety paid the bankers 500*l*., and he then proved in the liquidation for 500*l*.—Held, by Bacon, C. J., that the proof of the bankers must be reduced by 500*l*., but that this reduction would not prejudice any right of the bankers against the surety. But held, by the Court of Appeal, that the bankers were entitled to retain their proof for the full amount. *National Provincial Bank of England, Ex parte, Rees, In re*, 17 Ch. D. 98; 44 L. T. 325; 29 W. R. 796. Reversing 44 L. T. 159.

**v. Sale of Security by Order of the Court.**

**Mortgage—Conditional Power of Sale.**—A bankrupt executed a mortgage with a power of sale, subject to a proviso that the power was not to be exercised for five years, if the interest was regularly paid:—Held, that the mortgagee might have the common order for sale, with liberty to prove for the residue. *Bignold, Ex parte*, 3 Deac. 151; 3 Mont. & Ayr. 477.

**Unpaid Vendor of Real Property.**—An application by a vendor, who had not conveyed, for a sale of the premises, in discharge of his lien for the unpaid purchase-money, and to prove for any deficiency, granted. *Glyde, Ex parte*, 1 Glyn & J. 323.

**Unpaid Vendor of Personality.**—Where a bankrupt contracted to buy some shares in the United States Bank, the certificates of which were left in the hands of the vendor as a security for the payment of the greatest portion of the purchase-money:—Held, that the vendor was entitled, as in the case of an equitable mortgage, to an order for the sale of the shares in satisfaction of the unpaid purchase-money, with liberty to prove for the difference. *Sheppard, Ex parte*, 2 Mont., D. & D. 481.

**Deposit without written Memorandum.**—Where, in June, 1837, the bankrupt verbally deposited a bundle of deeds to secure a debt, which the petitioner believed were all the deeds relating to the property; and in August, 1843, only two days before the fiat, the bankrupt deposited two other material deeds relating to the property; and there was no affidavit on the part of the assignee, or the bankrupt, impeaching the validity of the latter deposit; the court would

not impute to it the character of a fraudulent preference, and made the common order as in the case of a verbal deposit. *Gillett, Ex parte*, 3 Mont., D. & D. 488.

The last deposit was accompanied with the following memorandum:—"The deeds are placed in the hands of F. G.:"—Held, that this did not entitle the petitioner to an order as on a deposit accompanied with a memorandum in writing. *Id.*

A trader deposited policies of assurance with his bankers to secure the floating balance due from him, and signed a memorandum of the object of the deposit, of which notice was given to the insurance office. Afterwards he took a partner, and the policies remained and were treated as a security for the floating balance due from the firm, but of this change in the object of the security no memorandum was signed, nor was any notice given to the office on the firm becoming bankrupt:—Held, that the bankers were entitled to the usual order as in the case of an equitable mortgage without a written memorandum. *Barnett, Ex parte*, 1 De Gex, 194.

— **Insufficient Memorandum.** — Where a written memorandum does not specify the purpose for which deeds are deposited, the party will only be entitled to an order, as on a deposit without any memorandum in writing. *Smith, Ex parte*, 1 Mont., D. & D. 165.

— **Leases Substituted for Agreements.** — A loan was made on a deposit of agreements for building leases, with a written memorandum; afterwards the leases were obtained and deposited in lieu of the agreements, but without any fresh memorandum:—Held, that on the usual petition of the equitable mortgagee in bankruptcy, the order ought to be made as in cases of no written memorandum. *Anderson, Ex parte*, 3 De G. & S. 600.

— **Conflict as to Terms of Deposit.** — The court will order a sale of property comprised in deposited deeds, although there is conflicting evidence upon the question whether they were deposited as a security or not. *Barnes, Ex parte*, 6 Jur. 652.

**Partners.** — Where a partner gives a separate security for a joint debt and becomes bankrupt, the other partners remaining solvent, the creditor may have, under the separate fiat, the usual order for sale, but can only have liberty to prove for the deficiency against the joint estate. *Leicestershire Banking Company, Ex parte*, 1 De Gex, 292.

One of two partners deposited the deeds of his own estate by way of equitable mortgage to secure a partnership debt, and afterwards became bankrupt, the other partner being solvent:—Held, that an order might be made for the sale of the equitable mortgage; but no proof allowed against the bankrupt partner for the purpose of receiving dividends. *Lloyd, Ex parte*, 3 Deac. 305; 3 Mont. & Ayr. 601.

**Bankrupt, the Purchaser of Equity of Redemption.** — A mortgagee cannot have the usual order where the bankrupt is not the mortgagor, but a purchaser of the equity of redemption, although the vendors of the equity of redemption, with whom the bankrupt has covenanted to pay

the debt, join in the petition, and pray to be at liberty, after paying the deficiency, to prove for the amount. *Keightley, Ex parte*, 3 De G. & S. 583.

**Freehold and Leasehold in one Order.** — Both freehold and leasehold may be included in an order of sale. *Leathes, Ex parte*, 3 Deac. & Chit. 112.

**Sale of Part.** — The court will, at the instance of a legal mortgagee, order the sale of a part only of his security, where the remainder, from its being the subject of litigation in a chancery suit, is at the time unsaleable. *Wace, Ex parte*, 2 Mont., D. & D. 730; 6 Jur. 1069.

**Order cannot be Abandoned.** — A creditor who has obtained an order for sale of a security, with liberty to prove for the deficiency, cannot afterwards abandon that order, and claim to prove for his whole debt, retaining his security; although the order may not have been acted on, and he was not aware of his rights when the order was obtained. *Davenport, Ex parte*, 1 Mont., D. & D. 313.

**Mortgagee's Right to Rent and Crops.** — A legal mortgagee obtained the usual order for sale of the property, previous to which it was arranged between himself and the assignees in bankruptcy that he should be placed in the same situation as if he had given notice to the tenants:—Held, that the mortgagee was, under these circumstances, entitled to the crops growing on the estate at the time of the order of the sale. *Barnes, Ex parte*, 3 Deac. 223; 3 Mont. & Ayr. 497; 2 Jur. 329.

And to the rents due since the bankruptcy, and to the crops. *Id.*

If a legal mortgage is ordered to be sold the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenants to pay the rents to him. *Living, Ex parte*, 2 Mont. & Ayr. 223; 1 Deac. 1.

Incumbrancers on a bankrupt's property, under an agreement for security, had enforced their lien against the assignees in a chancery suit, in which the subject of the security had been sold, and the proceeds applied in reduction of the debt:—Held, that in proving for the residue, the mortgagees were entitled to set off the income of the property accruing due after the bankruptcy against the interest upon the debt since the same period. *Penfold, Ex parte*, 4 De G. & S. 282.

Where there has been an order for the sale of mortgaged property, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequently to the order of sale, and up to the time of taking the account. *Ramsbottom, Ex parte*, 4 Deac. & Chit. 198; 2 Mont. & Ayr. 79.

**Liability for Rent.** — An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency. *Cocks, Ex parte*, 3 Deac. & Chit. 8.

In general, an equitable mortgagee is not entitled to his rents prior to the date of the order for sale. But where, prior to the bankruptcy, the mortgagor absconded, and the equitable

mortgagee of part of the property took possession of that part from an agent, and a fiat issued against the mortgagor, and then the solicitor to the commission, on behalf of the creditors and the equitable mortgagee jointly, appointed the same agent to manage the whole property, which agent was subsequently adopted by the assignees:—Held, that the mortgagee, though he was also petitioning creditor, was entitled to the rents from the time of his first taking possession. *Bignold, Ex parte*, 4 Deac. & Chit. 259; 2 Mont. & Ayr. 16.

Equitable mortgagees, having received rents before an order for sale, are entitled to retain the same as against the assignees, and are not bound to refund, as a condition for obtaining the order. *Williams, Ex parte*, 13 W. R. 564; 12 L. T. 180.

**Sale of Security at Instance of Secured Creditor—Jurisdiction.**—Where the trustee of a liquidating debtor had with the sanction of the creditors accepted a composition under s. 28 of the Bankruptcy Act, 1869:—Held, on appeal, reversing the decision of the court below, that the Court of Bankruptcy had no jurisdiction upon the application of a secured creditor, who had not proved in the liquidation, to order the sale of his security. His proper course was to realize his security as a mortgage in the usual manner in the High Court and then prove for any deficiency that might ensue in the Court of Bankruptcy. *Holmes, In re, Woods or Holmes, Ex parte*, 43 L. T. 447; 29 W. R. 124.

When an equitable mortgagee is allowed to conduct the sale, and wishes to bid and become the purchaser of the premises comprised in his mortgage, the court will, before giving leave, ascertain the value of the premises, and fix a reserved bidding. *Commercial Bank of London, Ex parte*, 9 L. T. 782.

**Costs of Sale.**—Where a legal mortgagee petitions for leave to bid and not for sale, it is not the practice to give him costs. *Smith, Ex parte*, 13 Jur. 1044; *S. P., Martelli, Ex parte*, 6 Jur. 52.

An order was made, with the consent of the mortgagee of an estate of the bankrupt with a power of sale, that it should be sold in the bankruptcy. A petition was presented by the mortgagee for liberty to bid at the sale, and for payment of the costs of the application out of the purchase-money, to which the assignees assented:—Held, that he was not entitled to such costs, unless the assignees would state that the petition was presented at their request. *Danks, Ex parte*, 12 L. J., Bk. 45.

Where the mortgagee of a bankrupt's estate called on the commissioners to direct a sale, under Lord Loughborough's order of March, 1794, and became the purchaser at such sale:—Held, in an action for money paid, brought by the solicitors to the assignees, that he was liable to reimburse them the expenses of advertisements, and the commissioners' fees for their attendance to perfect such sale, although the estate sold was insufficient to cover the sum originally advanced by such mortgagee. *Bowles v. Perring*, 5 Moore, 290; 2 B. & B. 457.

Where a party, having an equitable mortgage by deposit of title deeds, with a written memorandum, has lost the memorandum, he will, on his presenting a petition for the usual order for sale, have to pay any costs occasioned

by such loss. *Rogers, Ex parte*, 3 Mont., D. & D. 297; 7 Jur. 406.

The costs of an application of a mortgagee for leave to bid at the sale will not be allowed out of the proceeds, unless the assignees consent. *Anon., Ex parte*, 3 Mont., D. & D. 339.

Practice as to costs of equitable mortgagee's petition for sale. *Barclay, Ex parte*, 5 De G., Mac. & G. 403.

Equitable mortgagee, by deposit of shares in a public company without written memorandum, is entitled to his costs on evidence of custom not to give a written memorandum. *Moss, Ex parte*, 3 De G. & S. 299; 18 L. J., Bk. 17; 13 Jur. 866.

A letter written after the deposit, and referring in general terms to it, and to a bond in which the purpose of the deposit was stated, is a sufficient memorandum to entitle to costs. *Bisdee, Ex parte*, 1 Mont., D. & D. 333.

A letter noticing that certain deeds had been deposited to secure a particular debt, together with a subsequent letter requesting further accommodation, on the ground that the depositary held ample security for the amount of the depositor's account, constitute together a sufficiently definite memorandum in writing of an equitable mortgage for the whole amount due, so as to entitle the depositary to his costs. *Chrellt, Ex parte*, 1 Mont., D. & D. 689; 5 Jur. 555.

Where there was a sufficient part performance to take a parol contract for sale out of the Statute of Frauds, and the purchaser became bankrupt:—Held, that the vendor, seeking to have effect given to his lien for unpaid purchase-money, was entitled to have his costs out of the estate sold. *Cooper, Ex parte*, 3 Mont., D. & D. 717.

#### i. Sureties.

**Who are Sureties.**—In 49 Geo. 3, c. 121, s. 8, the words "person liable" comprehend all persons rendering themselves responsible for the debt of another. *Yonge, Ex parte*, 2 Rose, 40; 2 Ves. & B. 31.

**Accommodation Parties to Bills of Exchange.**—The acceptor of an accommodation bill is a surety, and must prove his debt under a commission against the drawer. *Van Sandau v. Corabie*, 3 B. & A. 13; 1 Chit. 16.

So an accommodation indorser is a person liable to pay the bill for the party accommodated; against whom therefore if he becomes bankrupt, such indorser, though not called on to pay the bill till after the bankruptcy, may prove the amount. *Bassett v. Dodgin*, 9 Bing. 653; 2 M. & Scott, 777.

The plaintiff having accepted a bill payable at a future day for the accommodation of the defendant, the latter afterwards, and before the bill became due, committed an act of bankruptcy, followed by a commission, which was afterwards superseded, and time was given to the bankrupt by his creditors; and the plaintiff thereupon accepted another bill for the same debt, with the addition of the interest and stamp:—Held, that this was a continuation of the suretyship by the plaintiff for the defendant, which existed before the act of bankruptcy and the first commission: and a second effectual commission having afterwards issued upon the same act of bankruptcy, before the plaintiff's second acceptance became

duc. which was paid when due :—Held, that the amount was provable as a debt under such commission. *Nedman v. Martinant*, 13 East, 427 ; 12 East, 664 ; 1 Rose, 106.

**Right to Sue.**—Where A. became surety for B. for a debt due to C., and, after a commission of bankruptcy issued against B., paid part of the debt to C., and obtained from him an indemnity against personal liability for the remainder, the whole of the debt having been proved under the commission by C. :—Held, that A. might maintain an action against B. for the money so paid, as having been paid to his use, notwithstanding the 49 Geo. 3, c. 121, s. 8. *Soutten v. Soutten*, 1 D. & R. 521 ; 5 B. & A. 352.

**Surety on Faith of Person joining as Co-Surety.**—A., as surety to a firm, signed a joint and several bill of exchange, on the faith that B. would join as co-surety ; B. never signed it, but A. was afterwards compelled to pay it, by proceedings at law, at the suit of an indorsee. One of the firm died, and the others became bankrupt :—Held, first, that the firm was not entitled to avail itself of the bill, and was liable to repay the amount, and the costs of proceedings both at law and equity ; and secondly, that the claim was of such a nature as not to be provable under the bankruptcy, and therefore not barred by the certificate. *Rice v. Gordon*, 11 Beav. 265.

**Co-Sureties.**—If A. and B. give a joint and several promissory note for the debt of C. and B. becomes bankrupt, and A. pays the amount, he cannot prove against B. as a surety. *Porter, Ex parte*, 2 Mont. & Ayr. 281.

**Contribution.**—The plaintiff, the defendant and another party, were co-sureties for A., by a joint and several promissory note payable on demand. The defendant afterwards became bankrupt, at which time the plaintiff had not paid his share of the debt, but subsequently he had paid more than his proportion :—Held, in an action for contribution, that the bankruptcy of the defendant was no answer, as the case was not within 6 Geo. 4, c. 16, s. 52, the plaintiff not being a person liable for the bankrupt's debt within the meaning of that section. *Wallis v. Swinburne*, 1 Ex. 203 ; 17 L. J., Ex. 169 ; 11 Jur. 781.

A., surety with B., for C., was compelled to pay the debt after the bankruptcy of B. The certificate of B. is no answer to the action of A. for contribution. *Clements v. Langley*, 2 N. & M. 269 ; 5 B. & Ad. 372.

**Bills Accepted to take up old Bills—Indemnity.**—The plaintiff accepted two bills drawn upon him by the defendant for value ; before they arrived at maturity, the plaintiff being unable to meet them, it was agreed that he should accept other two bills in lieu of them, in consideration of which the defendant undertook to provide for the first two, which he had negotiated. The defendant, however, failed to perform his engagement, and the plaintiff was ultimately compelled to pay all the bills. The two first-mentioned bills became due before, but were not taken up by the plaintiff until after, the fiat against the defendant. In an action against him for breach of the indemnity :—Held,

that the bills constituted a debt of the bankrupt, for which the plaintiff was liable at the time the fiat issued, within the 6 Geo. 4, c. 16, s. 52, and consequently that the certificate was a bar. *Filbey v. Lawford*, 4 Scott, N. R. 208 ; 3 M. & G. 468.

**Counter Security by Principal Debtor and his Partner.**—A., and B. his surety, entered into a bond for payment, by instalments, of a debt of A., and also of interest and premiums on a policy. As part of the same arrangement, A. and C. (his partner), entered into a counter security to B., by way of joint covenant of indemnity. A. and C. became bankrupt, and the condition of the bond having been fulfilled up to the date of the fiat, was afterwards broken :—Held, that B., who paid the amount, could not prove against the joint estate of A. and C., on the counter security *Meyer, Ex parte*, 6 De G., Mac. & G. 775 ; 12 Jur. 447.

**Bond to the King.**—Where A., B., and C. entered into a bond to the king, the condition of which was, that A. as sub-distributor of stamps, should truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for the same, and also the price of such vellum, together with all moneys which he should receive on account of the duties on personal legacies and stage coaches ; and A., being indebted to the king in a certain sum, became bankrupt, and afterwards obtained his certificate ; and a scire facias having afterwards issued on the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same :—Held, in an action by the surety to recover these sums from the bankrupt, that B. was a person surety for or liable for a debt of the bankrupt, within the 49 Geo. 3, c. 121, s. 8, and consequently that the latter was protected by his certificate. *Westcott v. Hodges*, 5 B. & A. 12.

**Principal Creditor failing to Prove.**—Action for money paid. Plea, the defendant's certificate under a fiat, that the money was paid for a debt of the defendant due before his bankruptcy, for which the plaintiff was surety, and that the plaintiff paid the money without request from the defendant, except the request supposed to arise by law. Replication, that, before the payment, the defendant had obtained his certificate, and that a final dividend had been made of his estate, and that there was not any debt in respect of the payment of which the plaintiff could have proved, or for which he could have received any dividend :—Held, that the certificate was a discharge from the claim, as the principal creditor might have proved, and if he had, the plaintiff would have been entitled to the benefit of that proof, either in reduction of his liability to the creditor, if the creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor ; or the plaintiff might have paid the debt at once to the creditor, and have himself proved before any dividend was declared ; or, if the creditor would not take the debt, the plaintiff might have compelled him to prove for the plaintiff's benefit. *Jackson v. Magee*, 3 Q. B. 48 ; 2 G. & D. 402 ; 6 Jur. 1107.

**Payment by Surety of Rent due after Bankruptcy.**—Where the plaintiff, who was surety

for the defendant for the payment of an annual rent, sued the defendant for money paid, and stated in the replication that he had paid it for rent due by the defendant after the bankruptcy:—Held, that he could recover, as he was not a surety within the statute. *McDougal v. Paton*, 2 Moore, 644; 8 Taunt. 580.

**Lessee and Sub-Lessee—Indemnity.**—A declaration alleged that the defendant occupied premises of W. at a certain rent; and in consideration that the plaintiff, at the request of the defendant, had become tenant to him at a certain rent, the defendant promised the plaintiff to indemnify him against the rent payable to W., and against any distress or action, costs, charges, damages, or expenses, by reason of non-payment, alleging as a breach that the defendant did not indemnify the plaintiff, by reason whereof a distress was made by W. on his goods for rent in arrear by the defendant, and that they were sold to satisfy that rent, and the costs of the distress. The defendant pleaded that, before distress, he petitioned the Court of Bankruptcy, was adjudged bankrupt, and obtained his certificate, and that the rent distrained for was due at the time of filing the petition, and that the plaintiff was the tenant of the defendant, and by reason of that tenancy was liable to W. for the rent due from the defendant:—Held, that the plea was bad, as the facts therein stated did not render the plaintiff a surety, or liable for the debt of the defendant; within 12 & 13 Vict. c. 106, s. 173. *Hoare v. White*, 3 Jur., N. S. 445.

**Limited Guarantee—Proviso as to Dividends.**—In a continuing limited guarantee there was a proviso, that if the creditors received a dividend from any estate of the principal debtors, it should not be taken in discharge of the guarantee, but that the creditors should be entitled to recover on the guarantee to the full extent of the limit. On the bankruptcy of the principal debtors the creditors proved, and, before receiving any dividend, obtained payment from the guarantors to the full extent of the limit:—Held, that the guarantors were not entitled to stand in the place of the creditors as to so much of the proof as was equal to their payment. *Miles, Ex parte*, 1 De Gex, 623.

To a count for money paid, the defendant pleaded his bankruptcy and certificate, and that the money was paid after the fiat on account of a debt due from the defendant to a banking company, and for which the plaintiff was liable. Replication, that the liability arose from the plaintiff's (before the fiat) signing a guarantee for the defendant, whereby, in consideration of the company making advances to the defendant on account, the plaintiff guaranteed the sum advanced, so that his liability did not exceed 250*l.*, and that in the event of the defendant's bankruptcy, and the debt to the company exceeding 250*l.*, the company might elect which part of the account might be secured by the guarantee, and might prove the whole of the money due on any securities against the defendant's estate, and apply all the dividends in consideration of the debt beyond the 250*l.*; and that the plaintiff should only be entitled to the benefit of any proof or dividend after the company should have received the full amount owing to them, and that the company might recover the full amount guaranteed from the plaintiff;

that advances were made by the company, and that they proved the whole sums due to them, and forced the plaintiff to pay the 250*l.* for which he was surety to the bankers for the bankrupt:—Held, that the plaintiff's debt was barred by 6 Geo. 4, c. 16, ss. 52 and 121. *Earle v. Oliver*, 2 Ex. 71.

**Assignees of Lease—Indemnity.**—Where one of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor and the performance of the other covenants in the lease, and for indemnifying the lessee against the non-performance of the covenants, both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy:—Held, that the lessee could not prove for the damages which had accrued previously to the bankruptcy, not having paid them to the lessor. *Taylor v. Young (in error)*, 3 B. & A. 521; 2 Moore, 326; 8 Taunt. 315.

**Co-sureties—Counter Bond.**—If A. is bound with B. as a surety for the payment of a sum certain, and takes an absolute bond from B. payable the day before the original bond will become due, and B. becomes a bankrupt before the day of payment, A. may prove this debt under the commission, and B.'s certificate will be a bar to an action by A. on the counter bond, though A. does not pay the original bond till after B. has committed an act of bankruptcy. *Martin v. Court*, 2 T. R. 640. And see *Touissant v. Martinant*, 2 T. R. 100.

**Surety—Indemnity.**—X. became bound as a surety in a bond with Y. to A. on the 10th of August, 1778, conditioned for payment in six months; on the 1st of March, 1780, he became bound with Y. to B., conditioned for payment in six months; on the 4th of March, 1780, Y. became bound to X. also in a bond conditioned for payment of the two former bonds, and likewise to indemnify X. against those two bonds; the money secured by the second bond not being paid on the day when it became due:—Held, that the last bond was thereby forfeited, though X. was not called on to pay the money in the second bond until afterwards, and that X. might prove it as a debt under the commission of bankruptcy that issued against Y. after the forfeiture, and before payment. *Hodgson v. Bell*, 7 T. R. 97.

In 1855 R., and H. as his surety, gave to G. a bond for 2,000*l.* R. gave to H. by way of indemnity a warrant of attorney. In 1858, G., without the knowledge of R., gave up the bond to H., and received in satisfaction for it a promissory note of H. for the sum remaining due; R. at the same time assigned all his property to H. in satisfaction of the liabilities under which H. had come for him. Afterwards R. became bankrupt, and the warrant of attorney and the assignment became void as against the assignees in bankruptcy:—Held, that the dealings between H. and G. had not taken away the rights of H. against R., and that H. having paid the debt was entitled to prove against R.'s estate. *Allen, Ex parte*, 3 De G. & J. 447.

**Appropriation of Payments or Dividends.**—Bankers made an advance to a customer on the security of a joint promissory note of himself

and a surety. The customer afterwards paid into the bank generally sums exceeding the amount of the advance, but also drew out a still larger amount, and became bankrupt :—Held, that the surety was not entitled to have the payments appropriated in discharge of the sums secured by the note. *Whitworth, Ex parte*, 2 Mont., D. & D. 164.

A. entered into a guarantee for the payment of a debt due from the bankrupt to B., upon which occasion the bankrupt deposited with A. a lease, by way of equitable mortgage, for his indemnity. B. proved for the whole amount of his debt; and then A. applied, as equitable mortgagee, for the sale of the leasehold property :—Held, that before any part of the proceeds of the sale could be appropriated, either in payment to B. or for the indemnity of A., so much of B.'s proof must be expunged. *Sherrington, Ex parte*, 1 Mont., D. & D. 195.

A bond was entered into by a principal and three sureties. The principal and one of the sureties compounded with their creditors, and the other two sureties became bankrupt. The obligee proved the full amount of his debt against the separate estates of the two bankrupts, and claimed under the compositions, and by these means received 20s. in the pound, but the estate of the compounding surety paid more than its contributive share :—Held, that the estate was entitled to the benefit of the proof made by the obligee against the bankrupt's surety, and to receive dividends to the extent of the bankrupt surety's contributive share. *Stokes, Ex parte*, 1 De Gex, 618; 12 Jur. 891.

A. being indebted to C., B. agreed to become surety for A.'s debt to the amount of 10,000l.; and it was agreed between C. and B., with the privity of A., that if A. should become bankrupt, and be then indebted to C. beyond the 10,000l., all such dividends as C. or B. should receive under the bankruptcy in respect of the whole or any part of C.'s debt should be applied, in the first place, in satisfaction of so much of such debt as should exceed in amount 10,000l., without B.'s being entitled to the benefit of such dividends until the whole of such excess should be discharged. A. subsequently became bankrupt, and, being indebted to C. in an amount exceeding 10,000l., the whole debt was proved by C. under the fiat. C. afterwards received from B. full payment of that portion of the debt for which he (B.) was responsible. B., having taken a mortgage for his indemnity from A., obtained also after the bankruptcy, by means of that mortgage, payment from the bankrupt's estate in full. C. had no notice of B.'s mortgage. C. did not receive 20s. in the pound on his whole debt :—Held, that A.'s assignees were not entitled, as against C., to receive the dividends on that part of his proof which represented the amount paid by B. *Hope, Ex parte*, 8 Jur. 1128.

#### j. By and against Trustees.

**Who are Trustees—Persons dealing with Trust Funds.**—A trustee under a will permitted the trust fund, as the moneys were from time to time realized, to be paid into the hands of bankers, who had knowledge of the trusts. One of the partners, without the assent of the trustee, dealt with a portion of the fund, by investing it on mortgage :—Held, that the bankers were not jointly and separately liable in the character of

trustees, but that they only incurred a liability as between banker and customer; and that, on the bankruptcy of the bankers, the trustees could only prove against their joint estate for such balance as was in their hands at the time of the bankruptcy. *Burton, Ex parte*, 3 Mont., D. & D. 364.

By a marriage settlement a sum of money was to be received by the trustees, and invested in government or real securities, and the interest was to be paid to the wife for life for her separate use, without a power of anticipation, with remainder to the children. One of the trustees received the money, and advanced it to a partnership of merchants, without taking any security. He received the interest from the partnership, and paid it over to the wife regularly up to the time of his death; afterwards the partnership paid the interest to the wife directly, and without the intervention of the surviving trustee. In the partnership books the accounts relating to the whole transaction were entered, as between the wife and the partnership only. Upon the partnership becoming bankrupt :—Held, that the partners had constituted themselves directly trustees, and that the proofs on behalf of the trust estate might be made either against the joint estate or the separate estates. *Woodin, Ex parte*, 3 Mont., D. & D. 399.

Executors had a balance in that character with bankers, who (with the executors' consent) invested part of it on securities, not of a proper description for an investment by executors. The bankers made no inquiry as to the power of the executors to make the investment, but if they had made the inquiry, all the information which they would probably have been able to obtain, would have shewn that the executors were residuary legatees, and that the balance was a part of the clear residue. The fact, however, was, that the investment was a breach of trust, there being a codicil which the executors had kept back, but afterwards proved, constituting them trustees only :—Held, on the bankers becoming bankrupt, that they had not so participated in the breach of trust as to entitle the cestuis que trustent to prove against their separate estates. *Barnewall, Ex parte*, 6 De G., Mac. & G. 801.

— **Purchaser or Agent.**—T. consigned goods to N. at an invoice price. N. dealt with the goods as an owner, and sold them at such prices and in such manner as he thought fit. He sent regular monthly statements of the goods sold, and every month paid the invoice price of the goods comprised in the previous monthly statement. N. was partner in a firm of N., J. & Co. and, by arrangement with his partners, used the partnership as his bankers in reference to the above business which he carried on for his separate benefit, and an account of the moneys paid in and drawn out was regularly kept. N., J. & Co. having executed a deed of arrangement with their creditors, at a time when the account of N. shewed a balance of 2,035l. 1s. 2d. in his favour, the account of N. with T. at that time shewed a balance in favour of T. of 2,052l. 11s. 8d. T. sought to prove against the partnership for the amount of this balance, as being trust moneys held by N. as his trustee :—Held, that the proof could not be admitted, as the nature of the business carried on between T. and N. was that of vendor and purchaser, and not principal

and agent, and therefore there was no trust. *White, Ex parte, Nevill, In re*, 6 L. R., Ch. 397; 40 L. J., Bk. 73; 24 L. T. 45; 19 W. R. 488.

— **Loan to Trader, as Trustee, to be employed in Business.**—A trader in 1857 went through the ceremony of marriage with M., a sister of his deceased wife, and thenceforth lived with her as his wife. In 1858, 2,000*l.* which came to her under the will of her father, was by her direction paid to the trader, to be employed by him in his business, it being at the same time agreed that the trader should be a trustee of the 2,000*l.* for M., and that a settlement should be executed to carry out the agreement. In 1876 the trader filed a liquidation petition. No settlement of the 2,000*l.* had been executed:—Held, that M. was not entitled to prove in the liquidation for the 2,000*l.*, in competition with the creditors of the business. *Beale, In re, Corbridge, Ex parte*, 4 Ch. D. 246; 46 L. J., Bk. 17; 35 L. T. 768; 25 W. R. 324.

**Debentures—Set-off of Debt due from Trustee personally.**—A father, who had been in pecuniary difficulties, and was largely indebted to his son, effected a policy on his own life in the names of the son and another person, as trustees for daughters of the father, and paid the premiums. The son accepted the trust, and on the father's death, some years afterwards, he, with the sanction of his co-trustee, received the policy moneys, and purchased with them debentures of a banking company, of which he was a director, and to which he was largely indebted. The banking company was wound up, and the son became bankrupt. The same person was appointed official manager of the company, and assignee under the son's bankruptcy. On the daughters claiming to be creditors of the company to the amount of the debentures:—Held, first, that notwithstanding the state of the accounts between the father and son, the trust for the daughters ought to be assumed for the purposes of the application to have been well created. *Boyd, Ex parte*, 1 De G. & J. 223; 3 Jur., N. S. 897.

Held, secondly, that the trust was not determined by the receipt of the money and the investment on the debentures. *Ib.*

Held, thirdly, that the right of the daughters to the debentures was not affected by the state of the accounts between the bankrupt and the banking company. *Ib.*

**Trustee adopting Breach of Trust.**—Trustees of a settlement only authorizing investments in government or real securities, advanced part of the trust moneys to a banking firm, in which one of the trustees was a partner, on the security of a mortgage of bonds, in which some of the bankers were obligees. Afterwards another partner in the bank was appointed a new trustee of the settlement. The trust moneys were not called in. On the bankers becoming bankrupt:—Held, that there was a breach of trust on the part of the new trustee, constituting a provable debt against his separate estate. *Geaves, Ex parte*, 8 De G., Mac. & G. 291; 25 L. J., Bk. 53; 2 Jur., N. S. 651.

The new trustee did not inquire whether the old trustees had received further trust moneys, under a covenant in the settlement to settle future property:—Held, that this was not sufficient ground for charging him for wilful default

in respect of sums which ought to have been got in by the old trustees, or in respect of sums received by the covenantor, after the appointment of the new trustee, and not settled, there having been nothing to lead to a suspicion that any default had been made by the old trustees or the covenantor in those respects. *Ib.*

**Co-Trustees.**—Three trustees were ordered to pay into court, in an administration suit, money found due from them. One became bankrupt and another died. An application by the third trustee for leave to prove under the bankruptcy for such sum of money as the bankrupt was indebted to the trust estate, including such sums as the bankrupt was bound to pay as between himself and his co-trustees, was refused; but, on appeal, the Lord Chancellor gave leave to the trustee to go in and prove for such debt as he might establish, but directed that any dividend which might be realized should be dealt with by the court in which the administration suit was pending. *Bromley, Ex parte*, 34 L. J., Bk. 33.

One of the residuary legatees under a will was the surviving trustee of it. The other was subsequently appointed a new trustee under a power, the trust estate then consisting of 9,000*l.* due from the continuing trustee, and of shares in a company, valued at 6,000*l.*, which were transferred into the names of the two. After the death of certain cestuis que trustent who were entitled for life, and when the trust estate constituted a clear fund belonging in moieties to the two residuary legatees, subject only to the payment of legacies, which amounted to 4,000*l.*, the continuing trustee became bankrupt, still owing the 9,000*l.* to the trust estate:—Held, that the new trustee was not entitled to prove for this amount, and retain the dividends till he should be paid his share in full, but could only prove to the extent of his beneficial interest immediately before the bankruptcy; and that, as the bankrupt could then have settled with him by paying 3,500*l.*, that was the amount provable. *Turner, Ex parte*, 2 De G., Mac. & G. 927.

**Against Trustee — Improper Investment — Amount of Proof.**—A partner in a bank drew out part of a balance standing to the account of trustees of a will, under which he was interested, without the authority of the trustees, and invested it upon a canal mortgage, which was an unauthorized security:—Held, on the bankruptcy of the bankers, that the cestuis que trustent were entitled to prove for the whole of the balance, without giving up the canal mortgage. *Biddulph, Ex parte*, 3 De G. & S. 587.

Where a bankrupt trustee has sold out stock forming the trust fund, and converted the proceeds to his own use, proof may be made against his estate, either for the amount of the produce of the stock, or for the value of the stock at the time of his bankruptcy, as should appear most for the benefit of the cestui que trust. *Gurner, Ex parte*, 1 Mont., D. & D. 497.

**Duty of Bankrupt Trustee.**—Where a trustee indebted to the trust becomes bankrupt, it is his duty to prove the debt; and if he neglects so to do, he is liable for the loss, notwithstanding his certificate. *Orrett v. Corser*, 21 Beav. 52.

**Claim against Bankrupt Trustee without pre-**



**Judice to Suit for an Account.**—Where a bankrupt and his co-trustees had been guilty of a breach of trust, and a bill in chancery had been filed against them by the cestuis que trustent for an account, which suit was pending at the time of the bankruptcy, the cestuis que trustent were permitted to enter a claim for the amount due to them, without prejudice to the chancery suit; and all dividends in respect of the claim were ordered to be transferred by the accountant in bankruptcy to the credit of the bankrupt and of the suit. *Stutley, Ex parte*, 1 Mont., D. & D. 643.

**Bankrupt interested in Trust Fund—Set-off.**—When a proof is made by the trustee of a settlement under which a bankrupt is himself interested, his interest cannot be made available to the estate by way of set-off, but proof must be allowed for the whole amount. *Stone, Ex parte, Welch, In re*, 8 L. R., Ch. 914; 42 L. J., Bk. 73.

**Policy of Insurance Settled—Covenant by the Settlor to pay Premiums—Proof by Trustees—Death of Settlor.**—By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay; and the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at 2,052l. 8s., and a claim for that amount was taken in by the settlement trustees, and in December, 1875, was admitted as a proof. In April, 1876, a dividend of 10s. was declared, but before the amount reached the hands of the settlement trustees, the husband, on the 13th of May, 1876, died. At that time the sums which had been disbursed by the settlement trustees amounted to 766l. 5s. Held, that the settlement trustees were not entitled to receive the whole dividend which had been declared, but only the amount of their payments for premiums, with such interest as the dividend had been actually making. *Miller, In re, Wardley, Ex parte*, 6 Ch. D. 790; 37 L. T. 38; 25 W. R. 881.

#### k. Wife of Bankrupt.

Bankrupt's wife admitted to prove as cestui que trust under a settlement of which bankrupt was trustee. *Thring, Ex parte*, 1 Mont. & Chit. 75.

**Money Lent by Wife.**—A bankrupt's wife may prove as a creditor against his estate for money lent by her to him out of her separate estate, under the statutes of Massachusetts, if the evidence clearly shows that the transaction was a loan and not a gift. *Blandin, In re*, 5 National Bankruptcy Register (N. Y.), 39.

**Settlement in Batavia—Deed not Registered as required by Dutch Law.**—An Englishman, domiciled in Batavia, in contemplation of marriage, executed, according to the forms of the Dutch Indian Civil Law which prevails there, a notarial deed, whereby he in effect settled a sum of money on his wife to her separate use. The deed was not registered in Batavia; it was

proved that such a contract was valid by the law of Batavia as between the husband and wife, but that it would not have any effect with regard to third parties but from the day on which it was registered. The husband afterwards became bankrupt in England, and the wife claimed to prove against his estate. Held, that the non-registration in Batavia did not affect the validity of the contract there, but only postponed any claim the wife might have against her husband's estate to the claims of all other creditors; that the question of the priorities of creditors inter se was governed by the law of the country where the bankruptcy took place; and, therefore, that the wife was entitled to prove *pari passu* with the other creditors against her husband's estate. *Melbourn, Ex parte*, 6 L. R., Ch. 64; 40 L. J., Bk. 25; 23 L. T. 578; 19 W. R. 83.

**Alimony.**—A wife may not prove against her husband's estate for arrears of alimony payable to her under an order of the Divorce Court. *Rice, Ex parte*, 10 L. T. 103; *S. P., Dickens v. Dickens*, 31 L. J., Mat. Cas. 183.

#### l. Person appointed by Court of Chancery in Administration Suit.

A creditor of a bankrupt died before the commencement of the bankruptcy and his estate was administered in chancery in a suit instituted by a creditor against the administratrix. The Court of Chancery appointed a person who was not the administratrix to prove the debt against the bankrupt's estate. Held, that the person appointed by the court had a right to prove the debt, and also to vote for the appointment of a trustee at the meeting of creditors. *Hare, Ex parte, England, In re*, 10 L. R., Ch. 218; 44 L. J., Bk. 50; 32 L. T. 291; 23 W. R. 412.

#### 24. MODE OF PROOF.

**By Agent under 24 & 25 Vict. c. 134, s. 146.**—A merchant who swears that he is the sole London agent of the creditor seeking to prove, and is perfectly conversant with all the circumstances attending the contracting of the debt with certainty and precision, the transaction having passed through his hands, is an agent within this section, and, being duly authorized, may prove for his principal. *Barrington, Ex parte*, 10 L. T. 103.

**By One on behalf of Several.**—A proof cannot be made by one person on behalf of several creditors entitled to prove, unless from necessity, or by consent. *Bank of England, Ex parte*, 2 Glyn & J. 363.

Under a fiat against a banker, one person was allowed to prove on behalf of a large number of holders of l. notes; not interfering as to the assignees of the certificate. *Gordon, Ex parte*, 1 Mont. & Ayr. 222.

**By Partners.**—One partner may act for all in proving debts. *Hodgkinson, Ex parte*, 19 Ves. 293; 2 Rose, 172; Coop. C. C. 99; *S. P., Mitchell, Ex parte*, 14 Ves. 597.

**By Trustees.**—A trustee cannot prove a debt alone; the cestui que trust must join in the proof. *Dubois, Ex parte*, 1 Cox, 310.

**By Infants.**—The guardian of an infant may

prove on his behalf. *Maltby, Ex parte*, 1 Rose, 387.

**By Lunatics.]**—The mother of a creditor of weak intellect was permitted, on her application *ex parte*, to prove on his behalf. *Ostoby, Ex parte*, 1 De Gex, 453.

**Costs.]**—Petition praying for liberty to prove a debt against the estate of a bankrupt, on behalf of a person of unsound mind:—Held, that, the assignees were not entitled to get their costs of the petition from the petitioner. *Bucknall, Ex parte*, 12 L. J., Bk. 42.

**By a Bankrupt Creditor.]**—Where a creditor becomes bankrupt, he must join with his assignee in an affidavit in proof of the debt. The affidavit of the assignee alone is not sufficient. *Robson, Ex parte*, 2 Mont., D. & D. 65.

**By Assignee of Creditor.]**—Where a creditor, after the issuing of the fiat, assigns his debt, this does not give the assignee a right to prove it, but merely a right to call on the assignor to prove the debt, as a trustee for the assignee. *Dickenson, Ex parte*, 2 Deac. & Chit. 520.

**By Banking and other Corporations.]**—Under 7 Geo. 4, c. 46, and 1 & 2 Vict. c. 96, if a shareholder in a joint-stock banking company, who is also a private customer of the bank, becomes bankrupt, the company is entitled, by means of its registered officer, to prove the balance of the bankrupt's private account under the commission, without reference to what may be due to the bankrupt's estate in respect of his interest as a shareholder in the banking concern. *Davidson, Ex parte*, 2 Mont., D. & D. 368; 6 Jur. 116.

Corporations may prove debts by the affidavit of a person authorized by a general power of attorney: and vote in the choice of assignees, by a person authorized by a special power of attorney, under their common seals. *Bank of England, Ex parte*, 1 Swans. 10; 1 Rose, 142; 1 Wils. C. C. 295.

The Bank of England was admitted to prove by its clerk, without a power of attorney. *Ib.*; overruling *Bank of England, Ex parte*, 18 Ves. 229.

An agent for a public company abroad may, to the prejudice of the bankrupt, prove, with the consent of the assignees, on behalf of the company, on bills of exchange. *Cotenworth, Ex parte*, 1 Mont. & Bligh. 92; 1 Deac. & Chit. 281.

## 25. PRACTICE ON PROOF.

**Defective Affidavit.]**—If a defective affidavit is produced, the commissioner should not reject, but adjourn the proof. *Maberley, Ex parte*, 2 Mont. & Ayr. 23.

An affidavit in support of a deposition of proof on a bill of exchange must state the consideration. *Ib.*

**Order for Payment.]**—In proving for costs ordered to be paid in a divorce suit, the order for payment must be set out in the proof or exhibited. *Collard, Ex parte*, 10 L. T. 792.

**Judgment Debt.]**—Commissioners may inquire into the consideration of a judgment debt. *Marson, Ex parte*, 3 Mont. & Ayr. 155; 2 Deac. 245; *S. P.*, 3 Deac. 79; 3 Mont. & Ayr. 444.

**Delay in Proving.]**—If a creditor, through accident, omits to prove at the final dividend, he may be permitted to prove, without disturbing any payment made by the assignees, and placing the creditors not paid in the same situation as if he had originally proved. *Day, Ex parte*, 1 Mont. 212.

Where a creditor has omitted to prove his debt, until after a dividend has been declared and is in course of payment, the court will not permit him to prove, so as to interfere with the amount of the dividend payable on the proofs of the other creditors. *M'Cheane, Ex parte*, 1 Mont., D. & D. 329.

Where a creditor has been guilty of gross negligence in omitting to prove his debt, or to enter a claim upon the proceedings, the court will not stay the payment of a dividend to enable him to prove, although he is a trustee. Payment of a dividend is stayed only where the creditor has been prevented from proving by fraud, accident, or mistake. *Todd, Ex parte*, 2 Deac. 416.

**Petition to Prove.]**—A petition by many creditors to prove is not multifarious if they have a common object. *Bousfield, Ex parte*, 1 Mont. 128.

Nor is a petition to prove and remove assignees. *Howell, Ex parte*, 1 Mont. 129.

The petition of three creditors for an order to prove three distinct debts is multifarious. The court will not permit the claims of different persons to be united in the same petition. *Sacr, Ex parte*, 1 Mont. & Mac. 280.

The proof of a debt must be absolutely rejected by the commissioner, to warrant a petition for an order to prove it. *Marson, Ex parte*, 2 Deac. 245.

A petition to be admitted to prove a debt which the commissioners have rejected, should state the ground of their rejection. *Curtis, Ex parte*, 1 Rose, 274; *Schmalding, Ex parte*, Buck, 93; *Wilson, Ex parte*, 1 Cox, 308; *Baker, Ex parte*, 1 Mont. & Chit. 156.

**Production of Security.]**—A creditor who holds a bill of exchange as security cannot prove his debt at the first meeting of creditors without producing the bill. *Jacobs, Ex parte, Carter, In re*, 17 L. R., Eq. 575; 43 L. J., Bk. 46; 30 L. T. 133; 22 W. R. 439.

C., under a building agreement, agreed to execute to D., the builder, leases of certain houses to be constructed by D. as they should be completed. Leases of two houses were afterwards granted to D., who deposited the agreement and the leases with Messrs. B. and T., his solicitors, to secure advances. D. also executed to them a legal mortgage of certain freeholds to secure other sums. C. also made advances to D. Upon the bankruptcy of D., C. proved for 1,155*l.* 13*s.* 10*d.* Messrs. B. and T. also tendered a proof for 1,959*l.*, and valued their securities at 1,500*l.*, leaving a balance due to them of 459*l.* At the first meeting they did not produce their securities, but at an adjourned meeting they produced the building agreement and the mortgage deed. The other title deeds were not produced, inasmuch as Messrs. B. and T. acknowledged that they had deposited them with their bankers, but they offered to produce them at a day's notice. The registrar trustee, however, refused to admit the proof upon the ground that the title deeds were deposited with the

bankers, and were not produced. After the rejection of Messrs. B. and T.'s proof, a trustee was appointed by the creditors whose proofs had been admitted, the bankers not voting. The county court judge afterwards allowed the proof and removed the trustee:—Held, that the debt was properly proved and ought to have been admitted, but that the trustee should not have been removed, there being no imputation upon his conduct. *Carr, Ex parte, Dunkley, In re*, 45 L. T. 560.

**Amendment of Proof.]**—A creditor having reason to suppose that the goods which he had sold to one of two partners were purchased on the partnership account, proved against the joint estate, and did not discover till seven months afterwards, that they were bought on the separate account of one of the partners:—Held, that he might transfer his proof from the joint to the separate estate. *Vining, Ex parte*, 1 Deac. 555.

A party is not estopped from amending his deposition of proof, by making a second deposition contradictory to the first: the only question is, which is the most worthy of belief. *Britten, Ex parte*, 3 Deac. & Chit. 35.

**On Ground of Mistake after Lapse of Time.]**—The valuation of his security by a secured creditor proving in a liquidation forms part of the general circumstances upon which any subsequent composition is based; and he will not, therefore, four years after the close of the liquidation proceedings, be allowed to amend his proof on the ground of having made a mistake, whether as to value, or as to the actual property included in his valuation. *Couldery v. Bartrum*, 19 Ch. D. 394; 51 L. J., Ch. 265; 45 L. T. 689; 30 W. R. 141—C. A.

B. & Co., creditors for 2,400l. of T. and W. (who were partners), held in respect of their debts—(1) a security upon the joint estate of T. and W.; (2) a security upon the separate estate of T.; both securities being created by one and the same deed. T. and W. having gone into liquidation, B. & Co. valued both securities at a total amount of 800l., and proved for the balance; a composition of ten shillings in the pound was then agreed to and carried out. Four years later, T. and W. brought an action against B. & Co. to redeem the whole of the property included in the securities, separate as well as joint, upon payment of 800l. and interest. The property had, in the meantime, turned out to be more valuable than it was thought to be at the date of the proof:—Held, that though B. & Co. need not, in the first instance, have included in their proof the joint security given by T., they could not now be allowed to amend such proof, and that T. and W. were, therefore, entitled to the relief claimed. *Ib.*

In the case of an evident mistake, an amendment of a proof will be allowed after the creditor has voted in the choice of a trustee. *Schafeld, Ex parte, Firth, In re*, 12 Ch. D. 337; 48 L. J., Bk. 122; 40 L. T. 823; 27 W. R. 925—C. A.

**Right of Bankrupt to Examine Creditor on Proof.]**—A compromise or arrangement having been made under s. 27, sub-s. 3, of the Bankruptcy Act, 1869, with a person claiming to be

a creditor, that he should be admitted to prove, but so that, as to the first 18s. in the pound, his dividends should be postponed to those of the other creditors:—Held, that the bankrupt had such a peculiar interest as to be entitled to examine the creditor on his proof. *Austin, Ex parte*, 4 Ch. D. 13; 46 L. J., Bk. 1; 35 L. T. 529; 25 W. R. 51—C. A.

**Rejection of Proof.]**—When a trustee in a liquidation by arrangement allows two years to elapse without giving notice of rejection of a creditor's proof, he will be taken to have admitted the proof. *Kemp, Ex parte, Russell, In re*, 42 L. J., Bk. 26; 28 L. T. 487; 21 W. R. 459.

But when there appeared to be a substantial objection to the proof, the order to which, under such circumstances, the creditor was entitled for payment of a dividend to him, was suspended for a week, to enable the trustee to apply to expunge the proof. *Ib.*

If a creditor who proves his debt by declaration, files a statement of account which is not full, true, and complete, his proof ought to be rejected. *Barnett, Ex parte*, 4 L. R., Ch. 68; 19 L. T. 406; 17 W. R. 88.

**Delay.]**—The lapse of three months after a proof has been sent in does not deprive a trustee of his right to reject it. *De Boos, Ex parte, Shallow, In re*, 40 L. T. 659.

A proof was sent to the trustee in December, 1872. In December, 1875, he gave notice of rejection:—Held, that it was too late for the trustee to proceed in that way, but that the proper course would have been to apply to the court to have the proof expunged. *Good, Ex parte, Armitage, In re*, 5 Ch. D. 46; 46 L. J., Bk. 65; 35 L. T. 554.

#### Discretion of Registrar as to Disputed Proofs.]

—The admission, or refusal to admit, a disputed proof at the first meeting of creditors, is an exercise of the judicial discretion of the registrar, even though the appointment of a trustee will be affected by the admission or refusal, and the registrar is not bound to adjourn the consideration of the proof merely because it is objected to. *Mark, Ex parte, Amor, In re*, 49 L. T. 356; 31 W. R. 101—C. A.

**Taking Proof off the File.]**—A creditor tendered a proof of a debt, and voted at the first meeting in favour of a composition. At the second meeting, being advised that his proof might prejudice a security which he held, he desired to withdraw it. The composition fell through, and therefore the vote at the first meeting had no effect. The registrar declined to allow the proof to be taken off the file:—Held, that under the circumstances the proof might be taken off the file. *Williams, Ex parte, Williams, In re*, 18 L. R., Eq. 373; 43 L. J., Bk. 105; 29 L. T. 404; 22 W. R. 570.

**Costs of Proof.]**—The general rule is, that costs of proof are to be paid by the creditor seeking to establish the claim. *Day, Ex parte*, 9 L. T. 350.

Where a creditor petitions to prove a debt which is not in its nature provable, the petition will be dismissed with costs, notwithstanding the commissioners rejected the proof for an in-

sufficient reason. *Worthington, Ex parte*, 1 Deac. & Chit. 288.

No costs given upon petition by joint creditors to prove against the separate estate, there being no joint effects or solvent partner. *Bradshaw, Ex parte*, 1 Glyn & J. 99.

Where the commissioners have exercised their judgment with respect to the proof of a debt, and have refused to admit it, the successful petitioner against their decision is not entitled to costs; it being a general rule that costs cannot be given when commissioners exercise their jurisdiction. *Millington, Ex parte*, 1 Mont. & Ayr. 114.

A creditor tendered a proof for 3,500*l.*, which the commissioners rejected in toto; and after presenting a petition against their decision, an order was made, by consent, that he should prove for 500*l.* The court would not grant him costs out of the estate; but ordered each party to pay his own costs. *Waterhouse, Ex parte*, 3 Deac. & Chit. 108.

The commissioners having improperly rejected a proof because the claim was merged in a felony, the petitioner was allowed costs out of the estate. *Hirke, Ex parte*, 2 Mont. & Ayr. 208, n.

The costs of a petition to prove must be paid by the creditor, if he adduces new evidence. *Price, Ex parte*, 1 Mont. & Ayr. 51.

## 26. AMOUNT OF PROOF.

**Present Debt payable in futuro.**—The amount of a proof, on a debitum in presenti, solvendum in futuro is not subject to any deduction in respect of rebate, which only applies upon payment of a dividend. *Hill, Ex parte*, 2 Deac. 249.

**Bill of Exchange—Indorsee—Part Payment by Indorser.**—A, being an indorsee of B, C. & Co.'s acceptances for 1,364*l.*, sued out a separate commission against B. At the time of suing out the commission, D., the person for whom A. had discounted the acceptances, had, by payments on account, reduced the debt to 420*l.* A. is entitled to prove for the whole amount, and for all that is received above 420*l.* will be a trustee for D. *De Tastet, Ex parte*, 1 Rose, 10.

**Discount.**—Upon a sale of goods to be paid for at the end of the year in which they were purchased, but if paid for before the end of the year, 20*l.* per cent. discount to be allowed, which were not paid for within the year:—Held, on the bankruptcy of the purchaser, that proof could not be made of the whole debt, without deduction for discount. *Pigou, Ex parte*, 3 Madd. 136.

Wholesale traders supplied goods to a retail dealer on the terms that he was to be allowed a discount of 20 per cent. from the invoice prices on payment in cash within a month:—Held, that cash payments not having been made, proof must be admitted in the bankruptcy of the retail dealer for the full amount of the invoice prices of the goods. *Cumberland, In re, Worthington, Ex parte*, 3 Ch. D. 803; 45 L. J., Bk. 136; 34 L. T. 951.

Upon a consignment with authority to sell to reimburse advances on the consignment, the deficiency to be made good, and the surplus, if any, restored. Where part of the goods was sold to the consignees, proof under their bankruptcy was limited to the balance of the original ad-

vance. *Thompson, Ex parte*, 18 Ves. 134; 1 Rose, 165.

## Deduction of Amounts arising from Security.]

—A contingent interest was assigned to secure in part a debt exceeding the value of the interest, the assignee insured against the contingency, and upon its taking effect received the sum insured:—Held, upon the bankruptcy of his debtor, that the sum so recovered, minus the premium and expenses, must be deducted from his proof. *Andrews, Ex parte*, 2 Rose, 410; 1 Madd. 573.

—**Affidavit.**—A creditor on a bill of exchange made affidavit of a debt due of 2,500*l.*, which proof was admitted for only 1,200*l.*; the residue was claimed. Afterwards the creditor was entitled to prove the whole against the bankrupt, but in the meantime he had received 500*l.* from some other party to the bill. The former affidavit cannot be received as a proof of the remainder of the debt, but a new proof must be made; and 500*l.* having been actually paid to the creditor, he can only prove the residue after deducting the 500*l.* *Worrall, Ex parte*, 1 Cox, 309.

**Delivery Warrants.**—A wharfinger was induced by the consignees of goods to sign and give them delivery warrants for goods which were stopped in transitu before they came into his possession. The consignees deposited the warrant with a bank as security for an advance. The wharfinger afterwards compounded with his creditors:—Held, that the bank was not entitled to prove against the wharfinger's estate for the value of the goods described in the warrants, but only for the sum actually advanced. *Moore, In re, Moore, Ex parte*, 31 L. T. 812; 23 W. R. 154—L.J.J.

**Landlord and Tenant—Disclaimer of Lease.**—A bankrupt was the lessee of premises for a term of ten years, at an annual rent of 500*l.* The trustee disclaimed the lease. The landlord was unable to re-let the premises at so high a rent:—Held, that the landlord was entitled to prove in the bankruptcy for the difference between the present value of the 500*l.* per annum agreed to be paid by the bankrupt for the residue of the term, and the present value for the same period of the letting value of the premises. *Llynvi Coal and Iron Company, Ex parte, Hyde, In re*, 7 L. R., Ch. 28; 41 L. J., Bk. 5; 25 L. T. 609; 20 W. R. 105.

See further, SECURED CREDITORS, ante.

## 27. EFFECT OF PROOF.

**Relinquishment of Legal Remedies.**—Where a defendant has become bankrupt, the plaintiff cannot discontinue upon the terms of the statute unless he has either proved his debt, or has had his claim entered on the proceedings under the fiat. *Augarde v. Thompson*, 5 D. P. C. 762; 2 M. & W. 617; M. & H. 105; 1 Jur. 632.

Where a defendant in an action for the recovery of a debt has become bankrupt, and the plaintiff has tendered his claim for proof of the debt under the bankruptcy, and the claim is not allowed, but adjourned, the defendant is not entitled to a stay of proceedings in the action. *Ball v. Bowden*, 22 L. J., Ex. 249.

To entitle him to such stay of proceedings the debt must be proved under the bankruptcy, or the claim entered upon the proceedings. *Ib.*

— **Action for Costs.**—Where a defendant had become bankrupt, after verdict and before judgment, and the plaintiff had proved for the debt, but had not been permitted to prove for the costs, the court, upon summary application, under 6 Geo. 4, c. 16, s. 59, stayed proceedings in the action for the recovery of the costs. *Woodward v. Meredith*, 2 D. & L. 136; 13 L. J., Q. B. 322; 8 Jur. 1136.

— **Assignee of a proved Debt.**—A creditor accepting an assignment of a debt proved, is substantially a creditor proving a debt, and thereby relinquishes an action brought by him against the bankrupt. *Taylor, Ex parte*, 1 Glyn & J. 399.

— **Restraint of Execution.**—A creditor who has proved will, upon petition by the assignees, be restrained from issuing execution against the property of the bankrupt in the possession of the assignees. *Bernasconi, Ex parte*, 2 Glyn & J. 381.

— **No Dividend.**—A creditor who proves under a fiat, thereby makes his election of the remedy for the recovery of his debt. *Flower, Ex parte*, De Gex, 503; 16 L. J., Bk. 9; 11 Jur. 482.

A creditor who had proved was accordingly restrained from proceeding for the same demand in a county court, although there was no dividend. *Ib.*

— **Release of Sureties.**—On the 1st February the plaintiffs commenced an action against G. and G. to recover a bill of exchange for 468*l.* 1*s.* 9*d.*, and a sum for goods sold and delivered, money paid, and money due upon an account stated. They afterwards filed an affidavit in the Court of Bankruptcy, under 1 & 2 Vict. c. 110, s. 8, alleging G. and G. to be indebted to them in 468*l.* 1*s.* 9*d.*; for which sum G. and G., on the 11th February, gave a bond, with sureties, pursuant to the statute. On the 21st March, the plaintiffs signed judgment against G. and G. (against whom a fiat in bankruptcy had issued) for 1,322*l.* 19*s.* 6*d.* which included the 468*l.* 1*s.* 9*d.* On the 5th April the plaintiffs proved their debt under the fiat, excluding the amount of the bill of exchange, in respect of which the bond had been entered into. On the 12th April they lodged a ca. sa. against G. and G., and afterwards commenced actions against the sureties upon the bond:—Held, that the proof under the fiat was an election to relinquish the action against G. and G.; and that, the principal debtors being thus entitled to be discharged if rendered pursuant to the conditions of the bond, the sureties were entitled to summary relief on motion. *Geikie v. Hewson*, 5 Scott, N. R. 484; 4 M. & G. 618.

— **Entry of Suggestion.**—Where a plaintiff, in an action against a bankrupt, makes his election to proceed under the commission, the defendant is entitled to have some entry or suggestion, recording the election, put on the record. *Kemp v. Potter*, 6 Taunt, 549.

— **Fleeing.**—Proof of a debt cannot be

pleaded in bar as an equitable defence to an action for the debt. *Spencer v. Demett*, 1 L. R., Ex. 123; 35 L. J., Ex. 73; 12 Jur., N. S. 194; 13 L. T. 677; 14 W. R. 310; 4 H. & C. 127.

A defendant covenanted to pay a sum of money, with interest, by instalments, and also to pay the annual premiums which might become due on a policy of insurance effected on the life of B., so that his life might be continually insured in 1,000*l.*, and, on request, to produce and shew to the plaintiff the receipt for the premium for the current year. In an action on this covenant, the declaration alleged two breaches—non-payment of the premiums and non-production of the receipt for the premium for the current year. The defendant pleaded in bar a certificate of conformity under an adjudication of bankruptcy. The plaintiff new assigned that the action was brought for the non-payment of a premium which became due after the filing of the declaration of insolvency, and after the allowance of the certificate, and for the non-production of the receipt for that premium. The defendant pleaded to the new assignment an equitable plea, that after the filing of the petition for adjudication the plaintiff proved a great part of the debt under the petition, and elected to take the benefit of the petition with respect to the whole debt:—Held, that the plea to the new assignment was a good equitable answer. *Elder v. Beaumont*, 8 El. & Bl. 353; 27 L. J., Q. B. 25; 4 Jur., N. S. 26.

Held, also, that the mere fact of the plaintiff's proof for a part of the debt was not sufficient evidence to support the plea. *Ib.*

— **Indictment—Costs—Attachment.**—A defendant having been convicted on an indictment for a nuisance, which had been removed by certiorari, upon his and two sureties entering into recognizances, judgment was rescripted by a rule of court, drawn up by consent, by which it was referred to the master to tax the costs. In February, 1852, the costs were taxed at 227*l.* 16*s.* 11*d.* In May, the defendant became bankrupt, and the prosecutor proved for that amount. The defendant was afterwards brought up for judgment; a side-bar rule for the taxation of costs was drawn up; the costs were taxed under 5 & 6 W. & M. c. 11, s. 3, at 243*l.*; and the side-bar rule and allocatur were served upon the bail. A rule having been obtained for an attachment against the defendant for non-payment of that sum, and against him and his bail for estreating the recognizances, the court discharged the rule as against the defendant, but made it absolute against the bail. *Reg. v. Hills*, 2 El. & Bl. 176; 22 L. J., Q. B. 322; 17 Jur. 714.

— **Mortgages—Proof by Inadvertence.**—A mortgagee having elected to prove, and having proved his debt under an assignment executed by the mortgagor for the benefit of his creditors, is not entitled afterwards to have his proof expunged as having been made through inadvertence, and to claim the balance of the purchase-money of the mortgaged property in the hands of the trustees under the deed in liquidation of his mortgage debt, and receive the dividends under the deed upon the balance. *Spicer, Ex parte*, 12 L. T. 55.

— **Distinct Debts.**—By 49 Geo. 3, c. 121, s. 14, a person having two debts could not come in under

the commission for the one, and proceed at law for the other. *Hardenburgh, Ex parte*, 1 Rose, 204.

Where a creditor proved one of several bills accepted in payment of the same debt, and afterwards declared against the bankrupt on the others:—Held, that the election of the creditor to take the benefit of the commission was confined by 49 Geo. 3, c. 121, s. 14, to the debt actually proved, and did not extend to distinct debts ejusdem generis due at the same time. *Harley v. Greenwood*, 5 B. & A. 95.

Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved under the commission, for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding was afterwards dishonoured:—Held, that the vendors were not precluded by 49 Geo. 3, c. 121, s. 14, from suing the bankrupt for the amount of the last parcel of goods. *Watson v. Meder*, 1 B. & A. 121.

So held on the 6 Geo. 4, c. 16, s. 59. *Edwards, Ex parte*, 4 Mont. & Mac. 116.

Where a party has clear separate demands on a bankrupt, he may sue for one, and come under the commission for the other, but not if they are only different securities for the same debt. *Crinsoz, Ex parte*, 1 Bro. C. C. 270.

If a creditor proves one debt under a commission, he is not thereby precluded from suing upon another, although it was due at the time of his proving the first. *Bridget v. Mills*, 12 Moore, 92; 4 Bing. 18.

A creditor cannot proceed at law upon one of two bills for goods sold, which became due and was dishonoured before proof of the other, but returned after the proof. *Schlesinger, Ex parte*, 2 Glyn & J. 392.

A creditor for goods sold may prove on a bill for part of a debt, and proceed at law on a bill for the remainder, which he has negotiated before the bankruptcy and taken up after the proof. *Sly, Ex parte*, 2 Glyn & J. 163.

A person to whom several debts were due from a bankrupt, arising out of separate sales of goods, proved some of the debts under the commission; another person, who was suggested to be a trustee for him, sued upon a note which the bankrupt had given for other part of the goods sold. The court refused to interfere in a summary way to stay proceedings on the bail bond in this action. *Hovell v. Gollledge*, 5 Taunt. 174; 2 Rose, 130.

A creditor may prove on a bill for part of his debt, and proceed at law on a bill for the remainder, which he has negotiated before and taken up after such proof, the bill proved and the bill taken up constituting distinct debts, although they were originally taken in settlement of the same account. *Newton, Ex parte*, 2 Mont., D. & D. 422; 6 Jur. 68.

A., being bonâ fide holder of two bills, accepted by the bankrupt, for the payment of which he also held a security, transferred the security to B., who proved for the amount:—Held, that such proof did not prevent the right of A. to prove also on the bills; though it might be a question for future consideration whether he would be entitled to receive dividends on such proof. *Barham, In re*, 1 Mont., D. & D. 179.

A. and B. having dissolved partnership, an award was made, by which B. was directed to pay A. a certain sum, and to pay several partnership debts. B. gave a warrant of attorney for securing the money awarded, with a stipulation in the defeazance, that, if A. should be called upon to pay any of the partnership debts, he should be at liberty to enter up judgment. B. became bankrupt, and A. proved his private debt under the commission, and received a dividend thereon. A. was afterwards sued for a partnership debt, and entered into an arrangement with the creditor to pay it by instalments, and then entered up judgment, and took out execution on the warrant of attorney, before B. had obtained his certificate:—Held, that A. was not deprived of his remedy by 49 Geo. 3, c. 121, ss. 8 and 14. *Dally v. Wolferston*, 3 D. & R. 269.

**Different Parties Partners.]**—The 49 Geo. 3, c. 121, s. 14, did not extend to prevent a creditor who proved a joint debt under a commission against one partner from suing the others. *Young v. Glass*, 16 East, 252; *S. P., Heath v. Hall*, 4 Taunt. 326; 2 Rose, 271.

Nor did it prevent a creditor who was suing two partners from proving his debt under a separate commission issued against one. *Blannin v. Tayler*, Gow, 199.

On a separate commission against one of a firm, a joint and separate creditor, who, in respect of his joint debt, has taken a warrant of attorney, and sued out a separate execution against the bankrupt, is entitled to prove his separate debt, without giving up his execution. *Stanborough, Ex parte*, 5 Madd. 89.

**Principal and Surety.]**—The proving against the principal is not an election not to proceed against the surety. *Hughes, Ex parte*, 5 B. & A. 482.

Where an attorney, in order to get possession of papers belonging to A., in the hands of A.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. should enter a reference:—Held, that A. having subsequently become bankrupt for the second time, and without paying fifteen shillings in the pound, the proof of the debt under the commission was not an election by the former attorney, so as to dispense with the reference. *Id.*

**Parties to Bill of Exchange.]**—The drawer of a bill of exchange, who has paid the amount to the holder after a commission against the acceptor, may sue the acceptor before he has obtained his certificate, and notwithstanding the holder has proved the bill under the commission. *Mead v. Braham*, 3 M. & S. 91; 2 Rose, 289.

The drawer of a bill who has paid the amount to an indorsee after a fiat issued against the acceptor, may sue the latter upon the bill before he has obtained his certificate, notwithstanding the indorsee has proved under the fiat. *Walker v. Pilbeam*, 4 C. B. 229.

**Discharge of Lien.]**—Proof is equivalent to payment; therefore, where solicitors obtained an order to have their bill taxed, and to prove for the amount:—Held, that they had relinquished their lien upon the papers in their hands belong-

ing to the bankrupt. *Hornby, Ex parte, Buck, 351.*

**By Executor against Legatee—Right to Retain.**—A bankrupt was indebted to the estate of a testator, and was also entitled as one of the residuary legatees of the testator, and also to distributive shares as next of kin of three other residuary legatees. The executor proved the debts under the bankruptcy, and received a dividend on the proof:—Held, that he had thereby abandoned the right to retain the debt out of the direct or derivative shares of the bankrupt in the residuary estate. *Stammers v. Elliott, 3 L. R., Ch. 195; 37 L. J., Ch. 353; 18 L. T. 1; 16 W. R. 489.*

A bankrupt was indebted to an estate of a deceased party, and was also entitled to a legacy from, and was one of the residuary legatees under, the same estate. A receiver appointed in a suit for the administration of the estate proved the debt, and was paid a dividend:—Held, that the right to retain the debt out of the legacies to which the bankrupt was entitled was thereby lost. *Armstrong v. Armstrong, 12 L. R., Eq. 614; 25 L. T. 199; 19 W. R. 971.*

**Admiralty Action for Wages.**—A master of a ship having sued for his wages at law and recovered judgment, which judgment remained unsatisfied in consequence of the owner's bankruptcy, and having proved his debt under the owner's bankruptcy, is entitled to sue the ship in the Admiralty Court, notwithstanding the ship has changed hands. *The Bengal, Swabey, 468.*

**Proof by Foreign Creditor—Jurisdiction.**—A foreign creditor, residing out of the jurisdiction of the Court of Bankruptcy, by proving a debt in a bankruptcy or liquidation, brings himself within the general jurisdiction of the court as to the administration of the estate, just as if he were residing within it. An order can therefore be made on him to restore property of the bankrupt or debtor improperly in his possession. *Robertson, Ex parte, Morton, In re, 20 L. R., Eq. 733; 44 L. J., Bk. 99; 32 L. T. 697; 23 W. R. 906.*

**Declining to Prove.**—A creditor took the body of the bankrupt in execution previously to the bankruptcy, held it until the bankrupt's discharge by his certificate, and declined to go in and prove until after the certificate was granted:—Held, that he had made his election to rely on his legal remedy, and could not be permitted to seek relief also under the fiat. *Mudie, Ex parte, 3 Mont., D. & D. 66; 12 L. J., Bk. 25; 7 Jur. 201.*

## 28. EXPUNGING OR REDUCING PROOF.

**Mere Claim.**—A mere claim cannot be expunged. *Dobson, Ex parte, 1 Mont. & Ayr. 670; 4 Deac. & Chit. 69.*

**Grounds for Expunging.**—The commissioners can only expunge a proof on the ground that the debt is not due; and it is irregular for them to state as a ground for expunging, that the bankrupt's liability has been discharged. *Whitworth, Ex parte, 2 Mont., D. & D. 164.*

The 12 & 13 Vict. c. 106, s. 183, empowering

the commissioner to expunge proof, was not confined to cases where new evidence was adduced. *Thornton, Ex parte, 3 De G. & J. 454.*

**Want of Stamp.**—A proof will not be ordered to be expunged merely because the instrument on which the proof was made required a stamp. *Byrom, Ex parte, 3 Mont., D. & D. 53; S. P., Christie, Ex parte, 8 Jur. 919.*

**Entries in Debtor's Books.**—Where a bankrupt had absconded to America, and the commissioners had expunged the proof of a debt, relying chiefly on the evidence afforded by the entries in his books, the proof was ordered to be restored, as evidence of this description ought not to have countervailed the oath of the creditor. *Boler, Ex parte, 1 Mont., D. & D. 602.*

**Deed of Release for Purpose of annulling Adjudication.**—Certain creditors executed a deed of release to their debtor, who had been adjudicated a bankrupt, for the purpose of enabling him to petition to annul the adjudication. The proceedings, however, became abortive, by reason of all the creditors not having joined in the release. Sometime afterwards he applied to expunge the proof of the creditors who had executed the release:—Held, that as the release was given for a particular purpose, it could not be used for an object not contemplated at the time of its execution. *Cusnean, Ex parte, 9 Jur., N. S. 655; 8 L. T. 11.*

The release of the debt of a bankrupt after the debt has been proved, and which release merely expressed that he should be discharged from all demands of the creditors, would not annul the creditor's right to the benefit of his proof. *Id.*

**Partners—Wrongful Proof against Joint Estate.**—Where what is in law only a separate debt has been proved on a joint estate, and a dividend received, the court will order the proof to be expunged. *Ferrer, In re, 10 Ir. Ch. Rep. 554.*

**Lapse of Time—Death of Creditor.**—A surety had paid a debt of a bankrupt after the bankruptcy, with interest down to the payment and proved for the whole amount paid, including interest subsequently to the fiat, but no dividend had been declared. An application to reduce the proof after seven years had elapsed, and after the death of the surety, was too late. *Sanderson, Ex parte, 8 De G., Mac. & G. 849; 26 L. J., Bk. 26; 2 Jur., N. S. 1217.*

**Consequence of Order to Expunge.**—It is not a necessary consequence of an order to expunge a proof, that the party must refund any dividends received upon it. *Wilson, Ex parte, 1 Mont., D. & D. 586.*

**Application by Trustee to expunge Proof—Lapse of Time.**—Under r. 73 of the Bankruptcy Rules, 1870, as under the previous practice, a trustee in bankruptcy who has admitted a proof against the estate is entitled at any time afterwards to apply to the court to expunge the proof, on the ground that it was originally wrongly admitted. Mere lapse of time is no objection to the application, but, though the proof is expunged, the creditor will be entitled

to retain any dividend which he may have previously received. *Harper, Ex parte, Tait, In re*, 21 Ch. D. 537; 52 L. J., Ch. 117; 47 L. T. 421; 31 W. R. 152—C. A.

**Grounds for reducing—Bill of Exchange.]—**

Where a creditor proved in respect of several bills of exchange drawn by the bankrupt and discounted by the creditor, and one of those bills was subsequently wholly paid:—Held, that so much of the proof as related to that bill must be expunged. *Barrett, Ex parte*, 1 Glyn & J. 327.

A customer pays in bills of exchange to his bankers, and becomes bankrupt. The banker proves for the whole balance due from him, and afterwards some of the bills of exchange paid in are paid in full by other parties liable, some before and some after the dividend is declared:—Held, that the proof ought to be reduced by the amount of the paid bills, and the dividends refunded. *Hornby, Ex parte*, De Gex, 69.

Where a creditor holding bills of exchange proves the amount of his debt, with a statement that he holds the bills as security, and any of the bills are subsequently paid by the other parties to them, the amount so paid must be deducted from the proof and the dividends; or, if the dividends have been paid upon the whole of the proof without such deduction, the assignees are not thereby concluded, for the court will order them to be refunded; it makes no difference whether the bills have been deposited without indorsement, or have been indorsed by the bankrupt to the creditor. *Burn, Ex parte*, 2 Rose, 55.

When an indorser of a bill of exchange becomes bankrupt, and the holder proves his bill under the commission, and afterwards compounds it, and discharges the acceptor without notice to the assignees of the indorser, he also discharges the indorser's estate, and the proof of his debt must be expunged. *Smith, Ex parte*, 3 Bro. C. C. 1.

**— Goods Sold—Excessive Price.]—**A bankrupt, who was a tavern-keeper, had bought of petitioners large quantities of wines lying in the docks, which were sold to him by sample, for stipulated prices, and at long credit, and for which the petitioners delivered to him the usual transfer warrants. The assignees sold the wines by auction at a considerable loss, in consequence of which the commissioner made a reduction in the proof, on the ground that the prices charged for the wines were too high:—Held, that he was not justified in making the reduction. *Reay, Ex parte*, 3 Deac. & Chit. 175.

**Acceptance of Composition under 33 & 33 Vict. c. 71, s. 23—Locus Standi of Bankrupt to apply to reduce Proof of a Creditor.]—**After the creditors of a bankrupt have resolved, under s. 28 of the Bankruptcy Act, 1869, to accept a composition offered by the bankrupt, the bankrupt, though undischarged, has a locus standi to apply to the court to reduce the amount of the proof of a creditor, and the mere fact that the proof has been upon the file of the proceedings in the bankruptcy for upwards of a year does not estop the bankrupt from making the application. *Bacon or Bond, Ex parte, Bond, In re*, 17 Ch. D. 447; 44 L. T. 834; 29 W. R. 574—C. A. Affirming, 43 L. T. 798; 29 W. R. 292.

**29. PROOF AGAINST SEVERAL ESTATES.**

**Bills and Notes.]—**A creditor by bill or note may prove against all the parties to his security; but if, previously to his proof against A., dividends have been declared upon his proof against B. or C., such dividends must be deducted from his proof against A. *Bank of Scotland, Ex parte*, 2 Rose, 197; 19 Ves. 310.

Proof is allowed against each person whether as principal or surety liable upon a bill or bond, if nothing is received before the bankruptcy, until 20s. in the pound are received. *Rushforth, Ex parte*, 10 Ves. 416.

A joint and several promissory note was signed by two members of a firm, by the firm, and by several other persons. The firm having become bankrupt, the holder of the note carried in proofs against the joint estate of the firm, and against the separate estates of the two partners who had signed the note:—Held, that the holder was entitled to prove against, and receive dividends from both the joint estate of the firm and the separate estates of the partners who had signed the note. *Honey, Ex parte, Jeffery, In re*, 7 L. R., Ch. 178; 41 L. J., Bk. 9; 25 L. T. 728; 20 W. R. 223.

**Principal and Surety.]—**If bills amounting to 1,320l. are delivered by the drawer to a creditor as collateral security for a debt of 4,000l., and the drawer and acceptor become bankrupt, but the estate of the acceptor proves solvent, the creditor is entitled to receive 20s. in the pound on the bills against the estate of the acceptor, and also prove the debt of 4,000l. and receive dividends in liquidation of the remaining portion of his debt under the commission against the drawer. *Sammon, Ex parte*, 1 Deac. & Chit. 564.

**— Right of Surety to Prove against Principal.]—**A trader made a promissory note as a surety for a debt due to one of the creditors of a firm. The firm and the trader became bankrupt, and the creditor proved against the estate of the trader on the note, and against the separate estate of a partner in the firm on the debt. A dividend was declared and paid on the former proof, but not on the latter:—Held, that the assignees of the trader were not entitled to an order to prove against the joint estate of the firm for the amount of the dividend which they had paid on the note. *Brown, Ex parte*, 2 Mont., D. & D. 718; 6 Jur. 1021.

**Against Debtor and his Bankers.]—**A., being indebted to B., gave him a cheque upon his bankers to pay him in a bill at three months. The bankers drew a bill for the amount upon their correspondents in London, who accepted it, the drawers and acceptors became bankrupt, and B. proved and received a dividend under both commissions:—Held, that B. was entitled to prove his debt also under A.'s commission. *Rathbone, Ex parte*, Buck, 215.

**Firms composed in Whole or in Part of same Individuals before 24 & 25 Vict. c. 134, s. 153.]—**Where there are two firms, one consisting of two individuals, and the other of the same two individuals and of a third, and they have mutual dealings, and draw bills on each other: if a bankruptcy occurs, the holders of their bills will



not be allowed to prove under both bankruptcies. *Goldsmid v. Cazenove*, 7 H. L. Cas. 785; 29 L. J., Bk. 17; 5 Jur., N. S. 1230; 34 L. T. 35. Affirming, *S. C.*, *Goldsmid, Ex parte*, 2 De G. & J. 67; 25 L. J., Bk. 25; 2 Jur., N. S. 1106.

This rule applied to cases where one of the firm carries on business in England, and the other abroad, and to cases where the firm consists of more than one person. *Ib.*

— **Sale of Goods—Proof against Agent and Vendee.**—The firm of J. F. & Sons, as agents of the plaintiffs, supplied goods to the firm of S. & W., upon the footing of the latter becoming debtors to the plaintiffs. They also supplied the same firm with other goods on their own behalf. They made no distinction in their accounts between the goods supplied by them as agents of the plaintiffs and those which they supplied on their own behalf. E. F. was a partner in both firms. Under a deed of inspection, by which it was agreed that the several estates of the two firms should be administered upon the principles and according to the rules and practice of the bankruptcy law, and as if acts of bankruptcy had been committed by the members of such firms respectively:—Held, that the plaintiffs were entitled to prove for the debts of S. & W., both against that firm and against the firm of J. F. & Sons. *Wickham v. Wickham*, 2 Kay & J. 478.

Held, also, this right was not affected by the circumstance that E. F. had survived the last of his partners in the firm of S. & W. upwards of two months, at the time when the act of bankruptcy was taken to have been committed. *Ib.*

— **Bill of Exchange—Ignorance of Holder.**—A holder of a bill of exchange drawn by a firm upon some of their members, constituting a distinct firm, has a right to prove it against all the parties according to their liabilities upon the bill, provided he was ignorant of their partnership. *Adam, Ex parte*, 2 Rose, 36; 1 Ves. & B. 493.

Three partners of a firm of six carried on a distinct trade in partnership, and indorsed a promissory note made by the six, which was discounted by a person who believed at the time, from general reputation that the three were partners in the aggregate firm, but that the firms were distinct:—Held, not a case for double proof. *Hinton, Ex parte*, De Gex, 550.

The holder of a bill, without notice that the indorser and acceptors were members of the same firm, is not entitled to a double proof. *Moult, Ex parte*, 1 Mont. & Bligh, 28; 2 Deac. & Chit. 419.

In bankruptcy among partners concerned also in other trades, the paper of one firm being given to the creditors of another, proof was allowed upon both estates. *Bonbons, Ex parte*, 8 Ves. 546.

Where joint debts were paid by a bill drawn by one of the debtors, and accepted by another, each carrying on distinct trades, proof was allowed under their separate commissions upon the bill. *Wensley, Ex parte*, 2 Ves. & B. 254; 1 Rose, 441.

— **Indorsement of one Member of a Firm.**—A creditor who, knowing the partnership of the

parties, took a bill drawn by all and indorsed by one, is not entitled to double proof, upon the ground that previously to taking the bill he required and had the indorsement of the one, and thereby raised a contract for double security. *Bank of England, Ex parte*, 2 Rose, 82.

— **Firm Abroad—Partner in England.**—A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government. The bills were not paid. Process of insolvency issued against the foreign firm, and a commission against the English partner:—Held, that the agent might prove under the commission, but would be restrained from receiving dividends, unless he elected not to prove under the insolvency abroad. *Chevalier, Ex parte*, 1 Mont. & Ayr. 345.

— **Under 24 & 25 Vict. c. 134.**—Two firms, one composed of A. and B., and the other of A., B., and C., carried on business at Liverpool and Pernambuco respectively. An English adjudication was made against A. and B., and the holder of a bill of exchange drawn by A., B., and C. on A. and B., proved under it and received a dividend. Afterwards A., B., and C. failed in Pernambuco, and the same creditor proved and received dividends on his bill under that liquidation:—Held, that he ought not to receive any further English dividend without refunding the Brazilian dividends; but he could not be ordered to refund the English dividend already received. *Mellor, Ex parte*, 3 De G., F. & J. 760.

D. carried on business in England under the style of D. & Co., and in Brazil under that of D., L. & Co. Bills for 1,900*l.* were drawn by D., L. & Co. upon and accepted by D. & Co. in favour of B. & Co. D. & Co. executed and registered a deed of assignment under the Bankruptcy Act, 1861. D., L. & Co.'s assets in Brazil were administered there according to the laws of Brazil, and B. & Co. received part payment of the 1,900*l.* there. B. & Co., notwithstanding the part payment, carried in their claim to prove and receive dividends for the whole 1,900*l.* under the deed of assignment:—Held, that although they might be admitted to prove for the amount, they were not to receive any dividend until after the other creditors had received a dividend equal to that received by B. & Co. in Brazil. *Wilson, Ex parte, Douglas, In re*, 7 L. R. Ch. 490; 41 L. J., Bk. 46; 26 L. T. 489; 20 W. R. 564.

The 152nd section of the Bankruptcy Act, 1861, did not apply, there being only one estate, that of D., to be wound up in bankruptcy, and not two distinct estates, within the meaning of that section. *Ib.*

A firm consisting of two persons, D. and Y., carrying on business as D., Y. & Co., at Liverpool, and another consisting of three persons, D., Y. & Y., carrying on business in Pernambuco, were adjudicated bankrupts, in 1854, at Liverpool. A creditor of both firms proved for a debt under this bankruptcy, and received a dividend, after which receipt the house at Pernambuco also became bankrupt, and the creditor proved the same debt against the estate there, and received a dividend in respect of it. In 1861 an order was made by the commissioner in England, that the proof in this country should be expunged, unless the creditor paid to the assignees

the dividend received by him at Pernambuco. This order was varied by the Lords Justices, who declared that the creditor was not entitled to any dividend in England, except the first which he had received, but without prejudice to any question as to that dividend, or as to any question under the foreign bankruptcy. The assignees presented a petition that the creditor might be ordered to refund such first dividend:—Held, that in the absence of all evidence to shew that the law of Brazil would not have given the creditor the right to receive the dividend there, he was under no obligation as to that which he received here; but that, as he had rightfully received, he was entitled to retain it. *Smith, Ex parte*, 31 L. J., Bk. 60; 6 L. T. 268; 10 W. R. 276.

— Under 32 & 33 Vict. c. 71. ]—In order that double proof may be admitted under s. 37 of the Bankruptcy Act, 1869, it is necessary (just as it was under s. 152 of the Bankruptcy Act, 1861) that there should be distinct estates to be wound up in bankruptcy. *Banco de Portugal, Ex parte, Hooper, In re*, 11 Ch. D. 317; 48 L. J., Bk. 73; 40 L. T. 406; 27 W. R. 856—C. A. Affirmed, sub nom. *Banco de Portugal v. Waddell*, 5 App. Cas. 161; 49 L. J., Bk. 33; 42 L. T. 698; 28 W. R. 477—H. L. (R.)

Two firms, consisting of the same members, which carried on business, the one in London and the other at Oporto, became bankrupt. The Portuguese firm had drawn bills of exchange on the London firm, which the latter had accepted:—Held, that the holders of the bills, who had received a dividend under the Portuguese liquidation, could not prove in respect of the bills in the London liquidation without giving credit for what they had received in Portugal. *Id.*

The Bankruptcy Act, 1869, s. 37, allowing a double proof where a person is liable as a sole contractor, and also as member of a firm, applies in the case of a joint and several covenant, though the joint covenant was not expressed to be made by the covenantors as partners, the covenant being, as a matter of fact, to secure an advance made for partnership purposes. *Stone, Ex parte, Welch, In re*, 8 L. R., Ch. 914; 42 L. J., Bk. 73.

Per Cotton, L. J.: Sect. 37 applies only to proofs arising out of contracts, it does not apply to proofs made in pursuance of s. 23. *Corbett, Ex parte, Shand, In re*, 14 Ch. D. 122; 49 L. J., Bk. 74; 42 L. T. 164; 28 W. R. 569—C. A.

— Identically the same Individuals. ]—Where traders possess two properties, one situated abroad and the other situated in this country, and there has been a petition for adjudication here, followed immediately, in point of date, by proceedings in insolvency abroad, and the foreign court takes possession of the foreign property, as under a *cessio bonorum*, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they had received abroad. *Banco de Portugal v. Waddell*, 5 App. Cas. 161; 49 L. J., Bk. 33; 42 L. T. 698; 28 W. R. 477.

The Statutes of Bankruptcy, 1861 and 1869, have no application to a case of two bankruptcies, either in the same country or in different countries, against identically the same individuals. *Id.*

Two persons of the name of H. carried on trade in Portugal as wine exporters, under the style of H. Brothers, and the same two persons carried on trade in London as wine merchants, under the style of H. & Sons. The practice of the business was for H. Brothers to draw bills on H. & Sons. These bills were accepted in London and paid in Portugal. The traders fell into difficulties, and in December, 1877, presented a petition for adjudication under the English Bankruptcy Act. Proceedings in insolvency were taken in Portugal, after the date of the petition but before that of the adjudication, and the Portuguese court took possession of the property there, and the Portuguese creditors received a dividend of about 8s. in the pound. These creditors then sought to prove under the English adjudication. This was refused otherwise than as a claim, until they had accounted for what they had received under the Portuguese insolvency:—Held, that this conditional admission of their claim to prove was correct. *Id.*

— Sole Trader trading in Ireland and Scotland. ]—P. carried on business at Cork, as a sole trader, under the style of D. Brothers, and at Glasgow (in partnership with M.), under the style of S. & Co. On the 3rd June, 1878, P., both as trading as D. Brothers, and in his individual capacity, gave a continuing guarantee by deed to the W. bank, carrying on business in Scotland, for all advances made or to be made by them to S. & Co., and the bank afterwards made advances to S. & Co. on such guarantee. On the 31st March, 1879, the partnership between P. and M. was dissolved, and notice of the dissolution was advertised in the Edinburgh Gazette on the 4th of April, 1879. By deed of the 3rd of April, 1879, M. transferred his estate and interest in the partnership property and business to P. P. was on the 12th August, 1879, adjudicated a bankrupt in Ireland, on his own petition. On the 23rd of August, 1879, the W. bank filed a petition in Scotland to sequester the estates of S. & Co., and of M., on foot of their original debt; and on the 22nd of February, 1880, a sequestration of both estates was ordered by the Court of Appeal in Scotland. The W. bank also claimed to be admitted to prove, unconditionally, in the Irish bankruptcy for the amount of the guarantee:—Held, that P. at the time of the Irish bankruptcy was a sole trader, trading in Ireland as D. Brothers, and in Scotland as S. & Co.; that consequently there was but one estate to be administered under the Irish adjudication; that the 48th section of the Bankruptcy (Ireland) Amendment Act, 1872, did not apply; and that the W. bank could not, therefore, be allowed to prove, except upon the condition of giving credit for so much of the Scotch estate of the bankrupt as they had received or might receive under the sequestration. *Pim, In re*, 7 L. R., Ir. 458.

Joint Adventures. ]—Where different firms are engaged in a joint adventure, and there is no joint property, the creditors of the adventure may prove against the joint estates of the minor partnerships. *Nolte, Ex parte*, 2 Glyn & J. 295.

Where several firms are engaged in a joint adventure, the creditors of the adventure, in the event of bankruptcy, and there being no joint property, must prove against the estates of the

individuals, not of the firms. *Wylie, Ex parte*, 2 Rose, 393.

Where A., a sole trader, B. & C., partners, and D., also a trader, engaged in a joint adventure for a joint purchase of goods by them, and the vendor, with a knowledge of their joint interest, received in payment a bill drawn by A. on and accepted by B. & C., the vendor was entitled to prove the bill against both their estates. *Wensley, Ex parte*, 1 Rose, 441; 2 Ves. & B. 254.

A. and B., trading under the firm of A. & Co., agreed with C. to purchase coffee on a joint account, A. & Co. to have the management of it; A. & Co. purchased the coffee, and C. paid them for his share; A. & Co., without the consent of C., deposited the coffee with D., who advanced money on it, and ignorant that C. was concerned in it, debited A. & Co. with the advances. The coffee was sold at a loss, a commission issued against A. & B., and another against C.: D. was entitled to prove his balance beyond the proceeds against the estate of C., as well as against the estate of A. & B. *Gellar, Ex parte*, 1 Rose, 297.

**Adjustment between Estates.]**—A., B., & C. were in partnership, and A. & B. were also concerned as partners in a distinct house. Commissions issued against both firms. The estate of the two cannot claim anything against the estate of the three, until the joint creditors of the three are fully satisfied. *Hargreaves, Ex parte*, 1 Cox, 440.

Where part of an account between two mercantile houses consists, on both sides, of bills, which may be proved against both estates, the cash balance as between the houses is provable, excluding the bills outstanding on both sides; but, in the event of a surplus, the bills on both sides are to be included in the amount. *Laforest, Ex parte*, 1 Mont. & Bligh, 363; 2 Deac. & Chit. 199.

If two proofs are made on a joint and several bond, against two separate estates, a subsequent consolidation of the estates does not affect the double proof. *Fuller, Ex parte*, 1 Mont. & Ayr. 222; 3 Deac. & Chit. 520.

A., B. & C. being partners, A. & B. borrowed 10,000*l.* for the firm, on mortgages of their separate estates; the firm became bankrupt; C. was wholly insolvent, and A.'s mortgaged estate paid more than his share of the debt. A.'s estate has a claim to contribution from B.'s for the difference between what B.'s estate sells for, and half the debt of 10,000*l.* *Plowden, Ex parte*, 3 Mont. & Ayr. 402.

Joint creditors, under an order to prove against separate estates, proving against one or more of them exclusively of the rest, the estate so burdened is entitled to reimbursement from the others. *Willock, Ex parte*, 2 Rose, 292.

Under a joint commission, the separate estate of one partner has a lien on the other's share of the surplus of the joint estate, in respect of a debt proved under bills drawn in the name of the firm for a separate debt; and may come in with the other separate creditors for the deficiency. *King, Ex parte*, 1 Rose, 212; 17 Ves. 115.

Under a separate commission, the separate estate is entitled to be reimbursed, out of the joint estate, expenses incurred in recovering property for the benefit of the joint creditors. *Rutherford, Ex parte*, 1 Rose, 201.

## XII. MUTUAL CREDITS, DEBTS AND DEALINGS.

### 1. GENERALLY.

**Effect of 33 & 35 Vict. c. 71, s. 39.]**—The Bankruptcy Act, 1869, s. 39, enacting that where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person claiming to prove under the bankruptcy, the sum due from one party shall be set off against any sum due from the other party and the balance only shall be claimed or paid, establishes an absolute statutory rule, and the fact that one party holds a lien or security for his debt will not affect the operation of the rule. *Barnett, Ex parte, Dewce, In re*, 9 L. R., Ch. 293; 43 L. J., Bk. 87; 29 L. T. 858; 22 W. R. 283.

B. & Co. had business transactions with a trader who became bankrupt, and at the time of the bankruptcy he owed B. & Co. 3,010*l.* and B. & Co. owed him 88*l.*; but he held goods of B. & Co. upon which he had a lien for that amount. The trustee in the bankruptcy insisted that B. & Co. should pay the debt of 88*l.* before the goods were delivered up to them, and that they should prove for the whole sum of 3,010*l.* against the bankrupt's estate.—Held, that B. & Co. were entitled to have 88*l.* set off against their claim, so as to free the goods from the lien and to prove for the balance against the bankrupt's estate. *Id.*

**— At what date Mutual Account should Stop.]**—The object of s. 39 of the Bankruptcy Act, 1869, is that where there are mutual accounts, a secret act of bankruptcy should not stop the currency of those accounts; the existence of mutual dealings and accounts protects the credits and debts on each side from the operation of the act of bankruptcy until notice of it. The exact date at which a mutual account is to stop must depend on the circumstances of the case and the nature of the credits, but may and ought to be taken at least up to the date when the person claiming the benefit of s. 39 has notice of an act of bankruptcy. *Elliot v. Turquand*, 7 App. Cas. 79; 51 L. J., P. C. 1; 45 L. T. 771; 30 W. R. 477—P. C.

**— Cannot be got rid of by Agreement.]**—The law of set-off enacted by s. 39 of the Bankruptcy Act, 1869, is an absolute statutory rule, which overrides any agreement to the contrary that may be existing between the bankrupt and his creditors at the commencement of the bankruptcy. *Jackson, Ex parte*, or *Fletcher, Ex parte, Vaughan, In re*, 36 L. T. 711; 25 W. R. 561. Affirmed, 6 Ch. D. 350; 37 L. T. 282; 25 W. R. 870—C. A.

The law of Scotland on the subject of compensation and retention in bankruptcy is very nearly, if not precisely, the same as the law of England as to mutual credit. *M'Kinnon v. Armstrong*, 2 App. Cas. 531; 36 L. T. 482—*Per* Lord Blackburn.

**Bankrupt Contributory to Company.]**—A shareholder of a company in course of winding up, being also a creditor of the company, assigned his estate and effects to trustees for his creditors:—Held, that inasmuch as a set-off of mutual credits was allowed by the Bankruptcy Law Act of 1849, though not allowed in respect of calls

by the Companies Act of 1862, the court of Chancery, sitting as the court of appeal in bankruptcy, was bound to allow the claim upon the company to be set off against the calls. *Duckworth, In re, Cooper, Ex parte*, 2 L. R., Ch. 578; 36 L. J., Bk. 28; 16 L. T. 580; 15 W. R. 858.

**Proof of Set-off.**—In an action by assignees, it is not sufficient proof of a set-off that the commissioners permitted the defendant to prove the debt proposed to be set off. *Pirie v. Menett*, 3 Camp. 279; 1 Rose, 359.

**When Court will restrain Action.**—Where there are cross acceptances, and the right of set-off is clear, the Court of Bankruptcy will restrain the assignees from bringing an action. *Clegg, Ex parte*, 1 Mont. & Ayr. 91; 3 Deac. & Chit. 505.

## 2. MUTUAL CREDITS.

**Must tend to Terminate in a Debt.**—In order to constitute a mutual credit it must be confined to pecuniary demands on such credits as in their nature will terminate in a debt. *Rose v. Hart*, 2 Moore, 547; 8 Taunt. 499.

**Guarantee.**—Therefore a guarantee, being merely a contract to indemnify against contingent damages, cannot form the subject of a mutual credit. *Sampson v. Burton*, 4 Moore, 515; 2 B. & B. 89.

**Contract to Indorse Bill of Exchange.**—A., having given the defendant his acceptance for 20l., the defendant, in consideration thereof, undertook that he would indorse to A. a bill drawn by him (the defendant) on E., payable to the defendant's order. He gave the bill, but would not indorse it. On an action by the assignees of A., who had become bankrupt, and whose acceptance was dishonoured:—Held, that the contract to indorse was not a subject of mutual credit within 6 Geo. 4, c. 16, s. 50, and could not have been set off by the assignees against the 20l. due from A. to the defendant. *Rose v. Sims*, 1 B. & Ad. 521.

A defendant may set off a debt due to him from a bankrupt for money lent against a claim by the bankrupt's assignees on him for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to himself. *Gibson v. Bell*, 1 Scott, 712; 1 Bing. N. C. 743; 1 Hodges, 136.

**Contingent Debts.**—An underwriter cannot set off, as a mutual credit, against a loss accruing after the bankruptcy of the assured, premiums of the same and other policies due before the bankruptcy from the assured, who was himself his own insurance broker in effecting those policies. *Glennie v. Edmunds*, 4 Taunt. 775.

Neither can he set off returns of premium upon voyages not complete before the bankruptcy, although the underwriter must, upon the conclusion of the adventure, necessarily become debtor to the assured either for a loss or a return of premium. *Ib.*

**Debts Payable in futuro.**—The defendants, who were bankers, had, previously to the 24th

October, 1842, discounted bills to a large amount for certain customers, who became bankrupts on that day, at which time the defendants had in their hands a balance of 179l. 19s. 11d. belonging to them. The bills were indorsed by the bankrupts in blank, and two of them were paid by the acceptors before the bankruptcy: the others, far exceeding in amount the 179l. 19s. 11d., did not become due until the 16th November, and on other subsequent days. The action, which was for money lent, was commenced on the 2nd November, 1842; and on the 8th of the same month, the defendants proved against the bankrupts' estate the whole of the bills, except the two which had been paid, deducting the balance of 179l. 19s. 11d.:—Held, that the defendants, as indorsees of the bills, were entitled to set them off in the action. *Alsager v. Currie*, 12 M. & W. 761; 13 L. J., Ex. 203.

A. first purchased one and afterwards another parcel of goods of B., each at six months' credit; when the first sum became due, A. lodged in B.'s hands a bill of exchange for a larger amount than the value of the goods, in order to pay for them, B. engaging to return to A. the overplus when the bill should be paid; B. received the amount of the bill, and then A. became a bankrupt, not having paid for the second parcel of goods:—Held, in an action by A.'s assignees for the surplus of the bill, that B. might retain it to satisfy his demand on A. for the second parcel of goods. *Atkinson v. Elliott*, 7 T. R. 378.

Acceptances not due till after the bankruptcy of the acceptor may be set off. *Wagstaff, Ex parte*, 13 Ves. 65.

**Notes issued by Bankers.**—To an action by assignees for a debt due to the bankrupt's estate, the defendant may set off notes in his possession issued by the bankrupt before the bankruptcy. *Moore v. Wright*, 2 Rose, 470; 2 Marsh. 209; 6 Taunt. 517.

**Person taking Bill of Exchange gives Credit to Acceptor.**—Action by the assignees of R., a bankrupt, on a note drawn by the defendant, payable to G. or order, and by him indorsed to the bankrupt, before the bankruptcy. In October, 1825, G. applied to the bankrupt to discount the note, and took as part payment the proceeds of a bill accepted by the bankrupt, payable to G.'s order. G. indorsed this bill for value to the defendant, and he got it discounted by H., who was the holder when it became due. A commission of bankruptcy issued against R. on the 23rd December, and the bill became due on the 24th, when it was presented and dishonoured. On the 26th, H. received the amount from the defendant, and returned the bill to him:—Held, that he had a right to set off the bill against the demand of the assignees on the note. *Collins v. Jones*, 10 B. & C. 777.

Defendant kept cash with M. & W., bankers, and accepted a bill drawn by one of the partners in the house, and indorsed by that partner to the house, who discounted and afterwards indorsed it for value to S. Before the bill became due, M. & W. were bankrupts, having funds in the hands of S. more than sufficient to pay the bill, and having in their hands money belonging to the defendant. When the bill became due, S. presented it for payment to the defendant, who having refused payment, S. paid himself out of the funds of M. & W. remaining in his hands,

and delivered the bill to their assignees :—Held, in an action by the assignees against the defendant as acceptor of the bill, that there had been before the bankruptcy a mutual credit between the bankrupts and defendant, and that the latter was entitled to set off against the sum due to the bankrupts on the bill the debt due from him to M. & W. at the time of their bankruptcy. *Boland v. Nash*, 8 B. & C. 105 ; 2 M. & R. 189.

The indorser of a bill of exchange, who has been compelled by the bankruptcy of the acceptor to take it up at maturity, may set off the amount of such bill against a debt to the estate of the acceptor, without being compelled to have recourse to a prior indorser, or being affected by any collateral security which such prior indorser may have. *M'Kinnon v. Armstrong*, 2 App. Cas. 531 ; 36 L. T. 482—H. L.

**An Accommodation Acceptance is a Credit.]—**

Action by the assignees of S., a bankrupt, for money had and received to the use of the assignees since the bankruptcy. Plea, that before the bankruptcy, and before notice of any act of bankruptcy, the defendant gave credit to the bankrupt to the amount of 50*l.*, by indorsing for his accommodation, and without consideration, a bill of exchange for that amount, drawn by him and payable to the bankrupt's order, and that such credit was of a nature extremely likely to end in a debt. The plea then alleged, that the amount of the bill was paid by the defendant on its dishonour after the bankruptcy, but before the commencement of the action ; and the bankrupt thereupon became indebted to the defendant : that before the bankruptcy, S. drew a bill of exchange on the Chesterfield bank, and delivered it to the defendant by way of loan, that he might raise the amount, and thereby give credit to the defendant to that amount ; and that afterwards, before the bankruptcy, the defendant obtained the amount of the bill from the Chesterfield bank, and that he was ready and willing to set off the two sums against each other :—Held, that the plea showed such a giving of credit to the bankrupt within the 6 Geo. 4, c. 16, s. 50, as might be the subject of a set-off in an action brought by his assignees. *Hulme v. Muggleston*, 3 M. & W. 31 ; 6 D. P. C. 112 ; M. & H. 344.

Where a defendant lent his acceptance to the bankrupt on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same under the words "mutual credit" in 5 Geo. 2, c. 30, s. 28. *Smith v. Hodson*, 4 T. R. 211.

To a declaration by assignees for goods sold and delivered by the bankrupt, the defendant pleaded that, before notice of any act of bankruptcy, and before the issuing of the fiat, and before action, the defendant gave credit to the bankrupt, by accepting bills of exchange for his accommodation, without any consideration or value, which bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit ; that the credits so given were likely to end in debts from the bankrupt to the defendant ; and that afterwards, and before action, the defendant paid the bills :—Held, a good set-off, under 6 Geo. 4, c. 16, s. 50, on the ground that a mutual credit was shewn. *Russell v. Bell*, 8 M. & W. 277 ; 1 D., N. S. 107.

Action by assignees of A., a bankrupt, for money had and received by the defendant to the use of the assignees. Plea, that before action, and before the defendant had notice of any act of bankruptcy committed by A., and before any fiat against him, the defendant gave credit to A. in 148*l.* 10*s.*, by accepting, for his accommodation, and without consideration, a bill of exchange for that sum, which bill A., afterwards and before notice to the defendant of A.'s bankruptcy, indorsed and negotiated for value, for his own use ; that the credit so given by the defendant to A. was a credit of a nature extremely likely to end in a debt from A. to the defendant ; that, afterwards and before action, the defendant was obliged to pay the bill to the holders, and thereby A. became indebted to the defendant in 148*l.* 10*s.* ; that, before the defendant had notice of any act of bankruptcy committed by A., and before any fiat against him, A. delivered to the defendant bills of exchange for 100*l.* and 20*l.*, for the purpose and in order that the defendant might receive the amounts thereof for the use of A. ; that the defendant afterwards received such amounts, and was ready and willing to set off the one debt against the other :—Held, that the acceptance of the bill for the accommodation of A. was a credit given to A., and that the delivery of the two bills by A. to the defendant for the purpose in the plea mentioned, was a credit given by A. to the defendant. *Bittleston v. Timmis*, 1 C. B. 389 ; 2 D. & L. 817.

Held, also, that such mutual credits resulted in debts, which might be set off against each other, under 6 Geo. 4, c. 16, s. 50. *Ib.*

**Where Goods or Bills of Debtor have been Deposited with Creditor.]—**

Where D. and another purchased goods of two London houses, and shipped them upon speculation to a foreign port in the name of C., and not wishing to appear as principals in the transaction, represented to the London houses, and to the consignees abroad, that C. was the principal, and that they acted merely as his agents ; and after the shipment, the London houses made advances to D. and his partner, as the agents of C., on account of the goods, the proceeds of which remained in the hands of the consignees abroad ; and C. also advanced money to D. and his partner, who afterwards became bankrupts, and at the date of the commission were indebted to C. for such advances :—Held, in an action by the assignees for money had and received, that C. had a right to retain the proceeds of the goods as a set off for money advanced to the bankrupts, it being a case of mutual credit. *Easum v. Cato*, 1 D. & R. 530 ; 5 B. & A. 361.

The defendants accepted two bills of exchange drawn by J. & Co., who undertook to provide funds before maturity, and as collateral security deposited with the defendants cotton, coffee, and certain bills of exchange. The defendants discounted away the bills so deposited, and obtained the assent of J. & Co. to their selling the goods and receiving the proceeds, and acted thereon. But after the cotton was sold, and before the coffee was sold, J. & Co. became bankrupts. The proceeds of the deposited bills and goods left a balance in the hands of the defendants after payment of the two bills accepted by them, but a larger balance was owing by J. & Co. to the defendants on other matters. The assignees in bankruptcy of J. & Co. brought an action to re-

cover the balance of the proceeds of the deposited bills and goods :—Held, that they were not entitled to succeed, inasmuch as the only question was whether, at the time of the bankruptcy of J. & Co., there was such a mutual credit between them and the defendants as to entitle the latter to retain the proceeds of the coffee against the larger balance owing to them, and that after the arrangement authorizing the sale of the cotton and coffee there was such a mutual credit. *Astley v. Gurney*, 4 L. R., C. P. 714; 38 L. J., C. P. 357; 18 W. R. 44—Ex. Ch.

Where A., before executing a deed of inspection, which was afterwards registered, deposited bills of exchange with a bank for collection when due, and the authority to collect and receive the money on the bills remained unrevoked up to the execution of such deed :—Held, that there was a credit given by A. to the bank within the meaning of the mutual credit clause of the Bankrupt Law Act, 1849, s. 171; and that the bank, therefore, was entitled to set off the amount collected on such bills against a debt due from A. to the bank. *Naorji v. Chartered Bank of India, Australia, and China*, 3 L. R., C. P. 444; 37 L. J., C. P. 221; 18 L. T. 358; 16 W. R. 791.

If a person intrusted with value trust his creditor with that which may become productive of value, the first becoming bankrupt, the second may retain his debt out of the proceeds of the things intrusted to him, and only pay the balance. A., a merchant, employed B., a broker, to effect policies, and sell goods, and trusted him with the possession of the policies; A. being indebted to B. for premiums of insurance, and having obtained an advance of money upon a pledge of goods placed in B.'s hands for sale, but not on those goods, to the exclusion of A.'s general creditors, became bankrupt; afterwards a loss happened, and B. received it from the underwriters :—Held, that this was a mutual credit within the 5 Geo. 2, c. 30, s. 28, and that B. might retain the sum received for the loss, in liquidation of his advances, as well as of the balance due for premiums. *Olive v. Smith*, 5 Taunt. 56; 2 Rose, 122.

— **For Special Purpose.**—A. deposited policies of insurance belonging to him as a security for a debt of 800*l.* at his bankers, who were in advance to him; B. (a creditor) knowing the circumstance, afterwards, at the request of A., expressly undertook to take the policies and settle with the underwriters, and pay in the amount which he might receive, at A.'s bankers, to his account. On this undertaking the policies were given up to him, and he received 949*l.* on them. A. becoming a bankrupt, and being indebted to B. in a larger sum than that received, he refused to pay over the money, and claimed to set off his own debt against the proceeds of the policies :—Held, that the assignees of A. could not (even with the assent of the bankers) maintain an action against B. for the breach of his undertaking. *Chalmer v. Page*, 3 B. & A. 697.

A. & Co., merchants at Liverpool, remitted a bill to B. & Co. in London, with directions to get it discounted, and apply the proceeds in a particular way; B. & Co. did not get the bill discounted, but received the money when it became due. Before that time, A. & Co. had stopped payment, and desired to have the bill returned to them. A commission of bankruptcy having

been issued against them before the money was received on the bill by B. & Co. :—Held, that the latter was liable to be sued for the amount by the assignees of A. & Co. for money received to their use; and that B. & Co. could not set off a debt due to them from A. & Co. *Buchanan v. Findley*, 9 B. & C. 738; 4 M. & R. 593.

A creditor of a partnership having made further advances on the security of a bill deposited with him for that purpose by the partners, and having undertaken to receive the amount when due and return the surplus, the bill having been dishonoured, and remaining in his hands unpaid, is not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill. *Flint, Ex parte*, 1 Swans. 30.

P. & Co., having borrowed a large sum of the bank of Bengal, deposited company's paper with the bank to a greater amount, as a collateral security, accompanied with a written agreement authorizing the bank, in default of non-payment by a given day, "to sell the company's paper for the reimbursement of the bank, rendering to P. & Co. any surplus." Before default, P. & Co. were declared insolvents, under the Indian Insolvent Act, 9 Geo. 4, c. 73, which declared that where there had been a mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other; and that all such debts as might be proved under a commission of bankruptcy in England might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency the bank were holders of two promissory notes of P. & Co., which they had discounted for them before the loan. The time for repayment having expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest, produced a considerable surplus. In an action by the assignees of P. & Co. against the bank, to recover the surplus :—Held, that the bank could not set off the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act. *Young v. Bank of Bengal*, 1 Moore, P. C. C. 150; 1 Deac. 622.

— **In Fraud of Debtor's Creditors.**—If a bankrupt, on the eve of his bankruptcy, fraudulently delivers goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract, and then the creditor may set off his debt. *Smith v. Hodson*, 4 T. R. 211.

**Money advanced by Defendant on Speculation by Debtor and Himself.**—The defendant and C. purchased a string of pearls with money advanced by the defendant, and agreed that the profit and loss thereon should be equally divided, C. paying his share of interest till the pearls were sold. C. became bankrupt, being indebted at that time to the defendant. The pearls were afterwards sold, and the money received by the defendant. In an action by the assignees of C. for his share of the money received :—Held, that the defendant was entitled to set off the debt due from C. to himself, this being a case of mutual credit within the 5 Geo. 2, c. 30, s. 28. *French v. Fenn*, 3 Dougl. 257.

**What Mutual Credit will destroy Lien.**—A

tradesman undertook to do work upon an article delivered to him, for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt.—Held, that the 6 Geo. 4, c. 16, s. 60, did not render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand. *Clarke v. Fell*, 4 B. & Ad. 404; 1 N. & M. 244.

**Set-off by Person standing in Place of Creditor.]**

—A., at Hamburg, had dealings with B. & Co., in London, and previously to their bankruptcy drew a bill on them for 400*l.*, which they accepted. No debt was then due from them to A., but they were afterwards indebted to him in 236*l.* 11*s.* 3*d.*, when they drew on him for 163*l.* 8*s.* 9*d.*, being the balance due from A. in case the bill for 400*l.* had been paid. This bill was drawn on the 16th February, and on the same day sold by them to the defendants for its full value, to be paid for on the 20th of the same month, on which day B. & Co. committed an act of bankruptcy, and requested the defendant to keep the bill at the disposal of A., by whom the bill for 400*l.* was drawn. On the 23rd February, A. accepted the bill without knowledge of the bankruptcy, and paid the amount of it, when it became due, to the defendant, on an agreement that the defendant should resist the claims of the assignees. At that time the bill for 400*l.* was over due and unpaid in the hands of A., and B. & Co. were indebted to him upon it in more than the amount of the bill in question:—Held, that the assignees could not recover against the defendant, as he stood in the place of A., who was a creditor to the estate of B. & Co., and that this, therefore, was a case of mutual credit between him and the bankrupts before the bankruptcy. *Sheldon v. Rothschild*, 2 Moore, 43.

**3. MUTUAL DEALINGS.**

A policy-holder in a life assurance company borrowed money from the company on his policy. Before the death of the assured the company was wound up, and an estimated value was put upon the policy. Afterwards the policy-holder filed a petition for liquidation, and a trustee was appointed. The official liquidators of the company proved against the estate of the policy-holder for the amount advanced to him, and the trustee claimed to set off the estimated value of the policy:—Held, that there were no mutual debts or mutual dealings within the Bankruptcy Act, 1869, s. 39, and that no set-off could be allowed. *Price, Ex parte, Lancaster, In re*, 10 L. R., Ch. 648; 33 L. T. 113; 23 W. R. 844.

One of the terms of an engineering contract was that the plant brought by the contractor on to the works should be deemed the property of the employers for the time being, and should not be removed during the progress of the work without the written order of the engineer, and that in case of suspension of the works by the engineer for any act or default of the contractor, the same should be subject to be used in and about the completion of the works. The works were suspended by the engineer, the contractor went into liquidation, and the works having been completed by the employers, the plant was by consent sold:—Held, that the plant did not

become the property of the employers, and that the user of the materials by the employers after the suspension of the works was not such a dealing within s. 39 of the Bankruptcy Act, 1869, as that the employers were entitled to set off the value of the plant against the sum due to them from the contractor for breach of the contract. *Winter, In re, Bolland, Ex parte*, 8 Ch. D. 225; 47 L. J., Bk. 52; 38 L. T. 362; 26 W. R. 512.

For twenty years the defendants settled yearly the balance between the goods supplied to them by a firm and the goods supplied by them to the members of the firm. The firm having gone into liquidation, the defendants sought to set off the amounts due for goods supplied to separate members against the goods received from the firm:—Held, that there could be no mutual dealings within s. 39 of the Bankruptcy Act, 1869, in the absence of an agreement to make the firm liable for the debts of the separate members. *Tyso v. Pettit*, 40 L. T. 132.

**4. TIME WHEN CREDIT GIVEN OR DEBT ACCRUED.**

**Debtor of Bankrupt becoming Creditor.]**

Banker's notes bought by a debtor after the banker has stopped payment, and before an act of bankruptcy is committed, may be set off in an action by the assignees. *Hawkins v. Whitten*, 10 B. & C. 217; 5 M. & R. 219.

A party has a right to set off notes of a firm of bankers, taken by him after he knew that they had stopped payment, but before he knew that either of the partners had committed an act of bankruptcy; but he is not entitled to set off notes of such bankers taken by him after he knew that either of the partners of the bank had committed an act of bankruptcy. *Dixon v. Cass*, 1 B. & Ad. 343.

**— In General must be before Bankruptcy.]**

—In trover by assignees to recover a policy of insurance, the defendant pleaded a custom for insurance brokers to have a general lien upon policies of insurance in their possession for their general balance; that mutual dealings and accounts existed between the bankrupt and the defendant; and that at the time of the conversion the bankrupt was indebted to the defendant in 200*l.* Replication, that the 200*l.* was the price of goods sold to the bankrupt upon twelve months' credit; and that a bill of exchange was drawn and accepted in payment, which bill was not due at the time of the conversion:—Held, that if the plea of mutual credits was set up, then it could not succeed, because it did not appear that the balance was due at the time of the bankruptcy. *Hurison v. Guthrie*, 2 Hodges, 51; 2 Bing. N. C. 755; 3 Scott, 298.

**— Assignee disclaiming Lease—Claim for Improvements.]**

—An agreement for a lease of a mill provided that the machinery on the mill at the commencement and expiration of the tenancy should be valued, and the increase or diminution in value paid by the lessor or lessee, as the case might be. The lessee became bankrupt, having improved the machinery. The assignees elected not to continue the tenancy, and the value of the improvements was ascertained:—Held, that against this amount the landlord might set off the rent, and also a demand for goods sold and

delivered. *Hanson, Ex parte*, 3 De G. & J. 92 ; 27 L. J., Bk. 40 ; 4 Jur., N. S. 164.

In 1840, A., being lessee of a warehouse and cellar under a demise from B., and being also lessee under C. of a vault, D. became tenant, from year to year, to A. of the warehouse and cellar and vault, under an annual rental of 185*l.*, made up of 140*l.* for the warehouse and cellar, and 45*l.* for the vault. On the 27th October, 1845, A. became bankrupt, 92*l.* 10*s.* being at that time due as rent from D. to A. Assignees, upon being appointed, elected to take the property held under B., and on the 26th February, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of 114*l.* 7*s.* 6*d.* became due from A. to C., for which amount C. distrained upon the goods in the vault held by D., who, to relieve himself from this distress, paid that sum to C. An action having been subsequently brought by the assignees of A. against D. to recover the 92*l.* 10*s.*, and also 35*l.*, being one quarter's rent of the warehouse and cellar due at Christmas, 1845 :—Held, that D. was not entitled, in such action, to avail himself of the payment of 114*l.* 7*s.* 6*d.* made by him to C. *Graham v. Allsopp*, 3 Ex. 186 ; 18 L. J., Ex. 85.

#### — After Bankruptcy — when Good. ] —

Though in general after bankruptcy an assignment cannot be taken of a debt of the bankrupt, in order to set it off against a debt due to the bankrupt, yet, if such assignment is taken in consequence of any arrangement for that purpose made before the bankruptcy, or by reason of any equity to have such assignment arising from matters which have occurred before the bankruptcy, then a set-off will be allowed in respect of the debt so assigned. So a surety before bankruptcy, paying off the debt of the principal after a bankruptcy, and taking an assignment of securities, among which is a security of the bankrupt, is entitled to set it off against a debt due from him to the bankrupt. *Barrett, Ex parte*, 34 L. J., Bk. 41 ; 13 W. R. 559.

Where authority had been given previous to an act of bankruptcy by the bankrupts to the defendant in the course of mutual dealings to receive the purchase-money of their estate, and to place it to their account, and such authority had been acted upon before notice of an act of bankruptcy :—Held, that such authority was not revoked by the act of bankruptcy ; that the payment thereof to the defendant was a rightful payment ; that being so received it became a debt and an item in the account between him and the bankrupts before notice of any act of bankruptcy, and that the defendant was entitled to set off against it, in an action brought by the trustee in bankruptcy, the debt due from the bankrupts to him. *Elliott v. Turquand*, 7 App. Cas. 79 ; 51 L. J., P. C. 1 ; 45 L. T. 771 ; 30 W. R. 477—P. C.

#### Creditor of Bankrupt becoming Debtor. ] —

Where, after a bankruptcy, a creditor in the bankruptcy becomes a debtor to the bankrupt estate, there is no right of set-off between the two debts. *Young, Ex parte, Day, In re*, 41 L. T. 40 ; 27 W. R. 942.

If bankers receive any pay-money on account of a bankrupt, after notice of an act of bankruptcy, all the sums received are to the use of

the estate ; and they cannot set off the payments made, or be allowed to come in as creditors, and claim dividends on debts paid, which were owing before the act of bankruptcy. *Hankey v. Verum*, 3 Bro. C. C. 313.

A debtor assigned his property to trustees by a deed registered under the Bankruptcy Act, 1861, by which it was provided that the property should be applied as if he had been "at the date hereof" adjudged bankrupt. At the date of the deed and of its registration R. held a bill of exchange accepted by the debtor, which had not yet arrived at maturity. After the execution of the deed, but before its registration, R. accepted a bill of exchange drawn upon him by the debtor :—Held, that R. had no right to set off the two bills against each other, for that the date of the deed, and not the time of registration, was to be looked to, and at the former time there was no mutual credit. *Ryder, Ex parte, Douglas, In re*, 6 L. R., Ch. 413 ; 40 L. J., Bk. 63 ; 24 L. T. 80 ; 19 W. R. 554.

To a count by assignees of a bankrupt for money had and received by the defendant to the use of the assignees (not stating whether received before or since the bankruptcy), the defendant pleaded a set-off for money due to him on an account stated with the bankrupt before the bankruptcy :—Held, that the plea was bad, for that it did not shew that the debts were mutual. *Groom v. Mealey*, 2 Scott, 171 ; 2 Bing. N. C. 138 ; 1 Hodges, 212. See *Wood v. Smith*, 4 M. & W. 522.

When a bankrupt has not obtained an order of discharge, a creditor who has proved in the bankruptcy, and who is being sued by the bankrupt, or by his executor, after his death, for a debt due to the bankrupt on a contract entered into after the commencement of the bankruptcy, cannot, during the period of three years from the close of the bankruptcy, set off the unpaid balance of his proved debt against the sum claimed in the action. *Smith, In re, Green v. Smith* (No. 1), 22 Ch. D. 586 ; 52 L. J., Ch. 411 ; 48 L. T. 154 ; 31 W. R. 413.

#### — Creditor leaving Legacy to his Debtor. ] —

T., being indebted to his sister C., became a bankrupt ; shortly afterwards C. made her will, and thereby gave certain sums to her trustees and executors, as pecuniary provisions for the benefit of T., in a form apparently intended to exclude the claims of creditors. She never proved her debt against the bankrupt's estate, and died before he obtained his certificate. On a bill in equity by the assignee against the executors of C. for payment of the money bequeathed for the use of the bankrupt :—Held, that the executors were not entitled to set off the amount of the unproved debt against the demand of the assignee. *Cherry v. Boulton*, 4 Mylne & C. 422.

A week before the death of a testatrix, a debtor to her, who was one of the residuary legatees under her will, dated several years previously, became bankrupt. The debt was never proved by the testatrix in her lifetime or by her executors after her death, nor had any dividend been declared in the bankruptcy :—Held, that the executors were not entitled to set off or retain the amount of the debt due to the testatrix against the share of the bankrupt ; nor, under the circumstances, any amount in respect of dividend on such debt. *Hodgson, In re*,



*Hodgson v. Fox*, 9 Ch. D. 673; 48 L. J., Ch. 52; 27 W. R. 38.

—**Trustee not disclaiming Lease of Farm—Claim to be Paid for Tillage by Custom of Country.**—The trustee of a bankrupt lessee of a farm did not disclaim the lease, but carried on the farm for a year, when the lease terminated by due notice from the trustee to the landlord. The custom of the country required the landlord, at the expiration of the lease, to pay the tenant a valuation for tillage, sowing, and cultivation:—Held, that the landlord was not entitled to set off against the sum claimed by the trustee for tillage, &c., the rent due from the bankrupt lessee at the time of the bankruptcy. *Alloway v. Steere*, 10 Q. B. D. 22; 52 L. J., Q. B. 38; 47 L. T. 333; 31 W. R. 290; 47 J. P. 55.

In respect of breaches of covenant committed by the tenant during his occupation, the only remedy of the landlord is to prove for damages in the liquidation, and the landlord has no right of set-off as against moneys due by him to the trustee for severed crops. *Dyke, Ex parte, Morrish, In re*, 22 Ch. D. 410; 52 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278—C. A. Affirming, 47 L. T. 26; 30 W. R. 952.

#### 5. RIGHT OF SET-OFF DEPENDS UPON BENEFICIAL INTEREST.

**Indorsement of Promissory Note for Purpose of Set off.**—Third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months (before which time the trader's acceptance would be due), but without communicating to the trader that they were the holders of his acceptance:—Held, that the trader having become bankrupt, and his assignees having brought an action to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons. *Fair v. M'Iver*, 16 East, 130.

To an action by assignees of a bankrupt for 48*l.*, the price of a phaeton which the defendant had purchased from the bankrupt for cash on delivery, the defendant pleaded that, before and at the time of the delivery of the phaeton and of the bankruptcy, the bankrupt was indebted to the defendant in 48*l.*, upon a bill of exchange drawn by Elves upon and accepted by the bankrupt, payable to Harland, and by Harland indorsed to the defendant: the plaintiffs replied that the bankrupt had accepted the bill for a debt due from him to Harland, and that after the bill became due and was dishonoured, Harland indorsed it to the defendant without consideration, in order that the defendant might purchase the phaeton, setting off the amount of the bill, and then hand over the phaeton to Harland:—Held, that the replication was a good answer to the claim of set-off. *Lackington v. Combes*, 8 Scott, 312; 6 Bing. N. C. 71.

When previously to the date of the winding up of a bank it has indorsed for value certain acceptances of a firm to which it was liable, the

bank cannot subsequently restore the right of set-off by a conditional agreement under which the indorsees re-indorsed the bills to the bank for the purpose of establishing the right, the bank and such indorsees to share in the benefit to be obtained by the set-off. *London, Bombay and Mediterranean Bank v. Narraway*, 15 L. R., Eq. 93; 42 L. J., Ch. 329; 27 L. T. 572; 21 W. R. 318.

**Holders of Notes issued by Bank.**—The defendants being indebted for money lent to them by their bankers, who afterwards became bankrupt, received from their customers, on the day of the bankers' stopping payment, but without notice of an act of bankruptcy, certain 5*l.* notes of the bankrupts, in part payment of antecedent debts, on condition of debiting themselves with so much only as they should receive from the assignees upon the notes. They also received, from other parties, other 5*l.* notes of the bankrupts, for which they were to pay so much only as they should receive from the assignees for such notes. An action for money lent having been brought by the assignees of the bankrupts against the defendants:—Held, that the defendants had a beneficial interest in the first description of notes, and might, therefore, set them off; but that they could not set off the second description of notes, as they held them merely as trustees for others. *Forster v. Wilson*, 12 M. & W. 191; 13 L. J., Ex. 209.

**Dishonoured Bill returned by Drawer to Holder for Purpose of Set off.**—The defendants were the holders of a bill of exchange, accepted by M., for 760*l.*, which was indorsed to them by the commercial bank of Scotland, and they were also the acceptors of a bill drawn by the commercial bank in favour of M. The former bill became due on the 6th of January, and was dishonoured, M. having stopped payment. On the 7th, the defendants debited the commercial bank in their account with the 760*l.*, and wrote a receipt on the back of the bill, and returned it protested to the commercial bank. The latter, hearing of the failure of M., on the 6th, wrote to the defendants, requesting them to keep the 760*l.* bill, and set off the amount against the 1,000*l.*, their acceptance, which would become due on the 12th. In an action by the assignees of M. (who afterwards became bankrupt) against the defendants, as acceptors of the 1,000*l.* bill:—Held, that they were not entitled to set off the 760*l.* *Belcher v. Lloyd*, 3 M. & Scott, 822.

**Regimental Agent—Money received from Paymaster-General—Set-off by Colonel.**—Where a regimental agent had received moneys from the paymaster-general of the forces, under the authority of a warrant of attorney from the colonel, and then became bankrupt:—Held, in an action by the assignees for goods sold and delivered by the agent for the use of the regiment, that the colonel might set off the money which the agent had received from the paymaster-general remaining unaccounted for, in reduction of the demand. *Knowles v. Maitland*, 6 D. & R. 312; 4 B. & C. 178.

**Where Plaintiff's Interest not a beneficial one.**—The assured had subsequently to the date of a policy of insurance on goods, executed a deed of inspectorship under the Bankruptcy

Act (24 & 25 Vict. c. 134), s. 192, and was suing on behalf of third persons who had made advances upon the shipping documents:—Held, that he was entitled to recover, and that the underwriters were not entitled to set off the amount of a debt due from the assured to them under the mutual credit clause of 12 & 13 Vict. c. 106, s. 171. *De Mattos v. Saunders*, 7 L. R., C. P. 570; 27 L. T. 120; 20 W. R. 801.

The plaintiffs and defendants being, by agreement between them, jointly entitled to the benefits of a charterparty, the plaintiffs assigned their interest in it, by indorsement, to D., their creditor, at the same time giving the defendants notice of the assignment, and afterwards became bankrupts. The assignees of the charterparty having sued upon it in the names of the plaintiffs, the defendants pleaded the bankruptcy of the plaintiffs, by which the right to their choses in action vested in their assignees. Replication, setting forth the assignment by the plaintiffs of their interest in the charterparty to D., and notice to the defendants of that assignment given by them before the bankruptcy of the plaintiffs, and that the plaintiffs sued on account of D. Rejoinder setting up the previous agreement between the plaintiffs and defendants, that they should share the benefits of the charterparty, by way of a mutual credit between the parties, on which an account should be stated, and one demand set off against the other, under 6 Geo. 4, c. 16, s. 50:—Held, had in substance, for at the time of the bankruptcy no mutual credit existed between the plaintiffs and defendants. *Boyd v. Mangles*, 16 M. & W. 337.

**Bill pledged by Bankrupt—Acceptor's Right of Set-off.**—A., B. & Co., bankers, advanced to C. 500*l.* on his promissory note, and subsequently, without notice to him, deposited his note, with other securities, with W. & Co. as security for a debt. A., B. & Co. having become bankrupts, W. & Co. compelled C. to pay to them the amount due on his note. Prior to the bankruptcy, C. had obtained possession of bank and interest notes of A., B. & Co., to an amount more than sufficient to have paid the amount due on his promissory note. Credit was given to the assignees of A., B. & Co. by W. & Co. for the amount paid to them by C., and the assignees having paid them the balance of their debt, they delivered over to them the securities then in their hands, which were more than sufficient to secure to them the repayment of their debt:—Held, that C. was entitled to set off against the amount due on his note a sufficient portion of bank and interest notes of A., B. & Co. in his hands, and to prove for the balance due on such note. *Staddon, Ex parte*, 3 Mont., D. & D. 256; 12 L. J., Bk. 39; 7 Jur. 358.

**Del Credere Insurance Broker has beneficial Interest in Insurances effected.**—Where a bankrupt has underwritten a policy to a broker acting under a del credere commission, and a loss upon the policy happens before, but is not adjusted till after the bankruptcy, the broker may deduct the amount of the loss from the debt which he owes to the bankrupt's estate. *Bize v. Dickason*, 1 T. R. 285.

Where insurance brokers effected several policies of insurance, some in the name and on account of their own firm, others in the name of their own firm, but on account of their prin-

cipals, and others in the name and on account of their principals, for which principals they acted under a del credere commission, without the knowledge of the underwriters:—Held, that in an action against them for premiums, by the assignees of one of the underwriters upon those policies, who had become bankrupt, the brokers might set off losses and returns due on all such of those policies as were effected in the name of their own firm, but not on such as were effected in the names of their principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had not been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the brokers had given their principals credit for the amount. *Koster v. Eason*, 2 M. & S. 112.

In an action by assignees of a bankrupt underwriter against insurance brokers for premiums due to the bankrupt the brokers are entitled to set off, by reason of mutual credit, under 12 & 13 Vict. c. 106, s. 171, a loss which occurred before the bankruptcy upon a policy underwritten by the bankrupt and effected by the brokers in their own name for a principal for whom they were acting on a del credere commission. *Lee v. Bullen*, 27 L. J., Q. B. 161; 4 Jur., N. S. 557; 8 El. & Bl. 692, n.

**So where Insurance Broker has a Lien on the Policy.**—Where brokers effected policies on goods on account of their principals, in their own names, and accepted bills on account of the goods which were consigned to them and lost before arrival:—Held, that they might set off such losses in an action by the assignees of the underwriter for premiums, although they had not any del credere commission, and the losses were not adjusted. *Parker v. Beasley*, 2 M. & S. 423.

**But not in other Cases.**—A broker, who is indebted to assignees for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy is not entitled to set off returns of premium due upon the arrival of ships which have arrived since the bankruptcy. *Goldschmidt v. Lyon*, 4 Taunt. 534.

An insurance broker who is indebted to the assignees of a bankrupt underwriter for premiums cannot, without an especial authority, set off against that debt sums due from the underwriter for returns of premium, whether the returns became due before the bankruptcy or after the bankruptcy. *Minett v. Forrester*, 4 Taunt. 541.

#### 6. PARTIES MUST BE DEBTORS AND CREDITORS IN THE SAME RIGHT.

**Partners—Joint Debt security for Separate.**—Set-off was allowed of a separate debt due from the estate against a joint debt due to it, and liberty given to prove the balance where joint debt was a security for the separate debt. *Hanson, Ex parte*, 12 Ves. 346.

**Joint Debtors—One Bankrupt.**—The provisions of the 12 & 13 Vict. c. 106, s. 171, do not

apply to cases in which one of several joint debtors becomes bankrupt. *New Quebrada Company v. Carr*, 4 L. R., C. P. 651; 38 L. J., C. P. 283; 17 W. R. 859.

A. sued B., C. and D. on a joint debt. They pleaded a set-off. A. replied that before plea D. had become bankrupt:—Held, a good replication. *Id.*

**Partners—Joint and Separate Debts.]—**A debtor by bond to the separate estate of a deceased partner is not allowed in equity to set off his bond debt in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission of bankruptcy. *Addis v. Knight*, 2 Mer. 117.

Three partners, A., B. and C., delivered bills to D. for a special purpose. A. and B. became bankrupts. In an action by their assignees against D. for the proceeds of the bill:—Held, that C. not having been made bankrupt, this was not a case of mutual credit within 5 Geo. 2, c. 30, s. 28, so as to entitle the defendant to set off the bills against a debt due to him from A., B. and C. *Staniforth v. Fellows*, 1 Marsh. 184; 2 Rose, 151.

Part owners of a ship cannot set off their proportions of a debt due to the bankrupt on that account against the debts due by the bankrupt to them severally. *Christie, Ex parte*. 10 Ves. 105.

Under a separate commission, relief in the nature of a set-off was refused against a separate creditor of the bankrupt indebted to the partnership to a greater amount. *Twogood, Ex parte*, 11 Ves. 517.

**—Collateral Security.]—**A firm consisting of two partners entered into a joint and several covenant for the payment of the balance of their current account with a bank, and one of the partners deposited with the bank, as a collateral security for the account, a sum of 8,750*l.* arising from the sale of part of his separate estate. That amount was deposited upon condition that it should not be applied in payment of the current account of the firm with the bank until after the expiration of twelve months' notice of demand for payment, and subject thereto it was to remain the separate property of the depositor. The firm became bankrupt upon the 18th of April, 1882, and the bank gave notice of demand on the 19th of May. Upon the 17th of October, the bank tendered a proof for 17,093*l.* 19*s.*, the total amount due from the firm upon their current account, without deducting the sum of 8,750*l.* deposited with them:—Held, that there was no such mutual dealing between the bank and the depositor as to give rise to any right of set-off under the 39th section of the Bankruptcy Act, 1869, and that consequently the bank were entitled to prove against the joint estate, and for the full amount due upon the current account. *Caldicott, Ex parte, Hart, In re*, 48 L. T. 910.

**—Debt due from retiring Partner to Firm.]**

—A., B. and C., traders in partnership, were indebted to H. in 51,891*l.* 12*s.* Upon a dissolution of the partnership, it was found that C., the retiring partner, was indebted to the firm in 6,817*l.* 9*s.* 8*d.*, supposing all the debts of the firm (including that of H.) to be paid; where-

upon it was agreed between them that C. should pay to A. and B. the 6,817*l.* 9*s.* 8*d.*, and should assign to them all the assets and effects of the firm, they undertaking to pay the partnership debts. A. and B., subsequently becoming bankrupts, leaving unpaid of the debt due to H. a balance of 47,000*l.*:—Held, that C.'s liability to H. did not constitute a debt or mutual credit, which could be set off under 6 Geo. 4, c. 16, s. 50, in an action by the assignees of A. and B. against him for the recovery of the 6,817*l.* 9*s.* 8*d.* due from him to the firm. *Abbott v. Hicks*, 7 Scott, 715; 5 Bing. N. C. 578; 3 Jur. 871.

**Bankers—Setting off Claim of Customers against Debt due from Customers.]—**A. entering into partnership with B., applied to his bankers for a loan to constitute his capital; they consented, upon condition that B. joined in a security for the repayment of the loan, which was complied with. The partnership opened an account with the bankers, who also continued the private bankers of A. On the bankruptcy of the bankers, the balance on the joint account, arising from this loan, was against A. and B., but A.'s private account was in his favour. A. & B. were allowed to set off this private balance against the joint debt, it being but a security for the separate debt. A. and B., soon after the partnership commenced, took in another partner, but it was understood that the account with the bankers was to continue as before. This partner drew cheques in the partnership name, and paid them into his private accounts. The assignees were held not entitled to charge the cheques so transferred against the partnership account. *Hanson, Ex parte*, 18 Ves. 233; 1 Rose, 156.

A building society borrowed a sum of money from its bankers upon a joint and several promissory note of two of its trustees and a director. The bankers at the time of their bankruptcy held the note, and there was also a balance in their hands to the credit of the society upon a current account:—Held, that the society was entitled to set off the amount of its balance against the sum due upon the note. *Clennell, Ex parte*, 9 W. R. 380. *S. C.*, nom. *Penfold, In re*, 4 L. T. 6.

**—Customer with two Accounts, one as Executor, he being also Residuary Legatee.]—**The trustee under the Bankruptcy Act, 1869, of K. & Co., bankers, sued the defendant for money lent, the balance due on his private account. The defendant had another account with the bank as executor of A., and at the time of the bankruptcy the balance on this account was in his favour. Under the will of A. the defendant was both executor and residuary legatee, and at the time of the bankruptcy he had assets in his hands exclusive of the balance in the bank, more than sufficient to provide for all bequests which remained unpaid, and to leave a balance due to him as residuary legatee:—Held, that he was entitled to set off the balance due to him on the executorship account, since the bank might have sued him in his own name if he had overdrawn the account due to him as executor, and the only effect of opening the account as executor was to give notice that there might be equitable rights as against the person opening the account, though in the present case there was no suggestion of any equity against the defendant. *Bailey v. Finch*,

7 L. R., Q. B. 34 ; 41 L. J., Q. B. 83 ; 25 L. T. 871 ; 20 W. R. 294.

A. and B., executors under a will, under which A. was also residuary legatee, kept an executorship account with a bank, at which A. kept also a private separate account. The bankers stopped payment, and filed a liquidation petition, and a trustee was appointed. Previously to the stoppage the executors had paid all the debts, and funeral and testamentary expenses, and set apart securities to answer the annuities bequeathed by the will, but the executors were jointly liable for two small sums for rates and taxes, and their solicitor's bill of costs in relation to the estate. At the date of the stoppage a sum of 1,400*l.* was due from the bank on the executorship account, while a sum of 1,200*l.* was owing by A. on his separate account. A. claimed to prove in the liquidation for the difference between the two sums, as having a right to set off, as against the debt due from him, the money owing from the bank on the executorship account, on the ground that the money on that account constituted in fact a clear net residue in which he was absolutely interested :—Held, that the one account could not be set-off against the other, the rules of equitable set-off or mutual credit not applying, unless A. was so much the person solely beneficially interested in the balance of the joint account that a court of equity would, without any terms or further inquiry, have obliged B. to transfer the account into the name of A. alone. *Morier, Ex parte, Willis, In re*, 12 Ch. D. 491 ; 49 L. J., Bk. 9 ; 40 L. T. 792 ; 28 W. R. 235—C. A.

#### 7. SET-OFF OF CLAIMS FOR UNLIQUIDATED DAMAGES.

**Before 32 & 33 Vict. c. 71.**—A plea of mutual credit, by way of set-off, cannot be pleaded to a declaration by assignees charging the defendant with having received a sum of money from the bankrupt for the purpose of meeting an acceptance, and neglecting so to apply it, whereby the bankrupt's estate sustained damage, the claim being for unliquidated damages. *Bell v. Curey*, 8 C. B. 887 ; 19 L. J., C. P. 103.

In an action by assignees of a bankrupt to recover the price of machinery supplied by the bankrupt, the court allowed the defendant to plead an equitable plea of set-off for unliquidated damages arising out of the same contract. *Makeham v. Crow*, 16 C. B., N. S. 847.

— **What are Unliquidated Damages.**—A declaration by assignees, that, in consideration that R., before his bankruptcy, would sell goods to the defendant, the defendant agreed to pay for them prompt two months, or by an acceptance; containing an averment of delivery of the goods, and of the defendant's refusal to pay by an acceptance or otherwise, whereby R., before he became a bankrupt, was deprived of the use and benefit of the acceptance, and of the benefit which would have resulted from discounting the acceptance, and was put to great loss and inconvenience, and his estate applicable to the discharge of his just debts was, by reason of the non-payment for the goods, much diminished in value—does not sound in unliquidated damages so as to deprive the defendant of his right of set-off. *Groom v. West*, 1 P. & D. 19 ; 8 A. & E. 758 ; 8 L. J., Q. B. 25 ; 2 Jur. 940.

VOL. I.

**Under 32 & 33 Vict. c. 71.**—Under the Bankruptcy Act, 1869, s. 39, the right of set-off in cases of mutual credits, mutual debts and other mutual dealings, extends to unliquidated damages. The word "liability," as defined by s. 31 of the same act, includes rents. *Booth v. Hutchinson*, 15 L. R., Eq. 30 ; 42 L. J., Ch. 492 ; 27 L. T. 600 ; 21 W. R. 116.

At the date of a creditors' deed, the bankrupt was under a liability for unascertained damages to B. in respect of a breach of covenant, and B. was indebted to him 40*l.* for rent. After the date of the deed, but before complete distribution of the estate, B. brought his action, and the amount of the damages was fixed at 50*l.*:—Held, that these were mutual dealings between the bankrupt and B. within the meaning of the Bankruptcy Act, 1869, s. 39, so as to entitle B. to set off the damages recovered by him in the action, although unliquidated at the date of the deed, against all rent due from him not only at the date of the deed, but down to the close of the bankruptcy, i.e., to the analogous period of the complete distribution of the estate under the creditors' deed. *Id.*

To an action for damages for not accepting goods to arrive by a particular ship, an equitable plea, that the contract was made with an agent of and intrusted by the plaintiff with the possession of the goods, as apparent owner ; that the agent, with the consent of the plaintiff, contracted in his own name, and that the defendant believed him to be the owner, and did not know that he was an agent only, or that the plaintiff was the owner of, or interested in the goods ; that the agent was afterwards adjudicated a bankrupt ; that, before the bankruptcy, mutual credit had been given by the defendant and the agent in respect of the sale of the goods under the contract, and in respect of money payable by him to the defendant upon accounts stated, before the bankruptcy and before the defendant had notice that he was acting as agent, and claiming a set-off is a bad plea,—the action being for unliquidated damages, and the set-off not within the rule in *George v. Clagett* (7 T. R. 359). *Turner v. Thomas*, 6 L. R., C. P. 610 ; 40 L. J., C. P. 271 ; 24 L. T. 879 ; 19 W. R. 1170.

The right of set-off under the Bankruptcy Act, 1869, extends to unliquidated damages. Such set-off may be pleaded by the defendant to an action by the trustee without recourse to a court of bankruptcy. H., who had contracted to deliver iron to the defendants by successive monthly deliveries, sued for the price, and went into liquidation. The plaintiff, who had been appointed trustee, continued the action. The defendants counter-claimed for damages for non-delivery of part of the iron :—Held, that these unliquidated damages could be pleaded as a set-off to the plaintiff's claim. *Peat v. Jones*, 8 Q. B. D. 147 ; 51 L. J., Q. B. 128 ; 30 W. R. 433—C. A.

— **Fraudulent Representation on Sale of a Chattel.**—A claim for unliquidated damages for a fraudulent representation made by a bankrupt on the sale of a chattel is within the mutual credit clause (s. 29) of the Bankruptcy Act, 1869, and consequently may be set off in an action brought by the trustee for the unpaid price ; such fraudulent representation not being a mere personal tort, but a breach of the obligation arising out of the contract of sale. *Jack v.*

O O

*Kipping*, 9 Q. B. D. 112; 51 L. J., Q. B. 463; 46 L. T. 169; 30 W. R. 441.

### XIII. DIVIDENDS.

#### 1. DIVIDEND LISTS UNDER 24 & 25 VICT. c. 134, s. 178.

The official assignee is bound to ascertain that the dividend lists are correct. *Hall, Ex parte*, 1 De Gex, 555; 16 L. J., Bk. 10; 11 Jur. 639.

#### 2. WHO ENTITLED TO DIVIDEND.

**Creditor must have Proved before Dividend declared.**—A creditor cannot petition for payment of a dividend, unless the dividend was declared subsequently to the proof of his debt. *Lee, Ex parte*, 2 Mont., D. & D. 780.

**Evidence of Proof dispensed with—Lapse of Time.**—In 1783, O. proved a debt under a bankruptcy, and in 1790 received the first dividend upon it. In 1798, the executor of O. assigned the debt and the proof of it to S. in trust for G., with a power of attorney to receive the dividends. In 1820 and 1824, two further dividends were paid to G.'s representative. In 1835, a fourth dividend, and subsequently other dividends, making up 20s. in the pound, were declared but not paid, owing to a want of representation, to the trustee's estate. The administrator of G. applied for the dividend warrants, but produced neither the assignments nor the other securities, and gave no evidence that the debt was due and unpaid:—Held, that having regard to the remoteness of the transaction, and the absence of any evidence that the debt was satisfied, the production of the proofs might be waived. *Graham, Ex parte*, 33 L. J., Bk. 1; 10 Jur., N. S. 1; 9 L. T. 278; 12 W. R. 1.

**Dividend Paid on Sum less than Proved Debt—Laches.**—A creditor, admitted in May, 1861, to prove against a bankrupt's estate, in June, 1861, received four dividends which had been previously declared, but such dividends were, by mistake, calculated upon a less sum than that for which he had been admitted to prove. Upon a fifth dividend, which exhausted the whole estate, being declared in June, 1864, the creditor received such dividend calculated rightly upon the whole sum for which he had been admitted to prove, and in November, 1864, for the first time he moved the court to order the official assignee to pay to him the deficiencies in the first four dividends:—Held, that the creditor was disentitled to relief in the Court of Bankruptcy, on the ground of his having, with full knowledge of the facts, abstained from making any application from 1861 until 1864, and until all that remained of the estate was swept away. *Deane, In re*, 12 L. T. 479.

#### 3. RECOVERY OF DIVIDEND.

**Creditor need not tender Receipt.**—Assignees compelled to pay dividends on the application of the person entitled to receive the same, although no receipt was tendered to them. *Moody, In re*, 12 L. J., Ch. 145.

**Omission to pay Dividend on proved Debt—Liability of Assignee.**—Where a proof had been

made and a dividend declared, and, by mistake in the list of proofs and dividend, one creditor had been excluded, and the whole fund divided among the other creditors; on petition by the creditor who had been excluded, it was declared that the official assignee must pay him the dividend to which he would have been entitled if the debt had been included in the calculation of the dividend, and also all his costs. *Hall, Ex parte*, 1 De Gex, 555; 16 L. J., Bk. 10; 11 Jur. 639.

**Refusal—Assignee not complying with Request of Creditor.**—After a dividend had been declared, a party entitled in respect of a proof requested the assignees by letter to send him the amount of his dividend in a post-office order, promising to send a receipt by return of post. The assignees sent no answer:—Held, that this was such a refusal to pay the dividend as entitled the creditor to an order upon petition, at the costs of the assignees personally. *Jackson, Ex parte*, 3 Mont., D. & D. 1.

**Secured Creditor—Production of Security.**—An official assignee, though he may decline to pay a creditor his dividend until he produces the security which he holds for his debt, is not justified in refusing to pay it on the production of such security. *Saunders, Ex parte*, 2 Mont., D. & D. 529.

**Lost Instruments.**—Where a creditor who had proved a bonded debt had subsequently lost the bond, the court ordered that he might receive the dividends on his debt, upon affidavit of the facts, and indemnifying the assignees. *Robins, Ex parte*, 1 Deac. 587.

Where a bill of exchange exhibited by a creditor at the time of his proof is lost before a dividend is declared, the commissioner should on the application of the creditor, give special directions to the official assignee to pay the dividend, without requiring the production of the bill. *Wallis, Ex parte*, 1 Deac. 496.

Where bills of exchange proved under a fiat have been lost by the creditor, and he therefore cannot produce them for the purpose of receiving his dividends, and an application to the court becomes necessary to receive them, the creditor must pay the costs of the application. *Trust, Ex parte*, 3 Deac. & Chit. 750.

A settlement having been lost, which declared the trusts of dividends, they were paid over to the parties without a reference, the fund being too small to bear the expense. *Harrison, Ex parte*, 3 Mont. & Ayr. 392.

#### 4. STAYING PAYMENT.

**After Omission to prove during Eleven Years.**—Dividend stayed, to give opportunity of proving to creditors who had delayed proving for eleven years, no dividend having been declared for upwards of ten years after the fiat issued. *Sturton, Ex parte*, De Gex, 341.

**Creditor must pay Costs of Application.**—Where a creditor of a bankrupt, after attending to prove, and being prevented from doing so by the other business in court, became insolvent, and the title of his assignee was not complete in time to enable the assignee to prove:—Held, that he must, nevertheless, pay the costs of his

petition to stay the dividend, and of the requisite sitting to receive his proof, and retain them out of the insolvent's estate. *Hughes, Ex parte*. De Gex, 387.

**No Stay on Ground of pending Action where Question already Litigated.]**—The court will not suspend the payment of a dividend, on the ground of a pending action against the creditor, in which it was sought to charge him as a partner with the bankrupt, after the very same question has been litigated and decided. *Turquand, Ex parte*, 2 Mont., D. & D. 345.

#### 5. OPENING A DIVIDEND.

Opening a dividend at the instance of one creditor lets in others to prove. *Bowyer, Ex parte*. De Gex, 343.

#### 6. FINAL DIVIDEND.

Where a final dividend had been declared, a creditor, who by inadvertence had omitted to prove his debt, was permitted to prove, he making good to the creditors who had been paid the difference of their dividend, and placing the creditors who had not been paid in the same situation as if he had originally proved. *Dilworth, Ex parte*, 3 Mont., D. & D. 63; 7 Jur. 95.

#### 7. EFFECT OF PAYMENT.

Payment of a dividend in bankruptcy is not payment of the debt except as against the debtor himself, and confers no right on the bankrupt or his assignee to call upon the creditor to surrender any collateral securities. *Ewart v. Latta*, 4 Macq. H. L. Cas. 983.

#### 8. UNCLAIMED DIVIDENDS.

**Interest on Unclaimed Dividends does not belong to Bankrupt.]**—Assignees had at their bankers' two accounts, one a general and the other a separate account. To the latter account, sums of a corresponding amount to that required for payment of dividends declared on the bankrupt's estate were paid. Dividends on the amount of the debts proved had been declared to the extent of 20s. in the pound. Interest accumulated on the amount standing in the separate account for unclaimed dividends:—Held, that such interest belonged to the creditors entitled to the dividends, and not to the bankrupt. *Woodford, Ex parte*, 3 De G. & S. 666; 19 L. J., Bk. 8; 14 Jur. 948.

**Distribution of Unclaimed Dividends—Further Assets—Apportionment.]**—After an order was made for the distribution of unclaimed dividends, fresh assets came to the hands of the assignees, which enabled them to make a further dividend:—Held, that this dividend ought to be declared on the debts of all the creditors, including those who had not claimed the former dividends, unless in the interim any of the non-claimants had renewed their proofs, in which case they must be placed *pari passu* with the other creditors. But the commissioners ought not, out of the further assets, to lay aside a sum equivalent to the dividends already unclaimed, as a fund in reserve to meet any future renewal of the proofs. *Mow-*

*bray, Ex parte*, 1 Mont. & Ayr. 300; 3 Deac. & Chit. 552.

**Unappropriated Moneys may be paid to Unclaimed Dividend Account.]**—Sums of money which cannot be appropriated to any particular bankruptcy, may be paid to the unclaimed dividend account. *Graham, In re*, 1 L. R., Ch. 175.

#### 9. UNDER COMPOSITION DEED.

See XIX. COMPOSITION DEEDS.

#### 10. UNDER LIQUIDATION PROCEEDINGS.

See XVII. LIQUIDATION BY ARRANGEMENT UNDER THE BANKRUPTCY ACT, 1869.

#### 11. UNDER COMPOSITION PROCEEDINGS.

See XVIII. COMPOSITION UNDER THE BANKRUPTCY ACT, 1869.

### XIV. THE ORDER OF DISCHARGE AND ITS EFFECT.

#### 1. PROCEEDINGS ON GRANTING ORDER.

**Presence of Bankrupt.]**—Where a certificate is in question, the bankrupt ought himself to be present in court. *Turner, Ex parte*, 27 L. J., Bk. 30; 4 Jur., N. S. 470—L. J.

**Opposition by Creditors.]**—A creditor who held a bankrupt in execution, and refused to discharge him from custody, could not be heard against the certificate. *Norton, Ex parte*, De Gex, 504; 11 Jur. 699.

**Notice of Appeal.]**—When two creditors only opposed the certificate:—Held, that these creditors should be served with a petition of appeal against its suspension. *Johnson, Ex parte*, 4 De G. & S. 25; 20 L. J., Bk. 6; 15 Jur. 185.

**Appeal by Creditors.]**—A creditor who has failed to prove his debt prior to the granting of an order of discharge, cannot qualify himself to appeal against such order, by proving his debt pending the thirty days allowed for appealing. *Greenwood, Ex parte*, and *Burgess, Ex parte* 33 L. J., Bk. 51; 10 Jur., N. S. 981; 10 L. T. 634; 12 W. R. 924.

To entitle a creditor to appeal against an order of discharge, it is not, however, necessary that he should have attended before the commissioner to oppose such order. *Id.*

**In Case of Surprise.]**—A creditor who intended to oppose the discharge of a bankrupt was misinformed as to the case being not to come on before a particular commissioner, and did not therefore attend. The bankrupt was discharged by another commissioner, and, on appeal, the case was remitted back as being a surprise on the creditors, and a proper subject for appeal. *Johnson, Ex parte*, 31 L. J., Bk. 66; 6 L. T. 234—L. J.

**Examination insufficient.]**—Where the examination of a bankrupt had been stopped by a county court judge, and he had been declared entitled to his order of discharge, upon an affi-

davit filed (under direction of the court) by the solicitor of the opposing creditors, stating his belief that if he had been permitted to continue the examination, he should have been enabled to prove that the bankrupt (a commission agent) had been in the habit of receiving moneys due from customers of the creditors not for the purpose of paying them over to them, but for payments in respect of gambling and betting transactions, the court ordered the opposing creditors to be at liberty to continue the examination on any matters which would be a statutory ground of objection to his receiving an order of discharge, and that their solicitor was to lay before the judge a clear and definite statement of the nature of the charges to which the examination was to be directed. *Urwick, Ex parte*, 10 L. T. 81.

**Pending Appeal of Partners.]**—The pendency of an appeal of two partners from a joint adjudication on bankruptcy against four was not a sufficient ground for adjourning the allowance of the certificates of the other two. *Braggiotti, Ex parte*, 2 De G., Mac. & G. 964; 22 L. J., Bk. 76, 77.

**Power of Registrar to Grant.]**—A registrar acting as the deputy of a commissioner, under 12 & 13 Vict. c. 106, s. 27, has power to grant orders of discharge in unopposed cases; and this power is not taken away by implication by 24 & 25 Vict. c. 134, s. 52, or by s. 159. The order of discharge in such a case ought to be signed by the registrar, and not by the commissioner. *Lees, Ex parte*, 33 L. J., Bk. 25; 12 W. R. 697.

**Form of Certificate.]**—A certificate of conformity under 6 Geo. 4, c. 16, s. 122, was invalid, although allowed by the Lord Chancellor, unless the commissioners certified that there did not appear to them any reason to doubt the truth as well as the fulness of the discovery of the bankrupt's estate. *Wagner v. Imbrie*, 2 L., M. & P. 510; 6 Ex. 882; 20 L. J., Ex. 416; 15 Jur. 803.

**Jurisdiction of Court of Bankruptcy to Suspend.]**—The Court of Bankruptcy has power to review an order refusing the discharge of a bankrupt, although it has no power to review an order granting or suspending the discharge. *Atherton, Ex parte*, 3 L. R., Ch. 142; 37 L. J., Bk. 6; 17 L. T. 485; 16 W. R. 294.

**Where Bankruptcy Suspended.]**—A bankrupt, the proceedings in whose bankruptcy have been suspended by a resolution, is entitled to apply for an order of discharge, but the bankrupt is not exempt from such reasonable examination as to conduct as may be had in other cases. *Petrie, In re*, 3 L. R., Ch. 610; 37 L. J., Bk. 20; 16 W. R. 817.

It is not the course of the Court of Bankruptcy to suspend proceedings before itself, because a proceeding which may give information as to the bankrupt's estate is pending in another court. *Lee, Ex parte*, 3 L. R., Ch. 150.

Where a bankrupt has not committed any of the offences specified in s. 159 of the Bankruptcy Act, 1861, the court has no discretion as to granting him an order of discharge, but is bound to give him an unconditional order of discharge. *Clayton, Ex parte*, 21 L. T. 342; 18 W. R. 55.

**Liquidation—Refusal of Trustee to Certify—Power of Court.]**—Resolutions were passed in a liquidation that the debtor should have his discharge on the trustee certifying that he had satisfied himself that the debtor had rendered all the assistance in his power in realizing his estate. The trustee, without sufficient reason, refused so to certify, and procure the debtor's discharge. Held, that the court had no power to compel the trustee to sign such certificate, but that it would order the debtor to be discharged, as if the certificate had been given. *Scholes, In re, Royle, Ex parte*, 47 L. J., Bk. 28; 37 L. T. 832; 26 W. R. 216.

The creditors of a liquidating debtor resolved that his discharge should be granted "on the certificate of the committee of inspection that he is entitled thereto." When the estate had been realized the committee refused to give the certificate. They alleged that the debtor had paid 5*l.* to induce a person not to bid at a sale of his book debts by auction. The debtor did not deny this statement. Held, that the court had no jurisdiction to order the registrar to sign a certificate of his discharge. *Cheesney, Ex parte, Dempster, In re*, 9 Ch. D. 701; 47 L. J., Bk. 117; 38 L. T. 887; 26 W. R. 633.

**Creditors cannot delegate Power to grant Discharge.]**—Creditors cannot delegate to anyone their statutory power of granting the debtor his discharge. A resolution doing this is ultra vires. But the registrar of the court can strike it out and direct the other resolutions to be registered without it. *Hope, Ex parte*, 9 Ch. D. 398; 47 L. J., Bk. 78; 38 L. T. 762; 27 W. R. 7—C. A.

**Agreement by Creditors to grant Discharge—Injunction.]**—Creditors agreed to dispose of the whole of a debtor's estate to a purchaser in consideration of a sum agreed to be paid by the purchaser by instalments, the debtor himself agreeing to pay a small part of such sum out of his future earnings. The debtor's business was then continued by the purchaser and himself. All the instalments were duly paid, but the creditors having become hostile to the debtor, refused to grant him his order of discharge, and attempted to possess themselves of the profits he had acquired in his business since the agreement. Held, that it would be inequitable to allow the creditors to claim the profits of the business merely because the order of discharge had not been formally granted, and an injunction was accordingly awarded to restrain the creditors from interfering with the profits of the business. *Tinker, Ex parte, France, In re*, 9 L. R., Ch. 716; 43 L. J., Bk. 147; 30 L. T. 846. Affirming, 43 L. J., Bk. 91; 30 L. T. 615; 22 W. R. 794.

**Close of Liquidation—Debtor not Party to Agreement.]**—The creditors of a liquidating debtor in 1877 passed a special resolution authorizing the sale of his estate to the trustee at such a price as would pay a dividend of 5*s.* in the pound to the creditors, and also the costs of the liquidation. The resolution was sanctioned by the court, and was carried out by the trustee. The debtor was not a party to the arrangement, and did not know of it for some time afterwards. The creditors did not pass any formal resolution fixing the close of the liquidation, or granting the debtor a

discharge, but he commenced another business. In 1881 this came to the knowledge of the trustee, and he thereupon took possession of the debtor's stock-in-trade, claiming it on behalf of the creditors under the liquidation:—Held, that the resolution did not amount in substance to a close of the liquidation or a discharge of the debtor, and that consequently the trustee was entitled to the debtor's after-acquired property for the benefit of the creditors. *Tinker, Ex parte* (9 L. R., Ch. 716), distinguished; *Wainwright, or Greener, Ex parte, Wainwright, In re*, 19 Ch. D. 140; 51 L. J., Ch. 67; 45 L. T. 562; 30 W. R. 125—C. A. Affirming, 30 W. R. 62.

But held, that, under the circumstances, the costs might properly be the subject of appeal, and that the debtor's costs must be paid out of the estate, and that the trustee's costs must also be allowed out of the estate. *Id.*

**Close of Bankruptcy—Where Bankrupt without Assets.**—The court has power, under s. 47, of the Bankruptcy Act, 1869, to make an order closing a bankruptcy in a case where it does not appear that the bankrupt has any assets. *Pitt, Ex parte, Gosling, In re*, 20 Ch. D. 308; 51 L. J., Ch. 733; 47 L. T. 263; 30 W. R. 763—C. A.

**Power of Court to re-open Proceedings.**—After an order has been made closing a bankruptcy, the court has, under s. 71, power to re-open it. *Id.*

**Rights of new Creditors.**—But such an order ought not to be made without notice to the creditors of the bankrupt (if any) whose debts have been contracted after the adjudication, nor without letting them in to prove as creditors against any property of the bankrupt acquired by him after the date of the order to close the bankruptcy. *Id.*

## 2. GROUNDS FOR REFUSING, SUSPENDING, OR QUALIFYING DISCHARGE.

### a. Generally.

**Under 24 & 25 Vict. c. 134, s. 159.**—There is no discretionary power vested in the commissioner to refuse or suspend an order of discharge, unless the bankrupt has been guilty of a misdemeanour, or one of the offences specified in the above section. *Undall, Ex parte*, 31 L. J., Bk. 87; 8 Jur., N. S. 980; 6 L. T. 732; 10 W. R. 799. See *Glass, Ex parte*, 31 L. J., Bk. 73; 6 L. T. 407; 10 W. R. 533.

The above section is not retrospective, and an offence created by that clause must, in order to justify the refusal of suspension of the order of discharge, have been committed subsequently to the passing of the act. *White, Ex parte*, 33 L. J., Bk. 22; 10 Jur., N. S. 189; 9 L. T. 702; 12 W. R. 390.

The Court of Bankruptcy has no power under the above enactment to award two distinct punishments for the same offence. *Marks, Ex parte*, 1 L. R., Ch. 334; 35 L. J., Bk. 16.

**Conditional Discharge.**—Where the court had attached conditions to an order of discharge, in consequence of the bankrupt's misconduct, and it appeared that the court had not confined their

consideration to the acts specified in 24 & 25 Vict. c. 134, s. 159, the court granted a rehearing. *Drinkwater, In re*, 7 L. T. 300; 11 W. R. 14.

An uncertificated colonial insolvent petitioned the court. His discharge was suspended, with protection, for twelve months, in order to enable the colonial creditors to come in and prove their debts, and was then made conditional upon his future property being made available for his creditors. *Gibson, Ex parte*, 34 L. J., Bk. 31; 11 Jur., N. S. 273; 12 L. T. 101; 13 W. R. 530.

**Under 32 & 33 Vict. c. 71, s. 48.**—Where a special resolution of creditors under the Bankruptcy Act, 1869, s. 48, has been properly passed, stating that in their opinion the bankrupt cannot justly be held liable for his failure to pay 10s. in the pound, and desiring his discharge, and the terms of the section are in other respects strictly complied with, the court has no discretionary power to refuse the bankrupt's application for discharge. *Hamilton, In re, Hamilton, Ex parte*, 9 Ch. D. 694; 38 L. T. 620; 26 W. R. 697.

### b. Trading by Means of fictitious Capital.

**Discounting Accommodation Bills.**—When a trader raised money by discounting accommodation bills, but did not negotiate the bills in the course of his trade, this was not trading by means of fictitious capital, within s. 159 of the Bankruptcy Act, 1861. *Harrison, Ex parte, Baillie, In re*, 2 L. R., Ch. 195.

### c. Contracting Debts without Reasonable Expectation of Ability to Pay.

**Exceeding fixed Income.**—The mere fact that a man who had a fixed income had exceeded it, and so incurred debts, was not sufficient to shew that he could not have had at the time when any of his debts were contracted any reasonable or probable ground of expectation of being able to pay the same. *Brundritt, Ex parte, Caldwell, In re*, 3 L. R., Ch. 26; 16 W. R. 66.

**Overdrawing Banker's Account.**—Overdrawing an account current at a banker's by a person in insolvent circumstances, did not in itself amount to contracting a debt without reasonable or probable ground of expectation of being able to pay the same. *Harrison, Ex parte, Baillie, In re*, 2 L. R., Ch. 195.

**Accepting Accommodation Bills.**—A bankrupt accepted accommodation bills without consideration, to an amount far beyond his means or expectations, for a firm in large business, to whom he was under considerable obligations, and whom he believed to be perfectly solvent:—Held, that his conduct amounted to a contracting of debts without reasonable or probable ground of expectation of being able to pay the same, and his order of discharge was absolutely refused. *Barker, Ex parte*, 33 L. J., Bk. 13; 9 L. T. 672; 12 W. R. 321.

Where a bankrupt had been in the habit of accepting accommodation bills for a Scotch firm, which failed, receiving a commission of one per cent. on such acceptances:—Held, that a suspension of the certificate for two years was not too



severe a sentence. *White, Ex parte*, 3 De G. & J. 75.

Accommodation bill transactions are not regarded with favour; and a bankrupt who has engaged in such dealings must expect them to be subjected to a rigid investigation; but where a bankrupt had not been shewn to have been guilty of dishonesty, or to have represented that the bills were accommodation bills, the court considered such transactions not sufficient ground for suspending his certificate for two years, without protection, as regarded liability in respect of the bills. *Hammond, Ex parte*, 6 De G., Mac. & G. 699; 24 L. J., Bk. 2. See *Mortimore, Ex parte*, 7 Jur., N. S. 320; 3 L. T. 828; 9 W. R. 423.

The acceptance of accommodation bills is a contracting of debts, and if done without reasonable or probable ground of expectation of being able to pay the same, was an offence within s. 159 of the Bankruptcy Act, 1861. *Mee, Ex parte*, 1 L. R., Ch. 337; 35 L. J., Bk. 41; 14 L. T. 318.

**Obtaining Goods on Credit—Sale below Cost Price.**—A bankrupt was not considered to have contracted a debt without any reasonable or probable ground of being able to pay the same, though he obtained goods on credit whilst insolvent, and soon afterwards sold them for less than the cost price. *Marks, In re*, 1 L. R., Ch. 334; 35 L. J., Bk. 16.

A certificate was altogether refused if it appeared that the bankrupt had systematically bought on credit to sell at less than at cost price. *Holthouse, Ex parte*, 1 De G., Mac. & G. 237; 21 L. J., Bk. 3; *S. P., Coleman, Ex parte*, 3 De G. & J. 43.

**—Pledging.**—Where a case is established of a trader having bought goods on credit, with the intent of raising money by pledging them, the court will visit such conduct with the utmost severity; and the circumstance of goods which had been purchased on credit having been pledged the next day by the bankrupt is one open to suspicion. Where, however, that circumstance was explained by uncontradicted evidence shewing that the goods had been purchased in the ordinary course of business, and had been pledged by reason of a sudden pressure requiring money to be raised forthwith, the court allowed the certificate. *Martyn, Ex parte*, 2 De G., Mac. & G. 225; 21 L. J., Bk. 46.

Where the usual course of dealing carried on by the bankrupt, who had traded without capital, had been to purchase goods, and immediately afterwards to raise money by pledging them, and it appeared that this was done, not for a purpose merely dishonest, but in accordance with the custom in his trade, and with the bona fide expectation of being able afterwards, on a rise in the market price of the goods, to redeem the goods and sell them at a profit:—Held, that this was not equivalent to the offence of contracting debts "by any manner of fraud, or by means of false pretences," within 12 & 13 Vict. c. 106, s. 256. *Manico, Ex parte*, 3 De G., Mac. & G. 502; 22 L. J., Bk. 41; 17 Jur. 359.

**Fresh Loans in Excess of Repayments.**—A bankrupt who pays to his relations from time to time a portion of the debts due to them with interest thereon, and during the same period

receives from them in advance more than he pays, whilst his indebtedness to his other creditors is constantly increasing, is not guilty of contracting debts without a reasonable or probable ground of expectation of being able to pay them. *Ryley, In re*, 14 L. T. 107.

**Continuing to Trade after heavy Losses.**—Two young men took to a family business of calico printing which was at the time insolvent. They carried it on upon a large scale from November, 1864, to June, 1867, without taking stock. At the end of that time they took stock, and found that the result of their business was a loss of 10,000*l.* for the whole period. Upon this they called their creditors together and became bankrupt. Up to that time they deposed that they had believed they were carrying on business at a profit. One of them, however, admitted that in January, 1867, he had believed the firm insolvent. From January to June the excess of liabilities over assets had increased by 4,000*l.*, and many debts contracted during that period, chiefly for drugs employed in the printing, remained unpaid. The commissioner considered that the bankrupts had contracted these debts without reasonable expectation of being able to pay them, and suspended the order of discharge for three months, with protection:—Held, by Lord Cairns, L. J., that they ought to have stopped trading sooner, but that this was not a punishable offence, and that there was not sufficient ground for holding that they had contracted debts without reasonable expectation of being able to pay them. *Bayley, Ex parte, Ainsworth, In re*, 3 L. R., Ch. 244; 16 W. R. 291.

Where bankers continued to trade for two years after they were hopelessly insolvent:—Held, that their certificates had been properly refused. *Rufford, Ex parte*, 2 De G., Mac. & G. 234; 21 L. J., Bk. 32.

If bankers continue to receive deposits, knowing that if the business was wound up they could not pay 5*s.* in the pound, that is a trading which is utterly unjustifiable. *Id.*

The facts of a trader having been, for more than three years before his bankruptcy, in such a condition that all his assets, if realized, would be less than the amount of his debts, and nevertheless continuing to trade, are not decisive against the allowance of his certificate, but render it incumbent on him to shew a justification, or some fair and reasonable excuse for such conduct, at least if any creditor under the bankruptcy has suffered by it. *Dornford, Ex parte*, 4 De G. & S. 29; 20 L. J., Bk. 7; 15 Jur. 278.

**Damages and Costs are not Debts—Co-Respondent.**—After an order nisi had been made in a divorce suit, dissolving the marriage, and ordering the co-respondent to pay damages and costs, the co-respondent made away with his property, and when the order became absolute he was utterly without means to pay them, and immediately afterwards was made bankrupt on his own application. He owed only one other debt of trifling amount for money borrowed some years before:—Held, that the damages and costs were not a debt contracted by him within the meaning of the Bankruptcy Act, 1861, s. 159, and that he could not be dealt with as having contracted

any of his debts without reasonable expectation of being able to pay them. *Clayton, Ex parte, Clayton, In re*, 5 L. R., Ch. 13; 21 L. T. 342; 18 W. R. 55. *S. P. Griffiths, Ex parte*, 33 L. J., Bk. 44; 10 Jur., N. S. 785; 10 L. T. 705.

— **Patent Action.**—In order that an order of discharge might be refused under the Bankruptcy Act, 1861, s. 159, on the ground that the bankrupt could not have had, when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay them, it was necessary that the debts should be strictly debts arising out of a contract. It was not enough that they were debts provable in the bankruptcy. *Goodier, Ex parte*, 22 L. T. 426.

The costs payable by an unsuccessful defendant in a patent suit, though provable on his bankruptcy, are not a debt arising out of a contract. *Id.*

#### d. Falsifying Books.

**Fictitious Entries.**—Where a bankrupt who stopped payment on a Monday, had on the previous Saturday made purchases of goods:—Held, that upon his application for his certificate, it was incumbent upon him satisfactorily to explain the circumstance; and, upon his giving an explanation which was incredible, and on its appearing from an inquiry into his previous career that he had twice before compounded with his creditors, and on this occasion wished to effect a third composition for 11s. in the pound, his assets being sufficient to pay 12s. in the pound, and upon its further appearing that he had made fictitious entries in his books:—Held, that his certificate had been properly refused. *Curtis, Ex parte*, 2 De G., Mac. & G. 225; 21 L. J., Bk. 53. *S. P., Hulingsworth, Ex parte*, 4 De G. & S. 44; 20 L. J., Bk. 13; 15 Jur. 914.

— **In Order to deceive Partner.**—A bankrupt partner falsified the books of the firm, not with the view of any pecuniary advantage to himself, but in order to conceal from his partners a state of embarrassment in which the partnership affairs were involved, but which was conceived by him to be temporary only, he believing at the time that the concern would ultimately turn out a profitable one, but that his partners, if they had known the true state of its affairs, would have abandoned it:—Held, that his certificate had been properly refused, but, under the circumstances, the court made an order for protection, so far as it might be available. *Nicholson, Ex parte*, 1 De G., F. & J. 270; 29 L. J., Bk. 1; *S. P., Knight, Ex parte*, 26 L. J., Bk. 57; *Stephanoff, Ex parte*, 26 L. J., Bk. 88; 3 Jur., N. S. 967.

— **By one of two Partners—Laches of Innocent Partner.**—One of two partners, who were agents to a banking company, made false returns to them of the notes in the agents' possession, but without the knowledge of the other partner. On the partners becoming bankrupt:—Held, that the last-mentioned partner ought to have seen to the accuracy of the returns, and had been guilty of negligence, imprudence and over confidence, but that it was not a case for the total refusal of his certificate. *Dance, Ex parte*, 1 De G., F. & J. 286; 29 L. J., Bk. 16.

#### e. Rash and Hazardous Speculation.

##### Banker—Accepting Bills without Security.]

—A country banker accepted, to a large amount, bills drawn upon him by a person who failed to remit other good bills, according to his agreement, without any security whatever. He afterwards became bankrupt:—Held, that his insolvency was attributable to rash and hazardous speculation, and that his order of discharge was properly made conditional on the setting aside part of his subsequent earnings for the benefit of his creditors. *Braginton, Ex parte*, 14 L. T. 276; 14 W. R. 593.

**Buying for the Rise.**—A merchant, at the end of 1865, held invoices for 800 bales of cotton, of the value of 29,000*l.*, for which he had accepted bills. At that time he knew himself to be, if not insolvent, at all events in a critical position, having nothing but the cotton to meet the bills. He stopped payment in June, 1866, and became bankrupt, having in the meantime given or confirmed orders for 1,100 more bales of cotton, of the value of 35,000*l.* He had scarcely any assets besides his cotton, which was pledged beyond its value, and his unsecured debts were 58,000*l.*:—Held, that although dealing in cotton was within the limits of legitimate commerce, still, as such dealing was notoriously hazardous, the bankrupt, having regard to the state of his affairs at the end of 1865, was bound to exercise the greatest caution as to extending his liabilities for cotton, and that the subsequent orders for the 1,100 bales, which appeared not to have been requisite for keeping his business together, must be considered as having been given in order to take the chance of a rise in price, with a certainty that the loss, in case of a fall, would have to be borne by his creditors, and that this was rash and hazardous speculation. *Heyn, Ex parte*, 2 L. R., Ch. 650; 17 L. T. 91; 15 W. R. 1185.

**Stockbroker—Time Bargains.**—The bankruptcy of a sharebroker, who has met with losses on time bargains, is to be attributed to rash and hazardous speculation, and by increasing the balances against him at two banks shortly before his failure, he is guilty of contracting debts without reasonable expectation of being able to pay them. *Wilson, In re*, 14 L. T. 492.

**Promoting Company.**—Where a bankrupt had entered into contracts from which he was to derive pecuniary advantages, on the formation of a company of which he was the promoter, but which company became defunct, by reason of the necessary capital not having been subscribed:—Held, that he had not been guilty of embarking in a rash and hazardous speculation. *Douman, Ex parte*, 32 L. J., Bk. 49; 9 Jur., N. S. 811; 8 L. T. 225; 11 W. R. 577.

**Sending Abroad Goods bought for Home Trade.**—During a period of unquestionable solvency, but shortly before bankruptcy, a trader purchased goods for, as he alleged to the seller, home trade. The goods were very soon after consigned to a relative in America, and when sold, were disposed of at very great loss. After his bankruptcy he applied for his discharge, but was opposed on the ground of having made misrepresentations, and that the consignment of the

goods to America was a rash and hazardous speculation, within the meaning of par. 3:—Held, that this paragraph was not applicable, the bankrupt at the time of the venture being possessed of property beyond the amount of his liabilities, and the representations, though erroneous, not being fraudulent. *Evans, Ex parte*, 31 L. J., Bk. 63; 6 L. T. 519—L. J.

**Debtor engaged in several Trades.**—Where a bankrupt had engaged in reckless trading, and speculations of a desperate character, the court would not grant him a certificate; but where a cotton spinner had engaged in several other trades, and undertakings of different kinds, and it was not shewn that he was at the time insolvent:—Held, that the number and variety of these undertakings did not constitute a case of reckless trading. *Wakefield, Ex parte*, 4 De G. & S. 18; 15 Jur. 961.

#### f. Unjustifiable Extravagance in Living.

A father, a solicitor in practice, took his son, aged twenty-four, into partnership; the son never investigated the affairs of the firm, but though he lived with and was maintained by the father, he drew out of the concern annually 300*l.* for his own purposes. The father became bankrupt, and subsequently also the son. On the latter applying for his discharge, the commissioner suspended it for twelve months, three months to be without protection. On appeal, the court mitigated the sentence by a suspension for three months only, with protection. *Holden, Ex parte*, 31 L. J., Bk. 86; 6 L. T. 673.

**Damages in Divorce Suit.**—Damages in a suit for divorce awarded against a bankrupt will not justify the suspension of an order of discharge, with imprisonment, either on the ground of unjustifiable extravagance in living, or that the damages were incurred without any reasonable or probable ground of expectation of being able to pay them. *Griffiths, Ex parte*, 33 L. J., Bk. 44; 10 Jur., N. S. 785; 10 L. T. 705.

#### g. Frivolous or Vexatious Defence to Actions.

**Defence in Order to gain Time for Arrangement with Creditors.**—A trader is not bound to leave off trading merely because he is in difficulties; the question in each case being, whether he has continued trading after there ceased to be any reasonable prospect of his retrieving himself. Thus, a trader, when in difficulties, and when sued, placed himself in the hands of the bulk of his creditors, who defended the action in his name, and in order to gain time for an arrangement, pleaded twenty pleas without any substantial defence:—Held, that he was not disentitled to his certificate for having vexatiously defended the action. *Johnson, Ex parte*, 4 De G. & S. 25; 20 L. J., Bk. 6; 15 Jur. 185.

**Action for Tort.**—An action founded on tort is not an action to recover any debt or money due, and a vexatious defence to such an action is therefore no ground for refusing an order of discharge. *Crabtree, Ex parte*, 33 L. J., Bk. 33; 10 Jur., N. S. 529; 10 L. T. 361; 12 W. R. 768.

A claim for damages in an action pending at

the date of the adjudication, and subsequently converted into a debt by the verdict of the jury, does not constitute a debt or money due from the bankrupt. *Boswell, In re*, 6 L. T. 28.

#### h. Concealing Property.

The certificate of a bankrupt who concealed any part of his property with intent to defraud his creditors was void by 5 & 6 Vict. c. 122, s. 38, even though he voluntarily gave it up before the granting of the certificate. *Courtice v. Mennier*, 6 Ex. 74; 20 L. J., Ex. 104; 15 Jur. 275.

Attempted concealment by a bankrupt of property, although of small intrinsic value, and prized by him for the sake of family recollections and associations, was a sufficient ground for refusing to disturb, in his favour, a suspension of his certificate for eighteen months, without protection. *Warwick, Ex parte*, 6 De G., Mac. & G. 749; 24 L. J., Bk. 23.

It is the duty of a commissioner when applied to by a bankrupt for his discharge under the circumstances mentioned in 24 & 25 Vict. c. 134, s. 110, to be judicially satisfied, before granting it, that the bankrupt has made a full discovery of his estate. *Jones, Ex parte*, 33 L. J., Bk. 11.

Where proceedings have been suspended under 24 & 25 Vict. c. 134, s. 110, and a bankrupt has not made a full discovery of his estate, it is doubtful whether he is entitled, as of right, to an order of discharge, or only entitled to apply for the order which may be granted or withheld on consideration of his general conduct. *Delamere, In re*, 31 L. J., Bk. 67; 6 L. T. 274—L. J.

Where proceedings have been suspended, a bankrupt, having made a full discovery of his estate, is not entitled to his discharge as a matter of right, and his application for a discharge will be dealt with according to the rules laid down in s. 159. *McKerrow, Ex parte*, 34 L. J., Bk. 37; 11 Jur., N. S. 830; 12 L. T. 753; 13 W. R. 1002.

It was no objection to the allowance of the certificate that the bankrupt had received money since his bankruptcy as a surveyor for valuing tithes, which he had not accounted for to his assignees, such money being considered as the fruits of his personal labour. *Walters, Ex parte*, 2 Mont., D. & D. 635.

#### i. Gaming or Wagering.

**Under 12 & 13 Vict. c. 106, s. 201.**—Railway stock was within the section. *Matheson, Ex parte*, 1 De G., Mac. & G. 448; 21 L. J., Bk. 18; 16 Jur. 769; *Copeland, Ex parte*, 2 De G., Mac. & G. 914; 22 L. J., Bk. 17; 17 Jur. 121.

A trader, who became bankrupt, had had dealings in consols and in scrip, by which he had purchased for the account, no intention existing on his part that either stock should be transferred to him. On the account-day he paid the differences, and so carried the transactions forward to the next account. He had thus several times lost more than 20*l.* in one day. The commissioner decided that this was gaming or wagering within 12 & 13 Vict. c. 106, s. 201, and refused him his certificate:—Held, upon appeal, that it was not so, though it might be taken into consideration with other conduct, on the question of certificate. *Ryder, Ex parte*, 1 De G. & S. 317; 26 L. J., Bk. 69; 3 Jur., N. S. 1159.

Where a bankrupt had lost 200*l.* on contracts

for the purchase of railway shares, the court refused to disturb a suspended certificate with protection, although the assignees opposed and appealed from the order. *Turner, Ex parte*, 3 De G. & J. 44; 27 L. J., Bk. 470; 6 Jur., N. S. 470.

#### j. Frauds by Solicitors.

A solicitor removed by certiorari an action brought against him by a client in a county court, to a duchy court of common pleas, and it appeared that he had no good defence; on judgment being recovered against him, he was adjudicated bankrupt on his brother's petition:—Held, that his certificate was properly suspended for twelve months. *Blackhurst, Ex parte*, 3 De G. & J. 39; 27 L. J., Bk. 24; 4 Jur., N. S. 1065.

A solicitor, who subsequently became bankrupt, had deposited a mortgage deed under circumstances which the commissioner thought fraudulent, and in consequence of which he had refused to grant him any certificate. On appeal, the court was of opinion that the deposit, although irregular and censurable on the part of a solicitor, did not amount to an act of wilful fraud, and granted him a second-class certificate, with a suspension for two years from adjudication, but with protection in the meantime, as he had already undergone an imprisonment of nearly three months. *Freston, In re*, 31 L. J., Bk. 1; 7 Jur., N. S. 1173; 5 L. T. 267; 10 W. R. 25—L. J.

T. S. & G. S. were partners as solicitors. G. S. received from H. 4,000*l.* for the purpose of being invested on good mortgage security. T. S. was mortgagee of the reversion of a large sum of stock, of which he was one of the trustees, and upon which he had lent 4,000*l.* The 4,000*l.* belonging to H. was lent by the firm to T. S., upon the security of a transfer of his mortgage, and applied to the purposes of the partnership business. With the consent of the tenant for life, the stock was sold upon the death of the reversioner, and the proceeds were applied in payment of the reversioner's debts, and among them the 4,000*l.*, and the balance was placed to the credit of T. S. in the books of the firm. No fresh security was ever given to H. for his 4,000*l.*, but for twenty years the firm and T. S. paid him interest as if on the original security, and represented that it was so. In 1850, H. discovered the fraud; but for four years he continued to receive his interest, when T. S. became bankrupt, and the 4,000*l.* was lost. The commissioner refused to grant T. S. any certificate; and, upon appeal, his decision was affirmed, the court holding that the transaction was a gross breach of duty by T. S., as a solicitor, towards his client, and one which the interests of society required should be severely visited; and that the acquiescence of the client in receiving interest after the discovery of the misconduct could not be looked upon as a condonation, by reason that the interests of society were involved. *Selby, Ex parte*, 25 L. J., Bk. 13; 2 Jur., N. S. 29—L. J.

#### k. Other Cases of Fraud.

##### Fraud to be distinguished from Recklessness.]

—On questions of bankrupts' certificates, cases tainted with fraud or dishonesty were to be carefully distinguished from those which were affected

merely by extravagance, carelessness or wildness of speculation. *Brown, Ex parte*, 3 De G. & J. 369.

But where a bankrupt had contracted liabilities when hopelessly insolvent, and had dealt largely in accommodation bills, and had obtained a bill of exchange under circumstances amounting to an engagement not to negotiate it, which he had nevertheless done; and had, moreover, after a meeting of his creditors, at which it was understood that he was not to deal with his estate, given to one of them a security without the privity of the others:—Held, that the adjudication suspending the certificate for three years without protection could not be mitigated further than by giving protection after an imprisonment of two months. *Id.*

Where a bankrupt had been negligent, careless, rash, improvident or lavish, there might be differences of opinion as to granting him a certificate, as to its class or as to the conditions (if any) which should be annexed to it. But where there had been wilful falsehood and dishonesty, the Court of Appeal refused to allow the certificate. *Dobson, Ex parte*, 6 De G., Mac. & G. 781; 25 L. J., Bk. 13; 2 Jur., N. S. 29.

##### Misrepresentation—Getting Bills Discounted.]

—The court, in the interests of the public, deals severely with cases in which bankrupts have been guilty of fraud, or of false and fraudulent misrepresentation. *Laurence, Ex parte*, 30 L. J., Bk. 33; 7 Jur., N. S. 1218; 5 L. T. 105; 10 W. R. 22—L. J.

Where, therefore, a trader had procured bills to large amount, drawn in some instances on insolvent houses, and in others for his own accommodation, to be discounted by representing them, in answer to inquiries on the subject, to be ordinary trading bills, and subsequently became bankrupt, the court dismissed an appeal from the decision of a commissioner refusing the bankrupt his certificate. *Id.*

—As to being a Trader.]—L., not being in trade, obtained a loan on the representation that he was in trade, had been so for five years, and wanted the money for the extension of his business. He afterwards entered into trade, and became bankrupt, the loan constituting one of the debts provable:—Held, that whether s. 198, or s. 256 of the 12 & 13 Vict. c. 106, applied to conduct before entering trade or not, the certificate must be refused: for that the bankrupt having, in the transaction in question, represented himself to be in trade, could not be heard to say that he was not in trade at the time. *Leslie, Ex parte*, 25 L. J., Ch. 37; 2 Jur., N. S. 822—L. J.

##### Allowing Uncertificated Bankrupt to Trade in Debtor's Name.]

—W., a chemist, allowed S., who was an uncertificated bankrupt, to carry on business as a jeweller, in the name of W., but for his own benefit, W. making himself liable for the debts. Some persons to whom S. applied for goods, asked W. whose the business was, to which he replied that it was his, and that S. was carrying it on for him. S. absconded, carrying away all the goods belonging to that business, and W. shortly afterwards became bankrupt, almost all his debts being debts contracted by S. in the jewellery business:—Held, that the representation by W. that the business was his,

was not a fraud disentitling him to a certificate. *Wildbore, Ex parte*, 2 De G., F. & J. 621.

— **As to Property—Borrowing Money.**—A bankrupt had, shortly before his bankruptcy, represented to his bankers, that he was owner of three ships in the course of building abroad. Afterwards his account with them being largely overdrawn, they prepared an agreement for him to sign, whereby he agreed to mortgage the ships to them for the floating balance. He had, previously, however, sold the ships to his brother, subject to an agreement for the payment to himself of any profit on a resale. He signed the proposed memorandum without mentioning the fact of the sale:—Held, that although the bankers made no further advance on the security of the memorandum, the bankrupt had been guilty of a suppression which could not be overlooked on the question of his certificate, and that it had been rightly suspended for three years without protection. *Holderness, Ex parte*, 1 De G., F. & J. 260; 28 L. J., Bk. 20; 5 Jur., N. S. 904.

— **As to Amount of Invoice.**—A trader purchased goods of a manufacturer, and after the invoice had been made out, he added to the invoice an amount more than double that of the sum charged by the manufacturer as the cost price of the goods, and upon the invoice so added to, or fabricated, he procured a loan of money to two-thirds of the fabricated price. The custom of the trade was to "salt" invoices to the extent of 5l. per cent. on the amount charged as cost price, to meet the incidental expenses of shipment, and the trader represented to the lender that this invoice had only been so "salted." The goods were shipped to Australia, and sold for an amount less than the true cost price. The trader became bankrupt, and for this and other acts of misconduct the commissioner refused him his certificate, and, on appeal, the court affirmed the decision. *Johnson, Ex parte*, 30 L. J., Bk. 38; 5 L. T. 228—L. J.

— **Representation implied—Custom of Trade.**—A trader bought foreign bills on 'change, on Tuesday, and on the Saturday following filed a declaration of insolvency, and became bankrupt on the Monday following, the bills not having been paid for. It appeared that, by the custom of merchants, there is an implied representation by the purchaser of foreign bills, that he has ready money to pay for them, and that they are to be paid for in cash, three days' grace being allowed. No satisfactory reason being given for such a representation having been made:—Held, that the bills were to be looked upon as procured by misrepresentation, and that the transaction furnished a ground for refusal of the certificate. *Simond, Ex parte*, 26 L. J., Bk. 49; 3 Jur., N. S. 424—L. J.

**Illegal Pledging.**—A banker who had pledged a short bill of a customer was excluded from a certificate. *Sturt, Ex parte*, 4 De G. & S. 49.

**Fraud by Stockbroker and Director.**—A broker, who was director of and broker to a company, received, at a time when he was insolvent, an order from a customer directed to him, and to a partner whom he knew or believed to be dead, to buy foreign stock. The broker contracted with L. for the stock, and received the

price from the customer, as for himself and his deceased partner. He did not pay L. for the stock, but allowed him interest for three months, and applied the money to his own purposes. Immediately before the adjudication, he sold a debenture of the company to A. for the amount due upon it, without requiring any money for the four years' interest, which was also due, and with the money paid L. part of the price of the stock, and gave him a bill for the remainder; and L. then transferred the stock to the customer. The broker had previously privately appropriated this debenture to the safety of the customer, and, when he sold it, had no authority from the customer for so doing. The broker became bankrupt, and received a first-class certificate, with protection; but upon appeal, the court, for the above, and other misconduct, suspended the certificate for five years. *Wryghte, Ex parte*, 26 L. J., Bk. 33—L. J.

**Fraudulent Preference.**—A trader, when involved in difficulties, and hopelessly insolvent, deposited the deeds of property, of which he was the surviving trustee, with his brother, who was entitled to the property for life under the will of which the bankrupt was such trustee, as a security for a debt owing to the brother. The commissioner held, that this was a fraudulent preference, and refused any certificate, and withheld protection. On appeal, the decision was affirmed, but protection was granted *valcat quantum*. *Barton, In re*, 31 L. J., Bk. 71; 6 L. T. 142—L. J.

### 1. Departing the Realm.

A trader who was not engaged in business, except as owner of two small sailing vessels, kept no regular accounts. He contracted with a shipbuilder for the repair of one of the vessels, and the amount claimed for the repair was far beyond the contract price, by reason of alteration alleged to be beyond the contract. Cross actions were brought, and settled by arbitration. The trader left England in a feeling of irritation at the result of the proceedings, and was declared bankrupt on the petition of the shipbuilder. He had on a former occasion compounded with his creditors, paying them less than 15s. in the pound, but had been forced into this proceeding by misfortune:—Held, that his conduct in quitting England was censurable, but would be sufficiently punished by suspending his certificate for twelve months, and allowing it as one of the second class. *Hodgson, Ex parte*, 3 De G., Mac. & G. 547.

### m. Filing Incorrect Statement of Accounts.

The issue of an order of discharge, on appeal, was suspended on the ground that the bankrupt's statement of accounts was incorrect, and a reference was directed to the commissioner to allow such amendments thereof as he should approve. *Clark, Ex parte*, 8 L. T. 814.

### n. Refusing to exercise Profession for Benefit of Creditors.

A professional singer having refused to exercise her musical talents for the benefit of her creditors, the commissioners refused her an order

of discharge, and withheld protection. On appeal, the decision was reversed. *Ellison, Ex parte*, 8 L. T. 407.

#### **o. Where Certificate of Conformity previously Refused.**

**Under 24 & 25 Vict. c. 134, s. 160.**—The court will not establish any general rule for the government of cases that arise under this section, being of opinion that all such cases must be determined upon their own peculiar circumstances. *Matheson, In re*, 31 L. J., Bk. 23; 8 Jur., N. S. 371; 6 L. T. 203; 10 W. R. 256—L. J.

The court, however, considers that the section gives it power to grant an order of discharge, after the expiration of three years; notwithstanding there may have been criminal acts committed by the bankrupt, upon which the court might originally have refused an order for his discharge. *Ib.*

#### **3. CONDITIONS ANNEXED TO CERTIFICATE.**

**Not to affect Remedy on particular Debt.**—A condition annexed to the grant of a certificate that it should not protect the property or person of the bankrupt in respect of a particular debt, was discharged, as being contrary to the policy of the bankrupt laws, though the bankrupt, in contracting the debt, had been guilty of gross misconduct towards the creditor. *Anderton, Ex parte*, 1 De G. & J. 298; 26 L. J., Bk. 54.

**Payment to be Made in respect of Debts.**—It was in general inexpedient to annex to a certificate of conformity a condition requiring any payment to be made in respect of debts. *Harnaden, In re*, 3 De G. & J. 489; 28 L. J., Bk. 18; 5 Jur., N. S. 852; 32 L. T., O. S. 348; 7 W. R. 280.

Where, therefore, a bankrupt holding a situation under government at a small salary, and carrying on a trade which was entirely conducted by his wife, had been induced by her to continue it too long after it became a losing concern:—Held, that the certificate ought not to have been made conditional on the bankrupt paying annually out of his salary a sum towards payment of his debts. *Ib.*

A, who was a surgeon and an apothecary, had shortly before his bankruptcy, and while hopelessly insolvent, allowed a creditor to obtain judgment against him, by means of which that creditor immediately before the bankruptcy obtained payment in full. The bankrupt allowed this judgment to be obtained by the advice of his solicitor, who was also the solicitor of the creditor, and under such circumstances that there was much ground for contending that it was a collusive and fraudulent preference. A court of law decided that the judgment was not void as a fraudulent preference, but was valid. The commissioner granted a certificate, with a condition annexed that it should not protect after-acquired property till the bankrupt had paid 5s. in the pound, assigning as one reason the character of the bankrupt's business, which did not materially depend on capital:—Held, first, that the circumstances of the case did not take it out of the general rule, that the granting of certificates with such conditions annexed was inexpedient. *Culhane, Ex parte*, 25 L. J., Bk. 60; 2 Jur., N. S. 863—L. J.

Held, secondly, that although it had been decided at law that the transaction as to the judgment did not technically amount to a fraudulent preference, still the conduct of the bankrupt in respect of it was not to be justified, and regard must be had to it on the question of the certificate, which was therefore suspended. *Ib.*

#### **4. TIME OF OPERATION.**

**After-acquired Property.**—The order of discharge granted to a bankrupt takes effect from the time the order is pronounced by the commissioner, and not from the expiration of the time allowed for appealing when the order is drawn up. Unless the order is annulled, property acquired by a bankrupt between the two periods passes to the bankrupt, and not to his assignees. *Bell, Ex parte*, 32 L. J., Bk. 50; 9 Jur., N. S. 856; 8 L. T. 481; 11 W. R. 738.

#### **5. RESCINDING OR ANNULING.**

A case of mere suspicion of fraud is insufficient to ground an application to rescind an order of discharge, but on the application of the assignee a petition of appeal was allowed to stand over for six weeks to afford time for further investigation. *Angerstein, In re*, 9 Jur., N. S. 763; 8 L. T. 223.

It is a good answer to a plea of bankruptcy, that the certificate was obtained by fraud. *Horn v. Ion*, 4 B. & Ad. 78; 1 N. & M. 627.

All the creditors of a debtor except one agreed to accept a composition, and, having the necessary majority, gave the debtor his discharge. The dissentient creditor applied to the county court to have the order of discharge rescinded on the grounds that it had been granted without proper care and from motives of benevolence. It appeared that the creditors did not wish to see the debtor ruined, but also that the main part of the debtor's property consisted of an equity of redemption, which might have taken time to realize. The county court judge refused the application:—Held that no case of fraud had been proved, and consequently that the creditor was not entitled to the order he asked for. *Linsley, Ex parte, Harper, In re*, 42 L. J., Bk. 109; 29 L. T. 77; 21 W. R. 909. Affirmed, 9 L. R., Ch. 290; 43 L. J., Bk. 84; 29 L. T. 857.

#### **6. AGREEMENTS IN CONSIDERATION OF NOT OPPOSING DISCHARGE.**

**Under 12 & 13 Vict. c. 106, s. 202.**—A contract or security made or given in trust for a creditor, for securing the payment of money due by a bankrupt, as a consideration or with intent to persuade him to forbear opposing the final examination of the bankrupt, was not rendered void by 12 & 13 Vict. c. 106, s. 202. *Taylor v. Wilson*, 5 Ex. 251; 19 L. J., Ex. 241; 14 Jur. 336.

The creditors of a bankrupt having assented to a composition of 3s. 6d. in the pound, to which the plaintiff, who was a creditor, was not a party, the same creditors afterwards signed a petition for annulling the adjudication of bankruptcy, which the plaintiff refused to sign unless the defendant would give him his guarantee for 167l., in part payment of his debt. The defendant accordingly, without the knowledge of the other creditors, gave the plaintiff his guarantee,

whereupon the latter signed the petition:—Held, in an action on the guarantee, that the same was not in contravention of 12 & 13 Vict. c. 106, s. 268, and was not fraudulent. *Smith v. Saltzman*, 9 Ex. 535; 23 L. J., Ex. 177.

A security given by a bankrupt to a creditor, with intent to persuade such creditor to forbear opposing the allowance of the bankrupt's certificate, was only void as between immediate parties to it, under 12 & 13 Vict. c. 106, s. 202; in the hands of a bona fide indorsee for value, it was an available instrument. *Goldsmid v. Hampton*, 27 L. J., C. P. 286; 4 Jur., N. S. 1108.

The 12 & 13 Vict. c. 106, s. 202, did not apply to a bill of exchange accepted by a bankrupt in blank before, but not dated or drawn until after the allowance of his certificate. *Goldsmid v. Hampton*, 5 C. B., N. S. 94; 27 L. J., C. P. 286; 4 Jur., N. S. 1108.

Non assumpsit (by statute) might be pleaded under the above enactment in an action on a bill or note. *Weeks v. Argent*, 16 M. & W. 817; 16 L. J., Ex. 209; 11 Jur. 525.

**Under 6 Geo. 4, c. 16, s. 125.**—A guarantee for the payment of goods to be supplied to a bankrupt by a creditor, given with intent to persuade the creditor to sign the certificate, was void by 6 Geo. 4, c. 16, s. 125. *Hankey v. Cobb*, 1 G. & D. 47; 1 Q. B. 490; 5 Jur. 891.

Where money is given to a creditor to induce him to sign a bankrupt's certificate, the certificate so obtained is void. *Sievers v. Boswell*, 4 Scott, N. R. 165; 3 M. & G. 524.

**Under 1 & 2 Vict. c. 110.**—An agreement by the attorney of an insolvent with one of the creditors, who had given notice of opposing the insolvent's discharge, to pay such creditor a sum of money in consideration that he would withdraw his opposition, was void; as being contrary to the policy of the Insolvent Debtors Act, 1 & 2 Vict. c. 110, and a fraud upon the other creditors. *Hall v. Dyson*, 17 Q. B. 785; 21 L. J., Q. B. 224. See *Heaclyne v. Sieley*, 18 Q. B. 443; 21 L. J., Q. B. 305.

**Under 24 & 25 Vict. c. 134, s. 166.**—This section has not a retrospective operation. *Reed v. Wiggins*, 13 C. B., N. S. 220; 32 L. J., C. P. 131; 7 L. T. 423; 11 W. R. 148.

Therefore the repeal of s. 202 of 12 & 13 Vict. c. 106, by 24 & 25 Vict. c. 134, does not make available, even in the hands of a bona fide holder for value without notice, a negotiable instrument declared void by the repealed section, where the indorsement was made and the instrument became due after that act came into operation. *Id.*; *S. P.*, *Reeves v. Hawkes*, 6 L. T. 53.

**Obtaining by a Bribe—Penalty—Scotch Bankruptcy Act.**—By the Scotch Bankruptcy Act, 1856, (19 & 20 Vict. c. 79), if any creditor shall receive a gratuity, or enter into any secret or collusive agreement for facilitating the bankrupt's discharge, such creditor shall not only forfeit his claim against the estate, but pay to the trustee double the amount of the gratuity:—Held, that a creditor who had been secretly induced by a sum of money to acquiesce in a dividend which he had previously opposed, was subject to the penalties of the statute, although he had stipulated for and obtained an assurance when receiving the money that it should not

come from the other creditors, and although he returned the amount with interest immediately on being told that his conduct in accepting it was a breach of the law, and was censured. *Carter v. M'Laren*, 2 L. R., H. L. (Sc.) 120.

## 7. EFFECT OF DISCHARGE.

### a. Generally.

**Bars all Provable Debts.**—The certificate protects the goods, as well as the person, of the bankrupt, from all debts provable under the commission. *Davis v. Shapley*, 1 B. & Ad. 54.

**Claim not Provable.**—The plaintiff rented a room of the defendant, who was tenant of the whole house under P., the owner. The defendant's rent being in arrear, P. put in a distress, and seized the plaintiff's goods. To obtain the release of his goods, the plaintiff was obliged to pay 15l. to P. The defendant then became bankrupt, and obtained his order of discharge; subsequently to which the plaintiff commenced an action to recover from the defendant compensation for the injury and loss sustained by the plaintiff in consequence of the defendant allowing the rent to be in arrear:—Held, that the right of action was not barred by the discharge in bankruptcy, inasmuch as the defendant was not liable, "by reason of any contract or promise to a demand in the nature of damages," within s. 153 of the Bankruptcy Act, 1861, so as to make the claim of the plaintiff provable under the bankruptcy. *Johnson v. Shapley*, 4 L. R., Q. B. 700; 38 L. J., Q. B. 318; 20 L. T. 909; 17 W. R. 1098; 10 B. & S. 727.

**Distress—Replevin.**—A landlord distrained the goods of A. on his tenant's premises for rent in arrear. The tenant afterwards became bankrupt, and obtained his certificate. A. having brought replevin:—Held, that the bankrupt's certificate did not extinguish the debt, and therefore that the landlord had a right in replevin at the suit of A. to avow for a return of the distress. *Newton v. Scott (in error)*, 10 M. & W. 471; 12 L. J., Ex. 488—Ex. Ch. Affirming, S.C., 9 M. & W. 434; 6 Jur. 510.

**Divorce—Alimony.**—An order of discharge protects a bankrupt from any proceeding to enforce payment of alimony, in respect of which he has been attached before the order of discharge was granted, and a rule to shew cause why sequestration should not issue against his estate will therefore be discharged. *Dickens v. Dickens*, 2 S. & T. 645; 31 L. J., Mat. Cas. 183; 7 L. T. 395.

**Debt and Costs.**—When in an action on a contract brought before bankruptcy a verdict and judgment are obtained after bankruptcy, and the defendant is arrested for debt and costs, a certificate of conformity entitles him to be discharged in respect of both, though the costs are not provable under the bankruptcy. *Simpson v. Mirabita*, 4 L. R., Q. B. 257; 38 L. J., Q. B. 76; 20 L. T. 275; 17 W. R. 589; 10 B. & S. 77.

**Order for Costs made after Discharge.**—Judgment was given against the petitioners in a suit to establish their legitimacy in 1860, and they were condemned to pay the costs of the

suit. They appealed against the judgment, and in 1861 one of them obtained a discharge in the Court of Bankruptcy from all his outstanding liabilities under 7 & 8 Vict. c. 70, s. 5. In 1869 the appeal was dismissed, and in 1870 an order was made on the petitioner to pay the costs of the original suit. On motion by the petitioner to rescind the order, the court held, that as the appeal was still pending in 1861, the debt did not exist until the order was made in 1870, and therefore was not discharged by the bankruptcy. *Shedden v. Att.-Gen.*, 23 L. T. 282.

#### **Divorce—Co-Respondent—Damages and Costs.]**

—A decree having been made in a suit of dissolution of marriage, whereby the co-respondent was condemned in damages and costs, and an order issued that the damages should be paid into the registry within three weeks from the time such order was served upon him, and before the expiration of that period, and before the costs had been taxed, the co-respondent, on his own petition, was adjudicated a bankrupt, and subsequently he obtained an order of discharge:—Held, that as both the damages and costs were debts which might have been proved under the bankruptcy, and were covered by the order of discharge, the court could not allow an attachment to issue against the co-respondent for their non-payment. *Wood v. Wood and Stanger*, 3 L. R., D. 467; 37 L. J., Mat. Cas. 25.

#### **Overseer—Default of Distress—Imprisonment.]**

—An auditor having certified a balance to be due from an overseer, which was not paid within seven days, an information was laid against him before justices, who declined to act, on the ground that since the information he had obtained an order of discharge in bankruptcy. A rule nisi was thereupon obtained for a distress warrant, and made absolute, no cause being shewn. A distress warrant having issued, to which there was a return of nulla bona, the justices again declined to act:—Held, that the balance certified by the auditor was a debt, and that the mode of enforcing payment in default of sufficient distress by warrant of commitment did not make the non-payment an offence, and therefore the bankruptcy was a discharge. *Reg. v. Master or Martin*, 4 L. R., Q. B. 285; 38 L. J., M. C. 73; 19 L. T. 733; 17 W. R. 442; 10 B. & S. 42.

**Debt incurred by the Fraud or Breach of Trust of a Partner.]**—The 49th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which enacts that, "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust," is not confined to a fraud or breach of trust committed by the bankrupt personally. Therefore, where a debt has been incurred by one of several partners for which the partnership is liable, and the partnership goes into liquidation under the Bankruptcy Act, 1869, a partner who has received his order of discharge is not thereby released from such debt if it was incurred by fraud, though he himself was innocent of such fraud. *Cooper v. Prichard*, 11 Q. B. D. 351; 52 L. J., Q. B. 526; 48 L. T. 848; 31 W. R. 834—C. A.

**Contracts in Foreign Countries.]**—A bankrupt is discharged by his certificate as to all contracts

in any part of the world. *Armani v. Castrique*, 13 M. & W. 443; 14 L. J., Ex. 36.

A certificate obtained under an English commission operates as a discharge of the debts of Scotch creditors, provable under the commission. *Bank of Scotland v. Stein*, 1 Rose, 462.

A certificate of conformity, obtained under a commission in England, is a bar to an action for a debt contracted by the bankrupt at Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta. *Edwards v. Ronald*, 1 Knapp, P. C. C. 259.

So, where, in a suit instituted in the Dutch colonial court at Demerara, for the recovery of the balance of an account for sugars, consigned to and received by the defendant and his partner in London, the defendant pleaded his bankruptcy in England, of which the plaintiffs had notice, but had not proved their debt under it:—Held, that the bankruptcy and certificate were a discharge of the debt. *Odwin v. Forbes*, Buck, 57.

#### **— Jurisdiction of Colonial Court to Inquire into Frauds.]**

—Although an adjudication in bankruptcy, followed by a certificate of discharge in England under the bankrupt laws, has the effect of barring any debt which the bankrupt may have contracted in any part of the world, and of putting an end to any claim; such proceedings do not supersede the authority of the court of Barbadoes to inquire into frauds and offences committed against the law of insolvent debtors in that island, in a proceeding had there previously to the adjudication of bankruptcy in England, the insolvent having again placed himself within the jurisdiction of that court. *Gill v. Barron*, 2 L. R., P. C. 157; 37 L. J., P. C. 33.

**After a previous Insolvency.]**—A debtor obtained his discharge under 1 & 2 Vict. c. 110, after giving the usual warrant of attorney to the provisional assignee. He afterwards became bankrupt, and obtained his order of discharge under the bankruptcy:—Held, that his after-acquired property remained liable to the claim of the official assignee for payment of his debts under the insolvency. *Pain, Ex parte*, 3 L. R., Ch. 639; 37 L. J., Bk. 21; 18 L. T. 753; 16 W. R. 833.

#### **b. On Co-Debtors and Sureties.**

All the three forms of proceeding in the case of an insolvent debtor, contained in the Bankruptcy Act, 1869, viz., by an adjudication of bankruptcy under s. 6, a liquidation by arrangement under s. 125, and a composition under s. 126, are (though different in form) "proceedings in bankruptcy." The general enactments, therefore, in ss. 49 and 50 apply to all discharges under the statute, and consequently an order of discharge in each of the three cases operates only to release the debtor in whose favour it is given, leaving his solvent co-debtor still liable to be sued separately by a joint creditor who has been a party to the release of the insolvent debtor. *Megrath v. Gray*, 9 L. R., C. P. 216; 43 L. J., C. P. 63; 30 L. T. 16; 22 W. R. 409.

When a principal debtor is discharged by a resolution under the Bankruptcy Act, 1869, s. 125, his surety remains liable in the same manner as in an ordinary bankruptcy, although the reso-



was satisfied on the evidence was a bona fide creditor. The bankrupt left on the 28th of October, 1872, having two days previously signed a declaration admitting his inability to pay his debts. The securities bore date the 30th of September; but they were not executed till after that day. The deeds were engrossed in the office of the bankrupt on the 10th of October, and were executed on the 14th of October. They were not stamped till after the bankrupt absconded. The clerk had been pressing for security during August and September, and it had been promised; and the drafts of the securities were prepared in September:—Held, on a suit by the trustee to set aside the securities as being a fraudulent preference, that the pressure and promise of security were sufficient to rebut the presumption of a fraudulent preference arising from the circumstances, and would sustain the deeds even if the knowledge of the insolvency was brought home to the clerk. *Smith v. Pilgrim*, 2 Ch. D. 127; 34 L. T. 408.

**Pressure—Effect of.**—When a trader, before becoming bankrupt on his own petition, assigns all his property to a particular creditor, under pressure, and without any fraud or intention to prefer the creditor, such as would have made the assignment a fraudulent preference, or void against creditors if bankruptcy had not ensued, the assignment is not voidable by the assignees in bankruptcy, although necessarily and to the knowledge of the creditor calculated to prevent the trader from paying the rest of his creditors, and thereby to defeat the operation of the bankrupt laws. *Jones v. Harber*, 6 L. R., Q. B. 77; 40 L. J., Q. B. 59; 23 L. T. 606; 19 W. R. 248.

**Payment under Demand.**—A fortnight previously to the date of a debtor filing a petition for liquidation, his solicitor lent him 200*l.* on the security of a bill of sale. At the same time as he handed the debtor a cheque for this amount, he presented him with his bill of costs, which amounted to 87*l.*, and the debtor paid it out of the money advanced:—Held, not a fraudulent preference, as the presentation of the bill of costs amounted to a demand for payment. *Boyle, Ex parte, Collett, In re*, 25 L. T. 550—L. JJ.

**Goods returned to Vendor under Pressure.**—A trader, being in insolvent circumstances, applied to a creditor to whom he owed 2,500*l.* for goods supplied in the way of business, to supply him with more goods on credit. The creditor refused to supply any more goods unless the debtor paid 200*l.* on account of the goods previously supplied. The debtor said he could not pay the money, and on being pressed by the creditor, he offered to return goods to the amount of the 200*l.*, which he did not want. This the creditor agreed to, and the goods were accordingly returned to him. On the same day the debtor filed a petition for liquidation:—Held, that the delivery of the goods to the creditor was not a fraudulent preference. *Topham, Ex parte, Walker, In re*, 8 L. R., Ch. 614; 42 L. J., Bk. 57; 28 L. T. 716; 21 W. R. 655.

Held, also, that the trustee in the liquidation was not entitled to have the goods given up by the creditor on the ground that the delivery to

him was on condition of his supplying fresh goods, which he had never done. *Id.*

**Pressure by Surety.**—Bankers agreed to allow their customer W. to overdraw his account to the extent of 1,800*l.* upon his brother, father and the bank manager becoming sureties for him to that amount. W.'s overdraft exceeded 2,400*l.*, and the bankers repeatedly pressed him to reduce his account within the limits of their security. Subsequently the manager, at an interview with W., who said "he was fast," pressed him to square his account, whereupon he handed to the manager 2,460*l.* in cheques and bills, against which he had drawn largely. The same evening the manager wrote to W. that the bank would not honour any more of his cheques. W. filed a liquidation petition within a week after this interview, and the creditors having resolved upon a liquidation by arrangement, the trustee claimed repayment of the 2,460*l.* upon the ground that the delivery of the cheques and bills constituted a fraudulent preference and an act of bankruptcy:—Held, in the absence of evidence to shew that the payment was made with a view to release the sureties, or otherwise than in the ordinary course of a current account, the general lien of the bankers attached for their benefit; and that the payment was neither a fraudulent preference within s. 92, nor an act of bankruptcy within s. 6 of the Bankruptcy Act, 1869. *Carlisle Banking Company, Ex parte, Walton, In re*, 36 L. T. 552. Affirmed, 5 Ch. D. 882.

**Withdrawing Balance from Bankers to defeat Attachment—Payment without Pressure.**—L., being on the eve of bankruptcy, drew out all his balance at his bankers, and sent it to K., who was employed by him as accountant, and to whom he owed a considerable sum. His object in sending the money to K. was to prevent its being attached by another creditor, who had issued a writ against him. K. took back the money, and refused to accept it unless the debtor consented to his paying himself out of it. After some discussion, the debtor agreed to this, and K. accordingly appropriated 421*l.*, part of the sum entrusted to him, in satisfaction of his own debt. The evidence did not establish that there had been anything which amounted to pressure for payment on the part of K. before the occasion on which he took back the money to L. Three days afterwards L. stopped payment, and soon afterwards presented his petition for liquidation:—Held, that the act of the debtor in drawing out the balance from the bankers for the purpose of defeating the creditor who was suing him was in itself an act of bankruptcy, and that the payment of the 421*l.* to K. was a fraudulent preference. *Halliday, Ex parte, Liebert, In re*, 8 L. R., Ch. 283; 28 L. T. 324; 21 W. R. 348.

**Pressure immaterial when Transaction Fraudulent in its Inception.**—A creditor suggested to his debtor that the latter should buy goods on credit from other persons, and should with the proceeds of the sale pay off the debt due to the former. The debtor adopted the suggestion, and out of the proceeds of the sale of goods which he had obtained on credit he made several payments on account of the debt. There was evidence that the payments were made under

pressure from the creditor. The debtor afterwards filed a liquidation petition:—Held, that, as the transaction was fraudulent in its inception, it was immaterial that the payments were made under pressure, but that they must be set aside as being fraudulent preferences. *Reader, Ex parte, Wrigley, In re*, 20 L. R., Eq. 763; 44 L. J., Bk. 139; 32 L. T. 36.

**Pressure by Creditor knowing of impending Bankruptcy.**—On the 17th of February a trader told one of his creditors that he was about to stop payment. The creditor then pressed for security for his debt, and threatened to commence proceedings against the debtor at once, if he did not fulfil a verbal promise which he had made on the 17th of January (when the debt was contracted), to supply the creditor with goods, or their equivalent, as security. The creditor had on the 14th of February, before he knew that the debtor was about to stop payment, pressed the debtor for the promised security, and the debtor had then again promised to give it. On the 19th of February the debtor delivered two bills of exchange, accepted by some other firms, to a third person, telling him to hand them to the creditor. On the 24th of February the debtor filed a liquidation petition, and on the 10th of March he was adjudicated a bankrupt:—Held, that the delivery of the bills of exchange amounted to a fraudulent preference of the creditor, and that it was void as against the trustee in the bankruptcy under s. 92. *Hall, Ex parte, Cooper, In re*, 19 Ch. D. 580; 51 L. J., Ch. 556; 46 L. T. 549—C. A.

Inasmuch as the threat to bring an action could have no influence on a man who was just about to become bankrupt, there was no real pressure exerted by the creditor on the 17th of February, and the prior pressure on the 14th of February having been ineffectual, could not be taken into account. *Id.*

**Stock Exchange Creditors.**—The rules of the Stock Exchange provide that a member who is unable to meet his engagements on the Stock Exchange shall be declared a defaulter, and thereupon cease to be a member, and shall not be re-admitted unless he shall pay at least one-third of his Stock Exchange debts; also, that the official assignees of the Stock Exchange shall obtain from the defaulter and examine his books of account, collect his assets, and administer his estate in conformity with the directions of the Stock Exchange creditors. A member of the Stock Exchange, being unable to meet his engagements, was declared a defaulter. His Stock Exchange liabilities amounted to 24,790*l.*, and he also owed 107,000*l.* to another creditor. His assets amounted to 8,000*l.*, including 5,000*l.*, his balance at his bankers. The secretary of the Stock Exchange gave notice to the bankers not to part with the balance. Next day the debtor attended with his books of account a meeting of his Stock Exchange creditors, and stated to them that he had no outside creditors. He was then informed that if he could pay to his Stock Exchange creditors a dividend of 13*s.* 4*d.* in the pound, his re-admission would not be opposed. He accordingly, in accordance with the request of the official assignees, handed to them a cheque for the 5,000*l.*, and out of this sum a dividend of 3*s.* 4*d.* was distributed among the Stock Exchange creditors. The debtor subsequently filed

a liquidation petition, and was adjudicated a bankrupt:—Held, that the payment of 5,000*l.* was a *cessio bonorum*, and also a fraudulent preference within s. 92 of the Bankruptcy Act, 1869, and that the trustee in the bankruptcy was entitled to recover the money from the official assignees of the Stock Exchange. *Tomkins v. Saffery*, 3 App. Cas. 213; 47 L. J., Bk. 11; 37 L. T. 758; 26 W. R. 62. Affirming *N. C.*, nom. *Saffery, Ex parte, Cooke, In re*, 4 Ch. D. 555; 35 L. T. 715; 25 W. R. 218.

**Pressure—Payment not owing to Pressure.**—A. obtained a loan from B., his brother-in-law, to enable him to set up in business as a publican. B. subsequently and repeatedly pressed A. for repayment. A. thereupon sold his public-house business, and paid B. in full. Shortly afterwards A. filed a petition for liquidation; his total assets amounted to 29*l.* 2*s.* 8*d.* There was evidence that the debtor would have paid his brother-in-law without pressure, inasmuch as he did not wish him to lose anything:—Held, that under the circumstances, the fact of pressure by the creditor for his debt was unimportant, and that the payment was a fraudulent preference and void under s. 92 of the Bankruptcy Act, 1869. *Wheatley, Ex parte, Grimes, In re*, 45 L. T. 80.

#### c. Must be in Contemplation of Bankruptcy.

##### Bankruptcy must follow within Three Months.]

—The meaning of s. 92 of the Bankruptcy Act, 1869, is, that an act which would otherwise be a fraudulent preference cannot be impeached unless a bankruptcy follows within three months. *Liverpool and London Guarantee and Accident Insurance Company, In re, Gallagher's case*, 46 L. T. 54; 30 W. R. 378.

**Liquidation Proceedings—Pleading.**—A plea that the plaintiff's claim is founded on a contract giving him a fraudulent preference over other creditors of a debtor in liquidation, must aver that proceedings in the liquidation had commenced or were imminent when the contract was entered into. *McKewan v. Sanderson*, 15 L. R., Eq. 229; 42 L. J., Ch. 296; 28 L. T. 159.

##### When Debtor dies without being adjudicated.]

—The creditor of an insolvent debtor, who dies without having been adjudicated bankrupt, is entitled to the benefit of any payment or security made or given by the debtor, although such payment or security would in case of bankruptcy have been set aside as a fraudulent preference. *Middleton v. Pollock, Elliott, Ex parte*, 2 Ch. D. 104; 45 L. J., Ch. 293.

E. placed in the hands of her solicitor a sum of money for investment. He died insolvent without investing the money, and after his death there was found in the safe at his office a memorandum dated a fortnight before his death, the contents of which had not been communicated to E. By this memorandum, the solicitor declared himself trustee of certain leaseholds then in mortgage to himself, and of a bill of exchange which he had indorsed to E., to secure the repayment of the sum placed in his hands. In a creditor's suit for the administration of the solicitor's estate:—Held, that even if the solicitor executed the memorandum with the knowledge of his insolvency, still E. was entitled

prius, confess this plea to be true, and go on with the case as to the other defendant. *Pascall v. Horsley*, 3 C. & P. 372.

#### 9. PROMISE TO PAY DEBT BARRED BY DISCHARGE.

**Before 12 & 13 Vict. c. 106, s. 204.**—A promise by a bankrupt after the issuing the fiat, and a few days before his certificate was signed, to pay a pre-existing debt, notwithstanding the certificate, was good, unless the contract either appeared on the face of it, or was shewn to be, illegal or fraudulent. *Kirkpatrick v. Tattersall*, 13 M. & W. 766; 1 C. & K. 577; 14 L. J., Ex. 209; 9 Jur. 214.

— **Promise in Writing under 6 Geo. 4, c. 16.**—On an issue whether a certificated bankrupt had given a written promise signed by him after his bankruptcy, so as, under 6 Geo. 4, c. 16, s. 131, to revive a claim barred by the certificate, the following letter was produced, written by him:—"Mr. S. begs to inform the plaintiffs that he will take an early opportunity of settling their account; but Mr. S. objects to give his bill. Mr. S. regrets that he has been prevented from answering the letter before." Evidence of the amount due was given:—Held, that the letter was sufficiently signed. *Lobb v. Stanley*, 5 Q. B. 574; D. & M. 635; 13 L. J., Q. B. 117; 8 Jur. 462.

— **Promise to repay Surety.**—A declaration set forth a guarantee, whereby, in consideration that a banking company would make advances to the defendant, the plaintiff undertook to guarantee the payment of sums advanced not exceeding 250*l.*, that the company made advances to the defendant, who afterwards became bankrupt, and that at the time of his bankruptcy there was due to the company for such advances a sum exceeding 250*l.*; that, after the issuing of the fiat, the defendant promised the plaintiff, that if, by virtue of the guarantee, the plaintiff should be called upon to pay the company the 250*l.*, the defendant would repay the same to the plaintiff when it should be in his power, notwithstanding he should previously obtain his certificate, and interest on the sum; and that the plaintiff, being called upon under the guarantee, paid to the company 250*l.*, of which the defendant had notice. Breach, non-payment:—Held, no objection to the promise, that it was made before certificate. *Earle v. Oliver*, 2 Ex. 71.

Held, also, that the mere liability to repay the plaintiff was an equally good consideration to support the promise as an existing debt. *Id.*

Held, also, that the conditional promise to pay when the defendant was able, was good as supported by the original consideration. *Id.*

Held, also, that the promise to pay interest was supported by the same consideration as the original promise. *Id.*

**Under 12 & 13 Vict. c. 106, s. 204.**—A bond is a contract, promise or agreement within 12 & 13 Vict. c. 106, s. 204; and therefore a bond given by a bankrupt for payment of a debt barred by his certificate is void. *Kidson v. Turner*, 3 H. & N. 581; 27 L. J., Ex. 492.

A bankrupt gave, after certificate, a promissory note for a debt incurred before his bankruptcy; at the time he did so, such a debt was recoverable

on a promise in writing made after certificate. It was subsequently enacted, by 12 & 13 Vict. c. 106, s. 204, that no bankrupt should be liable on such a promise. After this enactment, money was paid on account of the debt, and a fresh note given for the balance:—Held, that the original note being valid, the note for the balance was valid also; and the debt secured by it a good debt on which to found an adjudication in bankruptcy. *Edwards, Ex parte*, 35 L. J., Bk. 11; 11 Jur., N. S. 896; 13 L. T. 338; 14 W. R. 67.

**Under 24 & 25 Vict. c. 134, s. 164—Consideration for Bill of Sale.**—In 1859, W. became insolvent and obtained his discharge. The defendant was at that time a scheduled creditor for 200*l.* In 1865, W. gave to the defendant a bill of sale on his furniture and effects to cover the prior debt of 200*l.* and further advances with interest at 5*l.* per cent. Sundry payments were made by W., who was charged 15*l.* per cent. interest; and the amount due, apart from the 200*l.*, was reduced to 38*l.* In February, 1867, W. gave the defendant a note of hand for 100*l.* The defendant then seized under the bill of sale, and sold the furniture and effects for 121*l.*, paying thereout 40*l.* due to the landlord. W. became bankrupt in October, 1867:—Held, that the 200*l.* due prior to the insolvency could not be revived; that the bill of sale was a security only for the advances made thereon with interest at 5*l.* per cent., and not for any further advances; that the seizure was illegal, and the sum of 40*l.* paid to the landlord was an improper payment; and that the 121*l.* realized by the sale must be refunded. *Peckman v. Harrison*, 14 L. R. Eq. 484.

**Under 32 & 33 Vict. c. 71.**—A promise to pay a debt barred by bankruptcy is a mere nudum pactum, notwithstanding the Bankruptcy Repeal Act, 1869. *James v. Phelps*, 20 W. R. 92.

A debtor and his creditors entered into a deed of composition while the Act of 1861 was in operation, which deed was to have the same effect on his debts as if the debtor had been discharged in bankruptcy. After the repeal of the statute by 32 & 33 Vict. c. 83, s. 20, the debtor gave a bill of exchange to one of his creditors who was barred by the composition deed, for his old debt:—Held, that the operation of s. 164 upon this transaction was preserved by the saving clause in s. 20; and the bill was therefore void. *Rimini v. Van Praagh*, 8 L. R. Q. B. 1; 42 L. J., Q. B. 1; 27 L. T. 540; 21 W. R. 107.

To a declaration by an indorsee against the acceptor, of two bills of exchange made in January, 1870, he pleaded that there was no other consideration for the bills than a debt barred by a composition deed entered into by him with his creditors in 1869, under the Bankruptcy Act, 1861:—Held, that the plea was good. *Id.*

A promise by a debtor to pay a debt barred by a discharge under 32 & 33 Vict. c. 71, s. 49, is nudum pactum, and its breach does not afford a cause of action. *Heather v. Webb*, 2 C. P. D. 1; 46 L. J., C. P. 89; 25 W. R. 253.

— **New Consideration.**—Where a debtor, after having obtained an order of discharge under the Bankruptcy Act, 1869, promises, for a new and valuable consideration, to pay a debt which by virtue of s. 49 has been released by the

discharge, an action lies against him for the amount of the debt. *Heather v. Webb, supra*, distinguished. *Jakeman v. Cook*, 4 Ex. D. 26; 48 L. J., Ex. 165; 27 W. R. 171.

**Contract to pay Creditor after Composition accepted, but before Payment of all Installments.**—It is only after a composition has been fully worked out and paid, that the debtor is in the position of a discharged bankrupt, so as to enable him for a new consideration to enter into a binding contract to pay in full the debt of one of the creditors bound by the resolution to accept a composition. Such an agreement entered into prior to the completion of the composition, is in contravention of good faith and the spirit of the bankruptcy laws, and void. *Jakeman v. Cook* (4 Ex. D. 26) distinguished. *Barrow, Ex parte, Andrews, In re*, 18 Ch. D. 464; 50 L. J., Ch. 821; 45 L. T. 197—C. A.

## XV. FRAUDULENT PREFERENCES.

### 1. UNDER STATUTES PRIOR TO THE BANKRUPTCY ACT, 1869.

#### a. Generally.

**Elements of Fraudulent Preference.**—In order to constitute a fraudulent preference there must be the concurrence of three circumstances: first, the trader must contemplate his own immediate bankruptcy; secondly, he must himself make the distribution; and thirdly, the distribution must be different from what a court of bankruptcy would make. The absence of any one of these ingredients will prevent the distribution from being impeached as a fraudulent preference. *Bourne v. Graham*, 2 Jur., N. S. 1225.

It is not necessary to shew that the creditor preferred was in any way party to any fraud or undue action. *Id.*

**— Intention to benefit Creditor.**—In order that a payment should constitute a fraudulent preference, it is not necessary that the bankrupt should have intended to benefit the creditor to whom the payment is made, or that the creditor should have derived benefit from such payment. *Marshall v. Lamb*, D. & M. 315; 5 Q. B. 115; 13 L. J., Q. B. 75; 7 Jur. 850.

Where a banker informed a creditor of his intention to stop payment, with the view of giving him an opportunity of withdrawing his own private moneys, and the creditor communicated this information to another creditor, who in consequence drew out his account, and the jury found that it was not the bankrupt's intention that the second creditor should obtain a preference:—Held, that the money paid to the second creditor did not constitute a fraudulent preference. *Belcher v. Jones*, 2 M. & W. 258; M. & H. 34; 1 Jur. 72.

**Payment to Principal in order to Prefer Surety.**—Where a bankrupt, in contemplation of bankruptcy, pays money to A., his banker, to redeem bills of exchange in his hands, for the payment of which B. is ultimately responsible, with a view to make a fraudulent preference of B., the assignees cannot recover back the amount from A. *Abbott v. Pomfret*, 1 Scott, 470; 1 Bing., N. C. 462; 1 Hodges, 24.

VOL. I.

**Payment to Husband to redeem Ante-nuptial Liability of Wife as Surety.**—The defendant's wife having before her marriage become, as surety, joint and several maker with F. of a promissory note, afterwards, at the suggestion of her husband, applied to F. for money to enable him to take up the note. F., being then insolvent, voluntarily paid the amount of the note to the defendant in contemplation of bankruptcy and by way of fraudulent preference. The defendant afterwards paid the money to an indorsee of the note:—Held, that the assignees of F., who afterwards became bankrupt, were entitled to recover the money from the defendant as money had and received to their use. *Groom v. Watts*, 4 Ex. 727; 19 L. J., Ex. 154.

**Partners—Payment of Separate Debt out of Partnership Assets in Fraud of Partner.**—Where one of two partners has, in fraud of the other and by way of fraudulent preference, indorsed bills of exchange of the firm to a separate creditor of his, in payment of a private debt, and has afterwards become bankrupt, his assignees may treat the indorsement as void as against them, and, if the indorsement is invalid also as against the solvent partner by reason of the creditor having taken the bills with knowledge of the fraud, the assignees and such solvent partner may sue jointly in trover for the recovery of the bills from such creditor. *Heilbut v. Nevill*, 4 L. R., C. P. 354; 38 L. J., C. P. 273; 20 L. T. 490; 17 W. R. 853.

**Under Jamaica Insolvent Act.**—A Jamaica insolvent act provided, that if any person, in contemplation of insolvency, should transfer any of his estate to any creditor for the benefit of such creditor, such transfer should be deemed fraudulent and void as against the official assignee of such person: provided always, that no such transfer should be so deemed fraudulent and void unless made within six months before a declaration of insolvency:—Held, that transfers of property made by a party in insolvent circumstances, if they occurred within six months before a declaration of insolvency, were absolutely void, although there was no evidence of any fraudulent preference. *Nunes v. Carter*, 4 Moore, P. C. C., N. S. 222; 1 L. R., P. C. 342; 36 L. J., P. C. 12; 15 W. R. 239.

#### b. Must be Voluntary.

**General Principles.**—In an action by assignees to recover back from a creditor of the bankrupts the amount of a debt paid him by the bankrupts, which the assignees alleged to have been paid by way of fraudulent preference, the judge directed the jury, first, that if the bankrupts were induced to make the payment by pressure of the creditor, the verdict should be for him; secondly, that if they were not influenced by the pressure, but acted voluntarily and with a view to give a preference to the creditor in the event of a bankruptcy, the verdict should be for the assignees; and, thirdly, that if the payment was made under the influence of the pressure of the creditor, and also with a desire to give a preference to the creditor in the event of a bankruptcy, the verdict should be for him:—Held, that the direction was right. *Brown v. Kempson*, 19 L. J., C. P. 169.

In an action by assignees to recover back

P P

money alleged to have been paid by the bankrupt to the defendant, by way of fraudulent preference, in contemplation of bankruptcy, the judge, assuming that there had been such a degree of importunity on the part of the creditor as would, under ordinary circumstances, repel the presumption of the payment being voluntary, left it to the jury to say, whether it was made in consequence of that importunity, or with a view to a fraudulent preference of the defendant:—Held, that this was a proper direction. *Cook v. Pritchard*, 6 Scott, N. R. 34; 5 M. & G. 329; 12 L. J., C. P. 121.

**Payments made pursuant to Prior Agreement are not Voluntary.**—If A. advances money to B., an insolvent trader, for the purpose of enabling him to execute an order for goods, upon the terms of being repaid out of the price of the goods, a payment made by B. to A. out of the price when received is not a fraudulent preference. *Hunt v. Mortimer*, 5 M. & R. 12; 10 B. & C. 44.

**Prima facie** a trader, who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law. But if circumstances exist which tend to explain and give a different character to the transaction, and to shew that the debtor acted from a different motive, these circumstances ought to be left to the jury; and the proper direction in such a case is, that unless the jury come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest of his creditors, the transaction stands good in law. The whole question turns upon the intention of the trader in disposing of his goods to the particular creditor. *Bills v. Smith*, 6 B. & S. 314; 34 L. J., Q. B. 68; 11 Jur., N. S. 154; 12 L. T. 22; 13 W. R. 407.

W., being in embarrassed circumstances, but in good general credit, applied to his brother C. for the loan of 500*l.* C. procured the required sum from his bankers, upon the terms that it should be repaid on the 1st of July following, and advanced the amount to W., who, upon being informed of the terms, undertook to repay it on that day. A few days before the 1st of July, W. told C. that he should be able to repay the money upon the day appointed, which he accordingly did, without any pressure or application on the part of C. On the 1st of July W. was hopelessly insolvent, and on the 22nd of September he became bankrupt. In an action by the assignees to recover the amount, upon the ground that it had been paid by way of fraudulent preference, the judge told the jury that if the bankrupt, though aware that bankruptcy was unavoidable, and though no application had been made for payment, paid the debt simply in discharge of the obligation he had entered into to pay on a given day, without any view of giving a preference to this particular creditor at the expense of the rest, the payment was not a fraudulent preference, within the meaning of the bankruptcy laws:—Held, no misdirection. *Id.*

The effect of pressure by a creditor upon a debtor, in legalising a payment made in consequence, is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent inten-

tion alone arises the invalidity of the transaction. *Id.*

**Debt not Due is not conclusive Evidence that Payment is Voluntary.**—Payment by a trader, who contemplates bankruptcy, of a debt not then due, upon a bona fide request of the creditor, is not in law a voluntary payment; the fact of the debt not being due is merely a circumstance for the jury in considering the question of fraudulent preference. *Strachan v. Barton*, 11 Ex. 647; 25 L. J., Ex. 182.

If a debtor gives goods out of his shop in part payment of a bond, not then due, and shortly afterwards becomes bankrupt, the mere circumstance of the bond not being due will not alone vitiate the part payment. *Hartshorn v. Slodden*, 2 B. & P. 582; 4 Esp. 60.

**Payments under Legal Process—On Arrest.]**

—A., on being arrested, gave a bail-bond to the sheriff, but did not perfect bail, by which the sheriff became fixed. Proceedings having been taken on the bail-bond, a judge made an order, on an application by the bail, that proceedings should be stayed on payment of debt and costs, which were accordingly paid by A.'s attorneys on the 27th October. A. had supplied his attorneys with a sum of money towards the payment of the debt and costs on the 10th October, and on the 14th he became bankrupt:—Held, that this was a payment under process of law, and that the assignees of A. had no right to recover the money back from the party to whom it was paid. *Belcher v. Mills*, 2 C., M. & R. 150; 1 Gale, 142; 5 Tyr. 715.

A defendant having been arrested in an action for a debt, paid the amount to the sheriff, with 10*l.* for costs, and the sheriff paid the same into court. The defendant became bankrupt before putting in special bail, or paying in an additional sum of 10*l.*, pursuant to 7 & 8 Geo. 4, c. 71, s. 2:—Held, that his assignees were not entitled to the money and costs paid into court. *Cooke v. Bell*, 11 W. R. 732.

**—Threat of Arrest.]**—Although voluntary payments are not protected, yet payments enforced by coercion of law are valid against the assignees. *Foster v. Allanson*, 2 T. R. 479.

If a bankrupt gives a preference to a creditor under the apprehension of legal process, however groundless, such preference is binding. *Thompson v. Freeman*, 1 T. R. 155.

Where a party made a payment to the defendant on the eve of bankruptcy, and after a threat by the defendant to arrest him:—Held, that, notwithstanding such a threat, the motives and state of mind of the bankrupt at the time of payment may properly be left to the jury, upon a question whether the payment was voluntary or compulsory. *Cook v. Rogers*, 7 Bing. 438; 5 M. & P. 353.

**—Threat of Criminal Process.]**—A transfer on the eve of bankruptcy, for fear of criminal process, is valid. *De Tastet, Ex parte*, 1 Mont. 154.

A transfer of property made on the eve of bankruptcy, but under the apprehension that a degree of force, civil or criminal, is about to be applied, is valid. *Id.*

A transfer by one of two partners on the eve

of bankruptcy, under circumstances which overcome the free will of the party, such as the apprehension of a prosecution for forgery, is valid. *De Tastet v. Carroll*, 2 Rose, 462; 1 Stark. 88.

Where a draft for money was intrusted to a broker to buy Exchequer bills for his principal, and the broker received the money, and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds:—Held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor v. Plumer*, 2 Rose, 415; 3 M. & S. 562.

—**Threat of Distraint.**—Money paid to a landlord by a bankrupt tenant, to avoid a threatened distress, is a protected payment. *Stevenson v. Wood*, 5 Esp. 200.

A bankrupt proposed, after an act of bankruptcy, to dispose of a beneficial lease; but the purchaser refused to take it unless five quarters' rent in arrear to the landlord were first paid. After a negotiation between the bankrupt and the landlord, who knew the situation of the former, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises, but the landlord having a right of re-entry:—Held, that the assignee of the bankrupt could not recover from the landlord the rent so paid him. *Mavor v. Croome*, 8 Moore, 171; 2 Bing. 261.

**Payment made in consequence of Creditor's Act is not Voluntary.**—In order to render a preference on the eve of bankruptcy valid, it is not necessary that there should be a threat or pressure, with an immediate power of rendering it available by taking legal steps. *Van Casteel v. Booker*, 2 Ex. 691; 18 L. J. Ex. 9.

To defeat a payment or transfer made to a creditor, the assignees must shew it to be fraudulent as against the body of creditors, by proving it to be voluntary on the part of the bankrupt and in contemplation of his bankruptcy; and if it is made in consequence of the act of the creditor, it is not voluntary. *Ib.*

To determine whether a fraudulent preference has been given by a bankrupt to one of his creditors by a payment, it will be for the jury to say whether the payment was voluntary, and without any pressure by the creditor, and was made when the debtor knew that he must be a bankrupt, and in contemplation of bankruptcy. *Green v. Bradford*, 1 C. & K. 449.

In order to constitute pressure, it is not necessary that legal proceedings should have been resorted to; for, if the pressure was such, that it overweighed the bankrupt's own inclination, and induced him to pay against his will, that would be sufficient pressure within the meaning of the bankrupt laws. *Ib.*

**Payment made under Pressure by Surety for Debt.**—O. and S., bankers at B., in the country, being in want of funds to meet an expected run upon their bank, obtained from some friends a

guarantee for 3,000*l.*, upon the strength of which the defendants, bankers in London, advanced to O. and S. 3,000*l.* The guarantee was signed by the sureties on the understanding with O. and S. that the money should be returned if they found themselves, notwithstanding the advance, unable to meet the run. The defendants knew nothing of this understanding. S. having received from the defendants in London the 3,000*l.* in notes and gold, in a box, took the money down to B., and saw O., his partner; and, finding that it was impossible to meet the run, O. and S. discussed the propriety of returning the money. While discussing it they received a letter from F., one of the sureties, saying that, as the case was hopeless, O. and S. could not honourably retain the money, and that it ought to be returned; and F. afterwards, in an interview, again urged upon them the return of the money. S. stated that this letter, and the subsequent application from F., operated upon their minds in coming to the conclusion to return the money. The box containing the money was returned to the defendants unopened; O. and S. suspended payment the next day, and afterwards became bankrupts. In an action by their assignees, to recover from the defendants the 3,000*l.*:—Held, that O. and S., in returning the money, were influenced not solely by their own wish, but also by the application from the surety; and that therefore the return of the money was not purely voluntary, and did not amount to a fraudulent preference. *Edwards v. Glyn*, 2 El. & El. 29; 28 L. J., Q. B. 350.

Held, also, by Erle, J., and Crompton, J., that the money was advanced on the specific understanding, and clothed with the specific trust, that it should be returned if the run could not be met; that, as the purpose for which it was advanced had failed, O. and S. had only a legal, and not also an equitable, title to the money; and that therefore the interest in such money did not pass to their assignees. *Ib.*

**Promissory Notes—Payment to Holder—Holder Agent for Payee.**—In 1837, A., being in embarrassed circumstances, executed a deed to secure to his creditors a composition of 7*s.* in the pound. B., a creditor, refused to sign the deed, until A. made B. a promise to give him security for the difference between the composition and the full amount of the debt. Pursuant to that agreement, A. subsequently handed over to B. his promissory notes payable to B. or order. B. indorsed the notes, and paid them into his bankers at Leeds, to whom B. was in the habit of indorsing all bills and notes received by him, and drawing generally on account. When the notes were at maturity, the London correspondents of the Leeds bankers presented them to A., by whom they were paid. A. continued to deal with B. down to his bankruptcy (in 1840), without ever complaining of the transaction or attempting to set off the payments made in respect of the notes against the subsequent demands of B. against him. No evidence was given to shew the state of the account between B. and the Leeds bankers at the time of the payments, or that A. knew the character in which the notes were held by the bankers who presented them. In an action for money paid by A. to the use of B., brought by the assignees of A. to recover back the amount of these notes, the judge left it to the jury to say, whether or not

the payment was voluntary, and told them, that, if the payment was made to the bankers as agents only, it must be considered as voluntary; and that, if they found the payment to be voluntary, and to have been made with a full knowledge of the circumstances, they must find for B., otherwise for the plaintiff. The court directed a new trial, in order that the attention of the jury might be more precisely called to the question—whether A. knew the character in which the bankers presented the notes for payment, namely, whether as agents of B. or as holders for value. *Gibson v. Bruce*, 5 M. & G. 399; 6 Scott, N. R. 309; 12 L. J., C. P. 132.

### c. Must be in Contemplation of Bankruptcy.

A party who seeks to avoid a payment or transfer of goods, on the ground that it was voluntarily made by the trader in contemplation of bankruptcy, must shew, not merely that the trader was insolvent when it was made, but also that he then contemplated bankruptcy. *Morgan v. Brundett*, 5 B. & Ad. 289.

**Probability of Bankruptcy.**—In order to constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a voluntary preference, and made in actual contemplation of bankruptcy; it is not enough to shew that the party was in such a state of insolvency and embarrassment as to render bankruptcy a probable event. *Atkinson v. Brindall*, 2 Scott, 369; 2 Bing. N. C. 225; 1 Hodges, 336.

**Embarrassed Circumstances.**—From a person being in embarrassed circumstances it does not necessarily follow that he contemplates bankruptcy, as he may hope that his affairs may rally and come round. *Green v. Bradfield*, 1 C. & K. 449.

Whether or not a voluntary payment made by a trader in insolvent circumstances, and on the verge of bankruptcy, to a particular creditor, is void as being a fraud upon the bankrupt laws, is a question of fact for the jury, depending upon the mind and intention of the party at the time of making the payment, to be collected from the surrounding circumstances. *Gibson v. Boutts*, 3 Scott, 229.

If his condition and conduct are such as to evince clearly a contemplation on the part of the trader that his embarrassment must of necessity end in bankruptcy, the jury will not be warranted in coming to any other conclusion than that the transaction is fraudulent. *Id.*

But, inasmuch as every man has, down to the time of committing an act of bankruptcy, sole right of dominion over his property, such a payment cannot be held to be a fraudulent preference where the bankrupt, at the time of making it, appears to entertain a bonâ fide hope or expectation that he may be extricated from his difficulties without being made a bankrupt. *Id.*

**Payment made to avoid Bankruptcy.**—A payment by a trader after he has committed an act of bankruptcy, and when he contemplated the probability of bankruptcy, is not a preference, if made to enable him to stand his ground. *Vachar v. Cocks*, 1 B. & Ad. 145; M. & M. 353.

In an action to recover money paid by a bankrupt in contemplation of bankruptcy, on the ground of fraudulent preference, the declarations

of the bankrupt as to the state of his affairs, made about the time of the transaction, but unconnected with it, are receivable in evidence. So, also, are letters received by him, refusing to advance him money, for the purpose of shewing the fact of such refusal, but not as evidence of other facts stated in them. *Id.*

**Composition paid after Failure of Composition Proceedings.**—A., a trader, being in embarrassed circumstances, offered his creditors a composition of 7s. 6d. in the pound, which was refused by the majority of them, and by B. among the number. B. filed an affidavit in bankruptcy, and, on the 13th of March, served on A. a copy and a notice, demanding payment pursuant to 1 & 2 Vict. c. 110, s. 8, and he also served a notice on an auctioneer, who had advertised the sale of A.'s goods, not to proceed with the sale. The goods were sold, and out of the proceeds a payment was made, on the 6th of April, to a creditor of the amount of the composition of his debt:—Held, that this was a fraudulent preference. *Gibson v. Muskett*, 4 M. & G. 161; 3 Scott, N. R. 427.

**Where Payment such as to cripple Debtor.**—If country bankers in embarrassment, and after they have stopped payment, deliver to their London banker, upon the faith that assistance will be given by him, bills and notes of such an amount that if assistance is not given the bank must fail, and such assistance is not given, it is a preference, although at the time there is not any contemplation of an act of bankruptcy. *Simpson v. Sykes*, 6 M. & S. 295.

## 2. UNDER THE BANKRUPTCY ACT, 1869.

### a. Generally.

#### Statutory Definition—Value of Old Decisions.]

—In determining whether a transaction amounts to a fraudulent preference the court ought now to have regard simply to the statutory definition contained in s. 92 of the Bankruptcy Act, 1869. The decisions on the subject before the Act may be useful as guides, but the standards laid down in them must not be substituted for that which is laid down in the Act. *Griffith, Ex parte, Wilcoxon, In re*, 23 Ch. D. 69; 52 L. J., Ch. 717; 48 L. T. 450; 31 W. R. 878—C. A.

**Elements of Fraudulent Preference.**—The Bankruptcy Act, 1869, s. 92, has not altered the law with respect to fraudulent preferences, and it is still necessary, in order to constitute a fraudulent preference, that the conveyance or transfer should be made voluntarily and in contemplation of bankruptcy. *Craven, Ex parte*, 10 L. R., Eq. 648; 39 L. J., Bk. 33; 23 L. T. 563; 18 W. R. 1022. Affirmed, sub nom. *Craven, Ex parte, Tempest, In re*, 6 L. R., Ch. 70; 40 L. J., Bk. 22; 23 L. T. 650; 19 W. R. 137—L. J.

To make an assignment of goods or payment of money a fraudulent preference, the delivery or payment must be made in immediate contemplation of bankruptcy, and must be altogether voluntary on the part of the bankrupt. *Beverly, In re*, 4 Ir. R., Eq. 198.

Where creditors get an opportunity of impeaching a transaction as a fraudulent preference by filing a charge, and decline to do so, the court will decide in favour of the bankrupt; but if the

case was one that ought to have been inquired into, the creditor taking evidence to ascertain facts, will get his costs. *Ib.*

**Intention to Prefer.]**—A payment by a bankrupt to a creditor, shortly before his bankruptcy, being impeached as a fraudulent preference, the case was tried before a jury, to whom the points submitted were: first, whether the bankrupt, when he made the payment, was unable to pay his debts as they became due; secondly, whether he made it with a view to give that creditor a preference over his other creditors; and, thirdly, whether the payment was made by the bankrupt voluntarily and without real pressure, bankruptcy being reasonably imminent. The jury found in the affirmative on the first and third points, and in the negative on the second. On these findings the county court judge ordered the money paid to be refunded; but the chief judge reversed this decision:—Held, that the decision of the chief judge was right, for that the jury having found as a fact that the payment was not made with a view to giving the creditor a preference, and no proceedings being taken to set aside their verdict, this finding disposed of the whole case, and the finding on the third issue was immaterial, that issue being calculated to mislead the jury. *Bolland, Ex parte, Cherry, In re*, 7 L. R., Ch. 24; 25 L. T. 646; 20 W. R. 136. Affirming *S. C.* nom. *Matthew, Ex parte, Cherry, In re*, 25 L. T. 276; 19 W. R. 1005.

A payment in the ordinary course of business made by a debtor in embarrassed circumstances does not amount to a fraudulent preference, provided that the creditor acted bona fide, and the evidence shews that the debtor did not intend the payment to be preferential. *Ib.*

Payment a few days before stopping payment, and less than three months before bankruptcy, by an agent to his principal of a sum of money payable in the ordinary course of business, without any intention to prefer such creditor being proved, is not a fraudulent preference within the Bankruptcy Act, 1869, s. 92. *Blackburn, Ex parte, Cheesebrough, In re*, 12 L. R., Eq. 358; 40 L. J., Bk. 79; 25 L. T. 76; 19 W. R. 973.

A creditor receiving payment of a sum due to him without any knowledge of the insolvent condition of the debtor's affairs, is within the exception contained in the last part of the same section. *Ib.*

**—Mixed Motive.]**—If a payment is made from a mixed motive, though one object of the payment is to prefer the creditor, the payment is not fraudulent within the bankrupt law. *Taylor v. Thompson*, 4 Ir. R., C. L. 129.

In order that a payment of money or a transfer of property made by a debtor in favour of one of his creditors should be void as a fraudulent preference under s. 92, it is sufficient that the preferring the creditor should have been the substantial, effectual, or dominant view with which the debtor made it; it is not necessary that it should have been his sole view. *Hill, Ex parte, Bird, In re*, 23 Ch. D. 695; 52 L. J., Ch. 903; 49 L. T. 278; 32 W. R. 177—C. A.

**—Creditor's Knowledge of Insolvency.]**—In order to constitute a fraudulent preference the inability of the debtor to pay out of his own moneys, and the intention to prefer a particular creditor, should be clearly established; yet, un-

less it is also established that the creditor or payee was conscious of such inability, and concurred in or assented to the preference, so as to be a partaker in the fraud, his rights cannot be prejudicially affected by s. 92, but are within the saving clause. *Putman, Ex parte, Crawford, In re*, 30 L. T. 335; 22 W. R. 569. Affirmed, nom. *Keran, Ex parte, Crawford, In re*, 9 L. R., Ch. 752.

C., a manufacturer in England, was in the habit of purchasing flax from P., in Belgium, whose sister he had married. In August, 1872, he owed upwards of 4,000*l.* to P., as the executrix of her mother's estate; and also 800*l.* on the current account between P. and himself; and being pressed by her for payment he promised to send 2,350*l.* on account of the debt to the estate. On the 4th of November, 1872, C. sent bills to the amount of 4,000*l.* to P., who received the proceeds, and applied 2,350*l.* towards the debt to her mother's estate, and carried the rest to the account current between C. and herself, and with that sum and other sums afterwards remitted she purchased flax, and consigned it to C. C. was at that time in insolvent circumstances, and on the 5th of November committed an act of bankruptcy, on which he was adjudicated bankrupt on the 28th of November. The trustee claimed the 4,000*l.*, as having been paid to P. by way of fraudulent preference:—Held, that there was no fraudulent preference. *Ib.*

Two of the principal creditors of a debtor had a meeting with him, at which he admitted that unless he could get assistance from his friends he must become bankrupt:—Held, that one of the creditors might, notwithstanding the meeting, obtain payment from the debtor of a debt previously due. *Topham, Ex parte, Walker, In re*, 8 L. R., Ch. 614; 42 L. J., Bk. 57; 28 L. T. 716; 21 W. R. 655.

**Withdrawing from Speculation.]**—A firm, though insolvent, may withdraw from or put an end to a current speculation, the result of which is still uncertain, on the best terms procurable, without any imputation of fraud; so also, the abandonment of a speculation whilst the result is uncertain may be both honest and politic, as it entirely differs from undue preference of one creditor to others after a debt has been incurred. *Miller v. Barlow*, 3 L. R., P. C. 733; 8 Moore P. C. C., N. S. 127.

**Provisions only Apply as between Debtor and Creditors strictly so called.]**—The provisions of s. 92 of the Bankruptcy Act, 1869, apply only to transactions between a debtor and persons who are, in the strict sense of the words, his creditors. *Kelly, Ex parte, Smith, In re*, 11 Ch. D. 306; 48 L. J., Bk. 65; 40 L. T. 404; 27 W. R. 830—C. A.

**In Consideration of not Opposing Composition.]**—A declaration alleged that A. was indebted to the plaintiff in 7,218*l.* upon certain bills of exchange drawn and accepted by A., and was also indebted to other persons, and being unable to pay the alleged several liabilities, he filed his petition, and instituted proceedings in the Bankruptcy Court, for liquidation by arrangement or composition with his creditors, and in consideration that the plaintiff would not oppose such petition or proceedings or take proceedings in bankruptcy against A., the defendant guaranteed



An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. *Lempriere v. Pasley*, 2 T. R. 485.

D., a captain of a vessel belonging to the defendant, entered into an agreement with the defendant, under which he was to have command of the vessel for a voyage to India and back, and to have for his own use the cabin accommodation for passengers, for which he was to pay the owner a certain sum. For purposes of his own D. abandoned the ship before her arrival in India, whereupon the command was assumed by F., the chief mate; after D. had left the ship, he wrote to F., giving him directions as to the disposal of certain property of his then on board. The owner, as soon as he became acquainted with the fact of D. having quitted the ship, wrote to F., confirming him in the command, and desiring him to retain everything on board belonging to D., who was largely indebted to him. D. returned to England, and on the 18th October, 1834, at the instance of the defendant, wrote him the following letter:—"I hereby authorize and request you to keep possession of all cabin furniture and other property of mine on board the Bolton, when she arrives, and to place the value of the same to the credit of my account with you." On the 18th December, a fiat issued against D. upon an act of bankruptcy committed by him on the 2nd. The vessel arrived in London on the 5th December:—Held, that the defendant had such a possession of the goods before the bankruptcy as to entitle him to retain them as against D.'s assignees, by virtue of the authority of the 18th October. *Belcher v. Oldfield*, 8 Scott, 221; 6 Bing., N. C. 102.

#### **h. Goods returned by Bankrupt to Seller.**

A trader ordered bags of wool of the defendants (merchants) in December, which were delivered 19th February following; and by the course of dealing, the trader had the option of returning the wool, for which he had no call, though previously ordered. The trader being from home when the bags were delivered, on his return, the same day, he gave directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice, he being then in embarrassed circumstances, and intending not to take them into the account of his stock, if he found himself unable to pursue his business. On the 4th and 5th of March, being then insolvent, he returned the bags with a letter declaring his situation, and hoping they would not object to take back the wool, and requesting a line of approbation thereof; which approbation was given, after an act of bankruptcy committed the same day the letter was sent:—Held, that by the trader keeping possession of the goods so long, his option (which ought to have been exercised on the receipt of them) was gone; and that being in a state of insolvency and on the eve of bankruptcy, he had not the power of restoring the goods to the vendors, and that the assignees were entitled to the property. *Neate v. Ball*, 2 East, 117.

A trader ordered goods from the country, to be sent to another place for the purpose of being afterwards sent to his correspondent abroad, which was the usual course of his dealing; it

was competent for him, upon his becoming insolvent, but before an act of bankruptcy, to agree *bonâ fide* to give up the goods to the defendants from whom they were ordered, upon a claim of right of stoppage in transitu; and the circumstance of the trader having called a meeting of his creditors, and taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that they were given up *bonâ fide*, and not from any motive of voluntary and undue preference to the defendants, though done by him in a situation of impending bankruptcy at the time. *Dixon v. Baldwin*, 5 East, 175.

A. purchased goods of B. on October 8th, for the purpose of exportation; but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them to B. on October 16th. On the 17th he stopped payment; but expecting remittances from abroad more than sufficient to pay his debts, had no doubt but his creditors would give him time; they however refusing, he was made bankrupt on November 2nd. In an action by the assignees against B. for the value of the goods:—Held, that the jury was warranted in finding, that the delivery of the goods to B. was not made in contemplation of bankruptcy. *Fidgeon v. Sharp*, 1 Marsh, 196; 2 Rose, 153; 5 Taunt. 539.

Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for, he cannot rescind the contract, and return the goods, with the consent of the seller, so as to give the seller a preference to his other creditors. *Barnes v. Freeland*, 6 T. R. 80.

If the consignee of goods, upon discovering his insolvency, gives notice to the wharfinger not to deliver the consignment, the goods remain in the consignor. *Bartram v. Farebrother*. 4 Bing. 579; 1 M. & P. 515.

#### **i. Warrants of Attorney.**

On an issue, whether a warrant of attorney was given by way of fraudulent preference, and therefore not protected, in order to shew such warrant of attorney was given in contemplation of bankruptcy, it is not necessary to shew that any particular act of bankruptcy was in contemplation, or that the giver had in view the approaching distribution of his property under the bankrupt laws. *Aldred v. Constable*, 4 Q. B. 674; 12 L. J., Q. B. 253; 7 Jur. 509.

Evidence that the giver of the warrant of attorney had in view approaching imprisonment for debt and insolvency, is evidence for the jury that he gave it in contemplation of bankruptcy. *Id.*

#### **j. Partnership Transactions.**

A payment by a partner, who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy, to a creditor who has notice of the act of bankruptcy, was not protected by 6 Geo. 4, c. 16, s. 82. *Craven v. Edmonson*, 8 Bing. 734; 4 M. & P. 623.

Where two partners have stopped payment, and a commission of bankruptcy is taken out against one of them, a debtor to the firm, who knows of the stoppage, cannot refuse to pay money due to them, on the ground that the other may have

was valid, and could not be set aside as being a fraudulent preference. *Ib.*

The motive or view which may have actuated the debtor wholly or partially is not material, unless it has also induced him, without pressure or just request from his creditor, to give him a preference over his other creditors. *Ib.*

The assignment of a security to a particular creditor, even when bankruptcy is inevitable, if the assignment is not made voluntarily, is not necessarily a fraudulent preference. *The Heart of Oak*, 39 L. J., Adm. 15.

**Conveyances made pursuant to Prior Agreement are not Voluntary.**—In October, 1869, a creditor visited his debtor's place of business, and seeing that the business was mismanaged, asked him to pay off the money. The debtor proposed to give security on a certain property, but the property being insufficient, it was arranged that the creditor should take it in satisfaction of part of his debt, and on the 6th of December the debtor and creditor went to a solicitor and instructed him to draw a conveyance accordingly. Owing to the illness of the solicitor the matter was delayed and the conveyance was not executed till the 3rd of February, 1870. On the 22nd of March the debtor filed a petition for liquidation.—Held, that as the conveyance was executed in pursuance of the verbal agreement made in December in consequence of the application of the creditor, it was not, according to the cases decided under the old law, a fraudulent preference; and that the Bankruptcy Act, 1869, s. 92, does not avoid as a fraudulent preference an act which was not such under the old law. *Tempest, Ex parte, Craven, In re*, 6 L. R., Ch. 70; 40 L. J., Bk. 22; 23 L. T. 650; 19 W. R. 137.

**Bill of Sale to be given if Required.**—A. lent money to B., the latter verbally promising to give A. a bill of sale when required. No bill of sale was required during the life of A., but after her death and four years after the money was lent, her executor hearing rumours against the debtor's solvency asked for and obtained a bill of sale from the debtor, which comprised substantially the whole of his property. It was agreed that the executor should not put the bill of sale in force unless the debtor's other creditors were pressing him, and the debtor promised that if any legal process was issued against him he would give notice to the executor. Afterwards the debtor gave the executor notice of a process issued against him, and the executor thereupon seized and sold the goods by a forced sale advertised only three days before it took place.—Held, that the giving of the bill of sale was a fraudulent preference, and that the proceeds of sale must be paid to the trustee. *Bolland, Ex parte, Gibson, In re*, 8 Ch. D. 230; 38 L. T. 326; 26 W. R. 481.

A debtor gave promissory notes for the amount of his debt, which notes contained the words "security to be given by bill of sale when required." One year afterwards the creditor required security, and six weeks after the request the debtor gave him a bill of sale over a portion only of his property, which was registered; he having afterwards petitioned for liquidation, the creditor took possession under his bill of sale.—Held, that the bill of sale was not bad as a fraud on the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), nor as a fraudulent pre-

ference under the Bankruptcy Act, 1869, s. 92. *Mackenzie, Ex parte, Bent, In re*, 42 L. J., Bk. 25; 28 L. T. 486.

Held, also, that the interval of six weeks between the request for security and the execution of the bill of sale was not in itself sufficient so to disconnect the two as to make the bill of sale voluntary. *Ib.*

When a bill of sale comprising the whole of the grantor's property is given on the eve of his bankruptcy to secure a pre-existing debt, and it is attempted to support it by an agreement alleged to have been made at the time when the money was advanced, it is for the court to judge from all the surrounding circumstances whether the agreement was a bona fide one, or whether the giving of the bill of sale was purposely postponed in order to protect the grantor's credit. *Kilner, Ex parte, Barker, In re*, 13 Ch. D. 245; 41 L. T. 520; 28 W. R. 269; 44 J. P. 264—C. A.

The fact that the agreement was to give the bill of sale "if or when required" by the creditor does not of itself necessarily invalidate it. *Ib.*

The court will require a very clear explanation of the delay in the execution of the bill of sale, and the onus is on the person who sets up the prior agreement to prove, not only its existence, but its bona fides. *Ib.*

A shipbuilder had an account with his bankers, which fluctuated largely. In August, 1874, the bankers asked for some statement about his account. He then offered to give them security on a ship he was building. The bankers declined to take the security then, but said that circumstances might arise which would make it desirable for them to accept the security, and he promised to let them have it when required. In October following the bankers requested him to give the security, and he assigned the ship accordingly.—Held, that in the absence of other evidence to prove that the bankers knew in August that he was insolvent, the transaction did not amount either to a fraud on the Bills of Sale Act or to a fraudulent preference under the 92nd section of the Bankruptcy Act, 1869, so as to render the assignment to the bankers invalid. *Winter, Ex parte, Hodgkin, Ex parte, Softley, In re*, 20 L. R., Eq. 746; 44 L. J., Bk. 107; 33 L. T. 62; 24 W. R. 68.

**Bill of Sale to be Signed on Loss of Confidence.**—Shortly before a trader filed a liquidation petition he executed a bill of sale of substantially the whole of his property, to secure the repayment of an advance which had been made to him two months previously. At the time when the advance was made the borrower agreed to give a bill of sale to secure it; but the agreement was that the bill of sale was not to be signed until the lender "lost confidence" in the borrower.—Held (reversing the decision of Bacon, C. J.), that this amounted to an agreement to postpone the giving of the bill of sale until the grantor should be on the verge of bankruptcy; and that; consequently, it could not support the deed. *Burton, Ex parte, Tunstall, In re*, 13 Ch. D. 102; 41 L. T. 571; 28 W. R. 268—C. A.

**Security by Solicitor to his Clerk pursuant to Verbal Promise.**—A solicitor, shortly before absconding as an insolvent debtor, had given securities to his clerk, who the court

ruptcy, directed his broker, who had authority to distrain for rents due to him, to pay a certain sum to B. in satisfaction of a debt, and the broker *bonâ fide* agreed with B. to pay him as soon as he received the rents, and after this A. became bankrupt:—Held, that the assignees of A. could not recover this sum from the broker, though he did not in fact pay it over to B. till after the commission issued. *Bedford v. Perkins*, 3 C. & P. 90.

## 2. UNDER THE BANKRUPTCY ACT, 1869.

### a. Fraudulent Conveyances.

#### i. What are.

#### a. Assignments of Debtor's Property.

See also *ante*, IV., ACT OF BANKRUPTCY.

**When Creditor entitled to have set aside.**—The result of the authorities decided upon 13 Eliz. c. 5, is, first, that where a debt contracted antecedently to the settlement exists, a subsequent creditor has the same rights as an antecedent creditor would have against the settlor; and secondly, that whether or not the settlor had any intention to defraud his creditors, a creditor having a debt existing at the date of the settlement, has a right to have the settlement set aside if the ultimate effect of it is to delay or defraud him with regard to his debt. *Freeman v. Pope*, 39 L. J. Ch. 148. Affirmed, 5 L. R., Ch. 538; 39 L. J., Ch. 689; 21 L. T. 816; 18 W. R. 906—C. A.

A bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under the statute 13 Eliz. c. 5. It will only be void if it is not made *bonâ fide*, i.e., if it is a mere cloak for retaining a benefit to the grantor. Nor, if the time be past within which the execution of the deed is an act of bankruptcy, available for adjudication against the grantor, or within which the deed can be set aside as a fraudulent preference, can it be treated as void under the bankruptcy law. *Games, Ex parte, Bamford, In re*, 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 744—C. A.

The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing and warehousing it, which he did, entering the brandy at M.'s request in his own name and paying charges amounting to 47*l*. Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for 245*l*. for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented to take M.'s acceptance at seven days for a balance of account, including the hire and the 47*l*., upon receiving M.'s authority to sell the brandy if the bills were not met. This acceptance not being met, the defendant sold the brandy. The firm was afterwards adjudicated bankrupt, and the trustee sued the defendant in trover for the value of the brandy. The transaction was *bonâ fide*, but the brandy formed in fact the whole property of the firm:—Held, that although the transaction under which the defendant obtained power to sell the brandy might be a "conveyance, gift, delivery or transfer" within the meaning of the Bankruptcy Act, 1869, s. 6, sub-s. 2, it was not fraudulent within the meaning of the act, because the de-

fendant's consent to give the bankrupt seven days' time to pay the debts due, taking his acceptance at seven days, was an equivalent for the power of sale given to the defendant. *Philps v. Hornstedt*, 1 Ex. D. 62—Ex. Ch. Affirming, 8 L. R., Ex. 26; 42 L. J., Ex. 12; 21 W. R. 174.

When an unregistered bill of sale of goods has been given to B. by A. and kept secret, and not acted upon, and subsequently the goods have been sold to a purchaser, and the proceeds of the goods paid to B., the payment to B. cannot be set aside, although A. was insolvent at the time, and bankruptcy followed shortly afterwards. *Wilson, Ex parte*, 29 L. T. 860; 22 W. R. 241—L. J.

The purchaser at the same time bought the bankrupt's stock-in-trade, being nearly all the rest of his property, and gave a bill of exchange for the price. This bill was handed to B. for the benefit of the creditors, but not indorsed to him:—Held, that the whole transaction was not an assignment of the bankrupt's whole property for the benefit of his creditors. *Id.*

**Private Arrangement not Binding on Creditors.**—W. was a partner in the firm of W. & Co. and also carried on another business separately from the partnership on his own private account. W.'s private transactions in the latter business involved him in irretrievable losses, the other partners in the firm excluded him from their partnership, purchasing his share for 749*l*. 15*s*., so as to prevent the partnership accounts being interfered with in the proceedings under W.'s prospective bankruptcy:—Held, that this arrangement between the partners, although within the terms of their deed of association, did not bind third parties, and that the trustee for the creditors of W. was entitled to an account of the partnership assets and profits. *Warden, Ex parte, Williams, In re*, 21 W. R. 51.

**Retaking Possession.**—B. sold certain furniture, stock-in-trade, &c., together with the goodwill and book debts of her business as a baker to Y. for a certain price payable by quarterly instalments of 15*l*. each, subject to a proviso for B.'s retaking possession on default in payment of the instalments. Y. made default, and B. resumed possession on the 7th of November, 1870. Y. was adjudicated a bankrupt on the 24th November, 1871:—Held, that the retaking of possession was not fraudulent or void as against the trustee in the bankruptcy. *Batchelor, Ex parte, Young, In re*, 20 W. R. 826.

Y. also made an assignment to B. of the whole of his (Y.'s) property in repayment of a subsisting debt; the deed was within twelve months of the adjudication:—Held, that the deed was fraudulent and void as against the trustee in bankruptcy. *Id.*

**Dissolution of Partnership invalid.**—A partnership of two was dissolved, the outgoing partner assigning to the continuing partner all his share in the partnership assets, and the latter covenanting to pay the partnership debts. At the date of the assignment the firm was insolvent, as was also each of the partners. The firm being shortly afterwards adjudged bankrupt:—Held, that the transaction was void; that it did not operate as a conversion of the outgoing partner's property into the separate estate of the continuing partner; and that the whole of the property, as it existed belonging to the bankrupts at

the date of the assignment, must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors. *Mayou, Ex parte, Edwards-Wood, In re, 4 De G., J. & S. 664.*

**Assignment on Demand pursuant to Agreement.]**—Two traders, brothers, obtained advances amounting to 500*l.* from their father and brother in various sums, and in 1870, on the last advance of 250*l.*, they signed an agreement that they would, on demand, assign the lease of their premises and their business, stock-in-trade, and book debts to the creditors, with a proviso that if they should repay the sums advanced the agreement should be void, but if they should fail to do so a valuation should be made, and the balance, if any, should be paid to the debtors. At the same time the lease was deposited with the same creditors as a security for the due performance of the agreement. In 1873, the debtors became embarrassed, and the creditors demanded the execution of an assignment in pursuance of the agreement, which was accordingly executed, and the balance of the valuation of the property, amounting to 123*l.*, was paid to the debtors. The assignment included substantially the whole of the debtor's property, and the creditors took possession of it forthwith. A few days afterwards the debtors filed a petition for liquidation, and the trustee applied to have the deed of assignment of 1873 declared void :—Held, that the agreement of 1870 became a binding security on demand being made, and that the assignment of 1873, being based upon it, was valid. *Isard, Ex parte, Cook, In re, 9 L. R., Ch. 271; 43 L. J., Bk. 31; 30 L. T. 7; 22 W. R. 342.*

**Consideration for.]**—A trader on the 28th of August executed a bill of sale of substantially the whole of his property to secure a debt for which the grantee had recovered judgment on the 3rd of July, and another debt which he owed the grantee. The grantor had on the 4th of July written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him on demand a bill of sale to secure the judgment debt and such other sums as he owed him. The grantee did not enter into any agreement not to enforce the judgment, but in fact he did not issue execution. On the 29th of August another creditor levied execution at the grantor's place of business, and on the 1st of September the grantor filed a liquidation petition. He had between the 4th of July and the 29th of August received by the carrying on of his business sums amounting to 10,000*l.* :—Held, that no equivalent had been given for the bill of sale, and that it was void as against the trustee in the liquidation. *Cooper, Ex parte, Baum, In re, 10 Ch. D. 313; 48 L. J., Bk. 40; 39 L. T. 521; 27 W. R. 298—C. A.*

**Growing Crops.]**—A bill of sale of growing crops does not require registration under the Bills of Sale Act, 1854. *Payne, Ex parte, Cross, In re, 11 Ch. D. 539; 40 L. T. 563; 27 W. R. 808—C. A. And see Brantom v. Griffiths, 2 C. P. D. 212; 46 L. J., C. P. 408; 36 L. T. 4; 29 W. R. 313—C. A.*

On the 2nd of May a farmer executed a bill of sale of his furniture and growing crops, being the whole of his property, to P., the only consideration for it being the forbearance of P. to

seize the property under a bill of sale given to him four months previously, as he alleged, for value, and not registered. On the 3rd of May the grantor gave a bill of sale of the same property to C. in consideration of a present advance of money. C. had no notice of P.'s bill of sale. Neither of the bills of sale was registered. C. took possession of the property on the 20th of August, and P. on the 23rd of August. On the 26th of August the grantor filed a liquidation petition, and on the 1st of October he was adjudicated a bankrupt :—Held, that P.'s bill of sale was void as against the trustee in bankruptcy of the grantor as an act of bankruptcy, and that C.'s bill of sale, so far as regarded the furniture, was also void as against the trustee for want of registration, notwithstanding the fact that he had no notice of the act of bankruptcy to which the trustee's title related back. *Ib.*

But, as to the growing crops, held, that C.'s bill of sale was a protected transaction by virtue of ss. 94 and 95 of the Bankruptcy Act, 1869, and was therefore good as against the trustee. *Ib.*

The fact that a bill of sale is set aside as void against the trustee in bankruptcy of the grantor does not entitle the trustee to stand in the place of the grantee, and thus acquire priority over the grantee under a valid bill of sale subsequently executed by the grantor. *Ib.*

**Voluntary Settlements.]**—A settlor, at the time of making a voluntary settlement, made a statement of his assets and liabilities, shewing a balance in his favour. He was incurring heavy liabilities as managing director of a company, and from transactions on the Stock Exchange. Nine months after the date of the settlement he called a meeting of his creditors, and laid before them a statement shewing himself to be insolvent, and subsequently he became bankrupt :—Held, that the burden was upon him to shew solvency at the date of the settlement. *Crossley v. Eliworthy, 12 L. R., Eq. 158; 40 L. J., Ch. 480; 24 L. T. 607; 19 W. R. 842.*

Seem, that damages recovered in an action commenced after the settlement for inducing the settlor to become a member of a company by false and fraudulent misrepresentations made previously to the settlement must be taken into consideration in estimating the settlor's solvency at the date of the settlement. *Ib.*

A distribution by a debtor, when in a weak state of mind and of body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts, is void as against creditors under 13 Eliz. c. 5, the children being aware at the time that the creditors' claims would be defeated, though the debtor had no such intention. *Cornish v. Clark, 14 L. R., Eq. 184; 42 L. J., Ch. 14; 26 L. T. 494; 20 W. R. 897.*

In the absence of an actual intent to defeat, delay, or hinder creditors, a voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement, ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid. *Kent v. Riley, 14 L. R., Eq. 190; 41 L. J., Ch. 569; 27 L. T. 263; 20 W. R. 852.*

A voluntary settlement whereby the settlor

to the benefit of the security as against the other creditors; for, as the solicitor retained no benefit for himself, the gift was *bonâ fide* within 13 Eliz. c. 5. *Ib.*

**Security to Bankers to enable Debtor to carry on Business.**—A company having largely overdrawn its banker's account, and wanting further accommodation for the purpose of carrying on its business, made an equitable mortgage of the bulk of its property to the bank. Six months afterwards the company was wound up:—Held, that such security did not operate as a fraudulent preference, and that the bank was entitled to the full benefit of it. *Patent File Company, In re, Birmingham Banking Company, In re*, 23 L. T. 484; 19 W. R. 44. Affirmed, 6 L. R., Ch. 83; 43 L. J., Ch. 190.

B. had overdrawn his account at his bankers' and the bankers, four months before he became a bankrupt, obtained a charge from him to secure this account, on moneys coming to him from third parties;—Held, that the charge was good, and that no case of fraudulent preference had been proved. *London and County Bank, Ex parte, Brown, In re*, 16 L. R., Eq. 391; 42 L. J., Bk. 112; 29 L. T. 73.

### 3. EFFECT OF PREFERENCE.

The effect of bankruptcy upon a fraudulent preference, is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once by the bankruptcy in the assignees, independently of any election on their part, other than their acceptance of the office of assignee, but by a transfer which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees at their election, and the title of the transferee is perfect, except so far as it is avoided by the assignees. *Newnham v. Stevenson*, 10 C. B. 713; 20 L. J., C. P. 111; 15 Jur. 360.

The commencement of an action of trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully, cannot, without more, be taken to be an election on the part of the assignees to avoid the transfer. *Ib.*

### 4. REMEDIES IN RESPECT OF PREFERENCE.

**Right of Trustee to Proceeds.**—When goods have been assigned to a creditor by a debtor on the eve of bankruptcy under circumstances which make it a fraudulent preference, and the goods have been sold by the creditor before the bankruptcy, it is immaterial that the adjudication was on the bankrupt's own petition, so that the fraudulent preference was not void as an act of bankruptcy to which the assignees' title could relate; the assignees may still recover the proceeds from the creditor, inasmuch as a transaction amounting to a fraudulent preference is voidable at the election of the assignees, as contrary to the spirit of the bankruptcy laws. *Marks v. Feldman*, 5 L. R., Q. B. 275; 39 L. J., Q. B. 101; 10 B. & S. 371—Ex. Ch.

**When only Individual Creditor would be benefited.**—When the result of recovering property alleged to have been delivered to a creditor by way of fraudulent preference would not be for the benefit of the creditors at large, but of an

individual creditor who claims a security on it, the trustee ought not to take proceedings for the recovery of the property himself; nor will the individual creditor be allowed to take them in his name. *Cooper, Ex parte, Zucco, In re*, 10 L. R., Ch. 510; 44 L. J., Bk. 121; 33 L. T. 3; 23 W. R. 782.

## XVI. FRAUDULENT CONVEYANCES AND PROTECTED TRANSACTIONS.

### 1. UNDER STATUTES PRIOR TO THE BANKRUPTCY ACT, 1869.

#### a. Sale of Goods.

Where a trader on the eve of bankruptcy makes a collusive sale of his goods to A., the assignees cannot maintain trover for them, without proving a demand and refusal. *Nixon v. Jenkins*, 2 H. Bl. 135.

A fraudulent sale of goods by a bankrupt to a creditor, in order to keep up his sinking credit, to prefer this one and cheat the others, is void. *Martin v. Peutress*, 4 Burr. 2477.

A. purchased of B., a hop merchant, a library, and paid him the value; B. at that time had committed an act of bankruptcy, of which A. had no knowledge:—Held, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment made by A. was declared valid by 6 Geo. 4, c. 16, s. 82; and, in order to give full effect to that enactment, A. must at least have a lien on the books in respect to which he had made the payment, until the assignees tendered him the sum paid. *Hill v. Farnell*, 9 B. & C. 45.

A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the hands of the defendant; the trader became bankrupt by lying two months in prison:—Held, that his assignees could not recover from the defendant, who was a mere bearer, the money he had so received and paid over. *Coles v. Wright*, 4 Taunt. 198; 2 Rose, 110. And see *Tope v. Hockin*, 7 B. & C. 101; 9 D. & R. 881.

In an action by the assignees of bankrupts, to recover the value of goods alleged to have been delivered to the defendant in contemplation of bankruptcy; evidence that the goods were delivered in payment and satisfaction of a debt due from the bankrupts to the defendant, does not support a plea alleging that the goods were *bonâ fide* sold and delivered to defendant by the bankrupts before the issuing of a fiat and without notice of an act of bankruptcy, and that the defendants *bonâ fide* paid for them. *Backhouse v. Jones*, 1 Scott, 148.

Evidence that other creditors of the bankrupts, to whom goods had been delivered under similar circumstances, had subsequently given them up to the assignees or paid their value, is irrelevant and inadmissible. *Ib.*

A bankrupt, previously to his bankruptcy, deposited timber with wharfingers, to be kept at their wharf, and delivered on payment of the wharfage. On the 7th February, 1848, a fiat issued against him. The bankrupt, after the fiat, sold the timber, and between September, 1848, and January, 1849, it was delivered to the purchaser by the wharfinger, who had no notice of bankruptcy. In trover, by the assignees:—Held, that the wharfingers were not liable for the value of the timber, being protected by 6 Geo. 4,

c. 16, s. 84. *Cannan v. South Eastern Railway Company*, 7 Ex. 843; 21 L. J., Ex. 257.

#### b. Gifts of Money.

**To Children.**—Money given by a father, who is a trader, to his son, to advance him in a partnership trading concern, was not within 1 Jac. 1, c. 15, s. 5, and could not be recovered from the son by the assignees of the father, who afterwards became bankrupt. *Kensington v. Chantler*, 2 M. & S. 36.

A fraudulent gift of money, in contemplation of insolvency, may be avoided by the assignees. *Abell v. Daniell*, M. & M. 370.

Where a bankrupt, in the habit of supplying his son with money to pay his bills, gave him 200*l.* just before he stopped payment, being at the time insolvent, but not expecting to become a bankrupt:—Held, that the question for the jury, in an action by his assignees against the son to recover that money, was whether it was given in the ordinary course of maintaining his son, or as a fraudulent preference of the son over the creditors, made in contemplation of insolvency. Such gift of money was not within the meaning of 6 Geo. 4, c. 16, s. 73. *Id.*

#### c. Claims of Lien.

Where a master and part owner of a vessel consigned her to the defendants, who were ship-brokers, on the usual terms of commission, on which the ship's papers were handed over to them, and they made disbursements on his account; and he was afterwards arrested, and lay in prison more than two months, on which a commission was issued against him, and the plaintiffs were appointed his assignees: and whilst he was in prison, the defendants adjusted their account with him, and received the balance due to them, on account of their disbursements, and at the same time delivered to him the ship's papers:—Held, in an action by the assignees for the recovery of such balance, that they were not entitled to recover, as the defendants had a lien on the papers until their account was adjusted and paid; and that neither the bankrupt nor his assignees could have disposed of the vessel before the papers were given up. *Thompson v. Beaton*, 7 Moore, 548; 1 Bing. 145.

Semble, that 2 & 3 Vict. c. 29, operated to protect a claim of general lien on goods of a bankrupt coming into the hands of the party before the fiat, without notice of an act of bankruptcy. *Bowman v. Malcolm*, 11 M. & W. 833; 12 L. J., Ex. 397.

The bankrupt, a woolstapler at Huddersfield, was in the habit of directing purchases of wool to be consigned to the defendant, a wharfinger and shipping agent at Hull, who forwarded them to him at Huddersfield. In July, 1841, the bankrupt purchased wool in Scotland, which was paid for by E., his agent there, and by him forwarded to the defendant at Hull. Part of the wool, consisting of ten bales, arrived at Hull on the 27th of September, and a portion of it was, at ten o'clock on that morning, taken possession of by the defendant, the remainder being taken possession of by him between ten o'clock and four. E., who had not been repaid the advances made by him for the purchase of wool, received a letter from the bankrupt on the 21st of September, which, after informing him of his insol-

veny, directed him to get the wool and do the best he could to save himself; and, accordingly, on some day between the 26th September and the 1st October, he gave directions to the defendant to seize the wool. The remaining portion of the wool arrived on the 3rd October, and was delivered into the defendant's warehouses on the 6th, 7th, and 8th of that month. An act of bankruptcy was committed on the 22nd of September, the fiat was dated and issued on the 27th, and was signed between twelve o'clock and two o'clock, but it did not appear at what hour it was delivered out. The defendant, who claimed to retain the wool in payment of a general balance, had been in the habit of sending to the bankrupt, together with the goods, printed delivery orders, which stated that all goods were considered as general lien, subject not only to freight but also to the balance of any former account due from the owners or consignors. These orders had been seen more than once in the bankrupt's hands, and, on one occasion, the weights therein stated had been altered by him. The defendant claimed to retain the wool as a lien in respect of a general balance:—Held, in trover by the assignees to recover the value of the wool, that the agent E. had no right to the goods, that the defendant had not a general lien, and that the assignees were entitled to recover the value of the whole. *Id.*

#### d. Attachments of Money and Goods.

B., by charter-party, hired a ship of the owners, to carry a cargo to Hayti, and engaged to find a homeward cargo. On the ship's arrival at Hayti, B. assigned the cargo to C. as a security for advances. The hire not having been paid, the owners, under a judgment of a court at Hayti, attached the cargo in the hands of C. to discharge the claim for hire; and B. having declined to find a homeward cargo, the captain procured one for the owners, who received the freight on its arrival in London:—Held, on B.'s having become bankrupt subsequently to the assignment, that his assignees could not recover from the owners the proceeds of the cargo attached at Hayti, or of the homeward freight. *Kymer v. Larkin*, 5 Bing. 71; 1 M. & P. 183.

A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, bank shares in the French funds. The latter drew bills on A. which he accepted, on the security of such shares standing in his name; and these bills were assigned by B. for a valuable consideration to C., a British subject. Before they became due, B. authorized A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before the letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured: B. also afterwards became bankrupt. C., by process in the foreign country, attached the bank shares standing in the name of A. for the debts due to him on the bills; and the court there decreed that the bank shares should be sold, and the proceeds should be applied first to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree C. received a certain sum of money on account of the bills:—Held, that the assignees of A. could not recover such sum back, as money belonging to B. *Cazenove v. Prevost*, 5 B. & A. 70.

A judgment creditor of G. obtained a judge's

order attaching the debts due from the garnishee, and ordering the latter to attend and shew cause why he should not pay the judgment creditor the debt due to G. The only claim of G. against the garnishee was on a contract for the sale of goods, by which the garnishee had undertaken to give bills payable at certain periods not elapsed. The garnishee, without waiting for any further order, gave the judgment creditor his promissory note for the amount becoming due to G., payable by instalments, and paid one instalment after notice of an act of bankruptcy by G. :—Held, that the order and note and payment were no answer to an action by G.'s assignees against the garnishee on his original contract with G. *Turner v. Jones*, 1 H. & N. 878 ; 26 L. J., Ex. 262.

From the time of the service upon a garnishee of an ex parte order of attachment, under 17 & 18 Vict. c. 125, s. 62, the debt due to the judgment debtor is bound in the hands of the garnishee, but subject to 12 & 13 Vict. c. 106, s. 184, for the distribution of the bankrupt's property. *Holmes v. Tutton*, 5 El. & Bl. 65 ; 24 L. J., Q. B. 346 ; 1 Jur., N. S. 975.

### e. Mortgages.

If a mortgagor in possession becomes bankrupt, and the mortgagee gives notice to the tenants to pay him the by-gone rents, a payment to the mortgagee is good against the assignees of the mortgagor. *Pope v. Biggs*, 9 B. & C. 245.

M., a trader engaged in extensive concerns, was in perilous circumstances, and likely to become bankrupt, although not suspected, from January, 1831, to January, 1832, when he actually became bankrupt. Among others, he owed his son 12,000*l.*, which debt, upon his son's marriage, was settled on the son's wife. In May, 1831, some of M.'s property in Middlesex was released from mortgage, and M., at the request of his son, on the 1st July, 1831, conveyed it to the trustees under his son's marriage settlement, as a security for or in discharge of the debt due from him to his son. The transfer was not registered or otherwise made public till after M.'s bankruptcy. A jury having found that it was not made voluntarily by way of fraudulent preference, or in contemplation of bankruptcy, the court refused to grant a new trial. *Belcher v. Prittie*, 4 M. & Scott, 295 ; 10 Bing. 408.

On a suit instituted by the assignees of a bankrupt mortgagor for payment of the surplus of the proceeds of the mortgaged property, which had been sold by transferees of the mortgage :—Held, that the transferees were entitled to tack a debt insufficiently secured by a previous mortgage of other property made to them directly, although they took the transfer after and with notice of the adjudication of bankruptcy. *Selby v. Pomfret*, 3 De G., F. & J. 595.

A trader, being indebted to the defendant in 570*l.* upon a balance of account for goods, and being pressed for payment, as an inducement for forbearance executed a deed by which he mortgaged to the defendant the public-house in which he carried on his business, and assigned to him his trade and other fixtures, with a covenant for payment, with interest, by instalments, the period for payment extending over several months, and a proviso that on payment of the instalments the deed was to be void, but on default the defendant might enter and sell. He continued his busi-

ness, receiving supplies of goods and advances from the defendant, and making various payments to creditors, until he became bankrupt :—Held, that the deed was not void as a fraudulent preference, for even if made in contemplation of bankruptcy, it was not voluntary, but procured by pressure on the part of the defendant. *Hale v. Allnutt*, 18 C. B. 505 ; 25 L. J., C. P. 267 ; 2 Jur., N. S. 904.

If the deed had been made with a view to give the defendant a fraudulent preference, the trader being uninfluenced by the pressure, it would have been void, notwithstanding the pressure ; but as the pressure exercised some influence on his mind, there was no fraudulent preference. *Id.*

A solicitor paid off with his own money a mortgage debt on a client's property, which was thereupon re-conveyed to the client. The solicitor took the title-deeds by way of equitable mortgage, with a written memorandum. Afterwards he induced another client to advance a smaller sum on a proposed mortgage of the property. The money was paid to the solicitor by the second client, and a mortgage was prepared for execution by the first client, who, however, never executed it, nor was aware of the intended security. The title-deeds were kept by the solicitor apart from other deeds of the mortgagor, but were not placed in any box of the proposed mortgagee. On the solicitor becoming bankrupt :—Held, that the second client had a valid security on the property as against the assignees, and the property having been sold by arrangement :—Held, that he was entitled to be paid his principal and interest and costs in priority to any claim on the part of the assignees in respect of the residue of the sum secured. *Hirtzel, Ex parte*, 3 De G. & J. 464.

### f. Delivery of Bills or Cheques as Security.

Where a bankrupt, seven days before his bankruptcy, deposited a bill by way of security with a party, without indorsing it, for a valuable consideration, an order was made that the bankrupt should indorse it, no question being raised as to its being a fraudulent preference. *Rhodes, Ex parte*, 2 Deac. 394 ; 3 Mont. & Ayr. 207.

A. desired leave to place certain long bills in B.'s hands, and to be allowed permission to draw, without renewal, bills of shorter dates, and desired B. to calculate the sum to be drawn for, allowing commission ; and the long bills indorsed by A. were inclosed to B. in the same letter. B. answered, that, agreeably to A.'s wishes, he had discounted the bills, and then specified the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills, on condition of being allowed to draw shorter bills ; and B., having accepted A.'s bills, and such acceptances being dishonoured in consequence of B.'s bankruptcy, and the long bills having remained in specie in B.'s hands at the time of his bankruptcy, and B.'s assignees having afterwards received the value of them, A. may recover the amount of them as money had and received to his use. *Parke v. Eliason*, 1 East, 544.

A. sold goods to B., for which the latter was to pay by a bill at three months ; B. gave a cheque on his bankers (who were also the bankers of A.) requiring them to pay A. on demand, in a bill at three months ; A. paid the cheque to the bankers,

and took no bill from them; but the amount was transferred in the bankers' books from B.'s account to A.'s with the knowledge of both; the bankers failed before the cheques became due:—Held, that A. could not recover the value of the goods against B. *Bolton v. Richard*, 6 T. R. 139; 1 Esp. 106.

A trader, in contemplation of bankruptcy and without solicitation, put three cheques in the hands of his clerk, to be delivered to a creditor at the counting-house of the latter; but, before they were delivered, the creditor called upon the trader, and demanded payment of his debt:—Held, that the intention to give a voluntary preference not having been consummated, this was a valid payment. *Bayley v. Ballard*, 1 Camp. 416.

A trader, in a state of insolvency, and concealing himself from his general creditors, after a secret act of bankruptcy, in part payment of a debt delivered a bill to a creditor who was acquainted with his place of retreat, and with whom he was in friendly communication:—Held, that this was not a payment protected by 6 Geo. 4, c. 16, s. 82. *Bagnall v. Andrews*, 7 Bing. 217; 4 M. & P. 839.

A banker is not justified in paying the drafts of a person who has placed money in his hands, after he has notice of an act of bankruptcy committed by him. *Verney v. Hankey*. 2 T. R. 113.

Payment of a debt by a cheque may be a fraudulent preference. *Simpson, Ex parte*, 1 De Gex. 9; 14 L. J., Bk. 1; 8 Jur. 1150.

On Saturday, the 11th of September, 1841, the firm of H. & S., merchants, being in difficulties, determined, with the advice of their solicitor, to suspend payment on the following Monday. They accordingly, at about five o'clock on Saturday afternoon, sent to their bankers a written notice not to make any further payments. But about half-an-hour previously to their sending such notice, they drew on their bankers three cheques for various amounts, which they gave to three different creditors, one of whom was brother to H. & S.'s confidential clerk, and another a cousin of Mr. H., and the third their solicitor, and neither of whom appeared to have previously pressed for immediate payment. Each of the cheques was received and cashed before the notice not to make further payments was sent to the bank. H. & S. never resumed payment, and were ultimately declared bankrupts:—Held, that these payments were made by way of fraudulent preference, and constituted an act of bankruptcy. *Id.*

Securities given by an uncertificated bankrupt to a creditor, for debts contracted subsequently to and without notice of the bankruptcy, will be valid as against his assignees. *Casneau, In re*, 2 Jur., N. S. 157.

A. agreed with B. to purchase goods, and pay for them three days after delivery. The goods were delivered, and on the third day, A. being unable to pay, B. drew a bill of exchange on A. at two months for their price, which A. himself promised to discount the following week. B. retained the bill in his own hands and did not dispose of it. B. continuing to press A. for payment, A., on the 10th of November, signed a paper, requesting a creditor of his to pay the amount of his debt to B. On the 19th of November, being the day on which the bill fell due, A. was adjudicated a bankrupt on his own

petition. The creditor having paid the sum to A.'s assignees, B. claimed the money. The evidence shewing to the satisfaction of the court that the bill was given only as a security, that there was no intention to depart from the terms of the original contract, and that pressure had been put upon A.:—Held, that the signing of the paper was not an act of fraudulent preference, and that B. was entitled to the debt. *Seals, Ex parte*, 10 L. T. 315—L. J.

#### g. Delivery of Goods as Security.

The facts that the debtor, being pressed for payment by one creditor, and being unable to pay him, went to another creditor, and, declaring that he must close his shop unless he could sell his stock, induced him to accept an assignment of his stock, partly for the debt already due to him, and partly for a fresh advance, do not constitute evidence of a fraudulent preference of such creditor, nor of any fraudulent intent, so as to invalidate the assignment as against the creditors under a subsequent bankruptcy. *Hell v. Simpson*, 2 H. & N. 410; 26 L. J., Ex. 363.

Where the act of delivering goods by a trader to secure the defendant, who was under acceptances for him, payable at a future day, was clearly not voluntary on the trader's part, but made in consequence of the urgency of the defendant (evidenced by the proposal for giving such security originating with him), it is immaterial to consider whether the trader had his bankruptcy in contemplation at the time; nor will the transaction, being bona fide and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world. *Crosby v. Crouch*, 11 East, 256; 2 Camp. 166.

When a trader, being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became a bankrupt; this, inasmuch as the act done did not redeem the trader, even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, is evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy; and is therefore void against the other creditors of the bankrupt. *Thornton v. Hargreaves*, 7 East, 544.

A trader may make a transfer of his goods, on the eve of bankruptcy, to a creditor who compels him so to do by any threat; but a voluntary and fraudulent preference is an act moving from the trader, whereby he elicits to favour a particular creditor. *Reed v. Ayton*, Holt, 503.

If a bankrupt, on the eve of his bankruptcy, fraudulently delivers goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumption, they affirm the contract, and then the creditor may set off his debt. *Smith v. Hobson*, 4 T. R. 211.

Whether a trader in embarrassed circumstances, who delivers goods to a creditor in discharge of his debt, does it in contemplation of bankruptcy, is a question of fact for the jury. *Fidgen v. Sharpe*, 5 Taunt. 359; 1 Rose, 153; 1 Marsh. 196.



An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. *Lempriere v. Pasley*, 2 T. R. 485.

D., a captain of a vessel belonging to the defendant, entered into an agreement with the defendant, under which he was to have command of the vessel for a voyage to India and back, and to have for his own use the cabin accommodation for passengers, for which he was to pay the owner a certain sum. For purposes of his own D. abandoned the ship before her arrival in India, whereupon the command was assumed by F., the chief mate; after D. had left the ship, he wrote to F., giving him directions as to the disposal of certain property of his then on board. The owner, as soon as he became acquainted with the fact of D. having quitted the ship, wrote to F., confirming him in the command, and desiring him to retain everything on board belonging to D., who was largely indebted to him. D. returned to England, and on the 18th October, 1834, at the instance of the defendant, wrote him the following letter:—"I hereby authorize and request you to keep possession of all cabin furniture and other property of mine on board the Bolton, when she arrives, and to place the value of the same to the credit of my account with you." On the 18th December, a fiat issued against D. upon an act of bankruptcy committed by him on the 2nd. The vessel arrived in London on the 5th December:—Held, that the defendant had such a possession of the goods before the bankruptcy as to entitle him to retain them as against D.'s assignees, by virtue of the authority of the 18th October. *Belcher v. Oldfield*, 8 Scott, 221; 6 Bing. N. C. 102.

#### **h. Goods returned by Bankrupt to Seller.**

A trader ordered bags of wool of the defendants (merchants) in December, which were delivered 19th February following; and by the course of dealing, the trader had the option of returning the wool, for which he had no call, though previously ordered. The trader being from home when the bags were delivered, on his return, the same day, he gave directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice, he being then in embarrassed circumstances, and intending not to take them into the account of his stock, if he found himself unable to pursue his business. On the 4th and 5th of March, being then insolvent, he returned the bags with a letter declaring his situation, and hoping they would not object to take back the wool, and requesting a line of approbation thereof; which approbation was given, after an act of bankruptcy committed the same day the letter was sent:—Held, that by the trader keeping possession of the goods so long, his option (which ought to have been exercised on the receipt of them) was gone; and that being in a state of insolvency and on the eve of bankruptcy, he had not the power of restoring the goods to the vendors, and that the assignees were entitled to the property. *Neate v. Ball*, 2 East, 117.

A trader ordered goods from the country, to be sent to another place for the purpose of being afterwards sent to his correspondent abroad, which was the usual course of his dealing; it

was competent for him, upon his becoming insolvent, but before an act of bankruptcy, to agree *bonâ fide* to give up the goods to the defendants from whom they were ordered, upon a claim of right of stoppage in transitu; and the circumstance of the trader having called a meeting of his creditors, and taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that they were given up *bonâ fide*, and not from any motive of voluntary and undue preference to the defendants, though done by him in a situation of impending bankruptcy at the time. *Dixon v. Baldwin*, 5 East, 175.

A. purchased goods of B. on October 8th, for the purpose of exportation; but finding that he must stop payment, and that he could not apply the goods to the purpose for which they were bought, he returned them to B. on October 16th. On the 17th he stopped payment; but expecting remittances from abroad more than sufficient to pay his debts, had no doubt but his creditors would give him time; they however refusing, he was made bankrupt on November 2nd. In an action by the assignees against B. for the value of the goods:—Held, that the jury was warranted in finding, that the delivery of the goods to B. was not made in contemplation of bankruptcy. *Fidgion v. Sharp*, 1 Marsh, 196; 2 Rose, 153; 5 Taunt. 539.

Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for, he cannot rescind the contract, and return the goods, with the consent of the seller, so as to give the seller a preference to his other creditors. *Barnes v. Freeland*, 6 T. R. 80.

If the consignee of goods, upon discovering his insolvency, gives notice to the wharfinger not to deliver the consignment, the goods remain in the consignor. *Bartram v. Farebrother*, 4 Bing. 579; 1 M. & P. 515.

#### **i. Warrants of Attorney.**

On an issue, whether a warrant of attorney was given by way of fraudulent preference, and therefore not protected, in order to shew such warrant of attorney was given in contemplation of bankruptcy, it is not necessary to shew that any particular act of bankruptcy was in contemplation, or that the giver had in view the approaching distribution of his property under the bankrupt laws. *Aldred v. Constable*, 4 Q. B. 674; 12 L. J., Q. B. 253; 7 Jur. 509.

Evidence that the giver of the warrant of attorney had in view approaching imprisonment for debt and insolvency, is evidence for the jury that he gave it in contemplation of bankruptcy. *Id.*

#### **j. Partnership Transactions.**

A payment by a partner, who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy, to a creditor who has notice of the act of bankruptcy, was not protected by 6 Geo. 4, c. 16, s. 82. *Craven v. Edmonson*, 6 Bing. 734; 4 M. & P. 623.

Where two partners have stopped payment, and a commission of bankruptcy is taken out against one of them, a debtor to the firm, who knows of the stoppage, cannot refuse to pay money due to them, on the ground that the other may have

committed an act of bankruptcy; in which case his assignees might call upon the debtor to pay a moiety of the money a second time. *Prickett v. Dowd*, 3 Camp. 131; 1 Rose, 224.

A., B., C. & D. were partners in a banking house at Liverpool, and C. & D. also carried on a separate mercantile concern in London; S., having accepted bills payable at the house of C. & D., employed A., B., C. & D. to get them paid accordingly, and agreed to deposit with them good bills, indorsed by him, for the purpose of enabling them so to do. A., B., C. & D. debited S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by S. were remitted by A., B., C. & D., upon the general account between the two houses; and before any of the acceptances of S. became due, both houses failed, and S. was obliged to pay his own acceptances:—Held, that the assignees of C. & D. were entitled to retain against S. the bills remitted to them by A., B., C. & D. *Bolton v. Fuller*, 1 B. & P. 539.

Held also that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of C. & D., though sent by A., B., C. & D. before that event. *Ib.*

Where one of two partners, who were country bankers, became bankrupt, and the defendants, being holders of their notes, obtained payment of part of them from the London banker at whose house they were payable, out of the funds in their hands belonging to the country bank, and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to the defendants, in payment of the residue of the notes in their hands, and afterwards became bankrupt, and no fraud was stated:—Held, that the assignees could not recover the money so paid to them by the London banker, nor the proceeds of the bill. *Harvey v. Crickett*, 5 M. & S. 336.

If one of two partners becomes bankrupt, the solvent partner may, for a valuable consideration and without fraud, dispose of the partnership effects; and if he afterwards fails, the assignees, under a joint commission against both, cannot maintain trover against the bona fide vendee of such partnership effects. *For v. Hanbury*, Cowp. 445.

Where one of two partners in trade had, after an act of bankruptcy, accepted a bill in the name of the firm, without the privity of his co-partner:—Held, that in the hands of an innocent indorsee it was an available security. *Lacy v. Woolcott*, 2 D. & R. 458.

After the bankruptcy of one of two joint owners of goods, the solvent joint owner may authorize the sale of the goods, and the broker who sells pursuant to such authority may set it up as a defence in an action by the assignees of the joint owner, who has become bankrupt, under the plea of non detinet. *Morgan v. Marquis*, 9 Ex. 145; 2 C. L. R. 276; 23 L. J., Ex. 21.

The circumstance that the broker was in the first instance employed by the bankrupt, and had no knowledge of any other person being interested in the goods, is immaterial; nor is the broker estopped from setting up the joint ownership by having sent to the assignees an account in which the goods were stated to have been sold for the bankrupt alone. *Ib.*

A., after the bankruptcy of his partner B., believing the firm to be solvent, paid in partner-

ship money to C., their banker, to meet current engagements, and the money was so applied. A. afterwards became bankrupt also. This payment is valid, and C. is not liable for the amount to the assignees of B. and of A. *Woodbridge v. Swann*, 1 N. & M. 725; 4 B. & Ad. 633.

One of two partners, after committing an act of bankruptcy, handed over a bank post bill and some silver to the agent of the drawer of a bill of exchange accepted by the partners, and which was just about to become due, for the purpose of protecting such bill. Such handing over was found a fraudulent preference, and to have been in contemplation of bankruptcy. On the same day, but a few hours later than the time of handing over the note and the money, the other partner committed an act of bankruptcy:—Held, that the act of the partner who had committed the act of bankruptcy before he handed over the property was not binding, and that the assignees of the two partners might recover the value of the property. *Burt v. Moulst*, 1 C. & M. 525; 3 Tyr. 564.

After an act of bankruptcy committed by one partner, the other delivered goods of their joint property to a creditor for a joint debt, and died; and afterwards a commission issued against the surviving partner:—Held, that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt, by relation back of the act of bankruptcy, which was in the lifetime of the solvent partner, and consequently that the assignees could not maintain trover against such creditor. *Smith v. Oriell*, 1 East, 368.

Money paid by one partner to another, before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it is not so applied, is provable as a debt under the commission of the bankrupt partner, although the solvent partner was not called upon to repay the debt to the joint creditor till after the bankruptcy of the other. *Wright v. Hunter*, 1 East, 20; 5 Ves. 792.

After an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands; then the solvent partner died, leaving the defendant his executor; and afterwards a commission of bankruptcy was taken out against the surviving partner, and his estate assigned to the plaintiffs:—Held, that they were tenants in common with the solvent partner, and after his decease, with his representatives, by relation of law from the act of bankruptcy, and could therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, 1 East, 363.

A trustee, with the consent of his cestui que trust, pledged Madras government notes held by him in trust for the benefit of a firm of which he was a partner. The notes were afterwards redeemed, and delivered to the firm. Subsequently the firm, without the consent of the cestui que trust, pledged them for a similar purpose. The firm being insolvent and bankruptcy imminent, the trustee redeemed the notes with partnership assets, indorsed them to himself personally, and replaced them in his private chest. The firm became bankrupt:—Held, that there was no fraudulent preference. *Sinclair v. Wilson*, 20 Beav. 324; 24 L. J., Ch 537; 1 Jur., N. S. 967.

**k. Seizing Debtor's Goods.**

A railway company contracted with R., that he should build a bridge for the company on the railway; he was to provide instruments and materials; and, if the company's architect considered that R. did not proceed with expedition, the company, on seven days' notice, might employ other workmen, and, in that case, might use the implements and materials of R., which, for the time being, should be used by him about the works; and he was to repay all additional expenses. The company was to have a lien on the implements and materials which should be upon the ground whereon the bridge was to be built, as a security for the completion of the works, R. undertaking to execute such deeds as counsel for the company should advise for confirming the lien. A fiat issued against R. on 31st July, on which day the company took possession of the implements and materials used by him. On the 1st of August, the company gave notice as provided in the contract; on the 2nd of August, they commenced completing the bridge, and, in so doing, used some of the materials, and detained the rest:—Held, that the agreement was lawful, not being made in contemplation of bankruptcy. *Hawthorn v. Newcastle-on-Tyne and North Shields Railway Company*, 3 Q. B. 734, n.; 2 Railw. Cas. 288.

Held, secondly, that the company was not entitled to use the implements and materials till the expiration of the seven days' notice, and that the previous use was a conversion. *Id.*

Held, thirdly, that they were entitled to a lien upon all such implements and materials used, as were upon any land possessed by the company, on which the building of the bridge was, in a popular sense, being carried on; but not to a lien upon the materials of a temporary railway constructed for bringing articles to the bridge from an adjoining river, nor to a crane at the end of such temporary railway, not being on the company's land. *Id.*

Held, fourthly, that these rights of the company were not invalidated by the possession of the bankrupt, under 6 Geo. 4, c. 16, s. 72, he being the true owner; nor by other implements and materials so used having been removed without any objection from the company's architect, the lien being a shifting one, and attaching to such articles as were brought from time to time, and ceasing as to such only as were removed; nor by the implements and materials not being scheduled. *Id.*

By an agreement between a guarantee society and H., after reciting that he was about to enter the service of a gas company, the society agreed with him to indemnify the company to the extent of 250*l.* against any loss that might occur through his dishonesty, and he agreed with the society that if they should receive any notice of any irregularity, default or claim intended to be made under the guarantee, it should be lawful for them by their officers, or any person authorized by them, to enter his house, and take possession of his goods; and, in case they should be called upon to make any payment under the guarantee, to sell the goods for their own indemnification. The guarantee was given accordingly, and H. having afterwards been guilty of dishonest conduct, the gas company called upon the society to pay the sum guaranteed. Thereupon the society, and the company by their authority, entered and

seized his goods. Meanwhile he had committed an act of bankruptcy, but of that, at the time of entry and seizure, neither the society nor the gas company had notice. He was subsequently adjudicated bankrupt, and his assignees brought an action for the entry and seizure against the guarantee society and gas company:—Held, that the agreement, and the entry and seizure of his goods under its provisions, constituted a transaction with the bankrupt protected by 12 & 13 Vict. c. 106, s. 133, and that his assignees were not entitled to recover. *Krehl v. Great Central Gas Company*, 5 L. R., Ex. 289; 39 L. J., Ex. 197; 23 L. T. 72; 18 W. R. 1035.

**l. Other Cases.**

Under 12 & 13 Vict. c. 106, s. 133, contracts, dealings, and all transactions entered into with a bankrupt *bonâ fide* before the fiat and the filing of the petition, are valid, notwithstanding a prior act of bankruptcy, provided the party to the transaction with the bankrupt had not notice of the act of bankruptcy. *Brewin v. Short*, 5 El. & Bl. 227; 24 L. J., Q. B. 297; 1 Jur., N. S. 798.

Under the same section, any act by the owner of goods in the possession of the bankrupt, which, if done before the act of bankruptcy, would have prevented the application of s. 125, is a transaction within s. 133, if done without notice of an act of bankruptcy. As if the owner demanded from the bankrupt possession of the goods. *Id.*

But where the owner, knowing that it was intended by the trader to execute an assignment of all his goods for the benefit of his creditors, went to take possession, but found the assignee under the assignment, which was an act of bankruptcy, in possession, and, upon stating why he came, was told by the assignee that he was too late, for that the assignee was in possession under the assignment, and the trader afterwards was made bankrupt:—Held, not to be within the protection of sect. 133, nothing appearing before the notice of the assignment beyond an intention to demand the goods. *Id.*

S., being indebted to the defendant, executed to him as security a bill of sale of his goods. Afterwards, on the 12th February, 1863, S., in whose apparent order and disposition the goods remained, was arrested and went to prison. On the 16th the defendant, knowing that S. had been arrested, left notice demanding repayment with S.'s wife, and immediately afterwards took possession of the goods, and sold them. On the 18th the defendant petitioned the Court of Bankruptcy in formâ pauperis, and on the 23rd was brought up to the county court, and adjudicated a bankrupt:—Held, that under 24 & 25 Vict. c. 134, s. 103, the adjudication, though made upon the 23rd, had relation back to the 12th, the date of the committal of S. to prison, and that the goods being then in his apparent order and disposition, with the consent of the true owner, passed to the assignees, s. 133 of the 12 & 13 Vict. c. 106, affording no protection in such a case. *Bramwell v. Eglinton*, 5 B. & S. 39; 33 L. J., Q. B. 130; 10 Jur., N. S. 583; 12 W. R. 551; 10 L. T. 295. Affirmed, 1 L. R., Q. B. 494; 35 L. J., Q. B. 163; 7 B. & S. 537—Ex. Ch.

Held, also, that, assuming the defendant to have been premature in taking possession of the

goods under the bill of sale immediately after demand for payment and non-compliance therewith, there was nothing to prevent him from taking possession after the lapse of a reasonable time before the 23rd of February, the date of the bankruptcy. *Id.*

A trader took possession of goods under an agreement with the owner that he should keep possession for a twelvemonth on payment of a certain sum; but if the money was not paid on a certain day, the owner should be at liberty to retake them. The goods continued in the possession of the trader until the stipulated time for payment, when, the money not having been paid, the owner sold them after an act of bankruptcy committed by the trader, but before the fiat issued:—Held, that this was a transaction protected by 2 & 3 Vict. c. 29, s. 1. *Young v. Hope*, 2 Ex. 105.

A., a trader, on the 2nd October, gave B., one of his creditors, an order for money drawn by a board of guardians of the poor on their treasurer, payable to A., but not to bearer or order. On the 4th October A. committed an act of bankruptcy, of which B. had notice on the 5th. On the 9th, the treasurer paid B. the amount of the order. A fiat issued against A. on the 22nd November:—Held, that A.'s assignees could not recover the amount of the order, as this was a transaction protected by 2 & 3 Vict. c. 29, s. 1, and that the transaction was, so far as the bankrupt was concerned, complete on the 2nd October. *Green v. Bradfield*, 1 C. & K. 449.

Where a bankrupt, whose property had been seized in execution, with a view of protecting himself, sent to request a friendly creditor, but who knew nothing of his being in bankrupt circumstances, to issue execution against him, which was done accordingly:—Held, that the transaction was not protected or rendered valid by 2 & 3 Vict. c. 29, s. 1. *Hall v. Wallace*, 7 M. & W. 353; 5 Jur. 198.

Giving cash for a bank post bill was a payment within the protection, extended by 6 Geo. 4, c. 16, s. 82, to all payments really and bona fide made to any bankrupt before the commission. *Willis v. Bank of England*, 4 A. & E. 21; 5 N. & M. 478.

Payment of bills to support the credit of a declining trader, without notice of any act of bankruptcy, is not fraudulent. *Foxcroft v. Devonshire*, 2 Burr. 931; 1 W. Bl. 193.

On the 29th December, 1842, A. distrained for 120*l.* for rent due to him from B. at Michaelmas, the goods of B. being then in the possession of C., to whom they had been conveyed by deed on the 13th December, in trust for B.'s creditors. On the 3rd January, 1843, it was agreed between A. and C. that the rent should be paid, A. consenting to forego the quarter's rent due at Christmas. The goods were accordingly appraised and condemned at 136*l.*, being the amount of the rent and expenses, and that sum was handed over to A. On the 9th January a fiat issued against B., the act of bankruptcy being the execution of the deed:—Held, that so much of the sum paid to A. as exceeded a year's rent was not money received to the use of the assignees. *Lackington v. Elliott*, 7 M. & G. 538; 8 Scott, N. R. 275; 13 L. J., C. P. 153; 8 Jur. 695.

The true owner of goods, in the order and disposition of a bankrupt at the time of the act of bankruptcy may, at any time before the filing of the petition, not having notice of the act of bank-

ruptcy (even though in contemplation of bankruptcy), remove the goods out of the bankrupt's possession, and retain the same as against the assignees; and although the assignees afterwards obtain an order from the court for the sale of the goods, such order, being *ex parte*, does not bind the true owner; nor can they, under such circumstances, maintain an action against him, whose removal of the goods is a dealing or transaction protected under s. 133. *Graham v. Furber*, 2 C. L. R. 10; 14 C. B. 134; 23 L. J., C. P. 10; 18 Jur. 61.

A. and B., brothers, partners in trade, and B. being indebted to the partnership, B. borrowed 500*l.* from a loan company, which was secured by a bond of C. (the uncle of A. and B.) and two other persons, and by a policy of assurance on B.'s life. Of this sum B. paid 400*l.* into the partnership funds. B. afterwards executed a warrant of attorney in favour of C., to indemnify him against the consequences of the bond. B. having made default in payment of the premiums on the policy, the company called on C. for payment under this bond; whereupon C. entered up judgment on the warrant of attorney against B., and issued a *fi. fa.* which was levied on the partnership effects on the 5th August, 1840. At that time A. and B. were in a state of hopeless insolvency. On the 7th August, another *fi. fa.*, at the suit of another creditor, was issued against B., and levied on the partnership effects. On the 8th August, A., in the name of the partnership, indorsed and delivered to C., on account of his claim against B., bills of exchange drawn by A. and B. for 81*l.*, which were paid at maturity; and on the 10th, A. paid to C., on the same account out of the moneys of the firm, a further sum of 80*l.* in cash. On the 11th a docket was struck against A. and B., and on the 12th a fiat issued against them, grounded on an act of bankruptcy committed on the 5th August, and on the 13th they were adjudged bankrupts:—Held, that the assignees were entitled to recover from C. the amount of the payments made to him on the 8th and 10th August, and that these were not protected by 2 & 3 Vict. c. 29, s. 1, not being payments really and bona fide made, even though C. was assumed to have received them without notice of the bankruptcy. *Turquand v. Vanderplank*, 10 M. & W. 180; 12 L. J., Ex. 132.

After notice of trial given in an action on a bill of exchange, the defendant obtained an order for a commission to examine witnesses abroad, on payment into court of a portion of the claim. The money was paid in accordingly, but the commission was not acted on. The defendant having subsequently become bankrupt, and assignees appointed, the plaintiff obtained leave to proceed with the action, which was tried, and the defendant not appearing, a verdict was given for the plaintiff:—Held, that the plaintiff was entitled to the money which had been paid into court, and that he was not deprived of this right by 12 & 13 Vict. c. 106, s. 184. *Murray v. Arnold*, 3 B. & S. 287; 32 L. J., Q. B. 11; 9 Jur., N. S. 461; 7 L. T. 385; 11 W. R. 147.

Money paid into court, under 7 & 8 Geo. 4, c. 71, s. 2, was not a payment to a creditor within the protection of 6 Geo. 4, c. 16, s. 82. *Ferrall v. Alexander*, 1 D. P. C. 132.

Payments out of court to a plaintiff under 43 Geo. 3, c. 43, s. 2, were protected against the assignees. *Reynolds v. Wedd*, 4 Bing. N. C. 694; 6 D. P. C. 728; 6 Scott, 699; 1 Arn. 230; 2 Jur. 495.

A., being a trader, before any act of bank-

ruptcy, directed his broker, who had authority to distrain for rents due to him, to pay a certain sum to B. in satisfaction of a debt, and the broker *bonâ fide* agreed with B. to pay him as soon as he received the rents, and after this A. became bankrupt :—Held, that the assignees of A. could not recover this sum from the broker, though he did not in fact pay it over to B. till after the commission issued. *Bedford v. Perkins*, 3 C. & P. 90.

## 2. UNDER THE BANKRUPTCY ACT, 1869.

### a. *Fraudulent Conveyances.*

#### i. *What are.*

#### a. *Assignments of Debtor's Property.*

*See also ante*, IV., ACT OF BANKRUPTCY.

**When Creditor entitled to have set aside.]**—The result of the authorities decided upon 13 Eliz. c. 5, is, first, that where a debt contracted antecedently to the settlement exists, a subsequent creditor has the same rights as an antecedent creditor would have against the settlor; and secondly, that whether or not the settlor had any intention to defraud his creditors, a creditor having a debt existing at the date of the settlement, has a right to have the settlement set aside if the ultimate effect of it is to delay or defraud him with regard to his debt. *Freeman v. Pope*, 39 L. J. Ch. 148. Affirmed, 5 L. R., Ch. 538; 39 L. J., Ch. 689; 21 L. T. 816; 18 W. R. 906—C. A.

A bill of sale of all the grantor's then existing and after-acquired property, by way of mortgage to secure an existing debt and future advances, is not necessarily void under the statute 13 Eliz. c. 5. It will only be void if it is not made *bonâ fide*, i.e., if it is a mere cloak for retaining a benefit to the grantor. Nor, if the time be past within which the execution of the deed is an act of bankruptcy, available for adjudication against the grantor, or within which the deed can be set aside as a fraudulent preference, can it be treated as void under the bankruptcy law. *Games, Ex parte, Bamford, In re*, 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 744—C. A.

The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing and warehousing it, which he did, entering the brandy at M.'s request in his own name and paying charges amounting to 47*l.* Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for 245*l.* for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented to take M.'s acceptance at seven days for a balance of account, including the hire and the 47*l.*, upon receiving M.'s authority to sell the brandy if the bills were not met. This acceptance not being met, the defendant sold the brandy. The firm was afterwards adjudicated bankrupt, and the trustee sued the defendant in trover for the value of the brandy. The transaction was *bonâ fide*, but the brandy formed in fact the whole property of the firm :—Held, that although the transaction under which the defendant obtained power to sell the brandy might be a "conveyance, gift, delivery or transfer" within the meaning of the Bankruptcy Act, 1869, s. 6, sub-s. 2, it was not fraudulent within the meaning of the act, because the de-

fendant's consent to give the bankrupt seven days' time to pay the debts due, taking his acceptance at seven days, was an equivalent for the power of sale given to the defendant. *Philps v. Hornstedt*, 1 Ex. D. 62—Ex. Ch. Affirming, 8 L. R., Ex. 26; 42 L. J., Ex. 12; 21 W. R. 174.

When an unregistered bill of sale of goods has been given to B. by A. and kept secret, and not acted upon, and subsequently the goods have been sold to a purchaser, and the proceeds of the goods paid to B., the payment to B. cannot be set aside, although A. was insolvent at the time, and bankruptcy followed shortly afterwards. *Wilson, Ex parte*, 29 L. T. 860; 22 W. R. 241—L. J.

The purchaser at the same time bought the bankrupt's stock-in-trade, being nearly all the rest of his property, and gave a bill of exchange for the price. This bill was handed to B. for the benefit of the creditors, but not indorsed to him :—Held, that the whole transaction was not an assignment of the bankrupt's whole property for the benefit of his creditors. *Id.*

**Private Arrangement not Binding on Creditors.]**—W. was a partner in the firm of W. & Co. and also carried on another business separately from the partnership on his own private account. W.'s private transactions in the latter business involved him in irretrievable losses, the other partners in the firm excluded him from their partnership, purchasing his share for 749*l.* 15*s.*, so as to prevent the partnership accounts being interfered with in the proceedings under W.'s prospective bankruptcy :—Held, that this arrangement between the partners, although within the terms of their deed of association, did not bind third parties, and that the trustee for the creditors of W. was entitled to an account of the partnership assets and profits. *Warden, Ex parte, Williams, In re*, 21 W. R. 51.

**Retaking Possession.]**—B. sold certain furniture, stock-in-trade, &c., together with the goodwill and book debts of her business as a baker to Y. for a certain price payable by quarterly instalments of 15*l.* each, subject to a proviso for B.'s retaking possession on default in payment of the instalments. Y. made default, and B. resumed possession on the 7th of November, 1870. Y. was adjudicated a bankrupt on the 24th November, 1871 :—Held, that the retaking of possession was not fraudulent or void as against the trustee in the bankruptcy. *Batchelor, Ex parte, Young, In re*, 20 W. R. 826.

Y. also made an assignment to B. of the whole of his (Y.'s) property in repayment of a subsisting debt; the deed was within twelve months of the adjudication :—Held, that the deed was fraudulent and void as against the trustee in bankruptcy. *Id.*

**Dissolution of Partnership invalid.]**—A partnership of two was dissolved, the outgoing partner assigning to the continuing partner all his share in the partnership assets, and the latter covenanting to pay the partnership debts. At the date of the assignment the firm was insolvent, as was also each of the partners. The firm being shortly afterwards adjudged bankrupt :—Held, that the transaction was void; that it did not operate as a conversion of the outgoing partner's property into the separate estate of the continuing partner; and that the whole of the property, as it existed belonging to the bankrupts at

the date of the assignment, must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors. *Mayou, Ex parte, Edwards-Wood, In re, 4 De G., J. & S. 664.*

**Assignment on Demand pursuant to Agreement.**—Two traders, brothers, obtained advances amounting to 500*l.* from their father and brother in various sums, and in 1870, on the last advance of 250*l.*, they signed an agreement that they would, on demand, assign the lease of their premises and their business, stock-in-trade, and book debts to the creditors, with a proviso that if they should repay the sums advanced the agreement should be void, but if they should fail to do so a valuation should be made, and the balance, if any, should be paid to the debtors. At the same time the lease was deposited with the same creditors as a security for the due performance of the agreement. In 1873, the debtors became embarrassed, and the creditors demanded the execution of an assignment in pursuance of the agreement, which was accordingly executed, and the balance of the valuation of the property, amounting to 123*l.*, was paid to the debtors. The assignment included substantially the whole of the debtor's property, and the creditors took possession of it forthwith. A few days afterwards the debtors filed a petition for liquidation, and the trustee applied to have the deed of assignment of 1873 declared void:—Held, that the agreement of 1870 became a binding security on demand being made, and that the assignment of 1873, being based upon it, was valid. *Icard, Ex parte, Cook, In re, 9 L. R., Ch. 271; 43 L. J., Bk. 31; 30 L. T. 7; 22 W. R. 342.*

**Consideration for.**—A trader on the 28th of August executed a bill of sale of substantially the whole of his property to secure a debt for which the grantee had recovered judgment on the 3rd of July, and another debt which he owed the grantee. The grantor had on the 4th of July written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him on demand a bill of sale to secure the judgment debt and such other sums as he owed him. The grantee did not enter into any agreement not to enforce the judgment, but in fact he did not issue execution. On the 29th of August another creditor levied execution at the grantor's place of business, and on the 1st of September the grantor filed a liquidation petition. He had between the 4th of July and the 29th of August received by the carrying on of his business sums amounting to 10,000*l.*:—Held, that no equivalent had been given for the bill of sale, and that it was void as against the trustee in the liquidation. *Cooper, Ex parte, Baum, In re, 10 Ch. D. 313; 48 L. J., Bk. 40; 39 L. T. 521; 27 W. R. 298—C. A.*

**Growing Crops.**—A bill of sale of growing crops does not require registration under the Bills of Sale Act, 1854. *Payne, Ex parte, Cross, In re, 11 Ch. D. 539; 40 L. T. 563; 27 W. R. 808—C. A. And see Brantom v. Griffiths, 2 C. P. D. 212; 46 L. J., C. P. 408; 36 L. T. 4; 29 W. R. 313—C. A.*

On the 2nd of May a farmer executed a bill of sale of his furniture and growing crops, being the whole of his property, to P., the only consideration for it being the forbearance of P. to

seize the property under a bill of sale given to him four months previously, as he alleged, for value, and not registered. On the 3rd of May the grantor gave a bill of sale of the same property to C. in consideration of a present advance of money. C. had no notice of P.'s bill of sale. Neither of the bills of sale was registered. C. took possession of the property on the 20th of August, and P. on the 23rd of August. On the 26th of August the grantor filed a liquidation petition, and on the 1st of October he was adjudicated a bankrupt:—Held, that P.'s bill of sale was void as against the trustee in bankruptcy of the grantor as an act of bankruptcy, and that C.'s bill of sale, so far as regarded the furniture, was also void as against the trustee for want of registration, notwithstanding the fact that he had no notice of the act of bankruptcy to which the trustee's title related back. *Id.*

But, as to the growing crops, held, that C.'s bill of sale was a protected transaction by virtue of ss. 94 and 95 of the Bankruptcy Act, 1869, and was therefore good as against the trustee. *Id.*

The fact that a bill of sale is set aside as void against the trustee in bankruptcy of the grantor does not entitle the trustee to stand in the place of the grantee, and thus acquire priority over the grantee under a valid bill of sale subsequently executed by the grantor. *Id.*

**Voluntary Settlements.**—A settlor, at the time of making a voluntary settlement, made a statement of his assets and liabilities, shewing a balance in his favour. He was incurring heavy liabilities as managing director of a company, and from transactions on the Stock Exchange. Nine months after the date of the settlement he called a meeting of his creditors, and laid before them a statement shewing himself to be insolvent, and subsequently he became bankrupt:—Held, that the burden was upon him to shew solvency at the date of the settlement. *Crossley v. Elworthy, 12 L. R., Eq. 158; 40 L. J., Ch. 480; 24 L. T. 607; 19 W. R. 842.*

Semble, that damages recovered in an action commenced after the settlement for inducing the settlor to become a member of a company by false and fraudulent misrepresentations made previously to the settlement must be taken into consideration in estimating the settlor's solvency at the date of the settlement. *Id.*

A distribution by a debtor, when in a weak state of mind and of body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts, is void as against creditors under 13 Eliz. c. 5, the children being aware at the time that the creditors' claims would be defeated, though the debtor had no such intention. *Cornish v. Clark, 14 L. R., Eq. 184; 42 L. J., Ch. 14; 26 L. T. 494; 20 W. R. 897.*

In the absence of an actual intent to defeat, delay, or hinder creditors, a voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement, ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid. *Kent v. Riley, 14 L. R., Eq. 190; 41 L. J., Ch. 569; 27 L. T. 263; 20 W. R. 852.*

A voluntary settlement whereby the settlor

takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect. *Mackay v. Douglas*, 14 L. R. Eq. 106; 41 L. J., Ch. 539; 26 L. T. 721; 20 W. R. 652.

When a voluntary settlement is made on the eve of the settlor engaging in trade, the burden rests upon him of shewing that he was in a position to make it. *Ib.*

In order to set aside a voluntary settlement as being void as against creditors, it is not necessary to shew that the settlor contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency. *Ib.*

A debtor is not entitled to set up, as a defence to a suit to set aside a voluntary settlement, a release contained in an inspectorship deed by which he vested all his property in the inspectors, the settlement or the existence of the property comprised in it not having been disclosed at the time the inspectorship deed was executed. *Ib.*

Where a clergyman, with an annual income of nearly 1,000*l.*, made in 1863 a voluntary settlement in favour of his god-daughter, and died in 1868 in insolvent circumstances, owing to his bankers the balance of a debt which had been contracted prior to the date of the settlement, a creditor, whose debt was contracted subsequently to the settlement, obtained a decree to set aside the settlement as fraudulent, within 13 Eliz. c. 5; although, having regard to the income and means of the settlor, the court was of opinion that in executing the settlement he had no intention whatever to cheat his creditors at that time. *Ib.*

A trader made a voluntary settlement of real estate which was subject to a mortgage, and covenanted with the trustees of the settlement to pay the interest on the mortgage, and, at their request, to pay off the principal of the mortgage debt. At the time of making the settlement the settlor was able to pay all his debts, exclusively of the mortgage debt, but not inclusive of it. He became bankrupt within ten days after the date of the settlement:—Held, that, inasmuch as the settlement comprised the whole estate, and not merely the equity of redemption, the settlement was void as against the trustee in bankruptcy under the Bankruptcy Act, 1869, s. 91. *Huxtable, Ex parte, Conibeer*, *In re*, 45 L. J., Bk. 59; 34 L. T. 605; 24 W. R. 685—C. A.

In 1858 a man, who was not then engaged in trade, and who owed no debts, made a voluntary settlement of 1,000*l.* The trusts of the deed were, a life estate to himself determinable on bankruptcy, then a life estate to his wife for her separate use, then trusts for the children of the marriage, and an ultimate remainder to the settlor. In 1873 he for the first time engaged in trade. In 1875 he was adjudicated a bankrupt:—Held, that the settlement was void in toto as against the trustee. *Pearson, In re, Stephens, Ex parte*, 3 Ch. D. 807; 35 L. T. 68; 25 W. R. 126.

A trader, doing business to the amount of 100,000*l.* per annum, executed two voluntary settlements in favour of his wife, the first being two years and the second one year before his death. By the first he settled two policies of assurance, each for 1,000*l.*; by the second he settled his furniture, worth about 1,000*l.* An inquiry into the state of his affairs having been directed, it was found that at the date of the first settlement his debts would have exceeded his assets by 1,293*l.*, and at the date of his second settlement his debts were 10,726*l.* over his assets. A bill was filed by a creditor, whose debt was contracted after the first, but before the second settlement, to set aside both deeds. No debt was proved to exist which had been contracted at the date of the first settlement:—Held, that as the settlor's debts exceeded his assets when both deeds were executed, he was then insolvent, and the deeds must be declared fraudulent and void as against the plaintiff and his other creditors. *Taylor v. Coenen*, 1 Ch. D. 636; 34 L. T. 18.

A term of years was bequeathed to the wife of one who was not then a trader. Subsequently he, while perfectly solvent, executed a deed purporting to convey all his interest in the term of years to his wife for her sole benefit. He then became a trader, and afterwards became bankrupt:—Held, that the deed was not void as against his assignees, who therefore were not entitled as of right to the term of years. *Cross, In re*, 19 W. R. 153.

Held, also, that as he, under 27 Eliz. c. 4 (1*r.*), could have defeated the deed by a subsequent conveyance for value, the assignees, if permitted by the court, could also defeat it; and that the court had power to direct the assignees to do so, but that, under the circumstances, the court would not exercise this power. *Ib.*

A voluntary settlement was executed, in 1865, by a trader who, in 1874, filed his petition for liquidation:—Held, that the settlement was governed by the Bankruptcy Act, 1869, s. 91, and that, as the trader was unable to shew that he was solvent at the time it was executed, it was void as against the trustee. *Davson, Ex parte, Davson, In re*, 19 L. R., Eq. 433; 44 L. J., Bk. 49; 32 L. T. 101; 23 W. R. 354.

**Ability to pay all Debts.]**—In determining whether a trader who has executed a voluntary settlement was, within the meaning of s. 91 of the Bankruptcy Act, 1869, "at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement," the value of the implements of his trade and of the goodwill of his business is not, if he was intending to continue his business, to be taken into account. At any rate, if that value is to be taken into account, it can only be such a value as would be realized at a forced sale. Per Lindley, L. J.: It is essential that the settlor should be able to pay his debts in the way in which he is proposing to pay them, i.e., in the ordinary course of his business, if he is proposing to continue it. A trader, who had for many years carried on the business of a baker, and had saved some money, being about to purchase a grocery business, which he intended to carry on in addition to the other, made a voluntary settlement of the bulk of his property for the benefit of his wife and children. He afterwards bought the grocery business, and

carried it on for about six months, but lost money by it. He then sold it for as much money as he had given for it, and afterwards carried on the baker's business alone, until, about three years after the execution of the settlement, he filed a liquidation petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid :—Held, that, under the circumstances, the settlement was void against the trustee in the liquidation under s. 91 of the Bankruptcy Act, 1869. *Russell, Ex parte, Butterworth, In re*, 19 Ch. D. 588 ; 51 L. J., Ch. 521 ; 46 L. T. 113 ; 30 W. R. 584—C. A.

**Settlement of Leasehold Property to which Liability is attached.**—A settlement of leasehold property, to which liability is attached, is of necessity a settlement for valuable consideration, and cannot therefore be avoided as a voluntary settlement under s. 91 of the Bankruptcy Act, 1869, even though no other consideration be given. *Doble, Ex parte, Doble, In re*, 38 L. T. 183 ; 26 W. R. 407.

A. being subject to a possible liability as surety for D., assigned the lease of his farm and the chattels thereon to his children B. and C., they undertaking to pay him an annuity of 50l. At the date of this assignment D. was insolvent, although it did not appear that the fact was known to B. and C. Apart from the property assigned to B. and C., A. had not sufficient at the date of that assignment to discharge his liability as surety, and when upon the failure of his principal to pay the debt, he was called upon to do so, he made default, and was subsequently adjudicated a bankrupt. Upon an application by the trustees to have it declared that the assignment to B. and C. was void under s. 91 of the Bankruptcy Act, 1869 :—Held, that the assignment of the leaseholds was not voluntary on the ground that the assignment of leasehold property to which a liability is attached is necessarily a conveyance for valuable consideration. *Id.*

**Conveyance to Trustees for exclusive Benefit of Creditors assenting to Deed.**—A trader, in insolvent circumstances, executed a deed of arrangement by which he conveyed all his property to trustees, who were to carry on his business and to collect his debts and to pay a dividend to such of his creditors as were parties to or assented to the deed. In case of any creditors refusing to assent to the deed, the trustees were empowered to hand over such creditors' dividend to the debtor. The deed was executed with the object of defeating executions which might prevent the equal distribution of the debtor's property among his creditors. The creditors who had not assented to the deed obtained a judgment and put in an execution on goods included in the deed and in the actual possession of the trustees :—Held, that the deed was fraudulent under 13 Eliz. c. 5, and that the trustees had no property in the goods seized as against the creditors. *Spencer v. Slater*, 4 Q. B. D. 13 ; 48 L. J., Ch. 480 ; 39 L. T. 424 ; 27 W. R. 134.

**Substantial Advance.**—In February, 1865, a builder mortgaged to his uncle the whole of his property, real and personal, present and future, to secure 450l. previously due, and 300l. then advanced. The deed was not registered under

the Bills of Sale Act. He became bankrupt on the 20th July, 1866, and on the 4th August notice of the deed was given to the assignees :—Held, that as there was a substantial advance made at the time of the deed, it justified the execution of the deed, which was, therefore, not fraudulent or void under 13 Eliz. c. 5 ; and that, even if it was originally an act of bankruptcy, the lapse of twelve months and upwards between its execution and the fiat would, under the Bankruptcy Act, 1849, s. 88, render it valid. *Allen v. Bonnett*, 5 L. R., Ch. 577 ; 23 L. T. 437.

**Substantial Exception.**—A substantial exception to a conveyance of the whole of a trader's property is where he retains so much as may enable him to continue his business. *Id.*

**Trustee of Voluntary Settlement not Purchaser for Valuable Consideration.**—The word "purchaser" in s. 91 of the Bankruptcy Act, 1869, means a buyer in the ordinary commercial sense, not a purchaser in the legal sense of the word. Therefore, the trustee of a post-nuptial settlement of leaseholds for the benefit of the settlor's wife and children is not a purchaser of the property for valuable consideration within the meaning of s. 91. *Hillman, Ex parte, Pumfrey, In re*, 10 Ch. D. 622 ; 48 L. J. Bk. 77 ; 40 L. T. 177 ; 27 W. R. 567—C. A.

**Evidence to prove Consideration.**—C., in 1855, mortgaged a house to the plaintiff in fee, handing over to him the deed of conveyance to himself, with the receipt of the vendors indorsed. In 1851, C. had made a voluntary conveyance of the house to trustees in trust for his wife and children, the consideration expressed being natural love and affection :—Held, that though evidence might be adduced to shew that valuable consideration had been in fact given for the settlement, such evidence must be of a most conclusive kind, and that on the evidence adduced the mortgage must prevail. *Lery v. Creighton*, 22 W. R. 605—L. J.

A husband, by will, left his house and business establishment to his wife for life, and after her death to his son, and a pecuniary legacy to his daughter. The son borrowed the money from his sister, and as security he and his mother gave his sister a bill of sale on the property left to them. In an issue between the sheriff and an execution creditor as to the bona fides of the bill of sale :—Held, that to shew the nature of the transaction, the will, though unproved, ought to have been received in evidence as a signed declaration of the former owner of the property before it passed out of his possession. *O'Sullivan v. Burke*, 9 Ir. R., C. L. 105.

**Bill of Sale in substitution for Unregistered Bill—Fraud on Bankruptcy Laws.**—In order to secure an advance by F. to P., the liquidating debtor, a bill of sale of part of P.'s property was on the 30th of March, 1876, executed by P. to F. on the agreement that the deed should not be registered for six (and afterwards for nine) months, if P. would execute a new bill of sale when called upon to do so. Accordingly, at intervals of about twenty-one days, the bill of sale was renewed fourteen times, the fifteenth and last deed being executed on the



11th of January, 1877. The first and last only of the series were stamped, and the last only was registered. Each deed recited a loan at the date of the deed of the amount purported to be thereby secured; but in fact there was only one loan, increased on two occasions by further advances. In the interval, that is to say, on the 26th of September, 1876, the debtor committed an act of bankruptcy by neglecting to satisfy a summons served by B., a creditor; and on the 6th of December B. served on the debtor a petition for adjudication in bankruptcy, under which a receiver was appointed on the 9th of December. The petition for liquidation was filed on the 18th of January, 1877; and on the 5th of February, F., the bill of sale holder, purchased and took an assignment of the debt of B.:—Held, that whatever might be the validity of the bill of sale of the 11th of January, 1877, at law, it was wholly invalid in bankruptcy, on the grounds that it purported to convey property which was then vested in the receiver, that it was based on an untrue recital, and that it was part of a scheme to defeat the operation of the bankruptcy laws; and that the title of the trustee in liquidation related back to the act of bankruptcy under the debtor summons. *Furber, Ex parte, Pellew, In re*, 6 Ch. D. 181; 36 L. T. 668.

Held, also, that the purchase by the bill of sale holder of the summoning creditor's debt, though it might purge the act of bankruptcy as between the debtor and creditor, could not abrogate the proceedings in bankruptcy, so as to defeat the rights of the other creditors. *Ib.*

**Partnership Transactions.]**—S., who was in partnership with B., indorsed bills of exchange belonging to the partnership to N., in payment of a private debt which he owed him, but such indorsement was a fraudulent preference, and N. had notice of its being a fraud on the firm. S. subsequently committed an act of bankruptcy, on which he was made bankrupt, and N. received the amount of the several bills of exchange at maturity:—Held, that the amount so received by N. was received to the use of the assignees of S., and B., the solvent partner, and that they jointly could sue N. for such amount as money had and received to their use. *Heilbut v. Nevill*, 5 L. R., C. P. 478; 39 L. J., C. P. 245; 22 L. T. 662; 18 W. R. 898—Ex. Ch.

#### *B. Assignments on Marriage.*

**Of Lands not included in the Articles.]**—By marriage articles, in June, 1865, the intending husband covenanted with the intending trustees to pay off the incumbrances on a leasehold estate, and to convey it to them, free from incumbrances, upon the trusts therein declared. In July, 1869, the husband being (according to his own account) pressed by one of the trustees to perform the covenant to convey to them the estate comprised in the articles of June, 1865, freed from incumbrances, and being unable to do so, proposed to convey other lands in lieu upon the trusts of the marriage articles. The husband's interest in the substituted lands, owing to the incumbrances thereon, was worth little more than his interest in the lands subject to the original articles. The husband, who subsequently, in January, 1870, became bankrupt, swore that in July, 1869, he neither apprehended nor contemplated bankruptcy. At that time

legal proceedings were pending which resulted in an award against him for 7,847l., in November, 1869:—Held, first, that the settlement of July, 1869, must be declared fraudulent and void against creditors, in so far as it affected to convey property not included in the marriage articles of June, 1865. *Gates v. Fabian, Wieland, In re*, 19 W. R. 61.

Held, secondly, that the trustees of the marriage articles might claim to prove under the bankruptcy in behalf of the trust fund, but that they must both join in the proof. *Ib.*

**Trustee proving for Funds in Bankruptcy.]**—A trader by his marriage settlement covenanted that he would pay 6,000l. to the trustees on or before a given day, to be held by them on the trusts of the settlement. Before the money was payable he filed a petition for liquidation by arrangement:—Held, that a covenant for payment of a sum of money not specifically earmarked was not within the Bankruptcy Act, 1869, s. 91, as a covenant for the future settlement of money or property in which the trader had no interest at the date of his marriage, and that the trustees were entitled to prove against his estate for the 6,000l., less the value of the settlor's life interest, which they were entitled to retain. *Bishop, Ex parte, Tonnes, In re*, 8 L. R., Ch. 718; 42 L. J., Bk. 107; 28 L. T. 862; 21 W. R. 716. Affirming, 28 L. T. 567; 21 W. R. 559.

**Conveyance of future Property.]**—A trader, in April, 1868, executed a settlement upon his marriage, by which he settled certain specific chattels upon trust for the benefit of his wife and the issue of the marriage. The settlement also contained a covenant by the settlor with the trustees that all future real or personal estate which he should at any time during the coverture be possessed of, or entitled to, or should otherwise acquire by devolution, gift, devise, bequest, purchase, accumulation, or otherwise howsoever, should be conveyed and assigned to the trustees upon the trusts thereby declared. In 1870, the settlor bought shares in a company. In February, 1873, he was adjudicated a bankrupt. At this time the shares were standing in his name, but the certificates were in the possession of his wife's father, and they were afterwards delivered to the trustees of the settlement. It was shewn that the settlor was solvent at the date of the settlement:—Held, that the covenant was void as against the creditors, and that the trustee under the bankruptcy was entitled to the shares. *Bolland, Ex parte, Clint, In re*, 17 L. R., Eq. 115; 43 L. J., Bk. 16; 29 L. T. 543; 22 W. R. 152.

**Fraudulent Recitals do not invalidate.]**—C., who carried on the business of a flax spinner at the Shepley Mills in partnership with R., by a settlement made in contemplation of his marriage, after reciting that he was indebted to his intended wife in 20,000l., covenanted to pay the 20,000l. to the trustees of the settlement, upon trust that as soon as he should become owner in fee simple of the Shepley Mills estate, which he had agreed to purchase, they should advance the 20,000l. to him on the security of the same estate; and it was declared that the trustees should stand possessed of the 20,000l. and the securities for the same upon trust to pay the in-

come to his intended wife for life for her separate use, and after her death to C. during his life or until he should become bankrupt, with remainder in trust for the children of the marriage, and in default of children, for his wife absolutely. The recital that C. was indebted to his intended wife was entirely false, and C. was at the time of the marriage in insolvent circumstances; but the wife had no knowledge of the insolvency of her husband, and understood nothing about the recitals of the arrangement as to the 20,000*l.*, except that that sum was to be settled. C. subsequently purchased the Shepley Mills estate, and mortgaged it to the trustees of the settlement for securing 20,000*l.*, but no money actually passed between the parties. C., and also his firm, afterwards became bankrupt, and a bill was filed by the trustee in C.'s bankruptcy against C. and his wife, the trustees of the settlement, and the trustee in the bankruptcy of the firm, praying that the settlement and the mortgage might be set aside as fraudulent against the creditors; and that the rights of all parties might be declared:—Held, that, notwithstanding the falsity of the recitals, the settlement and the mortgage deed were valid against the creditors so far as concerned the interests of the wife and the children. *Keenan v. Crawford*, 6 Ch. D. 29; 46 L. J., Ch. 729; 37 L. T. 322; 25 W. R. 49—C. A.

Held, that it would be premature to decide any question as to the future life interest of C. contingent on his wife's death in his lifetime. *Id.*

Held, also, that as the plaintiff's case had entirely failed, the court had no power to decide any question between the trustees of the settlement and their co-defendant, the trustee in the bankruptcy of the firm. The husband and wife having joined in their defence, the bill was dismissed against them both with costs. *Id.*

**Covenant to settle Share under Will.]**—A trader, who was entitled under his father's will to a share in his property, subject to a power for the widow to appoint among himself and the other children, on his marriage covenanted to settle his share whether appointed or unappointed. The widow appointed one-third to him and the remainder to other children, and subsequently he became bankrupt:—Held, that the covenant was not void under s. 91 of the Bankruptcy Act, 1869. *Andrews, In re*, 7 Ch. D. 635; 38 L. T. 137; 26 W. R. 572.

**Policies of Assurance.]**—In April, 1870, a trader effected two policies of assurance on his own life. In April, 1871, he surrendered them to the office and received in exchange two policies at the same premiums and entitled to the same privileges as the former ones, and expressed to be for the benefit of his wife if she survived him, but for his own benefit if she predeceased him. In January, 1873, he became a liquidating debtor, and in the August following he died without having obtained his discharge. It was alleged by the widow that the premiums on the new policies were paid out of her separate moneys. The trustee under the liquidation claimed the policies:—Held, that as the policies effected in 1870 had no surrender value the obtaining of the new policies in lieu thereof was not a settlement of property within the Bankruptcy Act, 1869, s. 91, and that consequently the new policies were protected by the Married Women's Property Act,

1870, s. 10, and the widow was entitled to their benefit. *Holt v. Everett*, 2 Ch. D. 266; 45 L. J., Ch. 433; 34 L. T. 599; 24 W. R. 471—C. A.

The 91st section of the Bankruptcy Act, 1869, has been so far modified by the Married Women's Property Act, 1870, s. 10, that a policy of insurance effected by a trader for the benefit of his wife or children in pursuance of the latter act is, in the event of his bankruptcy, valid as against his trustee, subject to a charge in favour of the trustee of an amount equal to all the premiums that it can be proved were paid by the trader with intent to defraud his creditors. *Id.*

*See HUSBAND AND WIFE, post.*

## ii. *Setting aside.*

A. made a voluntary conveyance of property in order to protect it from his creditors, and in pursuance of an arrangement with his creditors three years afterwards made under the Bankruptcy Act, 1861, s. 110, he filed a bill for a reconveyance:—Held, that his illegal purpose did not preclude him from obtaining relief. *Symes v. Hughes*, 9 L. R., Eq. 475; 39 L. J., Ch. 304; 22 L. T. 462.

In order to set aside a voluntary settlement as fraudulent against creditors, it is not necessary to prove an actual intention to delay creditors present to the mind of the settlor at the time. If the necessary consequence of the settlement is to hinder or delay creditors, the intention will be presumed. *Freeman v. Pope*, 5 L. R., Ch. 538; 39 L. J., Ch. 689; 21 L. T. 816; 18 W. R. 906.

A testator, with a view of placing property out of the control of liquidators, conveyed it to his stepdaughter absolutely, and, as she alleged, by way of gift. The conveyance purported to be for a valuable consideration, but was in fact voluntary. Subsequently the claims of the liquidators were satisfied out of other property belonging to the testator:—Held, that there was a resulting trust in favour of the testator, and that the property must be reconveyed for the benefit of his estate. *Couttas v. Swan*, 22 L. T. 539; 18 W. R. 746.

The trustee of a bankrupt's estate applied, under the Bankruptcy Act, 1869, s. 72, to the Court of Bankruptcy to declare a bill of sale, made by the bankrupt previously to his bankruptcy, fraudulent and void as against himself as trustee, and to order the assignee under the bill of sale, who had previously to the bankruptcy sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Court of Bankruptcy having made the order prayed for, and the assignee having accordingly paid over the proceeds of the sale:—Held, that the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods and the amount realized by the sale, inasmuch as by the proceedings in bankruptcy to recover the proceeds of the sale he had affirmed such sale and waived the tort. *Smith v. Baker*, 8 L. R., C. P. 350; 42 L. J., C. P. 155; 28 L. T. 637.

The grantee of a bill of sale and the trustee in bankruptcy of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its validity had been decided, the grantee forcibly removed part of the property:—Held, that, notwithstanding the fact

that the grantee had taken possession first, the removal was an unlawful act, and that the grantee must pay the trustee's costs of a motion to compel the restoration into the joint possession of the property which had been removed. *Fells, In re, Andrews, Ex parte*, 4 Ch. D. 509; 46 L. J., Bk. 23; 36 L. T. 38; 25 W. R. 382.

**Forged Conveyance—Rights of Trustee as representing Bankrupt.**—M. wrote to B. to the effect that he had forged B.'s name by putting it with his own to a bill of exchange for 100*l.*, which would become due in a few days. He implored B. to meet the bill, and offered, if he would do so, to give him a bill of sale of all his property to secure what he owed him. B., who was already an unsecured creditor of M. for 100*l.*, paid the 100*l.* bill and took a bill of sale of all M.'s property to secure 200*l.* Three weeks later B. entered and sold the property and satisfied his debt. The following month M. was adjudicated a bankrupt, the act of bankruptcy alleged being the execution of the bill of sale. The trustee applied for an order that B. should refund the proceeds of sale received by him, on the ground that the bill of sale was void as being given only for a past debt, and as being the price of a bargain for the concealment of a felony:—Held, that the wrong done not being an offence against the bankrupt law, the trustee was in no better position than the bankrupt would have been, and that, the latter having been a party to the wrong, the maxim "In pari delicto potior est conditio possidentis" would have applied, and no action could have been maintained. *Mapleback, In re, Butt, Ex parte*, 4 Ch. D. 150; 46 L. J., Bk. 14; 35 L. T. 503; 25 W. R. 103; 13 Cox, C. C. 374—C. A. Reversing, 35 L. T. 172.

#### b. Protected Transactions.

##### i. Transactions protected by Section 34.

**Advance Repayable in Monthly Instalments—Monthly Tenancy.**—A member of a building society borrowed 7,500*l.* from the society, which was to be repaid in a series of monthly instalments of 7*l.* 17*s.* 6*d.* each, including interest at 7 per cent. The instalments were payable at the monthly meetings of the society, and, if the member neglected to pay them when due, he became liable to a fine at the rate of 5 per cent. per month on the total amount in arrear and unpaid at each meeting. To secure the loan he executed to the trustees of the society a mortgage of real estate. The deed contained a proviso that if the member should fail for three monthly meetings to pay his subscription, interest, fines, or other moneys, or to observe the regulations of the society, or in the event of his becoming bankrupt, the mortgagees might enter into possession or receipt of the rents of the mortgaged property. And "for the better securing the payments which by the rules of the society ought to be made by the mortgagor," it was agreed that, if the mortgagees should at any time become entitled to enter into possession or receipt of the rents, and the mortgagor should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mortgagees, at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor from time to time for subscrip-

tions, interest, fines, and other moneys under the rules, and that the tenancy should commence on the day up to which he should have fully paid all and every part of such subscriptions, interest, fines, and other moneys, and the rent for the period intervening between the commencement of the tenancy and the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable and paid on that day, and the monthly rent due upon and subsequently to that day should become due monthly in advance, and be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mortgagees should first become entitled to enter into possession. Power was given to the mortgagees to determine the tenancy by fourteen days' notice. The deed was not executed by the mortgagees, nor was it registered under the Bills of Sale Act. The mortgagor committed default in his payments, and was afterwards adjudicated a bankrupt:—Held, that the attornment clause, and distresses levied under it for rent which accrued due both before and after the commencement of the bankruptcy, were valid as against the trustee in the bankruptcy. *Voisey, Ex parte, Knight, In re*, 21 Ch. D. 442; 52 L. J., Ch. 121; 47 L. T. 362; 31 W. R. 19—C. A. Affirming, S. C., sub nom. *Isherwood, Ex parte*, 46 L. T. 539.

*Williams, Ex parte* (7 Ch. D. 138); *Stockton Iron Furnace Company, In re* (10 Ch. D. 335); and *Jackson, Ex parte* (14 Ch. D. 725), discussed. *Ib.*

Held, that it was no objection to the attornment clause that the monthly rent was fluctuating in amount. *Ib.*

A rent, the amount of which may fluctuate according to the happening of certain events, is not an uncertain rent. *Ib.*

**Tenancy at Will.**—Held, also, that the tenancy under the attornment clause was not made by s. 1 of the Statute of Frauds a tenancy at will. *Ib.*

**Distress for Year's Rent—Further Distress for Half Year.**—On the 5th of September, 1881, a tenant holding a lease for twenty-one years filed his petition for liquidation. On the 13th of September the landlord distrained for a year's rent due, according to the terms of the lease, upon the 24th of March, 1881. Trustees in the debtor's liquidation were appointed on the 13th of October, 1881; and on the 25th of October the landlord distrained for a further six months' rent, due on the 29th of September. On the 14th of November the trustees in the liquidation disclaimed the lease, pursuant to leave granted by the court:—Held, that the landlord, having levied his distress for rent after the commencement of the bankruptcy, could only distrain for one year, according to the 34th section of the Bankruptcy Act, 1869; and that the second distress was therefore invalid. *Dyke, Ex parte, Morrish, In re*, 22 Ch. D. 410; 52 L. J., Ch. 570; 48 L. T. 303; 31 W. R. 278—C. A. Affirming, 47 L. T. 26; 30 W. R. 952.

**Agreement for Sale or Hire of Chattels—Power of Distress.**—Agreement for the hire of railway waggons for the term of five years at a yearly rent of 10*l.* apiece, with power to the lessors, when the rent should be in arrear for seven days, to distrain goods on the lessee's premises, and

sell, &c., as landlords may on distress for rent, the lessee at the end of the term to have the option of purchasing the waggons for 5s. each. The lessee having gone into liquidation, the lessors distrained under the agreement. The agreement being admitted to be of a usual character having regard to the subject-matter, a motion in an action by the debtor and the receiver under his petition to restrain proceedings upon the distress was refused. The agreement and the distress thereunder were held not to be in fraud of the general creditors in the lessee's bankruptcy. A power to distrain will not by itself in an ordinary case render such an agreement fraudulent against creditors in bankruptcy. *Leman v. Yorkshire Railway Waggon Company*, 50 L. J., Ch. 293; 29 W. R. 466.

**Distress by Gas Company under Statutory Powers.**—The special act of a gas company empowered it to levy by distress all sums of money due to it for the supply of gas, the amount of which should not be disputed, and provided that any justice on application, might inquire into and ascertain the amount due, and issue his warrant accordingly for levying the same. By s. 16 of the Gasworks Clauses Act, 1847 (incorporated with the special act), money due to a gas company for gas supplied is spoken of as rent. The company, after one of its customers had filed a liquidation petition, and with notice of the petition, proceeded to seize his goods under distress warrant granted by the justices in respect of money due for gas supplied to him within a year before the filing of the petition:—Held, that the company did not come within the words "landlord or other person to whom any rent is due from the bankrupt" in s. 34 of the Bankruptcy Act, 1869, but that the distress was a legal process against the estate of the debtor in respect of a provable debt, which the court had, under s. 13, or under r. 260 of the Bankruptcy Rules, 1870, power to restrain. *Hill, Ex parte, Roberts, In re*, 6 Ch. D. 63; 46 L. J., Bk. 116; 37 L. T. 45; 25 W. R. 784—C. A.

**Mortgage—Attornment Clause.**—A mortgage of smelting works to secure the repayment of an advance of 55,000*l.*, contained, in addition to the ordinary clauses, a covenant by the mortgagee that, if the interest was punctually paid as it became due, and all the covenants contained in the deed (other than the covenant for payment of the principal) were performed, and the mortgagor should not have become bankrupt or have taken proceedings for liquidation by arrangement or composition with his creditors, and should not have parted with the possession of the mortgaged property, and should not have ceased to carry on his business thereon, then the mortgagee would not for a period of five years require payment of the principal. And the mortgagor attorned tenant from year to year to the mortgagee in respect of the mortgaged property at the yearly rent of 20,000*l.*, to be paid half-yearly on the days on which the interest on which the mortgage debt was made payable. The deed was not registered under the Bills of Sale Act, 1854. The letting value of the property was not more than 3,000*l.* per annum. Four months after the execution of the mortgage the mortgagor filed a liquidation petition, and the mortgagee afterwards claimed the right to distrain the chattels upon the mortgaged pro-

perty for a year's rent under the attornment clause:—Held, that the arrangement was a mere device to give the mortgagee an additional security in the event of the mortgagor's bankruptcy, and was, therefore, in that event, void, as a fraud upon the bankrupt law, and that s. 34 did not protect a distress levied for a mere sham rent. *Williams, Ex parte, Thompson, In re*, 7 Ch. D. 138; 47 L. J., Bk. 26; 37 L. T. 764; 26 W. R. 274—C. A.

Though an attornment clause in a mortgage deed is a valid clause, if it constitutes a real relation of landlord and tenant between the mortgagee and the mortgagor, and a distress levied for the rent fixed by the clause will be good as against the trustee in the bankruptcy of the mortgagor, and will thus enable the mortgagee to obtain a security upon chattels of the mortgagor, the proceeds of which would otherwise have been distributed among his creditors, yet, if the rent fixed by the clause be so excessive that the court comes to the conclusion that it was not intended to create a real rent or a real tenancy, but that the clause was a mere device to enable the mortgagee, in the event of the bankruptcy of the mortgagor, to obtain an additional security upon chattels which would otherwise have been distributed among his creditors, the clause and any distress levied under it, even though before the commencement of the bankruptcy, will be invalid as against the trustee in the bankruptcy of the mortgagor, as being a fraud upon the bankruptcy law. *Jackson, Ex parte, Bowes, In re*, 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253—C. A.

*Morton v. Woods* (4 L. R., Q. B. 293) explained. *Id.*

*Williams, Ex parte* (7 Ch. D. 138), and *Stockton Iron Furnace Company, In re* (10 Ch. D. 335), discussed. *Id.*

**—Attornment to Second Mortgagee—Fair Rent.**—An attornment by a mortgagor to a second mortgagee is valid, notwithstanding the fact that the mortgagor has already attorned tenant to the first mortgagee of the same property. And if the amount of the rents fixed by the two attornment clauses is a fair rent of the property, so that there is no fraud on the bankruptcy law, valid distresses can be levied by both mortgagees after the commencement of the bankruptcy of the mortgagor. *Morton v. Woods* (4 L. R., Q. B. 293) explained and followed. *Punnett, Ex parte, Kitchin, In re*, 16 Ch. D. 226; 50 L. J., Ch. 212; 44 L. T. 226; 29 W. R. 129—C. A.

**—Tenancy from Year to Year or at Will.**—A mortgage deed contained an attornment clause whereby A. (the mortgagor) attorned and became tenant from year to year to B. (the mortgagee) for and in respect of the mortgaged premises, at the yearly rent of 800*l.*, to be paid by equal quarterly payments. And it was thereby agreed that it should be lawful for B., at any time after three months from the date of the mortgage, without giving previous notice of his intention so to do, to enter upon and take possession of the premises whereof A. had attorned tenant, and to determine the tenancy created by the aforesaid attornment. A. filed a liquidation petition, and on the same day a receiver was appointed, who entered into possession of A.'s estate and effects. Notice of the

petition and of the appointment of a receiver was sent to B., who two days later, by virtue of the attornment clause, distrained upon the goods and chattels on the mortgaged premises for a half-year's rent then due:—Held, that a tenancy from year to year and not a tenancy at will was created by the attornment clause, and that B. was entitled, under the Bankruptcy Act, 1869, s. 34, to distrain for the rent due to him from A. at the time of filing the liquidation petition. *Morton v. Woods* (4 L. R., Q. B. 293) explained. *Queen's Benefit Building Society, or Blake, Ex parte, Threlfall, In re*, 16 Ch. D. 274; 50 L. J., Ch. 318; 44 L. T. 74; 29 W. R. 128—C. A.

— **What Amount of Rent may be Distrained for.**—B. executed a mortgage of certain real property to secure the payment of 12,500*l.*, with interest at 4*l.* 15*s.* per cent., payable half-yearly, on the 8th May and 8th November in each year; and the deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagees at the yearly rent of 593*l.* 15*s.*, that being the exact amount of the interest reserved by the deed, and payable on the same days. Subsequently by a parol agreement the days of payment were changed to the 1st July and the 1st January. The mortgagor subsequently filed his petition, and composition-resolutions having been resolved upon, the mortgagees, on the 19th November, 1880, distrained for a half-year's rent under the attornment clause, although, at that time, in accordance with an arrangement which had been previously entered into and acted upon by both parties, the interest had been paid by the trustees appointed under the composition proceedings down to July 1, 1880. Upon the application of the trustees, the county court judge decided that the mortgagees were only entitled to receive the amount of rent or interest from the 1st July:—Held, that the mortgagees were entitled to the full amount for which they had distrained, and that the balance, after payment of the interest then due, was applicable for the reduction of the principal debt. *Harrison, Ex parte, Betts, In re*, 18 Ch. D. 127; 50 L. J., Ch. 832; 45 L. T. 290; 30 W. R. 38—C. A. Affirming, *S. C.* 44 L. T. 616; 29 W. R. 668, sub. nom. *Tempest, Ex parte*.

## ii. Transactions protected by Section 92.

**Burden of Proof on Person claiming Protection.**—The burden of proof is on the person who claims the protection of the proviso at the end of s. 92 of the Bankruptcy Act, 1869, as "a payee in good faith." *Tate, Ex parte*, 35 L. T. 531; 25 W. R. 52—C. A.

Semble, that that proviso applies not only to cases of fraudulent preference under s. 92, but also to cases of "a fraudulent conveyance, gift, delivery, or transfer of the debtor's property, or any part thereof," under s. 6, sub-s. 2. *Id.*

**Where Consideration is pre-existing Debt.**—The concluding words of s. 92 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), giving protection to payments, &c., made as therein mentioned, apply to a creditor of the bankrupt and not merely to his transferee. *Butcher v. Stead*, 7 L. R., H. L. 839; 44 L. J., Bk. 129; 33 L. T. 541; 24 W. R. 463.

When, therefore, a person sold goods to another as upon a cash credit, and, just before

the credit expired, received from the vendee, then on the eve of bankruptcy, payment for those goods, being at the time of such payment, entirely without knowledge or even suspicion of the true state of the vendee's circumstances, he was held to be protected. *Id.*

S., a calico merchant at Manchester, sold calico in September, 1873, to M. and W., calico printers there, on the usual terms of the Manchester market, which would have made payment due on the 2nd of December. M. and W. were at the time of the purchase (though quite unknown to S.) in insolvent circumstances. In November M. and W. sold a large portion of their stock-in-trade, and directed their cashier to pay their trade creditors. The cashier did so, and on the 22nd of November paid S., taking discount and rebate of interest in the ordinary way. M. and W. were largely indebted to other persons for advances, and on banking accounts. On the 3rd of December, M. and W. filed a petition for liquidation, and a trustee was appointed. The trustee sought to get back the money which had been paid to S.:—Held, that S. was protected as "a payee in good faith, and for valuable consideration," within the words of s. 92 of the Bankruptcy Act, 1869. *Id.* Affirming, 9 L. R., Ch. 595; 30 L. T. 482; 22 W. R. 721.

On the 6th of June, 1871, G., a dealer in oil, borrowed 400*l.* of N., his brother-in-law, the money to be repaid in a month. The money not having been repaid when due, N. pressed for it and ultimately placed the matter in the hands of his solicitors, who gave G. till the end of July to pay. On the 1st of August, G. asked N. for further time, and N. said he must have a speedy settlement or he should take proceedings. G. said he would do what he could during the week. On the 5th of August he went to N. and said he had no money, but that he had some oil, and that if N. could induce a firm of B. & Co., in which he had formerly been a partner, to buy it, he should be paid out of the proceeds. N. went to B. and explained the circumstances to him, and ultimately B. consented to treat with G. G. then went to B., and, in the result, a contract was entered into by B. on behalf of his firm to buy fourteen casks of oil from G. At this time G. had, in fact, no oil, but on the 9th of August he ordered fourteen casks from W. on credit, and this oil was by G.'s directions sent to B. & Co. G. never paid for it, and had no means of doing so when he ordered it. On the 15th of August G. called at the warehouse of B. & Co. to settle the purchase, and by his order B. & Co. paid to N. the amount of his loan and interest, and paid the balance of the price of the oil to G. On the 6th of April, 1872, G. was adjudicated a bankrupt, the act of bankruptcy being the filing of a petition for liquidation on the 7th of March. The trustee afterwards applied to the county court to set aside the payment of the 400*l.* to N. as a fraudulent preference and an act of bankruptcy. The case was tried before a jury, who found that when the transaction took place the oil was substantially the whole of the bankrupt's property; that to the knowledge of N. he was insolvent; and that the transfer was not made bona fide, but fraudulently without pressure, with a view of giving N. a preference over the other creditors of G. The judge thereupon held that the transaction was void as an act of bankruptcy, and a fraudulent preference, and ordered N. to pay to the trustee the sum which he had

received. On appeal, held, that the purchase of the oil was a bona fide transaction in the ordinary course of trade, and that N. was a payee in good faith, and for valuable consideration; that there was no act of bankruptcy and no fraudulent preference. *Norton, Ex parte, Golden, In re*, 16 L. R., Eq. 397; 21 W. R. 402.

The proviso in s. 92 of the Bankruptcy Act, 1869, in favour of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration, extends to a case where the consideration is the payment of a pre-existing debt. *Ib.*

At the time when a bill of sale was executed, the mortgagee had notice of an act of bankruptcy committed by the mortgagor, upon which he was afterwards adjudicated a bankrupt. The money secured by the deed consisted in part of a sum paid by the mortgagee in discharge of the claim of the holder of two prior registered bills of sale executed before the act of bankruptcy was committed. The old bills of sale were not transferred to the new mortgagee, and satisfaction of them was entered up. The new bill of sale was registered:—Held, that the new bill of sale was valid as against the trustee in the bankruptcy to the extent of the sum paid to the prior mortgagee. *Harris, Ex parte, James, In re*, 19 L. R., Eq. 253; 44 L. J., Bk. 51; 31 L. T. 621; 23 W. R. 536.

#### **Bona fide Sale not a Fraudulent Preference.]**

—A., a liquidating debtor and C. the creditor, as trustees and executors under a will, kept an account at the B. Bank. The debtor having overdrawn the trust account, and misappropriated the money, in order to recoup the trust estate, sold some wool to G., who advanced 2,050*l.* on account of the purchase-money, which it was agreed should be determined by valuation. The county court judge considered the advance of 2,050*l.* to be a loan, and the transfer and delivery of the wool a fraudulent preference of G., and ordered G. to repay to the trustee in the liquidation the price of the wool:—Held, on appeal (reversing the decision of the court below), that the transaction was a bona fide sale, and that as neither a debt nor a loan had ever existed prior to the contract for the purchase and sale, no case of fraudulent preference could arise. *Gaunt, Ex parte, Wilkinson, In re*, 43 L. T. 448.

**Fraudulent Purchase by Bankrupt—Non-completion of Purchase—Deposit-money paid to Stakeholder—Forfeiture.]**—W. having secretly realized the greater part of his available property and effects, absconded with the proceeds. W. was subsequently adjudicated a bankrupt, and on the 4th of October, 1882, the plaintiff was appointed a trustee of the estate. On the 10th of October, W. entered into an agreement in an assumed name with F. for the purchase of certain house property, and paid to the defendant, as stakeholder under the agreement, a certain sum by way of deposit, which it was admitted formed part of the proceeds of the secret realization. The agreement provided, inter alia, that the deposit-money should be forfeited to the vendor if the purchaser neglected or failed to complete the purchase. W. was shortly afterwards arrested and convicted as an absconding bankrupt, and the purchase of the property was consequently never completed. It was admitted that both the defendant and F. had acted throughout bona fide in the ordinary course of

business, and that the non-completion of the agreement was not caused by any default on the part of F. The plaintiff having claimed to have the deposit-money paid over for the benefit of the bankrupt's estate:—Held, that, inasmuch as it was of the essence of the contract that the deposit-money should be forfeited if the purchase was not completed, such money belonged to F. and could not be followed by the trustee of the bankrupt's estate. *Collins v. Stimson*, 11 Q. B. D. 142; 52 L. J., Q. B. 440; 48 L. T. 828.

#### **Assignment of whole Property—Payment to Bankers.]**

—A judgment creditor, who had issued execution upon the property of his insolvent debtor, agreed to make him a substantial advance for the alleged purpose of enabling him to carry on his business, upon the understanding come to at a meeting at which all the parties to the transaction were present, that the advance should be applied in paying the bankers of the debtor, who had pressed for payment of a debt of 2,000*l.*, and threatened to make the debtor a bankrupt if they were not paid, and also in paying off two other debts due to solicitors employed in the transaction. A bill of sale over substantially the whole of the debtor's property was given by the debtor to the execution creditor, on the 9th of September, 1882, to secure the execution debt and the fresh advance. The fresh advance was applied in payment of the debts to the bankers and the solicitors. On the 11th of September, possession under the bill of sale was taken by the grantee. On the 13th of September, the debtor filed a liquidation petition, and the trustees impeached the bill of sale and the above-mentioned payments:—Held, that the effect of the granting of the bill of sale being to prevent the debtor from carrying on his business, the bill of sale and also the payments to the solicitors were fraudulent and void; but that the payment to the bankers, who had acted bona fide, was protected by the saving clause of s. 92 of the act. *Clater, Ex parte, Denison, Ex parte, Wilkinson, In re*, 48 L. T. 648.

#### **iii. Transactions protected by Sections 94 & 95.**

**Meaning of Sections.]**—The meaning of s. 94, sub-s. 3, of the Bankruptcy Act, 1869, is in effect the same as that of s. 133 of the Bankruptcy Act, 1849. *Wright, In re, Arnold, Ex parte*, 3 Ch. D. 70; 45 L. J., Bk. 130; 35 L. T. 21; 24 W. R. 977—C. A.

#### **What is a Dealing—Rescission of Contract.]**

A trustee under a liquidation by arrangement of the affairs of a debtor, in a first count, sued the defendants on a contract made between them and the debtor, for a breach of the contract in not delivering either to the debtor before liquidation or to the trustee after the liquidation, a quantity of iron according to the terms of the contract. The second count stated that it was agreed between the defendants and the debtor as in the first count, and that before the liquidation the defendants delivered a portion of the iron under the contract to the debtor, who made default in payment of the price; and afterwards the trustee elected to take the benefit of the contract, and was ready to pay in cash the full amount for the portion of iron already delivered, and to pay for the residue in cash on delivery, and to perform the contract, in all things on his

part, whereof the defendants had notice, and waived formal tender of such amount. Yet they did not, nor would deliver to the trustee the residue of the iron, but neglected and refused so to do, and wholly refused any further to perform the contract on their part, whereby the trustee lost the benefit of the contract. Plea, that before any breach of the agreement on the part of the defendants, and before the commencement of the liquidation, or the filing by the debtor of a petition for liquidation, and before notice to the defendants of any act of bankruptcy by the debtor, he exonerated and discharged them from the agreement, and from any further performance of the same, and the defendants say that the dealing and transaction were made in good faith:—Held, that the plea was good, and that the exoneration thereby shewn was a "dealing for valuable consideration," between the parties within the protection of the Bankruptcy Act, 1869, s. 94, sub-s. 3. *Checkland v. McNiel*, 32 L. T. 367.

— **Notice to Sheriff by Landlord.**—A trader's goods were seized by the sheriff under a judgment obtained after the debtor had committed an act of bankruptcy. The landlord of the house where the trade was carried on gave notice to the sheriff that he claimed to distrain the goods for arrears of rent. Afterwards the trader was adjudicated bankrupt upon the act of bankruptcy:—Held, that the notice to the sheriff was not a dealing with the bankrupt under the Bankruptcy Act, 1869, s. 94. *Dooman, Ex parte, Lake, In re*, 8 L. R., Ch. 51; 42 L. J., Bk. 30; 27 L. T. 528; 21 W. R. 94.

— **Garnishee Order.**—A garnishee order, attaching a debt due to a bankrupt, is not a "dealing" with the bankrupt within s. 94, sub-s. 3, of the Bankruptcy Act, 1869. *Pillers, Ex parte, Curtoys, In re*, 17 Ch. D. 653; 50 L. J., Ch. 691; 44 L. T. 691; 29 W. R. 575—C. A. Reversing, 44 L. T. 224; 29 W. R. 568.

A judgment creditor, therefore, who prior to the presentation of a bankruptcy petition against the debtor, but after the commission of an act of bankruptcy of which he had no notice, has served a garnishee order nisi attaching moneys due to the debtor from a third party, is not entitled to the debts attached as against the trustees in bankruptcy. *Ib.*

Whether such an order is "an attachment against goods" of a bankrupt within s. 95, sub-s. 2, *quære. Ib.*

But, if it is, it is not within the protection of s. 95, sub-s. 3, unless the garnishor has obtained actual payment of the attached debt from the garnishee before the order of adjudication. *Ib.*

— **Building Contract providing for taking Possession in Bankruptcy.**—A building contract contained stipulations that in the event of the insolvency or bankruptcy of the builder, the architect of the proprietors should have power, after two clear days' notice, to appoint other persons to complete the work, and should also in such case have power to seize and retain all materials, plant and implements, and might either proceed with the work or sell them and apply the proceeds to the completion of the work; and that in the event of the contract being put an end to as aforesaid, the contractor should not remove

either work, materials, implements, scaffolding, or plant from the premises, but all materials and work should be left or appropriated for the use of whosoever might be appointed to finish the work. After being engaged on the contract for about eighteen months, and receiving sums on account thereof, which covered the value of the materials, plant and implements then upon the premises, the contractor filed a petition for liquidation. Three days afterwards the proprietors gave him notice that they intended to employ other means to finish the work, and claimed the materials, plant and implements under the contract. It did not appear whether the proprietors at that time had notice of the petition, but they had such notice before the expiration of two days, and before they took possession:—Held, that under the contract the proprietors acquired a right to a lien upon the goods in the events which happened; and that the contract and the possession taken thereunder was a transaction protected by s. 94, sub-s. 3, of the Bankruptcy Act, 1869, and not invalidated by the act of bankruptcy. *Dickin, Ex parte, Waugh, In re*, 4 Ch. D. 524; 46 L. J., Bk. 26; 35 L. T. 769; 25 W. R. 258.

— **Forfeiture of Materials in Event of Builder's Bankruptcy—Fraud on Bankruptcy Law.**—An agreement, dated the 17th of September, 1878, between an owner of land and a builder provided that, in consideration of the rent thereby reserved and certain agreements on the part of the builder, the landowner would, as the builder should erect and completely cover in the messuages thereafter agreed to be erected by him, demise to him a piece of land for ninety-nine years, at a yearly rent of 300*l.* And the builder agreed to erect and completely finish forty houses, each of a specified value, within fifteen months from the date of the agreement, and vigorously and effectually to proceed continuously with all buildings once commenced by him on the ground, and to accept leases of the land and houses as the same should be erected and covered in. Until the leases should be granted the builder was to hold the premises subject to the payment of the rent, and to the observance and performance of his part of the terms and stipulations of the agreement, and subject to the power of distress and entry in default of any of the stipulations on his part, or on his becoming bankrupt or insolvent, in either of which cases all improvements, materials, and effects on the land, or adjacent thereto, which should not have been actually demised to the builder, should become absolutely forfeited to the landlord, but without prejudice to any right of action which might have accrued to him under the agreement (which was not to be construed as an actual demise), and the landlord was to be at liberty to re-enter and take possession of the ground, premises, chattels and effects, and to relet or sell the same, or otherwise to use and enjoy the same, as fully as if the agreement had never been made. In January, 1879, the builder filed a liquidation petition. At this time there was a large quantity of building materials on the land comprised in the agreement, which had been placed there by the builder. Up to the time of the filing of the petition the builder had made no default in performing his agreement:—Held, that the provisions for forfeiture of the materials to the landlord on the bankruptcy of the builder was

void, as contrary to the policy of the bankruptcy law, and that the materials on the land were the property of the trustee in the liquidation. *Jay, Ex parte, Harrison, In re*, 14 Ch. D. 19; 42 L. T. 600; 28 W. R. 449; 44 J. P. 409—C. A. Reversing, *S. C.*, nom. *Meads, Ex parte, Harrison, In re*, 49 L. J., Bk. 47; 41 L. T. 560; 28 W. R. 308.

*Brown v. Bateman* (2 L. R., C. P. 272), and *Dickin, Ex parte* (4 Ch. D. 524), distinguished. *Ib.*

— **Seizing under Bill of Sale.**—The holder of a bill of sale, given to secure a debt, received notice on the 10th of March from the debtor's solicitor that the debtor was about to file a liquidation petition. The creditor at once sent a man to demand payment of the debt, and to take possession of the property comprised in the bill of sale if payment was not made. Possession was obtained on the 11th of March. The petition had been filed on the 10th of March, but neither the creditor nor the man who was sent to take possession knew this until after possession had been obtained:—Held, that the taking possession of the property was a dealing with the debtor for valuable consideration which was protected by s. 94, sub-s. 3; that it took the goods out of the order and disposition of the bankrupt notwithstanding the prior act of bankruptcy; and that the creditor was entitled to retain the property as against the trustee under the liquidation. *Wright, In re, Arnold, Ex parte*, 3 Ch. D. 70; 45 L. J., Bk. 130; 35 L. T. 21; 24 W. R. 977—C. A.

**Payment to Debtor of Purchase-money after Adjudication.**—A debtor, after the presentation of a bankruptcy petition against him, but before adjudication, entered into a contract for the sale of leasehold property, the purchaser paying a deposit. After adjudication, the purchaser, who had no knowledge of the adjudication or of the bankruptcy petition, or of the commission of any act of bankruptcy by the vendor, paid the remainder of the purchase-money to the bankrupt, and obtained possession of the title-deeds and of the property, but no assignment to him was executed. On an application by the purchaser to the Court of Bankruptcy for an order that the trustee should assign the property to him:—Held, that, the trustee being the legal owner of the property, subject to the equity of the purchaser to have it assigned to him on payment of the balance of the purchase-money, the purchaser could not enforce his equitable right except upon paying to the trustee the balance of the purchase-money. *Rabbige, Ex parte, Pooley, In re*, 8 Ch. D. 367; 38 L. T. 663; 26 W. R. 646—C. A.

**Post-dated Cheque—Bankruptcy of Payee before Date of Cheque—Duty of Drawer to stop Cheque.**—The drawer of a post-dated cheque given for value is under no obligation to stop its payment before its date for the benefit of a third person. If, for instance, before the date of payment the drawer receives notice of an adjudication of bankruptcy, made against the payee since the delivery of the cheque to him upon an act of bankruptcy committed by him before the delivery, he is not bound, for the benefit of the bankrupt's creditors, to give notice to his bankers not to pay the cheque, and thus expose himself

to the risk of an action by a bonâ fide holder of the cheque for value. If the cheque was originally delivered by the drawer to the payee, in good faith and for value, and without notice of an act of bankruptcy previously committed by the payee, on which an adjudication is subsequently made, the transaction is protected by s. 94, sub-s. 3 of the Bankruptcy Act, 1869, and the trustee in the bankruptcy cannot recover the amount of the cheque from the drawer. *Richdale, Ex parte, Palmer, In re*, 19 Ch. D. 409; 51 L. J., Ch. 462; 46 L. T. 116; 30 W. R. 262—C. A. Reversing, 51 L. J., Ch. 61; 45 L. T. 557; 30 W. R. 124, sub nom. *Armstead, Ex parte*.

**Re-assignment of Goods after Revocation of Assignment for Benefit of Creditors.**—A debtor caused a deed to be prepared by B. her attorney, whereby she assigned all her stock-in-trade and effects to M. in trust for her creditors. This deed was intended to protect her property from executions in case certain offers about to be submitted to her creditors were not accepted. The assignment was executed by the debtor and trustee on 17th February, 1870, and formal possession of the property was given under it to the latter. A meeting of creditors was then held. The existence of the deed was never communicated to them, but proposals were made to them which they accepted; whereupon it became necessary to borrow money, and B. applied to K., who advanced 400l. to the debtor on the security of a bill of sale over all her property. This instrument was drawn up by B. and executed at his office by the debtor in the presence of K. A re-assignment of even date was made by M. to the debtor, of his trust estate in her property. The debtor's goods were subsequently seized and removed to the premises of M. by B., then acting for K., under the bill of sale. On the 22nd March the debtor was adjudicated a bankrupt, having filed a declaration of insolvency. An action having been brought by the trustee against B. & M. for the conversion of the goods:—Held, that whether the assignment to M. of all the effects in trust for creditors was or was not an act of bankruptcy, K. had no notice of it; for even assuming that he had employed B. as his attorney in the preparation of the bill of sale, yet the relations thereby established between them would not be such that the knowledge of B. of the assignment to M. would be constructive knowledge in K.; that the re-assignment by M. to the debtor was valid, notwithstanding her bankruptcy; and that K., being therefore a bonâ fide mortgagee for value without notice of a prior act of bankruptcy, was protected; and consequently had a valid title to the goods as against the trustee. *Brittain v. Brown*, 24 L. T. 504.

**Payment to Guardians by Overseer after Petition Filed.**—Three days after filing his petition for liquidation, one of the overseers of a parish paid into the bank, to the credit of the treasurer of a board of guardians of the union, a sum of 55l. in respect of a call for a contribution from the poor rates, which had been previously made upon the overseers by the board of guardians. The trustee in the liquidation claimed the money so paid as being money divisible amongst the creditors:—Held, that the payment into the bank was a dealing with the bankrupt within



s. 94, sub-s. 3 of the Bankruptcy Act, 1869, and was protected accordingly. *Atcham Board of Guardians, Ex parte, Dickinson, In re*, 46 L. T. 238; 30 W. R. 644.

**Executions.]—See EFFECT OF BANKRUPTCY, post.**

**Effect as regards Bills of Sale Act.]—**The protecting provisions of the Bankruptcy Act, 1869, ss. 94, 95, have no operation as regards a transaction which is made void by the Bills of Sale Act, 1854. *Attwater, Ex parte, Turner, In re*, 5 Ch. D. 27; 46 L. J., Bk. 41; 35 L. T. 682; 25 W. R. 206—C. A.

### 3. NOTICE OF ACT OF BANKRUPTCY TO INVALIDATE TRANSACTIONS.

#### a. Generally.

**What Amounts to Notice.]—**Notice of an act of bankruptcy means knowledge thereof, or wilfully abstaining from acquiring such knowledge. *Bird v. Bass*, 6 M. & G. 143; 6 Scott, N. R. 928.

**Notice Indefinite as to Nature of Act of Bankruptcy.]—**A notice by a bankrupt to an execution creditor, that he has committed several acts of bankruptcy, is a sufficient notice of a prior act of bankruptcy. *Udal v. Walton*, 14 M. & W. 254; 14 L. J., Ex. 262; 9 Jur. 515; *S. P., Arthur v. Whitworth*, 6 Jur. 323.

Notice that a trader had committed an act of bankruptcy, without specifying the act, or stating of what the act consisted, is sufficient notice of an act of bankruptcy. *Turner v. Hardcastle*, 11 C. B., N. S. 683; 31 L. J., C. P. 193; 5 L. T. 748.

A. having recovered judgment against B., issued execution and seized his goods under a f. fa. on the 3rd of December, 1851. On the morning of the 5th, a notice was given to A. by the solicitors of certain of B.'s creditors, who afterwards prosecuted a petition in bankruptcy against him. This notice stated that it was given on behalf of several creditors of B., that he had committed an act of bankruptcy, and also that he had, on the 4th (the previous day) executed a conveyance of all his property to trustees for the benefit of his creditors. On the afternoon of the 5th, the goods which had been taken in execution were sold. The petition in bankruptcy was presented on the 11th of December, and on the following day B. was adjudicated a bankrupt. In an action by his assignees against A. to recover the proceeds of the goods so sold after an act of bankruptcy, and notice—Held, that the notice was sufficient. *Hope v. Meek*, 10 Ex. 829; 25 L. J. Ex. 11.

**Notice of Intention to Commit.]—**A letter from a bankrupt to a creditor, saying that he had resolved not to open his bank on Monday, does not amount to notice of an act of bankruptcy, but is only notice of an intention to commit an act of bankruptcy. *Hallifax, Ex parte*, 2 Mont., D. & D. 544; *S. P., Glyn, Ex parte*, 6 Jur. 839.

A creditor who receives notice of his debtor's intention to commit an act of bankruptcy is not bound to inquire whether the act has been committed, but is entitled to avail himself of his remedies just as if he had received no such

notice. *Wright, In re, Arnold, Ex parte*, 3 Ch. D. 70; 45 L. J., Bk. 130; 35 L. T. 21; 24 W. R. 977—C. A.

**Nature of Act.]—**Notice that a party has executed a deed conveying all his property for the benefit of his creditors, is notice of an act of bankruptcy. *Lackington v. Elliott*, 7 M. & G. 538; 8 Scott, N. R. 275; 13 L. J., C. P. 153; 8 Jur. 695.

Notice of a docket having been struck was not notice of a prior act of bankruptcy, within 2 & 3 Vict. c. 29, s. 1. *Hocking v. Accraman*, 1 D., N. S. 434; 12 M. & W. 170; 13 L. J., Ex. 34.

Evidence that the defendant, in an action by assignees, was aware that the bankrupt had left his home and place of business in difficulties, and contrary to the rules of his employment as postmaster, and had not returned, is evidence of the defendant's knowledge of an act of bankruptcy, by absenting with intent to delay and defeat creditors. *Smith v. Osborn*, 1 F. & F. 267.

#### — Filing Declarations of Insolvency.]—

Under 5 & 6 Vict. c. 122, s. 22, the filing of a declaration of insolvency was of itself a complete act of bankruptcy, without being followed by an advertisement of the same in the Gazette, under 6 Geo. 4, c. 16, s. 6. Therefore, where a trader gave execution creditors notice that he had filed a declaration of insolvency, and thereby committed an act of bankruptcy, this was a sufficient notice of a prior act of bankruptcy to deprive the creditors of the protection of 2 & 3 Vict. c. 29, s. 1. *Follett v. Hoppe*, 5 C. B. 226; 17 L. J., C. P. 76; 11 Jur. 974.

A trader, having been arrested on a ca. sa., at the suit of the defendant, who, as well as the sheriff's officer, had received a notice of a prior act of bankruptcy, paid over a portion of his assets to the officer, in order to procure his discharge, and the officer paid over the amount to the defendant.—Held, that the bankrupt's assignees were entitled to recover back from the defendant the amounts paid in an action for money had and received. *Id.*

A trader, being indebted to the defendant, on the 1st of July filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122, s. 22, and, on the following day, gave notice thereof to the defendant. At a subsequent period of the same day the defendant levied an execution on the trader's goods. A fiat in bankruptcy issued on the day following.—Held, that the act of bankruptcy dated from the time of filing the declaration of insolvency, and that the defendant, having had notice thereof, was not entitled to the proceeds of the execution within 2 & 3 Vict. c. 29, s. 1. *Green v. Laurie*, 1 Ex. 335; 17 L. J., Ex. 61; 11 Jur. 997.

#### — Filing Petition for Arrangement.]—

Notice to an execution creditor that his debtor has filed a petition for arrangement under 12 & 13 Vict. c. 106, s. 76, is notice of an act of bankruptcy within s. 133, provided an adjudication is filed within two months after the petition for arrangement is dismissed. *Edwards v. Gabriel*, 6 H. & N. 701; 30 L. J., Ex. 245; 7 Jur., N. S. 634; 4 L. T. 303; 9 W. R. 669. Affirmed, 7 H. & N. 520; 31 L. J., Ex. 113; 8 Jur., N. S. 592; 10 W. R. 95—Ex. Ch.

**To whom given—Clerk to Creditor's Attorney.]**

—An intimation given by a clerk of a defendant's attorney to a clerk of the plaintiff's attorney, that the defendant had committed an act of bankruptcy, the clerk to whom it is given not being shewn to be a managing clerk, or to have communicated the matter to his principal, is not such a notice as will defeat an execution. *Penneil v. Stephens*, 7 C. B. 987; 7 D. & L. 133; 18 L. J., C. P. 291; 13 Jur. 766.

— **Marriage Settlement.]**—A trader, previously to and in consideration of his marriage, which was solemnized in pursuance of an engagement of several years' standing, the fulfilment of which had been delayed by circumstances not connected with the state of his affairs, made a settlement of part of his property. After his marriage he was adjudged bankrupt. Before the execution of the settlement he had, to the knowledge of the intended wife, committed acts of bankruptcy subsequently to his contracting the debt due to the petitioning creditor, and within twelve months before the adjudication:—Held, that the settlement was invalid as against the assignees. *Fraser v. Thompson*, 4 De G. & J. 659.

A trader, being in insolvent circumstances, covenanted, by an ante-nuptial settlement, to pay 500*l.* to trustees, to be held by them upon trust for such persons as the intended wife should appoint, and subject thereto upon trust for the intended wife for life for her separate use, then for the husband for life, and then, as to the capital, in trust for the survivor. The settlement also extended to property belonging to the intended wife, who was wholly unaware of the intended husband's insolvency:—Held, on the husband's bankruptcy, that the settlement was valid against the assignees, and entitled the trustees to prove for the 500*l.* *McBurnie, Ex parte*, 4 De G., Mac. & G. 441; 21 L. J., Bk. 15; 16 Jur. 807.

— **Sheriff's Officer.]**—Notice to a sheriff's officer in possession under a fi. fa. of an act of bankruptcy committed by the defendant, is not notice to the execution creditor. *Ramsay v. Eaton*, 10 M. & W. 22; 2 D., N. S. 219; 6 Jur. 489.

— **Creditor's Solicitor.]**—Where an act of bankruptcy had been committed, and the fact was communicated to the attorney of an execution creditor, previously to the issuing of a fi. fa. sued out by such attorney:—Held, sufficient (although the fiat issued after the writ was lodged with the sheriff, and notwithstanding the 2 & 3 Vict. c. 29, s. 1) to render the execution of no validity as against the assignees. *Rothwell v. Timbreil*, 1 D., N. S. 778; 6 Jur. 691.

**Solicitor acting for Creditor's Solicitor.]**

—On the 22nd November, 1858, an execution was put into the house of W., a trader. He left his house on the 23rd, and thereby committed an act of bankruptcy. On the 24th, U., an attorney at S., was informed by the attorney of the creditors that W. had committed an act of bankruptcy. On the morning of the 25th U. received a letter from the attorneys of the execution creditor, instructing him in the matter, which, after directing him to get an assignment from the sheriff, ended thus, "You will be good enough to let this

have your immediate attention, as, if anything is to be done, it must be done quickly." After the receipt of this letter, U. was told by the auctioneer that he had received notice that W. had committed an act of bankruptcy. U. sent for the sheriff's officer, who said that he had also received notice. U. nevertheless told the officer to get an assignment to the execution creditor executed by the sheriff, which was accordingly done. On the evening of the 25th U. wrote to the attorneys of the execution creditor, saying, "I fear my services have been called in when too late." In an action against the execution creditor by the assignees of W., who had been adjudged a bankrupt—Held, that the letter of the attorneys for the execution creditor constituted U. such an agent of the execution creditor that notice to him of an act of bankruptcy was notice to the execution creditor; and that the information U. received, and his letter to the attorneys for the execution creditor, shewed that he had notice of an act of bankruptcy before the execution of the assignment. *Brewin or Brown v. Briscoe*, 2 El. & El. 116; 28 L. J., Q. B. 329; 5 Jur., N. S. 1206; 7 W. R. 584.

— **One of Two Co-Plaintiffs.]**—If execution is issued in the name of two parties jointly interested as co-plaintiffs, and one knows of an act of bankruptcy already committed by the defendant, his knowledge is *prima facie* the knowledge of both, and the execution was not protected by 2 & 3 Vict. c. 29, s. 1, even though the execution was, in fact, sued out by one party only of whose knowledge there was no evidence. *Edwards v. Cooper*, 11 Q. B. 33.

— **When given—Sent by Post.]**—A party to whom notice of an act of bankruptcy is sent by post is not to be deemed to have had notice until the day when, in the ordinary course of post, he would receive the letter containing it. *Loader v. Hiscock*, 1 F. & F. 132.

**Notice of prior Act of Bankruptcy—Onus of Proof lies on Person supporting the Transaction.]**

—Where a person claims protection against the title of the trustee relating back to an act of bankruptcy committed prior to the transaction sought to be protected, the onus lies on the person supporting the transaction to prove that it was entered into without notice of the prior act of bankruptcy, not on the trustee to prove such notice. *Cartwright, Ex parte, Joy, In re*, 44 L. T. 883—C. A.

**b. Under the Bankruptcy Act, 1869.**

**Notice must be Specific.]**—The notice of an act of bankruptcy, in order to invalidate an execution, ought to convey specific information as to the facts constituting the act of bankruptcy, and ought not to leave room for doubt. *Beans v. Hallam*, 6 L. R., Q. B. 713; 40 L. J., Q. B. 229; 24 L. T. 939; 18 W. R. 1158.

A notice stating circumstances, which may or may not amount to an act of bankruptcy, is insufficient. *Id.*

A creditor obtained judgment against a non-trader, and issued a fi. fa. The sheriff seized thereunder his goods. Prior to the seizure, he had executed a deed of assignment of all his estate and effects for the benefit of his cre-

ditors, and thereby committed an act of bankruptcy. On the day after the seizure, the attorneys of the debtor wrote to the attorney of the execution creditor a letter as follows:—"B. made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at." The sheriff sold the goods under the execution; and the debtor was adjudicated a bankrupt on the next day:—Held, that the letter of the attorneys was insufficient as a notice of the act of bankruptcy; and that the execution creditor was entitled to the proceeds of the sale. *Ib.*

**Notice of Petition is a sufficient Notice.]**—A notice to an execution creditor which states that a petition in bankruptcy against the execution debtor has been filed on a date, at a court, and by a person named in the notice, is sufficient notice of an act of bankruptcy to prevent the execution being a protected transaction within 32 & 33 Vict. c. 71, s. 95, sub-s. 3, since such creditor ought to know that the petition would contain a statement that the debtor has committed an act of bankruptcy. *Hooking v. Acraman* (12 M. & W. 170) commented on; *Lucas v. Dicker*, 6 Q. B. D. 84; 50 L. J., Q. B. 190; 43 L. T. 429; 29 W. R. 115—C. A.

**Notice of Facts sufficient without Creditor drawing Inference of Law.]**—A person having notice of facts from which a court or jury would infer that an act of bankruptcy had been committed, must be considered as having notice that an act of bankruptcy had been committed, notwithstanding his oath that he did not in fact draw the inference. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

**"Available for Adjudication."]**—The expression "notice of any act of bankruptcy available for adjudication" used in s. 31 of the Bankruptcy Act, 1869, means notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered. *Crosbie, Ex parte, Bedell, In re*, 7 Ch. D. 123; 47 L. J., Bk. 19; 37 L. T. 583; 26 W. R. 119—C. A.

Therefore a creditor who contracted a debt with a bankrupt with notice only of an act of bankruptcy committed by him more than six months before the presentation of the petition upon which the adjudication is made is not precluded by s. 31 from proving under the adjudication. *Ib.*

The words "notice of an act of bankruptcy available for adjudication" in ss. 94 and 95 of the Bankruptcy Act, 1869, mean notice of an Act of bankruptcy which would have been available for the making of the adjudication actually made, that is, an act of bankruptcy committed within six months from the presentation of the petition on which the adjudication was founded. *Gilbey, Ex parte, Bedell, In re*, 8 Ch. D. 248; 47 L. J., Bk. 49; 38 L. T. 728; 26 W. R. 768—C. A.

A., a trader, committed an act of bankruptcy. More than six months afterwards he was adjudicated a bankrupt upon a second such act. Between the dates of the first and second acts, money was paid to him by a depository having notice at that time of the first act of bankruptcy:

—Held, that the payment was protected by s. 94, sub-s. 2 of the Bankruptcy Act, 1869. *Quilter, Ex parte, Barnes, In re*, 30 W. R. 739—C. A.

The appellants claimed to retain money in respect of a transaction in relation to the property of the bankrupt, entered into by them at a time when they had notice of an act of bankruptcy committed by the bankrupt, to which the title of the trustee related back, but committed more than six months before the presentation of the petition on which he was subsequently adjudicated a bankrupt, on the ground that they were protected by s. 95, sub-s. 1, as having had no notice of an act of bankruptcy available for adjudication:—Held, that they were not protected. *Tilleard, Ex parte, Barnes, In re*, 30 W. R. 568. Practically overruled by preceding case.

**Debtor Summons.]**—After the plaintiff had commenced an action against the defendant for dissolution of partnership, the plaintiff took out a debtor summons against the defendant. The defendant failed to comply with it, and the plaintiff filed a petition of bankruptcy against him based on the summons. Another creditor afterwards took out a debtor summons against the defendant, and, on his non-compliance with it, filed a petition and obtained adjudication of bankruptcy against him. Before the adjudication, and without notice of the act of bankruptcy on which it was based, the plaintiff entered into an agreement with the defendant for compromise of the action, which the trustees in the bankruptcy sought to impeach as void against the creditors:—Held, that although the non-compliance with the plaintiff's debtor summons was not an act of bankruptcy available for adjudication on the petition of the particular creditor who obtained the adjudication against the defendant, it was an act of bankruptcy "available for adjudication" within the meaning of the Bankruptcy Act, 1869, s. 94, and therefore the agreement for compromise between the plaintiff and defendant was not a protected transaction under that section. *Crosbie, Ex parte*, 7 Ch. D. 123, distinguished, and the judgment of James, L. J., explained. *Hood v. Newby*, 21 Ch. D. 605, 52 L. J., Ch. 204; 47 L. T. 721; 31 W. R. 185—C. A.

**— Failure to pay Composition.]**—On the 12th of November a debtor filed a liquidation petition. The creditors resolved to accept a composition. The debtor failed to pay it when due, and on the 28th of May he was adjudicated a bankrupt upon a petition filed on the 29th of April, the act of bankruptcy being the filing of the liquidation petition. On the 29th of March he had executed a mortgage of leasehold property, in substitution for a mortgage, given to the same creditor two years before the liquidation petition was filed, of a lease which afterwards turned out to be void:—Held, that though, when the mortgage of the 29th of March was executed, the mortgagee had notice of the filing of the liquidation petition, yet it was not notice of an act of bankruptcy then available for adjudication against the debtor, and consequently that the mortgage was protected by the Bankruptcy Act, 1869, s. 95. *Hoare, Ex parte, Walton, In re*, 16 L. R., Eq. 625; 43 L. J., Bk. 38; 29 L. T. 140; 21 W. R. 909.

**Executions against Goods—Onus is on Creditors.]**—In the Bankruptcy Act, 1869, s. 95, sub-s. 3, "act of bankruptcy" means an act of bankruptcy which has been committed prior to the time of seizure. *Schulte, Ex parte, Matanile, or Matulle, In re*, 8 L. R., Ch. 409; 30 L. T. 478; 22 W. R. 462.

The onus is on the execution creditor, who claims the protection of that section to prove that he had no notice of any prior act of bankruptcy. *Ib.*

Notice to the sheriff's officers in possession under an execution of an act of bankruptcy is not notice to the creditor. *Ib.*

## XVII. LIQUIDATION BY ARRANGEMENT UNDER THE BANKRUPTCY ACT, 1869.

### 1. PETITION FOR LIQUIDATION.

**By Lunatic not so Found.]**—A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition:—Semble, that, in the case of a lunatic so found by inquisition, the Court of Lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf. *Cohen, Ex parte, Cohen, In re*, 13 Ch. D. 183; 39 L. T. 645; 27 W. R. 387—C. A.

**Misdescription of Debtor.]**—A debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence:—Held, that this was a misdescription; that the defect was not a mere formal one, but was a matter of substance; and that resolutions passed by the creditors in favour of a liquidation by arrangement ought not to be registered. *Jerningham, Ex parte, Jerningham, In re*, 9 Ch. D. 466; 47 L. J., Bk. 116; 39 L. T. 186; 27 W. R. 157—C. A.

An application for leave to amend the petition, and summon a fresh first meeting of the creditors, was refused. *Ib.*

The debtor presented his petition for liquidation upon the 31st August, 1881. He therein described himself as an engineer, giving a private address. Previously thereto, and down to February, 1881, he had carried on business at first in partnership, but afterwards by himself, as an iron founder, at another address. In February he made over this business to his (the debtor's) father, but until the month of May in that year, it was continued to be carried on in the debtor's name. On the 30th August the debtor's furniture, which formed, as it appeared, the whole of his assets, was seized by the sheriff under an elegit:—Held, that the description in the petition was insufficient and misleading, and that resolutions for liquidation by arrangement and giving to the debtor his immediate discharge could not be registered upon this ground, and also that the resolutions were passed in the interest of the debtor, and not of the creditors. *Kershaw, Ex parte, Woodhouse, In re*, 45 L. T. 687.

In a statement of affairs produced by a debtor, he described some of his assets as the lease of a house No. 15, Motcombe Street, Belgrave Square, but in his petition described himself as of 165, Ferndale Road, Clapham, in the county of Surrey, and, on being examined, admitted that he occasionally slept at Motcombe Street:—Held, that the description of the debtor was

VOL. L.

insufficient. *Pulbrook, Ex parte, Lloyd, In re*, 48 L. T. 128.

**When Objection to be taken.]**—Any objection to the description of a debtor in the advertisement in the Gazette must be taken before the registration of the resolutions passed by the creditors. *Cooper, Ex parte, Green, In re*, 39 L. T. 260.

**Trustee not bound by Misdescription.]**—When a trader-debtor falsely describes himself as a non-trader in his petition for liquidation, the trustee of his estate is not stopped from proving that he is a trader. *Ross, Ex parte, Hare, In re*, 28 L. T. 450; 21 W. R. 560.

**Farmer and Cattle Dealer described as "Cattle Dealer."]—**A farmer, who had also carried on the business of a cattle dealer, filed a liquidation petition, in which he gave his correct address, but described himself only as a cattle dealer:—Held, by Bacon, C. J., and by the Court of Appeal, that this was not a misdescription such as to invalidate the proceedings, and that the resolutions passed by the creditors ought to be registered. But leave was given to amend the petition by adding the description "farmer." *Kirkwood, Ex parte, Mason, In re*, 11 Ch. D. 724; 40 L. T. 566; 27 W. R. 806—C. A.

**Where Assets very Small.]**—A debtor who has practically no assets distributable among his creditors is not entitled to file a liquidation petition. *Aaronson, Ex parte, Aaronson, In re*, 7 Ch. D. 713; 47 L. J., Bk. 60; 38 L. T. 243; 26 W. R. 470—C. A.

A debtor filed a liquidation petition, and the creditors unanimously resolved to accept a composition of 3d. in the pound. The debts were 130*l.*; the assets amounted to 7*l.* The registrar refused to register the resolutions, though no creditor opposed, on the ground that there were no "available assets for distribution among the creditors":—Held, that, as all the requirements of the Bankruptcy Act, 1869, and the rules had been complied with, the resolutions must be registered. *Elworthy, Ex parte, Elworthy, In re*, 20 L. R., Eq. 742; 44 L. J., Bk. 123; 32 L. T. 699; 23 W. R. 790.

The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to 540*l.*, and that his assets were only 32*l.* The creditors resolved upon a liquidation. One creditor opposed the registration of the resolutions:—Held, that the petition was an abuse of the procedure of the court, and that the registration had been rightly refused. *Staff, Ex parte, Staff, In re*, 20 L. R., Eq. 775; 44 L. J., Bk. 137; 32 L. T. 40; 23 W. R. 950.

There is no absolute rule that a debtor who has no assets cannot file a liquidation petition. *Hudson, Ex parte, Walton, In re*, 22 Ch. D. 773; 52 L. J., Ch. 581; 47 L. T. 674; 31 W. R. 372—C. A.

**Second Petition.]**—A debtor filed a petition for liquidation, but his statement shewed no available assets. The creditors nevertheless passed a resolution for a composition of one shilling in the pound, which was accordingly paid to them. The resolution not having been filed within the three days limited by the 284th rule, the debtor presented a second petition

R 2

under which the creditors passed a similar resolution:—Held, that the presentation of the second petition was regular, and that the resolution to accept the composition ought to be registered. Where there has been actual payment of a composition no security is necessary. *Thomas, Ex parte, Pres., In re*, 40 L. T. 835.

**Petition Filed after Office Hours.**—A liquidation petition which is in fact filed by a debtor in the proper office is good, although it may have been filed after office hours. *Jones, Ex parte, Williams, In re*, 42 L. T. 157.

**Effect of Filing—Vesting of Property in Trustee.**—Filing a petition for liquidation by arrangement is an act of bankruptcy, and the vesting of the debtor's goods in the trustee relates back to the filing of the petition; so that an execution creditor, with notice of the petition, cannot seize the goods of the debtor, and hold them as against a subsequently-appointed trustee. *Duignan, Ex parte, Bissell, In re*, 11 L. R., Eq. 604; 40 L. J., Bk. 33; 24 L. T. 237; 19 W. R. 711. Affirmed, 6 L. R., Ch. 605; 40 L. J., Bk. 68; 25 L. T. 284; 19 W. R. 1127.

— **Where Composition accepted.**—After a petition has been filed by a debtor for liquidation by arrangement, it is at the option of the requisite majority of creditors to determine whether the liquidation shall be effected by means of the appointment of a trustee, or whether they shall accept a composition, the debtor being left in possession of his assets. If the creditors adopt the latter course, there is then no power to deprive secured creditors of their securities; no relation of title to any act of bankruptcy prior to the presentation of the petition; nor anything in which the creditors who have resolved to receive a composition have any interest, beyond enforcing the performance of that condition on which they agreed to accept the composition. *Birmingham Gaslight and Coke Company, Ex parte, Adams, In re*, 11 L. R., Eq. 204; 40 L. J., Bk. 1; 24 L. T. 42; 19 W. R. 123.

**Debtor Dying after Filing.**—A debtor filed a petition for liquidation by arrangement, and the same day notices were sent out convening a general meeting of creditors. He died the following day. The creditors desired that proceedings might be continued as if he were alive:—Held, that the court had no jurisdiction to order the continuation of the proceedings. *Obbard, In re*, 24 L. T. 145; 19 W. R. 563.

## 2. STAYING BANKRUPTCY PROCEEDINGS.

A creditor, having presented a petition for an adjudication against his debtor, ought not to have his proceedings stayed by injunction merely because before the adjudication is actually made the debtor himself presents a petition for liquidation by arrangement or composition. *Dimond, Ex parte, Williams, In re*, 5 L. R., Ch. 743; 39 L. J., Bk. 47; 23 L. T. 292; 18 W. R. 1123.

**Petition Filed by one of Joint Debtors.**—When a creditor of joint debtors is proceeding against them jointly, and one of them takes pro-

ceedings for liquidation of his affairs, the court will not restrain the proceedings of his creditor against his joint creditors. *De Vecchj, In re, Isaacs, Ex parte*, 6 L. R., Ch. 58; 40 L. J., Bk. 19; 22 L. T. 523; 19 W. R. 38.

## 3. MEETINGS OF CREDITORS, THEIR DEBTS AND RIGHT TO VOTE.

**Notice to be given to all Creditors.**—When a petition has been presented and a resolution passed at a meeting of creditors, such resolution cannot be registered unless all the creditors have received notice of the meeting. *Rogers, Ex parte*, 22 L. T. 283.

**Signing Notice summoning Meeting.**—It is not necessary that the notice summoning the first general meeting of creditors under a liquidation petition should be signed by the debtor's attorney with his own hand. *Hirst, Ex parte, Hirst, In re*, 18 L. R., Eq. 704; 43 L. J., Bk. 130.

The notice is sufficient if the attorney's name is subscribed by his clerk by his direction. *Ib.*

**Proof of Notice.**—Rules 97 and 98 of the Bankruptcy Rules, 1870, apply to bankruptcy only, and do not apply to liquidation by arrangement or composition. *Dean, Ex parte, Dean, In re*, 13 Ch. D. 313; 41 L. T. 602; 28 W. R. 204—C. A.

The affidavit, made in accordance with r. 256, of the posting to creditors of notices of a general meeting under a liquidation petition, is only *prima facie*, not conclusive, evidence that the creditors have received the notices. *Ib.*

The registrar has a judicial discretion to require further evidence of the receipt of the notices, and, if satisfied that some of the creditors have not received notice, to direct the summoning of a fresh meeting, and the Court of Appeal will not interfere with the exercise of his discretion, unless very clearly satisfied that he has exercised it wrongly. *Ib.*

**Place of Meeting.**—The affidavit of a debtor filed with his liquidation petition stated that Stone would be the most convenient place for the meeting of the creditors, but the notices sent out by the registrar to the creditors summoned them to meet at Stafford:—Held, that, as no formal order had been made by the court to change the place of meeting mentioned in the affidavit, the proceedings were invalid, and that the resolutions passed by the creditors could not be registered. But leave was given to the debtor to summon a fresh first meeting. *Mayer, In re, Lewis, Ex parte*, 4 Ch. D. 519; 46 L. J., Bk. 33; 35 L. T. 915; 25 W. R. 275.

**Adjourning Meeting.**—In liquidation by arrangement a resolution to adjourn a meeting is an "ordinary resolution," and therefore must be decided by a majority in value of the creditors present, personally or by proxy, at the meeting and voting on such resolution. *Orde, Ex parte, Horsley, In re*, 6 L. R., Ch. 881; 40 L. J., Bk. 60; 25 L. T. 400; 19 W. R. 1103.

— **After Rejection of Resolution for Composition.**—At the first meeting under a liquidation petition the debtor offered a composition. His solicitor took the votes of the creditors and

found that the requisite majority in favour of it could not be obtained, but the question was not formally put from the chair, nor was any resolution reduced into writing. A resolution to adjourn the meeting was then carried, and at the adjourned meeting the debtor's offer was accepted, and the resolution to accept it was duly confirmed at the second meeting. The resolution for adjournment was written and signed, and filed with the proceedings:—Held, that the adjournment and all the subsequent proceedings were invalid, the offer having been rejected by the first meeting. *Till, Ex parte, Ratcliffe, In re*, 10 L. R., Ch. 631; 44 L. J., Bk. 103; 32 L. T. 521; 23 W. R. 670. Reversing *S. C.*, 32 L. T. 504; 23 W. R. 636.

#### — Removing Proof used at First Meeting.]

—When the creditors at the first meeting, under a petition for liquidation, only voted an adjournment, a proof which had been inadvertently admitted, and in respect of which the creditor had voted for the adjournment, may be taken off the file, under circumstances shewing that the party in whose name the proof was made as the principal was only an agent in the matter. *Anon.*, 22 L. T. 151.

#### Summoning fresh Meeting of Creditors.]

The power to direct a fresh meeting to be summoned extends not only to a case where, through accident or mistake on the part of the debtor, no valid resolution has been passed, but also to a case where, owing to a mistake on the part of the creditors, or from any other cause, no valid resolution has been passed. *Terrell, In re, Sheffield and Rotherham Joint Stock Banking Company, Ex parte*, 4 Ch. D. 293; 46 L. J., Bk. 47; 35 L. T. 646; 25 W. R. 153—C. A. See *Mayer, In re*, 4 Ch. D. 519; 46 L. J., Bk. 33; 35 L. T. 915; 25 W. R. 275. *Buckley, Ex parte, Buckley, In re*, 16 Ch. D. 513; 44 L. T. 39; 29 W. R. 920—C. A.

A debtor, who was a member of a partnership firm, filed a petition for liquidation. In the statement produced by the debtor to the first meeting of his creditors, he made no distinction between his joint and separate debts and assets. The creditors passed a resolution for liquidation, but by reason of the irregularity of the debtor's statement, the resolution was not registered. The debtor then obtained an order to summon a fresh first meeting:—Held, that inasmuch as no valid resolution could have been passed at the meeting, and, consequently, the creditors had had no opportunity of expressing their opinion as to a liquidation, the court was justified in permitting a fresh first meeting. *Gibbs, Ex parte, Webb, In re*, 10 L. R., Ch. 382; 44 L. J., Bk. 73; 32 L. T. 292; 23 W. R. 529.

**Right to Vote—Production of Bills of Exchange.]**—It is sufficient for the validity of the vote of a creditor who holds bills of exchange or promissory notes signed by the debtor if he produces the bills or notes before the registration of the resolutions upon which he has voted. *Ashworth, Ex parte, Hoare, In re*, 18 L. R., Eq. 705; 43 L. J., Bk. 142; 30 L. T. 906; 22 W. R. 925.

The creditors of a debtor at their first meeting resolved on an adjournment. Some of the creditors who voted in favour of the adjournment held bills of exchange and bonds of the debtor,

which they did not produce. If their votes had been rejected the adjournment would not have been duly carried. At the adjourned meeting these creditors produced their bills of exchange and bonds, and a liquidation was then resolved upon:—Held, that the production of the bills and bonds at the adjourned meeting was sufficient. *Id.*

**— Secured Creditor.]**—If a secured creditor votes without producing his security, his vote is valid, but his security is forfeited. *Id.*

Whether a secured creditor, who in his proof states his security, and afterwards votes at a liquidation meeting in respect of his whole debt, thereby abandons his security, *quære*. *Ball, Ex parte, Shepherd, In re*, 10 Ch. D. 667; 48 L. J., Bk. 57; 27 W. R. 563—C. A.

#### — Amount of Debt unascertained — Annuity.]

—A debtor who filed a liquidation petition had, by a separation deed between himself and his wife, covenanted to pay to a trustee an annuity, during the joint lives of himself and his wife, for the maintenance of the wife and a child of the marriage. The annuity was to cease in case the husband and wife should cohabit again:—Held, that the value of the annuity not having been ascertained, the trustee was not entitled to vote in respect of it at a meeting of creditors under the petition. *Pearce, Ex parte, Grieces, In re*, 13 Ch. D. 262; 41 L. T. 742; 28 W. R. 404—C. A.

**— Untaxed Costs.]**—A liquidating debtor was indebted to a creditor in 357*l.* recovered by verdict, and costs, which had not been taxed. The creditor attended the first meeting of creditors, and stated in his affidavit that the debtor was indebted to him in 357*l.* on the verdict and an amount of costs which he estimated at 200*l.*; and claimed to vote in respect of the aggregate amount. The creditor had been restrained by injunction from taking any further proceedings in the action:—Held, that the estimated amount of untaxed costs was an unliquidated debt within the Bankruptcy Act, 1869, s. 16, sub-s. 3, and that he could not vote in respect thereof. *Ruffle, Ex parte, Dummelow, In re*, 8 L. R., Ch. 997; 42 L. J., Bk. 82; 29 L. T. 384; 21 W. R. 932.

The proper course for the creditor to pursue was either to apply for leave to sign judgment and tax his costs, or else to swear to such a sum as the costs when taxed would at least amount to. *Id.*

#### — By Creditor who has Sold his Debt.]

The fact that a creditor who has signed a notice summoning a general meeting for the purpose of removing the trustee, and who has voted at the meeting in favour of a resolution for removing the trustee, had previously sold his debt to another creditor, will not invalidate the notice or the resolution. *Evans, Ex parte, Baum, In re*, 13 Ch. D. 424; 49 L. J., Bk. 25; 42 L. T. 384; 28 W. R. 500—C. A.

**Practice on Voting.]**—All creditors present, personally or by proxy, are to be considered as voting on every resolution so long as their proofs are in the hands of the chairman. *Ord, Ex parte, Horsley, In re*, 6 L. R., Ch. 881; 40 L. J., Bk. 60; 25 L. T. 400; 19 W. R. 1103.

The assent of each such creditor must be evidenced by his signing the resolution when reduced to writing, and if he does not sign it, he must be taken to have voted in the negative. *Ib.*

A creditor who does not wish to vote on any resolution must, before the resolution is put, withdraw his proof. *Ib.*

A resolution for adjournment requires to be passed with the same formalities as other resolutions. *Ib.*

At a meeting of creditors resolutions were proposed for a liquidation by arrangement. A large creditor attended by proxy and opposed the resolutions, and voted against them on the show of hands, but afterwards signed them. If this creditor should be excluded, the resolutions were not passed by the requisite majority:—Held, that the resolutions were duly passed and ought to be registered; for that, according to the act, the votes of the signing creditors were determined by their signatures; and the course which they had taken at the meeting could not be looked to. *Pooley, Ex parte, Russell, In re*, 5 L. R., Ch. 722; 40 L. J., Bk. 41; 23 L. T. 275; 18 W. R. 1013.

At a meeting of creditors, called in pursuance of a petition for liquidation by arrangement, resolutions were proposed. They were opposed, and on a show of hands, several creditors, including a principal creditor, voted against the resolutions. This creditor afterwards signed the resolutions. And a requisite majority of assents was thus obtained, which would not have been the case if this creditor had been dissentient:—Held, that the resolutions ought to be registered, the evidence afforded by the signature being conclusive, whatever might have been the conduct of the voters at a show of hands. *Ib.*

A creditor, who is present at a general meeting of creditors under a liquidation petition, cannot be considered as present on behalf of another creditor for whom he holds a proxy, notwithstanding the fact that the proxy is on the file of proceedings, unless he has done some act to shew that he intends to be present on that occasion on behalf of his principal as well as on his own behalf. *Orde, Ex parte* (6 L. R., Ch. 881), distinguished. *Evans, Ex parte, Baum, In re*, 13 Ch. D. 424; 49 L. J., Bk. 25; 42 L. T. 384; 28 W. R. 500—C. A.

— **Authority conferred by Proxy.**—The appointment of a proxy under the Bankruptcy Act and rules only confers on the person so appointed an authority to represent his principal; it does not necessarily follow that he in fact represents his principal on all subsequent occasions when he is present at a meeting, unless he would have no right to be present in any other capacity. *Ib.*

— **Blank Proxy—Implied Authority to insert Name.**—A creditor of a liquidating debtor, who signs a proxy in blank and sends it to his solicitor, who forwards it to the debtor's solicitor, without any express instructions as to the use to be made of it, thereby confers on him an implied authority to fill up the proxy with his own name and to vote on his behalf. *Duce, Ex parte, Whitehouse, In re*, 13 Ch. D. 429; 42 L. T. 385; 28 W. R. 501—C. A.

A proxy paper signed by a creditor, leaving the name of the proxy in blank, may be filled up by the person to whom the creditor has intrusted

it, with a verbal authority to use it, and that when so filled up it will be valid. *Lancaster, Ex parte*, 5 Ch. D. 911; 46 L. J., Bk. 90; 37 L. T. 674; 25 W. R. 669—C. A. Reversing 46 L. J., Bk. 55; 36 L. T. 72; 25 W. R. 380.

At a first meeting of creditors resolutions for composition were moved; the votes were ascertained, shewing the resolutions were not carried. The debtor's solicitor then put in a proof for another debt, and voted as proxy in respect of it. This vote was admitted, and by means of it the requisite majority was created, and the resolutions were declared to be carried:—Held, that the whole matter was *in fieri*, and that the vote was properly admitted. *Ib.*

**Proxy on Behalf of Lunatic Creditor.**—The committee of the estate of a lunatic who is a creditor of a liquidating debtor has no power, without the sanction of the Court of Lunacy, to appoint a proxy to vote on behalf of the lunatic in the liquidation proceedings, or to waive any of his rights against the debtor's estate. *Ball, Ex parte, Shepherd, In re*, 10 Ch. D. 667; 48 L. J., Bk. 57; 40 L. T. 141; 27 W. R. 563—C. A.

**Objection to Creditors Voting.**—An objection to the proof of a creditor who has voted at the first meeting of creditors on a composition resolution is in time if taken at the second meeting. *Weil, Ex parte, Mentrop, In re*, 5 Ch. D. 345; 46 L. J., Bk. 84; 36 L. T. 533; 25 W. R. 552—C. A.

Semble, that the objection would be in time if taken after the second meeting and before the registration of the resolution. *Ib.*

#### 4. DEBTOR'S STATEMENT OF AFFAIRS.

**Joint and Separate Debts and Assets.**—In a petition for liquidation it is the duty of the debtor in his statement of affairs to distinguish between his joint and separate assets and liabilities. *Cockayne, Ex parte*, 15 L. R., Eq. 218; 42 L. J., Bk. 71; 28 L. T. 678; 21 W. R. 749.

Where a debtor had not so distinguished his assets and debts, and the registrar in consequence refused to register a special resolution for liquidation by arrangement:—Held, that this decision was correct. *Ib.*

When a liquidating debtor has been formerly in partnership, his statement of affairs must shew which are his joint and which are his separate assets and liabilities, and if the statement produced at the first meeting of the creditors does not shew this distinction, the resolutions passed at the meeting are invalid and will not be registered. *Gibbs, Ex parte, Webb, In re*, 10 L. R., Ch. 382; 44 L. J., Bk. 73; 32 L. T. 292; 23 W. R. 592.

A debtor, who in his liquidation petition describes himself as having been formerly in partnership, ought in his statement of affairs to distinguish between his joint and separate debts and assets, or to state expressly that no debts and no assets of the former partnership exist. *Buckley, Ex parte, Buckley, In re*, 16 Ch. D. 513; 44 L. T. 39; 29 W. R. 920—C. A.

If the statement of affairs fails to do this, resolutions passed by the creditors under the petition ought not to be registered. The court, however, granted leave to summon a fresh first meeting of the creditors. *Ib.*

**Statement should not be supplemented by Affidavit.**—The statement of affairs ought not to be supplemented by affidavits filed after the meeting of the creditors. *Ib.*

**Accuracy of Statement.**—In the statement of affairs of a debtor who had filed a liquidation petition, there was inserted a large debt due to an illegal association. At the first meeting of creditors a liquidation was resolved on:—Held, that the resolutions ought to be registered. *Day, Ex parte*, 1 Ch. D. 699; 45 L. J., Bk. 53; 33 L. T. 867; 24 W. R. 492.

**Jurisdiction of Registrar.**—When a liquidation has been resolved upon, the registrar on the application to register the resolution has no jurisdiction to entertain any question as to the accuracy of the debtor's statement of affairs. *Walter, Ex parte, Webb, In re*, 2 Ch. D. 326; 45 L. J., Bk. 105; 34 L. T. 701; 24 W. R. 834—C. A.

It is for the statutory majority of the creditors to decide as to the sufficiency of the debtor's statement, and all inquiries as to the correctness of the different items of the debtor's statement must be made at the meeting of the creditors, and not before the registrar on the application for registration. *Ib.*

**When Objection should be taken.**—If the majority of the creditors has passed the resolution not for the benefit of the creditors at large, but from motives of kindness to the debtor, the objection should be raised on the application for registration; but if the debtor's statement is fraudulent, the question of fraud ought not to be entered into on the application for registration, but a distinct application should be made to rescind the resolution, or to vacate the registration if it has been registered. *Ib.*

**Same Statement used on two Occasions.**—Registration of the resolutions passed by the creditors under a liquidation petition having been refused, leave was given to the debtor, a trader, to summon a fresh first meeting of the creditors. The fresh meeting was held more than two months after the original meeting, but the debtor produced the same statement of his affairs as he had produced at the original meeting:—Held, that there being no evidence that the state of the debtor's affairs had changed in the interval, it could not be taken that the statement was necessarily inaccurate. *Early, Ex parte, Golding, In re*, 13 Ch. D. 300; 42 L. T. 298; 28 W. R. 310—C. A.

**Creditor's Knowledge of Inaccuracy.**—The statement of the debts and assets of a liquidating debtor shewed that his assets covered his liabilities, but his principal assets consisted of houses which were heavily mortgaged. The majority of creditors passed a resolution to accept a composition of 10s. in the pound. A dissentient creditor applied to set aside all the proceedings, producing evidence that the debtor had undervalued his property. The debtor filed an affidavit stating that his creditors accepted the composition with a full knowledge of the state of his property, and from a desire to assist him and prevent his being completely ruined, and also to avoid waiting for the realization of the property, which would have taken a considerable time:—Held, that as the dissentient creditor, as well as

the others, knew that the assets exceeded the liabilities, there was no ground for setting aside the proceedings. *Linsley, Ex parte, Harper, In re*, 9 L. R., Ch. 290; 43 L. J., Bk. 84; 29 L. T. 857.

#### 5. OMISSION TO INSERT CREDITOR'S NAME AND DEBT IN STATEMENT OF AFFAIRS.

A certificate of discharge obtained by a debtor who has filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, s. 125, is valid against a creditor, whose name has been omitted by the debtor from the list of creditors delivered to the registrar. *Elmslie v. Corrie*, 4 Q. B. D. 295; 48 L. J., Q. B. 462; 40 L. T. 150; 27 W. R. 279—C. A. Affirming *S. C.*, 39 L. T. 107.

The certificate of discharge of a liquidation debtor is a good answer to a claim in respect of a debt due before the discharge, though the creditor's name was omitted from the debtor's statement, and though he had no notice of the proceedings in liquidation. *Heather v. Webb*, 2 C. P. D. 1; 46 L. J., C. P. 89; 25 W. R. 253.

To a statement of defence, setting up that the defendant was discharged from the claim by an order of discharge obtained by him as the result of proceedings for liquidation by arrangement subsequently to the accrual of the claim, the plaintiffs replied that they had had no notice of the liquidation proceedings until long after they had been concluded, and that the defendant had not inserted their names as his creditors, or their debt in any list, statement or document forming any part of the proceedings, and that subsequently to the close of the proceedings the defendant had promised to pay the claim:—Held, a bad reply. *Ib.*

**Restraining Action.**—An action having been brought against the debtor by a creditor whose name was not inserted in the debtor's statement of affairs, and who had no notice of the liquidation proceedings, the debtor obtained an injunction restraining further proceedings in the action:—Held, that the right of the creditor had been prejudiced by the resolutions, and that the action ought not to be restrained. *Harold, Ex parte, Meade, In re*, 3 Ch. D. 119; 45 L. J., Bk. 121; 34 L. T. 649; 24 W. R. 903.

**Holder of Bill of Exchange.**—In the statement of debts produced by a debtor at the meetings of creditors, at which resolutions for accepting a composition were passed, the debtor had inserted the amount coming due on two bills of exchange, and the name and address of the drawer as the creditor, believing the drawer to be the holder of the bills. The bills had, in fact, been negotiated:—Held, that the actual holder, having had no notice of the meeting of creditors, was not bound by the resolutions to accept a composition. *Mathewes, Ex parte, Angel, In re*, 10 L. R., Ch. 304; 44 L. J., Bk. 128; 32 L. T. 631; 23 W. R. 730.

A mistake made inadvertently by a debtor in the statement of his debts, will not be allowed to be corrected, unless he takes steps for doing so within a reasonable time after finding out the mistake. *Ib.*

**Fraudulent Omission—Remedy of Creditor.**—



A certificate of discharge, obtained by a debtor who has filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, is a defence to an action by a creditor whose name has been fraudulently omitted by the debtor from the list of creditors delivered to the registrar, the only remedy of such creditor being to apply to the Court of Bankruptcy to vacate the registration and cancel the certificate. *Wadsworth v. Pickles*; 5 Q. B. D. 470; 49 L. J., Q. B. 454; 43 L. T. 410; 28 W. R. 628.

**Entry of Creditor as fully Secured.**—A debtor, in his statement of affairs, entered A. as a creditor, fully secured. The creditors accepted a composition of 10s. in the pound. A. did not attend or take any part at either of the meetings, nor prove any debt under the petition. The debtor paid the composition to all the creditors except A. Two years afterwards the debtor filed a second petition, whereupon A. realized his security, and claimed to prove under the first petition for the balance remaining due:—Held, that he was not bound by the debtor's statement of his affairs, and that he was entitled to prove for the balance found due to him, and be paid the composition payable upon such balance. *Hodgkinson, Ex parte, Bestwick, In re*, 1 Ch. D. 702; 45 L. J., Bk. 78; 34 L. T. 73. Affirmed, 2 Ch. D. 485; 45 L. J., Bk. 148; 34 L. T. 784; 24 W. R. 938—C. A.

#### 6. EXAMINATION OF THE DEBTOR.

**When to be Held.**—The proper time for investigating the affairs of a debtor, who has filed a petition for liquidation by arrangement with his creditors, is at the meetings of creditors; and the registrar has no power, upon the presentation to him for registration of a resolution for composition, to direct an examination before him of the debtor or other witnesses. *Lery, Ex parte, Varbetian, In re*, 11 L. R., Eq. 619; 40 L. J., Bk. 40; 24 L. T. 332; 19 W. R. 586.

**Order granted on *prima facie* Case.**—When a person is entitled to stand as a creditor of a debtor whose estate is being wound up in liquidation, he is entitled to have an order for the examination of the debtor under the Bankruptcy Act, 1869, s. 96, as extended by the r. 166, on making out a *prima facie* case for such examination in accordance with the requirements of r. 172. *Swift, Ex parte, Russell, In re*, 26 L. T. 226—L. J.

**Questions limited to State of Assets.**—Under the Bankruptcy Act, 1869, s. 125, sub-s. 3, a debtor is only bound to answer such questions as are properly put for the purpose of shewing the state of the assets; he is not bound to answer vexatious questions or questions put by a creditor for the purpose of obtaining information to be used in a matter not affecting the interests of the creditors. *Hope, In re*, 9 Ch. D. 398; 47 L. J., Bk. 78; 38 L. T. 762; 27 W. R. 7—C. A. Affirming 38 L. T. 537.

Semble, that the effect of r. 301 of the Bankruptcy Rules, 1870, is to make the creditors, if they act *bona fide*, the sole judges whether the debtor has given sufficient information as to his affairs. *Id.*

**Debtor entitled to Advice of Solicitor.**—A

liquidating debtor attending at the first meeting of his creditors to answer inquiries, under the Bankruptcy Act, 1869, s. 126, sub-s. 4, is entitled to the advice of his solicitor as to whether a question is material. *Mackenzie, Ex parte, Helliwell, In re*, 10 L. R., Ch. 88; 44 L. J., Bk. 14; 31 L. T. 421; 23 W. R. 121.

A refusal to answer proper questions would be a ground of objection to the registration of the resolutions. *Id.*

When a paper was put into the debtor's hand, and he was asked the question whether it was written by his authority; but the paper was not read to the meeting nor was his solicitor allowed to see it, and, by his solicitor's advice, he refused to answer the question:—Held, that this was no ground for refusing the registration of the resolutions, though the question put was really material. *Id.*

Any questions should be put so that the meeting generally may see their materiality. *Id.*

**Answers form Part of Statement of Affairs.**—The answers given by a debtor at a liquidation meeting to questions put to him by the creditors respecting his affairs are to be taken as part of his statement of affairs. *Aaronsen, Ex parte, Aaronsen, In re*, 7 Ch. D. 713; 47 L. J., Bk. 60; 38 L. T. 243; 26 W. R. 470—C. A.

#### 7. THE RESOLUTIONS.

##### a. Generally.

**Must be reduced to Writing.**—The provision in r. 275, Bankruptcy Rules, 1870, that "only such resolutions as are reduced into writing and signed by or on behalf of the statutory majority of creditors at a meeting shall be taken cognizance of by the court," refers only to resolutions in favour of liquidation by arrangement or the acceptance of a composition. *Till, Ex parte, Ratcliffe, In re*, 10 L. R., Ch. 631; 44 L. J., Bk. 103; 32 L. T. 521; 23 W. R. 670.

**Cannot be Signed after Filing.**—When a special resolution for liquidation has been filed by the person intrusted with it, it is too late for a creditor to sign it. *Thorne, Ex parte, Butlin, In re*, 8 L. R., Ch. 722; 42 L. J., Bk. 60; 29 L. T. 122; 21 W. R. 766.

**Resolution Rejected—Withdrawal of Opposition allowed.**—At the meeting of the creditors of a debtor, whose proofs amounted to 50,075*l.* 3*s.* 1*d.*, fifty-two creditors out of fifty-nine voted for a resolution for liquidation by arrangement; but, because the proofs of the fifty-two assenting creditors amounted only to 32,072*l.* 0*s.* 1*d.*, which sum fell short of three-fourths of the 50,075*l.* 3*s.* 1*d.*, the resolution was lost. Among those who voted for bankruptcy (as opposed to liquidation by arrangement) were a banker, a creditor for 6,963*l.* 15*s.* 11*d.*, and F. & Co., creditors for 1,425*l.* 4*s.* 6*d.* Both of them voted by proxy, and both of them were desirous subsequently to withdraw their vote, and vote for liquidation by arrangement, in which case the requisite three-fourths in value would be obtained:—Held, under the peculiar circumstances of the case, that the banker and F. & Co. might be deemed assenting creditors to the liquidation by arrangement. *Wheeler, In re*, 20 W. R. 199.

But every case of the kind must be dealt with according to its own circumstances. *Ib.*

**Proper Resolutions—Money Paid in Satisfaction of Creditors' Right to apply to Court.]—**Resolutions to the effect that the affairs of the debtor should be liquidated by arrangement and not by bankruptcy, that if the bankrupt should within a month pay 4,000*l.*, and give a bond to the trustee for a further sum of 5,000*l.*, he should have a discharge, and that the sum of 4,000*l.* was to be deemed a satisfaction of the creditors' rights to apply to the court in reference to the pay or half-pay of the debtor, are proper resolutions. *Poolley, Ex parte, Russell, In re*, 5 L. R., Ch. 722; 40 L. J., Bk. 41; 23 L. T. 275; 18 W. R. 1013.

**— Good in Form, Bad in Substance.]—**Resolutions which in form are resolutions for liquidation by arrangement, but amount in fact to resolutions for a composition, are an evasion of the act, and ought not to be registered. *Harold, Ex parte, Meade, In re*, 3 Ch. D. 119; 45 L. J., Bk. 121; 34 L. T. 649; 24 W. R. 903.

The creditors of a debtor who had filed a liquidation petition resolved that his affairs should be liquidated by arrangement, and appointed a trustee; that, on payment by the debtor to the trustee of a sum equal to 1*s.* in the pound on the amount of the debts, he should be entitled to have his discharge; and that the payment should be made by three instalments of 4*d.* in the pound, at six, twelve, and eighteen months from the registration of the resolutions. No second meeting was summoned to confirm these resolutions, but they were registered:—Held, that the arrangement was, in substance, a composition; that it amounted to an evasion of the provisions of the Bankruptcy Act, 1869, s. 126, and that the resolutions ought not to have been registered. *Ib.*

**Where some Resolutions ultra vires, rest may be Registered.]—**A debtor, partner in a firm, having filed a petition for liquidation by arrangement, a general meeting of his creditors was held, at which the requisite majority of his joint and separate creditors passed a resolution agreeing to the liquidation, appointing a trustee and committee of inspection, and granting the debtor his discharge. The resolution also contained a clause authorizing the trustee to sell to the mother of the debtor his reversionary interest under his father's will at such a price as would pay the costs of the liquidation and a composition of 1*s.* in the pound to his separate creditors. This resolution was registered:—Held, that the clause authorizing the trustee to sell the reversionary interest was ultra vires and void; but that the rest of the resolutions were not thereby rendered invalid, and that the liquidation must proceed in the ordinary course. *Browning, Ex parte, Marks, In re*, 9 L. R., Ch. 583; 43 L. J., Bk. 129; 30 L. T. 481; 22 W. R. 638.

When some of the resolutions passed by creditors are ultra vires, the court has power to direct the registration of the rest. *Ashworth, Ex parte, Hoare, In re*, 18 L. R., Eq. 705; 43 L. J., Bk. 142; 30 L. T. 906; 22 W. R. 925.

**— Resolutions may be Registered as to Part.]—**The creditors of a debtor passed resolutions for liquidation by arrangement, and appointed a

trustee with power to sell the estate at such price as should be sufficient to pay a composition of 7*s.* 6*d.* in the pound to the creditors. The registrar registered the resolutions for the liquidation and the appointment of a trustee, but struck out the remaining resolutions as ultra vires:—Held, that the registrar had full power to strike out the void resolutions, and register the others. *Frampton, Ex parte, Watkins, In re*, 45 L. T. 720.

**Application to register Notice to Creditors.]—**A creditor who has objected to a proof tendered at a meeting under a liquidation petition, and has had his objection marked upon the proof, ought to have notice given to him, either by the registrar or by the person whose duty it is to register the resolutions passed at the meeting, of the time when and the place where the application for the registration of the resolutions is to be heard. *Lancaster, Ex parte*, 5 Ch. D. 911; 46 L. J., Bk. 90; 37 L. T. 674; 25 W. R. 669—C. A.

A creditor, who had objected to a proof of debt, had no notice given to him of the application to register the resolutions carried by means of that proof, and they were registered in his absence. He afterwards applied to the county court judge to vacate the registration, and upon the hearing of this application he insisted upon some technical objections, but did not ask to have the creditor, whose proof he had objected to, cross-examined, or adduce any evidence to shew the invalidity of the debt:—Held, that the irregularity had been cured, and that the registration ought not to be vacated. *Ib.*

**Registrar cannot direct Issue.]—**Upon an application under the 295th Bankruptcy Rule to register the resolutions passed by the creditors, the registrar has no power to direct an issue to be tried by a jury as to the existence of a debt, but must decide the matter himself or refer it to the judge. *Williams, Ex parte, Beetonson, In re*, 46 L. T. 241; 30 W. R. 491.

**Registration of Resolutions after Adjudication.]—**When there has been a simple adjudication in bankruptcy, without any stay of proceedings, and resolutions are afterwards duly passed in favour of liquidation, it is the duty of the registrar to register such resolutions, whatever may be the consequences of such registration. *Davis, Ex parte, Russ, In re*, 2 Ch. D. 231; 45 L. J., Bk. 61; 34 L. T. 259; 24 W. R. 684. *But see next case.*

The registrar has no power to register a resolution for liquidation or composition after an adjudication of bankruptcy has been made; unless the adjudication has been made under r. 266 of the Bankruptcy Rules, 1870, in which case the adjudication is intended to be merely ancillary to the liquidation. *Davis, Ex parte* (2 Ch. D. 231), overruled. *Milward, Ex parte, Stanley, In re*, 16 Ch. D. 256; 50 L. J., Ch. 166; 44 L. T. 73; 29 W. R. 167—C. A.

After an ordinary adjudication of bankruptcy has been made (not an adjudication merely for the purpose of protecting the debtor's property pending proceedings for liquidation or composition) the creditors have no power to pass resolutions for either liquidation or composition, and such resolutions if passed will be inoperative. *Milward, Ex parte (supra)*, explained and fol-

A certificate of discharge, obtained by a person who has filed a petition for liquidation under the Bankruptcy Act, 1869, in an action by a creditor, who has been fraudulently omitted from the list of creditors delivered to the Court of Bankruptcy, is a valid remedy of such creditor, and the Court of Bankruptcy may cancel the certificate. *Pickles, 5 Q. B. D.* 43 L. T. 410; 28 W.

**Entry of Creditors.**—A creditor, in his capacity as a creditor, cannot attend or vote at a meeting of the creditors, nor prove his debt, except by a second petition.

**Registration—Locus standi to Oppose.]**—From the hearing of an application to register liquidation resolutions, no one has a locus standi to be heard in opposition but a creditor who has previously proved a debt in the mode prescribed by the rules. A person who claims to be a creditor, and in that character to oppose the registration, cannot prove his debt when he comes before the registrar to oppose. If he has not previously proved a debt he cannot be heard. *Bagster, Ex parte, Bagster, In re*, 24 Ch. D. 477; 49 L. T. 272; 32 W. R. 215—C. A.

**Locus Standi of Creditor withdrawing Proof.]**—A person who alleged that he was a creditor tendered a proof of debt at the first meeting of the creditors, but withdrew it. He attended before the registrar to oppose the registration of the resolutions passed by the creditors:—Held, by Bacon, C. J., and *semble*, per James, L. J., that the objector had no locus standi, and the registrar could not put his proof on the file for the purpose of giving him a locus standi. *Duce, Ex parte, Whitehouse, In re*, 13 Ch. D. 429; 42 L. T. 385; 28 W. R. 501—C. A.

#### b. Validity with Reference to Amount of Assets or Dividends.

**Assets.]**—Where a debtor has practically no assets distributable among his creditors, resolutions for a liquidation by arrangement ought not to be registered, even though they do not include a discharge to the debtor. *Aaronson, Ex parte, Aaronson, In re*, 7 Ch. D. 713; 47 L. J., Bk. 60, 38 L. T. 243; 26 W. R. 470—C. A.

The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to 540*l.*, and that his assets were only 32*l.* The creditors resolved upon a liquidation. One creditor opposed the registration of the resolutions.—Held, that the petition was an abuse of the procedure of the court, and that the registration had been rightly refused. *Staff, Ex parte, Staff, In re*, 20 L. R., Eq. 775; 44 L. J., Bk. 137; 32 L. T. 40; 23 W. R. 930.

... filed a liquidation petition, and the creditors unanimously resolved to accept a composition of 3*d.* in the pound. The debts were 1,000*l.*; the assets amounted to 7*l.* The registrar refused to register the resolutions, though no creditor opposed, on the ground that there were no "available assets for distribution among the creditors."—Held, that, as all the requirements of the Bankruptcy Act, 1869, and the rules had been complied with, the resolutions must be registered. *Elworthy, Ex parte, Elworthy, In re*, 20 L. R., Eq. 742; 44 L. J., Bk. 123; 32 L. T. 699; 23 W. R. 790.

**Power of Majority not to be Used out of Motives of Kindness to Debtor.]**—The power of the majority of creditors, under the Bankruptcy Act, 1869, s. 126, to resolve to accept a composition which will be binding on the minority must be exercised bona fide for the benefit of the creditors and not out of motives of kindness to the debtor. *Page, Ex parte*, 2 Ch. D. 323; 43 L. J., Bk. 119; 34 L. T. 638; 24 W. R. 502—C. A. Therefore, where a resolution was passed for the acceptance of an offer by the debtor to pay 1*s.* in the pound in twelve months, without security, and his own estimate of his assets shewed that he could have paid 5*s.*:—Held, that the registrar had rightly refused to register the resolution. *Id.*

The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts amounted to 11,358*l.*, while his assets were only 75*l.* Of the debts the preferential claims amounted to 127*l.* The creditors, by the proper statutory majority, resolved to accept a composition of 1*s.* in the pound, to be paid within one month after registration of the resolution, no security for its payment being offered. One of the dissentient creditors opposed the registration:—Held, that the resolution could not have been passed in the interests of the creditors, but must have been passed for the benefit of the debtor; that it therefore was not binding on the dissentient minority, and that the registrar was right in refusing to register it. *Terrell, In re, Sheffield and Rotherham Joint Stock Banking Company, Ex parte*, 4 Ch. D. 293; 46 L. J., Bk. 47; 35 L. T. 646, 648; 25 W. R. 153—C. A.

**Where Debtor has bona fide Claims.]**—Want of bona fides will not necessarily be imputed to liquidation resolutions, however small the assets immediately available may be, if the debtor has substantial bona fide claims which are the subject of pending litigation. *Hope, Ex parte, Hope, In re*, 9 Ch. D. 398; 47 L. J., Bk. 78; 38 L. T. 762; 27 W. R. 7—C. A.

**In Absence of Fraud, Resolutions must be Registered.]**—The statutory majority of the creditors of a liquidating debtor passed a resolution accepting a composition of 6*d.* in the pound, which was subsequently duly confirmed:—Held, that in the absence of fraud, the resolution must be registered. *Williams, Ex parte*, 36 L. T. 324; 25 W. R. 432.

The creditors of a debtor, whose statement of affairs shewed that his debts amounted to 534*l.* and his assets to 85*l.*, resolved on a liquidation by arrangement, and gave the debtor an immediate discharge. The registration was opposed by one creditor, who had, after the filing of the petition, seized the whole of the debtor's goods.

der a fi. fa. :—Held, that the resolutions could be treated as any abuse of the procedure of court, or as having been passed *malâ fide*.  
*y. Ex parte, Golding, In re*, 13 Ch. D. 300; 11. T. 298; 28 W. R. 310—C. A.

**Opposition by Judgment Creditor.**—The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts were 1,759*l.* and his assets 85*l.*, the latter sum being subject to a deduction in respect of preferential debts. The creditors resolved upon a liquidation by arrangement, and gave the debtor an immediate discharge. They also voted 10*l.* for the remuneration of the trustee. The registration of the resolutions was opposed by a creditor who had brought an action against the debtor for 182*l.*, but who had been restrained from proceeding with his action. He was in a position to sign judgment and issue execution so soon as the injunction should be dissolved :—Held, that, notwithstanding the small amount of the assets, the resolutions ought to be registered, the contest being really whether the assets, such as they were, should be distributed among the creditors generally, or be swept away by the judgment creditor, and this although the judgment creditor offered in the Court of Appeal to undertake to present a bankruptcy petition against the debtor.  
*Mathews, Ex parte, Sharpe, In re*, 16 Ch. D. 655; 50 L. J., Ch. 284; 44 L. T. 117—C. A.

### c. Vacating or Setting Aside.

**Fraud or Malpractices.**—The court will not rescind the registration of resolutions for composition on the ground of misstatement of assets by the debtor except upon evidence sufficient to convict him of a misdemeanor under the Debtors Act, 1869, s. 11, sub-s. 6. *Law, In re, Hart, Ex parte*, 47 L. J., Bk. 88.

A liquidating debtor whose statement of affairs shewed debts amounting to 5,146*l.*, with assets 3,485*l.*, was proved to have estimated six specified debts at 63*l.* 15*s.* 7*d.* only in his statement of affairs, while in the course of the next two years he recovered 249*l.* 3*s.* 8*d.* in respect of them. On an application by a creditor to rescind the registration of the resolutions on the ground that the debtor had fraudulently misstated his assets :—Held, that the evidence being insufficient to establish an intent to defraud, the application must be dismissed, but without costs. *Ib.*

—**Application not Barred by Delay.**—Held, also, that the application, under the circumstances, was not barred by delay, though made more than two years after the date of the resolutions. *Ib.*

**Creditor accepting Benefits cannot impugn Resolution.**—A creditor who dissents from, but who accepts the composition paid under resolutions adopted for the liquidation by arrangement of a debtor's affairs, cannot, the debtor having duly received his discharge and certificate, on default being afterwards made in the payment of a part of the composition, impugn the validity of the resolutions and sue on the original debt. *Lewis v. Leonard*, 5 Ex. D. 165; 49 L. J., Ex. 309; 42 L. T. 351; 28 W. R. 719—C. A.

**Certificate of Discharge, Effect of.**—The cer-

tificate of discharge given by the registrar to a debtor whose affairs are liquidated by arrangement is conclusive evidence of the validity of the liquidation proceedings. *Ib.*

The defendants filed a petition for liquidation by arrangement or composition under the Bankruptcy Act, 1869, and at the first meeting of creditors a resolution was passed that the defendants' discharge might be granted on a certificate of the committee of inspection and trustee to that effect. At a subsequent meeting of creditors for the purpose of considering a scheme for the settlement of the defendants' affairs, it was resolved that the whole estate should be sold to one of the defendants in consideration of his paying a dividend of 8*s.* in the pound secured by four promissory notes payable at successive dates. The certificate of discharge was granted. The plaintiff was a creditor and proved on the estate to the full amount of his debt. Three of the promissory notes were paid to all the creditors including the plaintiff, but default was made in payment of the fourth :—Held, first, that the certificate of discharge was, by force of the Bankruptcy Act, 1869, ss. 49, 125, conclusive evidence of the validity of the proceedings under the liquidation, and that the discharge was valid. *Ib.*

Held, secondly, that the plaintiff having received and retained a dividend could not be heard to object to the resolutions. *Ib.*

When a resolution to discharge a liquidating debtor has been passed by the statutory majority and registered, the registration will be vacated if it is shewn that any one of the votes of the majority was obtained by a malpractice on the part of the debtor, such as bribing the creditor to give his vote, even though, if the vote thus procured were struck off, the statutory majority in favour of the discharge would remain. *Baum, Ex parte, Baum, In re*, 7 Ch. D. 719; 47 L. J., Bk. 48; 38 L. T. 367; 26 W. R. 568—C. A.

—**Time.**—An application to vacate the registration of a resolution on the ground of fraud or mala fides is not an appeal to which the limit of twenty-one days applies. *Ib.*

—**Jurisdiction of High Court of Justice.**—The High Court of Justice has jurisdiction to inquire and decide whether fraud has been committed in the registration of a resolution for liquidation by arrangement under the Bankruptcy Act, 1869, ss. 125, 127. *Eyre v. Smith*, 2 C. P. D. 435; 37 L. T. 417; 25 W. R. 871—C. A.

Therefore when in an action of debt the defendant pleads that he has liquidated his affairs by arrangement and that the debt sued for is provable under the proceedings, the plaintiff is at liberty to reply and prove that the registration of the resolution for liquidation in the Court of Bankruptcy has been procured by fraud, and is therefore invalid. *Ib.*

**Locus Standi—Appeal against Cancellation of Registration.**—Creditors who have not been heard before the registrar on an application to register have nevertheless a locus standi to appeal against an order cancelling the registration. *Walter, Ex parte, Webb, In re*, 2 Ch. D. 326; 45 L. J., Bk. 105; 34 L. T. 701; 24 W. R. 834—C. A.

ditors, and thereby committed an act of bankruptcy. On the day after the seizure, the attorneys of the debtor wrote to the attorney of the execution creditor a letter as follows:—"B. made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at." The sheriff sold the goods under the execution; and the debtor was adjudicated a bankrupt on the next day:—Held, that the letter of the attorneys was insufficient as a notice of the act of bankruptcy; and that the execution creditor was entitled to the proceeds of the sale. *Id.*

**Notice of Petition is a sufficient Notice.**—A notice to an execution creditor which states that a petition in bankruptcy against the execution debtor has been filed on a date, at a court, and by a person named in the notice, is sufficient notice of an act of bankruptcy to prevent the execution being a protected transaction within 32 & 33 Vict. c. 71, s. 95, sub-s. 3, since such creditor ought to know that the petition would contain a statement that the debtor has committed an act of bankruptcy. *Hocking v. Acraman* (12 M. & W. 170) commented on; *Lucas v. Dicker*, 6 Q. B. D. 84; 50 L. J., Q. B. 190; 43 L. T. 429; 29 W. R. 115—C. A.

**Notice of Facts sufficient without Creditor drawing Inference of Law.**—A person having notice of facts from which a court or jury would infer that an act of bankruptcy had been committed, must be considered as having notice that an act of bankruptcy had been committed, notwithstanding his oath that he did not in fact draw the inference. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

**"Available for Adjudication."**—The expression "notice of any act of bankruptcy available for adjudication" used in s. 31 of the Bankruptcy Act, 1869, means notice of an act of bankruptcy which would have been available for the making of the particular adjudication under which the proof is tendered. *Crosbie, Ex parte, Bedell, In re*, 7 Ch. D. 123; 47 L. J., Bk. 19; 37 L. T. 583; 26 W. R. 119—C. A.

Therefore a creditor who contracted a debt with a bankrupt with notice only of an act of bankruptcy committed by him more than six months before the presentation of the petition upon which the adjudication is made is not precluded by s. 31 from proving under the adjudication. *Id.*

The words "notice of an act of bankruptcy available for adjudication" in ss. 94 and 95 of the Bankruptcy Act, 1869, mean notice of an Act of bankruptcy which would have been available for the making of the adjudication actually made, that is, an act of bankruptcy committed within six months from the presentation of the petition on which the adjudication was founded. *Gilbey, Ex parte, Bedell, In re*, 8 Ch. D. 248; 47 L. J., Bk. 49; 38 L. T. 728; 26 W. R. 768—C. A.

A., a trader, committed an act of bankruptcy. More than six months afterwards he was adjudicated a bankrupt upon a second such act. Between the dates of the first and second acts, money was paid to him by a depository having notice at that time of the first act of bankruptcy:

—Held, that the payment was protected by s. 94, sub-s. 2 of the Bankruptcy Act, 1869. *Quilter, Ex parte, Barnes, In re*, 30 W. R. 739—C. A.

The appellants claimed to retain money in respect of a transaction in relation to the property of the bankrupt, entered into by them at a time when they had notice of an act of bankruptcy committed by the bankrupt, to which the title of the trustee related back, but committed more than six months before the presentation of the petition on which he was subsequently adjudicated a bankrupt, on the ground that they were protected by s. 95, sub-s. 1, as having had no notice of an act of bankruptcy available for adjudication:—Held, that they were not protected. *Tilleard, Ex parte, Barnes, In re*, 30 W. R. 568. Practically overruled by preceding case.

**Debtor Summons.**—After the plaintiff had commenced an action against the defendant for dissolution of partnership, the plaintiff took out a debtor summons against the defendant. The defendant failed to comply with it, and the plaintiff filed a petition of bankruptcy against him based on the summons. Another creditor afterwards took out a debtor summons against the defendant, and, on his non-compliance with it, filed a petition and obtained adjudication of bankruptcy against him. Before the adjudication, and without notice of the act of bankruptcy on which it was based, the plaintiff entered into an agreement with the defendant for compromise of the action, which the trustees in the bankruptcy sought to impeach as void against the creditors:—Held, that although the non-compliance with the plaintiff's debtor summons was not an act of bankruptcy available for adjudication on the petition of the particular creditor who obtained the adjudication against the defendant, it was an act of bankruptcy "available for adjudication" within the meaning of the Bankruptcy Act, 1869, s. 94, and therefore the agreement for compromise between the plaintiff and defendant was not a protected transaction under that section. *Crosbie, Ex parte*, 7 Ch. D. 123, distinguished, and the judgment of James, L. J., explained. *Hood v. Newby*, 21 Ch. D. 605, 52 L. J., Ch. 204; 47 L. T. 721; 31 W. R. 185—C. A.

**Failure to pay Composition.**—On the 12th of November a debtor filed a liquidation petition. The creditors resolved to accept a composition. The debtor failed to pay it when due, and on the 28th of May he was adjudicated a bankrupt upon a petition filed on the 29th of April, the act of bankruptcy being the filing of the liquidation petition. On the 29th of March he had executed a mortgage of leasehold property, in substitution for a mortgage, given to the same creditor two years before the liquidation petition was filed, of a lease which afterwards turned out to be void:—Held, that though, when the mortgage of the 29th of March was executed, the mortgagee had notice of the filing of the liquidation petition, yet it was not notice of an act of bankruptcy then available for adjudication against the debtor, and consequently that the mortgage was protected by the Bankruptcy Act, 1869, s. 95. *Hoare, Ex parte, Walton, In re*, 16 L. R., Eq. 625; 43 L. J., Bk. 38; 29 L. T. 140; 21 W. R. 909.

**Executions against Goods—Onus is on Creditors.**—In the Bankruptcy Act, 1869, s. 95, sub-s. 3, "act of bankruptcy" means an act of bankruptcy which has been committed prior to the time of seizure. *Schulte, Ex parte, Matanlé, or Matulle, In re*, 8 L. R., Ch. 409; 30 L. T. 478; 22 W. R. 462.

The onus is on the execution creditor, who claims the protection of that section to prove that he had no notice of any prior act of bankruptcy. *Ib.*

Notice to the sheriff's officers in possession under an execution of an act of bankruptcy is not notice to the creditor. *Ib.*

## XVII. LIQUIDATION BY ARRANGEMENT UNDER THE BANKRUPTCY ACT, 1869.

### 1. PETITION FOR LIQUIDATION.

**By Lunatic not so Found.**—A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition:—Semble, that, in the case of a lunatic so found by inquisition, the Court of Lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf. *Cohen, Ex parte, Cohen, In re*, 13 Ch. D. 183; 39 L. T. 645; 27 W. R. 387—C. A.

**Misdescription of Debtor.**—A debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence:—Held, that this was a misdescription; that the defect was not a mere formal one, but was a matter of substance; and that resolutions passed by the creditors in favour of a liquidation by arrangement ought not to be registered. *Jerningham, Ex parte, Jerningham, In re*, 9 Ch. D. 466; 47 L. J., Bk. 115; 39 L. T. 186; 27 W. R. 157—C. A.

An application for leave to amend the petition, and summon a fresh first meeting of the creditors, was refused. *Ib.*

The debtor presented his petition for liquidation upon the 31st August, 1881. He therein described himself as an engineer, giving a private address. Previously thereto, and down to February, 1881, he had carried on business at first in partnership, but afterwards by himself, as an iron founder, at another address. In February he made over this business to his (the debtor's) father, but until the month of May in that year, it was continued to be carried on in the debtor's name. On the 30th August the debtor's furniture, which formed, as it appeared, the whole of his assets, was seized by the sheriff under an elegit:—Held, that the description in the petition was insufficient and misleading, and that resolutions for liquidation by arrangement and giving to the debtor his immediate discharge could not be registered upon this ground, and also that the resolutions were passed in the interest of the debtor, and not of the creditors. *Kershaw, Ex parte, Woodhouse, In re*, 45 L. T. 687.

In a statement of affairs produced by a debtor, he described some of his assets as the lease of a house No. 15, Motcombe Street, Belgrave Square, but in his petition described himself as of 165, Ferndale Road, Clapham, in the county of Surrey, and, on being examined, admitted that he occasionally slept at Motcombe Street:—Held, that the description of the debtor was

insufficient. *Pulbrook, Ex parte, Lloyd, In re*, 48 L. T. 128.

**— When Objection to be taken.**—Any objection to the description of a debtor in the advertisement in the Gazette must be taken before the registration of the resolutions passed by the creditors. *Cooper, Ex parte, Green, In re*, 39 L. T. 260.

**— Trustee not bound by Misdescription.**—When a trader-debtor falsely describes himself as a non-trader in his petition for liquidation, the trustee of his estate is not estopped from proving that he is a trader. *Ross, Ex parte, Hare, In re*, 28 L. T. 450; 21 W. R. 560.

**— Farmer and Cattle Dealer described as "Cattle Dealer."**—A farmer, who had also carried on the business of a cattle dealer, filed a liquidation petition, in which he gave his correct address, but described himself only as a cattle dealer:—Held, by Bacon, C. J., and by the Court of Appeal, that this was not a misdescription such as to invalidate the proceedings, and that the resolutions passed by the creditors ought to be registered. But leave was given to amend the petition by adding the description "farmer." *Kirkwood, Ex parte, Mason, In re*, 11 Ch. D. 724; 40 L. T. 566; 27 W. R. 806—C. A.

**Where Assets very Small.**—A debtor who has practically no assets distributable among his creditors is not entitled to file a liquidation petition. *Aaronson, Ex parte, Aaronson, In re*, 7 Ch. D. 713; 47 L. J., Bk. 60; 38 L. T. 243; 26 W. R. 470—C. A.

A debtor filed a liquidation petition, and the creditors unanimously resolved to accept a composition of 3d. in the pound. The debts were 180*l.*; the assets amounted to 7*l.* The registrar refused to register the resolutions, though no creditor opposed, on the ground that there were no "available assets for distribution among the creditors":—Held, that, as all the requirements of the Bankruptcy Act, 1869, and the rules had been complied with, the resolutions must be registered. *Elworthy, Ex parte, Elworthy, In re*, 20 L. R., Eq. 742; 44 L. J., Bk. 123; 32 L. T. 699; 23 W. R. 790.

The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to 540*l.*, and that his assets were only 32*l.* The creditors resolved upon a liquidation. One creditor opposed the registration of the resolutions:—Held, that the petition was an abuse of the procedure of the court, and that the registration had been rightly refused. *Staff, Ex parte, Staff, In re*, 20 L. R., Eq. 775; 44 L. J., Bk. 137; 32 L. T. 40; 23 W. R. 950.

There is no absolute rule that a debtor who has no assets cannot file a liquidation petition. *Hudson, Ex parte, Walton, In re*, 22 Ch. D. 773; 52 L. J., Ch. 584; 47 L. T. 674; 31 W. R. 372—C. A.

**Second Petition.**—A debtor filed a petition for liquidation, but his statement shewed no available assets. The creditors nevertheless passed a resolution for a composition of one shilling in the pound, which was accordingly paid to them. The resolution not having been filed within the three days limited by the 284th rule, the debtor presented a second petition

under which the creditors passed a similar resolution:—Held, that the presentation of the second petition was regular, and that the resolution to accept the composition ought to be registered. Where there has been actual payment of a composition no security is necessary. *Thomas, Ex parte, Freeman, In re*, 40 L. T. 835.

**Petition Filed after Office Hours.**—A liquidation petition which is in fact filed by a debtor in the proper office is good, although it may have been filed after office hours. *Jones, Ex parte, Williams, In re*, 42 L. T. 157.

**Effect of Filing—Vesting of Property in Trustee.**—Filing a petition for liquidation by arrangement is an act of bankruptcy, and the vesting of the debtor's goods in the trustee relates back to the filing of the petition; so that an execution creditor, with notice of the petition, cannot seize the goods of the debtor, and hold them as against a subsequently-appointed trustee. *Duignan, Ex parte, Biasell, In re*, 11 L. R., Eq. 604; 40 L. J., Bk. 33; 24 L. T. 237; 19 W. R. 711. Affirmed, 6 L. R. Ch. 605; 40 L. J., Bk. 68; 25 L. T. 286; 19 W. R. 1127.

— **Where Composition accepted.**—After a petition has been filed by a debtor for liquidation by arrangement, it is at the option of the requisite majority of creditors to determine whether the liquidation shall be effected by means of the appointment of a trustee, or whether they shall accept a composition, the debtor being left in possession of his assets. If the creditors adopt the latter course, there is then no power to deprive secured creditors of their securities; no relation of title to any act of bankruptcy prior to the presentation of the petition; nor anything in which the creditors who have resolved to receive a composition have any interest, beyond enforcing the performance of that condition on which they agreed to accept the composition. *Birmingham Gaslight and Coke Company, Ex parte, Adams, In re*, 11 L. R., Eq. 204; 40 L. J., Bk. 1; 24 L. T. 42; 19 W. R. 123.

**Debtor Dying after Filing.**—A debtor filed a petition for liquidation by arrangement, and the same day notices were sent out convening a general meeting of creditors. He died the following day. The creditors desired that proceedings might be continued as if he were alive:—Held, that the court had no jurisdiction to order the continuation of the proceedings. *Obbard, In re*, 24 L. T. 145; 19 W. R. 563.

## 2. STAYING BANKRUPTCY PROCEEDINGS.

A creditor, having presented a petition for an adjudication against his debtor, ought not to have his proceedings stayed by injunction merely because before the adjudication is actually made the debtor himself presents a petition for liquidation by arrangement or composition. *Dimond, Ex parte, Williams, In re*, 5 L. R., Ch. 743; 39 L. J., Bk. 47; 23 L. T. 292; 18 W. R. 1123.

**Petition Filed by one of Joint Debtors.**—When a creditor of joint debtors is proceeding against them jointly, and one of them takes pro-

ceedings for liquidation of his affairs, the court will not restrain the proceedings of his creditor against his joint creditors. *De Vecchi, In re, Isaacs, Ex parte*, 6 L. R., Ch. 58; 40 L. J., Bk. 19; 22 L. T. 523; 19 W. R. 38.

## 3. MEETINGS OF CREDITORS, THEIR DEBTS AND RIGHT TO VOTE.

**Notice to be given to all Creditors.**—When a petition has been presented and a resolution passed at a meeting of creditors, such resolution cannot be registered unless all the creditors have received notice of the meeting. *Rogers, Ex parte*, 22 L. T. 283.

**Signing Notice summoning Meeting.**—It is not necessary that the notice summoning the first general meeting of creditors under a liquidation petition should be signed by the debtor's attorney with his own hand. *Hirst, Ex parte, Hirst, In re*, 18 L. R., Eq. 704; 43 L. J., Bk. 130.

The notice is sufficient if the attorney's name is subscribed by his clerk by his direction. *Ib.*

**Proof of Notice.**—Rules 97 and 98 of the Bankruptcy Rules, 1870, apply to bankruptcy only, and do not apply to liquidation by arrangement or composition. *Dean, Ex parte, Dean, In re*, 13 Ch. D. 313; 41 L. T. 602; 28 W. R. 204—C. A.

The affidavit, made in accordance with r. 256, of the posting to creditors of notices of a general meeting under a liquidation petition, is only *prima facie*, not conclusive, evidence that the creditors have received the notices. *Ib.*

The registrar has a judicial discretion to require further evidence of the receipt of the notices, and, if satisfied that some of the creditors have not received notice, to direct the summoning of a fresh meeting, and the Court of Appeal will not interfere with the exercise of his discretion, unless very clearly satisfied that he has exercised it wrongly. *Ib.*

**Place of Meeting.**—The affidavit of a debtor filed with his liquidation petition stated that Stone would be the most convenient place for the meeting of the creditors, but the notices sent out by the registrar to the creditors summoned them to meet at Stafford:—Held, that, as no formal order had been made by the court to change the place of meeting mentioned in the affidavit, the proceedings were invalid, and that the resolutions passed by the creditors could not be registered. But leave was given to the debtor to summon a fresh first meeting. *Mayer, In re, Lewis, Ex parte*, 4 Ch. D. 519; 46 L. J., Bk. 33; 35 L. T. 915; 25 W. R. 275.

**Adjourning Meeting.**—In liquidation by arrangement a resolution to adjourn a meeting is an "ordinary resolution," and therefore must be decided by a majority in value of the creditors present, personally or by proxy, at the meeting and voting on such resolution. *Orde, Ex parte, Horsley, In re*, 6 L. R., Ch. 881; 40 L. J., Bk. 60; 25 L. T. 400; 19 W. R. 1103.

— **After Rejection of Resolution for Composition.**—At the first meeting under a liquidation petition the debtor offered a composition. His solicitor took the votes of the creditors and



found that the requisite majority in favour of it could not be obtained, but the question was not formally put from the chair, nor was any resolution reduced into writing. A resolution to adjourn the meeting was then carried, and at the adjourned meeting the debtor's offer was accepted, and the resolution to accept it was duly confirmed at the second meeting. The resolution for adjournment was written and signed, and filed with the proceedings:—Held, that the adjournment and all the subsequent proceedings were invalid, the offer having been rejected by the first meeting. *Till, Ex parte, Ratcliffe, In re*, 10 L. R., Ch. 631; 44 L. J., Bk. 103; 32 L. T. 521; 23 W. R. 670. Reversing *S. C.*, 32 L. T. 504; 23 W. R. 636.

— **Removing Proof used at First Meeting.**—When the creditors at the first meeting, under a petition for liquidation, only voted an adjournment, a proof which had been inadvertently admitted, and in respect of which the creditor had voted for the adjournment, may be taken off the file, under circumstances shewing that the party in whose name the proof was made as the principal was only an agent in the matter. *Axon*, 22 L. T. 151.

— **Summoning fresh Meeting of Creditors.**—The power to direct a fresh meeting to be summoned extends not only to a case where, through accident or mistake on the part of the debtor, no valid resolution has been passed, but also to a case where, owing to a mistake on the part of the creditors, or from any other cause, no valid resolution has been passed. *Terrell, In re, Sheffield and Rotherham Joint Stock Banking Company, Ex parte*, 4 Ch. D. 293; 46 L. J., Bk. 47; 35 L. T. 646; 25 W. R. 153—C. A. See *Mayer, In re*, 4 Ch. D. 519; 46 L. J., Bk. 33; 35 L. T. 915; 25 W. R. 275. *Buckley, Ex parte, Buckley, In re*, 16 Ch. D. 513; 44 L. T. 39; 29 W. R. 920—C. A.

A debtor, who was a member of a partnership firm, filed a petition for liquidation. In the statement produced by the debtor to the first meeting of his creditors, he made no distinction between his joint and separate debts and assets. The creditors passed a resolution for liquidation, but by reason of the irregularity of the debtor's statement, the resolution was not registered. The debtor then obtained an order to summon a fresh first meeting:—Held, that inasmuch as no valid resolution could have been passed at the meeting, and, consequently, the creditors had had no opportunity of expressing their opinion as to a liquidation, the court was justified in permitting a fresh first meeting. *Gibbs, Ex parte, Webb, In re*, 10 L. R., Ch. 382; 44 L. J., Bk. 73; 32 L. T. 292; 23 W. R. 529.

— **Right to Vote—Production of Bills of Exchange.**—It is sufficient for the validity of the vote of a creditor who holds bills of exchange or promissory notes signed by the debtor if he produces the bills or notes before the registration of the resolutions upon which he has voted. *Ashworth, Ex parte, Hoare, In re*, 18 L. R., Eq. 705; 43 L. J., Bk. 142; 30 L. T. 906; 22 W. R. 925.

The creditors of a debtor at their first meeting resolved on an adjournment. Some of the creditors who voted in favour of the adjournment held bills of exchange and bonds of the debtor,

which they did not produce. If their votes had been rejected the adjournment would not have been duly carried. At the adjourned meeting these creditors produced their bills of exchange and bonds, and a liquidation was then resolved upon:—Held, that the production of the bills and bonds at the adjourned meeting was sufficient. *Ib.*

— **Secured Creditor.**—If a secured creditor votes without producing his security, his vote is valid, but his security is forfeited. *Ib.*

Whether a secured creditor, who in his proof states his security, and afterwards votes at a liquidation meeting in respect of his whole debt, thereby abandons his security, *quære*. *Ball, Ex parte, Shepherd, In re*, 10 Ch. D. 667; 48 L. J., Bk. 57; 27 W. R. 563—C. A.

— **Amount of Debt unascertained—Annuity.**—A debtor who filed a liquidation petition had, by a separation deed between himself and his wife, covenanted to pay to a trustee an annuity, during the joint lives of himself and his wife, for the maintenance of the wife and a child of the marriage. The annuity was to cease in case the husband and wife should cohabit again:—Held, that the value of the annuity not having been ascertained, the trustee was not entitled to vote in respect of it at a meeting of creditors under the petition. *Pearce, Ex parte, Grieves, In re*, 13 Ch. D. 262; 41 L. T. 742; 28 W. R. 404—C. A.

— **Untaxed Costs.**—A liquidating debtor was indebted to a creditor in 357*l.* recovered by verdict, and costs, which had not been taxed. The creditor attended the first meeting of creditors, and stated in his affidavit that the debtor was indebted to him in 357*l.* on the verdict and an amount of costs which he estimated at 200*l.*; and claimed to vote in respect of the aggregate amount. The creditor had been restrained by injunction from taking any further proceedings in the action:—Held, that the estimated amount of untaxed costs was an unliquidated debt within the Bankruptcy Act, 1869, s. 16, sub-s. 3, and that he could not vote in respect thereof. *Ruffle, Ex parte, Dummelow, In re*, 8 L. R., Ch. 997; 42 L. J., Bk. 82; 29 L. T. 384; 21 W. R. 932.

The proper course for the creditor to pursue was either to apply for leave to sign judgment and tax his costs, or else to swear to such a sum as the costs when taxed would at least amount to. *Ib.*

— **By Creditor who has Sold his Debt.**—The fact that a creditor who has signed a notice summoning a general meeting for the purpose of removing the trustee, and who has voted at the meeting in favour of a resolution for removing the trustee, had previously sold his debt to another creditor, will not invalidate the notice or the resolution. *Evans, Ex parte, Baum, In re*, 13 Ch. D. 424; 49 L. J., Bk. 25; 42 L. T. 384; 28 W. R. 500—C. A.

— **Practice on Voting.**—All creditors present, personally or by proxy, are to be considered as voting on every resolution so long as their proofs are in the hands of the chairman. *Orde, Ex parte, Horsley, In re*, 6 L. R., Ch. 881; 40 L. J., Bk. 60; 25 L. T. 400; 19 W. R. 1103.



The assent of each such creditor must be evidenced by his signing the resolution when reduced to writing, and if he does not sign it, he must be taken to have voted in the negative. *Ib.*

A creditor who does not wish to vote on any resolution must, before the resolution is put, withdraw his proxy. *Ib.*

A resolution for adjournment requires to be passed with the same formalities as other resolutions. *Ib.*

At a meeting of creditors resolutions were proposed for a liquidation by arrangement. A large creditor attended by proxy and opposed the resolutions, and voted against them on the show of hands, but afterwards signed them. If this creditor should be excluded, the resolutions were not passed by the requisite majority:—Held, that the resolutions were duly passed and ought to be registered; for that, according to the act, the votes of the signing creditors were determined by their signatures; and the course which they had taken at the meeting could not be looked to. *Pooley, Ex parte, Russell, In re*, 5 L. R. Ch. 722; 40 L. J., Bk. 41; 23 L. T. 275; 18 W. R. 1013.

At a meeting of creditors, called in pursuance of a petition for liquidation by arrangement, resolutions were proposed. They were opposed, and on a show of hands, several creditors, including a principal creditor, voted against the resolutions. This creditor afterwards signed the resolutions. And a requisite majority of assentients was thus obtained, which would not have been the case if this creditor had been dissentient:—Held, that the resolutions ought to be registered, the evidence afforded by the signature being conclusive, whatever might have been the conduct of the voters at a show of hands. *Ib.*

A creditor, who is present at a general meeting of creditors under a liquidation petition, cannot be considered as present on behalf of another creditor for whom he holds a proxy, notwithstanding the fact that the proxy is on the file of proceedings, unless he has done some act to shew that he intends to be present on that occasion on behalf of his principal as well as on his own behalf. *Orde, Ex parte* (6 L. R. Ch. 881), distinguished. *Evans, Ex parte, Baum, In re*, 13 Ch. D. 424; 49 L. J., Bk. 25; 42 L. T. 384; 28 W. R. 500—C. A.

— **Authority conferred by Proxy.**—The appointment of a proxy under the Bankruptcy Act and rules only confers on the person so appointed an authority to represent his principal; it does not necessarily follow that he in fact represents his principal on all subsequent occasions when he is present at a meeting, unless he would have no right to be present in any other capacity. *Ib.*

— **Blank Proxy—Implied Authority to insert Name.**—A creditor of a liquidating debtor, who signs a proxy in blank and sends it to his solicitor, who forwards it to the debtor's solicitor, without any express instructions as to the use to be made of it, thereby confers on him an implied authority to fill up the proxy with his own name and to vote on his behalf. *Duce, Ex parte, Whitehouse, In re*, 13 Ch. D. 429; 42 L. T. 385; 28 W. R. 501—C. A.

A proxy paper signed by a creditor, leaving the name of the proxy in blank, may be filled up by the person to whom the creditor has intrusted

it, with a verbal authority to use it, and that when so filled up it will be valid. *Lancaster, Ex parte*, 5 Ch. D. 911; 46 L. J., Bk. 90; 37 L. T. 674; 25 W. R. 669—C. A. Reversing 46 L. J., Bk. 55; 36 L. T. 72; 25 W. R. 380.

At a first meeting of creditors resolutions for composition were moved; the votes were ascertained, shewing the resolutions were not carried. The debtor's solicitor then put in a proof for another debt, and voted as proxy in respect of it. This vote was admitted, and by means of it the requisite majority was created, and the resolutions were declared to be carried:—Held, that the whole matter was *in fieri*, and that the vote was properly admitted. *Ib.*

**Proxy on Behalf of Lunatic Creditor.**—The committee of the estate of a lunatic who is a creditor of a liquidating debtor has no power, without the sanction of the Court of Lunacy, to appoint a proxy to vote on behalf of the lunatic in the liquidation proceedings, or to waive any of his rights against the debtor's estate. *Ball, Ex parte, Shepherd, In re*, 10 Ch. D. 667; 48 L. J., Bk. 57; 40 L. T. 141; 27 W. R. 563—C. A.

**Objection to Creditors Voting.**—An objection to the proof of a creditor who has voted at the first meeting of creditors on a composition resolution is in time if taken at the second meeting. *Weil, Ex parte, Mcntrop, In re*, 5 Ch. D. 345; 46 L. J., Bk. 84; 36 L. T. 533; 25 W. R. 552—C. A.

Semble, that the objection would be in time if taken after the second meeting and before the registration of the resolution. *Ib.*

#### 4. DEBTOR'S STATEMENT OF AFFAIRS.

**Joint and Separate Debts and Assets.**—In a petition for liquidation it is the duty of the debtor in his statement of affairs to distinguish between his joint and separate assets and liabilities. *Cockayne, Ex parte*, 15 L. R., Eq. 218; 42 L. J., Bk. 71; 23 L. T. 678; 21 W. R. 749.

Where a debtor had not so distinguished his assets and debts, and the registrar in consequence refused to register a special resolution for liquidation by arrangement:—Held, that this decision was correct. *Ib.*

When a liquidating debtor has been formerly in partnership, his statement of affairs must shew which are his joint and which are his separate assets and liabilities, and if the statement produced at the first meeting of the creditors does not shew this distinction, the resolutions passed at the meeting are invalid and will not be registered. *Gibbs, Ex parte, Webb, In re*, 10 L. R. Ch. 382; 44 L. J., Bk. 73; 32 L. T. 292; 23 W. R. 592.

A debtor, who in his liquidation petition describes himself as having been formerly in partnership, ought in his statement of affairs to distinguish between his joint and separate debts and assets, or to state expressly that no debts and no assets of the former partnership exist. *Buckley, Ex parte, Buckley, In re*, 16 Ch. D. 513; 44 L. T. 39; 29 W. R. 920—C. A.

If the statement of affairs fails to do this, resolutions passed by the creditors under the petition ought not to be registered. The court, however, granted leave to summon a fresh first meeting of the creditors. *Ib.*

**Statement should not be supplemented by Affidavit.]**—The statement of affairs ought not to be supplemented by affidavits filed after the meeting of the creditors. *Ib.*

**Accuracy of Statement.]**—In the statement of affairs of a debtor who had filed a liquidation petition, there was inserted a large debt due to an illegal association. At the first meeting of creditors a liquidation was resolved on:—Held, that the resolutions ought to be registered. *Day, Ex parte*, 1 Ch. D. 699; 45 L. J., Bk. 53; 33 L. T. 867; 24 W. R. 492.

**— Jurisdiction of Registrar.]**—When a liquidation has been resolved upon, the registrar on the application to register the resolution has no jurisdiction to entertain any question as to the accuracy of the debtor's statement of affairs. *Walter, Ex parte, Webb, In re*, 2 Ch. D. 326; 45 L. J., Bk. 105; 34 L. T. 701; 24 W. R. 834—C. A.

It is for the statutory majority of the creditors to decide as to the sufficiency of the debtor's statement, and all inquiries as to the correctness of the different items of the debtor's statement must be made at the meeting of the creditors, and not before the registrar on the application for registration. *Ib.*

**— When Objection should be taken.]**—If the majority of the creditors has passed the resolution not for the benefit of the creditors at large, but from motives of kindness to the debtor, the objection should be raised on the application for registration; but if the debtor's statement is fraudulent, the question of fraud ought not to be entered into on the application for registration, but a distinct application should be made to rescind the resolution, or to vacate the registration if it has been registered. *Ib.*

**Same Statement used on two Occasions.]**—Registration of the resolutions passed by the creditors under a liquidation petition having been refused, leave was given to the debtor, a trader, to summon a fresh first meeting of the creditors. The fresh meeting was held more than two months after the original meeting, but the debtor produced the same statement of his affairs as he had produced at the original meeting:—Held, that there being no evidence that the state of the debtor's affairs had changed in the interval, it could not be taken that the statement was necessarily inaccurate. *Early, Ex parte, Golding, In re*, 13 Ch. D. 300; 42 L. T. 298; 28 W. R. 310—C. A.

**— Creditor's Knowledge of Inaccuracy.]**—The statement of the debts and assets of a liquidating debtor shewed that his assets covered his liabilities, but his principal assets consisted of houses which were heavily mortgaged. The majority of creditors passed a resolution to accept a composition of 10s. in the pound. A dissentient creditor applied to set aside all the proceedings, producing evidence that the debtor had undervalued his property. The debtor filed an affidavit stating that his creditors accepted the composition with a full knowledge of the state of his property, and from a desire to assist him and prevent his being completely ruined, and also to avoid waiting for the realization of the property, which would have taken a considerable time:—Held, that as the dissentient creditor, as well as

the others, knew that the assets exceeded the liabilities, there was no ground for setting aside the proceedings. *Linsley, Ex parte, Harper, In re*, 9 L. R., Ch. 290; 43 L. J., Bk. 84; 29 L. T. 857.

#### 5. OMISSION TO INSERT CREDITOR'S NAME AND DEBT IN STATEMENT OF AFFAIRS.

A certificate of discharge obtained by a debtor who has filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, s. 125, is valid against a creditor, whose name has been omitted by the debtor from the list of creditors delivered to the registrar. *Elmalie v. Corrie*, 4 Q. B. D. 295; 48 L. J., Q. B. 462; 40 L. T. 150; 27 W. R. 279—C. A. Affirming *S. C.*, 39 L. T. 107.

The certificate of discharge of a liquidation debtor is a good answer to a claim in respect of a debt due before the discharge, though the creditor's name was omitted from the debtor's statement, and though he had no notice of the proceedings in liquidation. *Heather v. Webb*, 2 C. P. D. 1; 46 L. J., C. P. 89; 25 W. R. 253.

To a statement of defence, setting up that the defendant was discharged from the claim by an order of discharge obtained by him as the result of proceedings for liquidation by arrangement subsequently to the accrual of the claim, the plaintiffs replied that they had had no notice of the liquidation proceedings until long after they had been concluded, and that the defendant had not inserted their names as his creditors, or their debt in any list, statement or document forming any part of the proceedings, and that subsequently to the close of the proceedings the defendant had promised to pay the claim:—Held, a bad reply. *Ib.*

**— Restraining Action.]**—An action having been brought against the debtor by a creditor whose name was not inserted in the debtor's statement of affairs, and who had no notice of the liquidation proceedings, the debtor obtained an injunction restraining further proceedings in the action:—Held, that the right of the creditor had been prejudiced by the resolutions, and that the action ought not to be restrained. *Harold, Ex parte, Meade, In re*, 3 Ch. D. 119; 45 L. J., Bk. 121; 34 L. T. 649; 24 W. R. 903.

**— Holder of Bill of Exchange.]**—In the statement of debts produced by a debtor at the meetings of creditors, at which resolutions for accepting a composition were passed, the debtor had inserted the amount coming due on two bills of exchange, and the name and address of the drawer as the creditor, believing the drawer to be the holder of the bills. The bills had, in fact, been negotiated:—Held, that the actual holder, having had no notice of the meeting of creditors, was not bound by the resolutions to accept a composition. *Mathewes, Ex parte, Angel, In re*, 10 L. R., Ch. 304; 44 L. J., Bk. 128; 32 L. T. 631; 23 W. R. 730.

A mistake made inadvertently by a debtor in the statement of his debts, will not be allowed to be corrected, unless he takes steps for doing so within a reasonable time after finding out the mistake. *Ib.*

**Fraudulent Omission—Remedy of Creditor.]**—

A certificate of discharge, obtained by a debtor who has filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, is a defence to an action by a creditor whose name has been fraudulently omitted by the debtor from the list of creditors delivered to the registrar, the only remedy of such creditor being to apply to the Court of Bankruptcy to vacate the registration and cancel the certificate. *Wadsworth v. Pickles*; 5 Q. B. D. 470; 49 L. J., Q. B. 454; 43 L. T. 410; 28 W. R. 628.

**Entry of Creditor as fully Secured.**—A debtor, in his statement of affairs, entered A. as a creditor, fully secured. The creditors accepted a composition of 10s. in the pound. A did not attend or take any part at either of the meetings, nor prove any debt under the petition. The debtor paid the composition to all the creditors except A. Two years afterwards the debtor filed a second petition, whereupon A. realized his security, and claimed to prove under the first petition for the balance remaining due:—Held, that he was not bound by the debtor's statement of his affairs, and that he was entitled to prove for the balance found due to him, and be paid the composition payable upon such balance. *Hodgkinson, Ex parte, Bestwick, In re*, 1 Ch. D. 702; 45 L. J., Bk. 78; 34 L. T. 73. Affirmed, 2 Ch. D. 485; 45 L. J., Bk. 148; 34 L. T. 784; 24 W. R. 938—C. A.

#### 6. EXAMINATION OF THE DEBTOR.

**When to be Held.**—The proper time for investigating the affairs of a debtor, who has filed a petition for liquidation by arrangement with his creditors, is at the meetings of creditors; and the registrar has no power, upon the presentation to him for registration of a resolution for composition, to direct an examination before him of the debtor or other witnesses. *Lery, Ex parte, Varbetian, In re*, 11 L. R., Eq. 619; 40 L. J., Bk. 40; 24 L. T. 332; 19 W. R. 586.

**Order granted on *prima facie* Case.**—When a person is entitled to stand as a creditor of a debtor whose estate is being wound up in liquidation, he is entitled to have an order for the examination of the debtor under the Bankruptcy Act, 1869, s. 96, as extended by the r. 166, on making out a *prima facie* case for such examination in accordance with the requirements of r. 172. *Swift, Ex parte, Russell, In re*, 26 L. T. 226—L. J.

**Questions limited to State of Assets.**—Under the Bankruptcy Act, 1869, s. 125, sub-s. 3, a debtor is only bound to answer such questions as are properly put for the purpose of shewing the state of the assets; he is not bound to answer vexatious questions or questions put by a creditor for the purpose of obtaining information to be used in a matter not affecting the interests of the creditors. *Hope, In re*, 9 Ch. D. 398; 47 L. J., Bk. 78; 38 L. T. 762; 27 W. R. 7—C. A. Affirmed 38 L. T. 537.

Semble, that the effect of r. 301 of the Bankruptcy Rules, 1870, is to make the creditors, if they act *bona fide*, the sole judges whether the debtor has given sufficient information as to his affairs. *Id.*

**Debtor entitled to Advice of Solicitor.**—A

liquidating debtor attending at the first meeting of his creditors to answer inquiries, under the Bankruptcy Act, 1869, s. 126, sub-s. 4, is entitled to the advice of his solicitor as to whether a question is material. *Mackenzie, Ex parte, Helliwell, In re*, 10 L. R., Ch. 88; 44 L. J., Bk. 14; 31 L. T. 421; 23 W. R. 121.

A refusal to answer proper questions would be a ground of objection to the registration of the resolutions. *Id.*

When a paper was put into the debtor's hand, and he was asked the question whether it was written by his authority; but the paper was not read to the meeting nor was his solicitor allowed to see it, and, by his solicitor's advice, he refused to answer the question:—Held, that this was no ground for refusing the registration of the resolutions, though the question put was really material. *Id.*

Any questions should be put so that the meeting generally may see their materiality. *Id.*

**Answers form Part of Statement of Affairs.**—The answers given by a debtor at a liquidation meeting to questions put to him by the creditors respecting his affairs are to be taken as part of his statement of affairs. *Aaronsen, Ex parte, Aaronsen, In re*, 7 Ch. D. 713; 47 L. J., Bk. 60; 38 L. T. 243; 26 W. R. 470—C. A.

#### 7. THE RESOLUTIONS.

##### a. Generally.

**Must be reduced to Writing.**—The provision in r. 275, Bankruptcy Rules, 1870, that "only such resolutions as are reduced into writing and signed by or on behalf of the statutory majority of creditors at a meeting shall be taken cognizance of by the court," refers only to resolutions in favour of liquidation by arrangement or the acceptance of a composition. *Till, Ex parte, Ratcliffe, In re*, 10 L. R., Ch. 631; 44 L. J., Bk. 103; 32 L. T. 521; 23 W. R. 670.

**Cannot be Signed after Filing.**—When a special resolution for liquidation has been filed by the person intrusted with it, it is too late for a creditor to sign it. *Thorne, Ex parte, Butlin, In re*, 8 L. R., Ch. 722; 42 L. J., Bk. 60; 29 L. T. 122; 21 W. R. 766.

**Resolution Rejected—Withdrawal of Opposition allowed.**—At the meeting of the creditors of a debtor, whose proofs amounted to 50,075*l.* 3*s.* 1*d.*, fifty-two creditors out of fifty-nine voted for a resolution for liquidation by arrangement; but, because the proofs of the fifty-two assenting creditors amounted only to 32,072*l.* 0*s.* 1*d.*, which sum fell short of three-fourths of the 50,075*l.* 3*s.* 1*d.*, the resolution was lost. Among those who voted for bankruptcy (as opposed to liquidation by arrangement) were a banker, a creditor for 6,963*l.* 15*s.* 11*d.*, and F. & Co., creditors for 1,425*l.* 4*s.* 6*d.* Both of them voted by proxy, and both of them were desirous subsequently to withdraw their vote, and vote for liquidation by arrangement, in which case the requisite three-fourths in value would be obtained:—Held, under the peculiar circumstances of the case, that the banker and F. & Co. might be deemed assenting creditors to the liquidation by arrangement. *Wehner, In re*, 20 W. R. 199.

But every case of the kind must be dealt with according to its own circumstances. *Id.*

**Proper Resolutions—Money Paid in Satisfaction of Creditors' Right to apply to Court.]—**

Resolutions to the effect that the affairs of the debtor should be liquidated by arrangement and not by bankruptcy, that if the bankrupt should within a month pay 4,000*l.*, and give a bond to the trustee for a further sum of 5,000*l.*, he should have a discharge, and that the sum of 4,000*l.* was to be deemed a satisfaction of the creditors' rights to apply to the court in reference to the pay or half-pay of the debtor, are proper resolutions. *Pooley, Ex parte, Russell, In re*, 5 L. R., Ch. 722; 40 L. J., Bk. 41; 23 L. T. 275; 18 W. R. 1013.

**— Good in Form, Bad in Substance.]—**

Resolutions which in form are resolutions for liquidation by arrangement, but amount in fact to resolutions for a composition, are an evasion of the act, and ought not to be registered. *Harold, Ex parte, Meade, In re*, 3 Ch. D. 119; 45 L. J., Bk. 121; 34 L. T. 649; 24 W. R. 903.

The creditors of a debtor who had filed a liquidation petition resolved that his affairs should be liquidated by arrangement, and appointed a trustee; that, on payment by the debtor to the trustee of a sum equal to 1*s.* in the pound on the amount of the debts, he should be entitled to have his discharge; and that the payment should be made by three instalments of 4*d.* in the pound, at six, twelve, and eighteen months from the registration of the resolutions. No second meeting was summoned to confirm these resolutions, but they were registered:—Held, that the arrangement was, in substance, a composition; that it amounted to an evasion of the provisions of the Bankruptcy Act, 1869, s. 126, and that the resolutions ought not to have been registered. *Id.*

**Where some Resolutions ultra vires, rest may be Registered.]—**

A debtor, partner in a firm, having filed a petition for liquidation by arrangement, a general meeting of his creditors was held, at which the requisite majority of his joint and separate creditors passed a resolution agreeing to the liquidation, appointing a trustee and committee of inspection, and granting the debtor his discharge. The resolution also contained a clause authorizing the trustee to sell to the mother of the debtor his reversionary interest under his father's will at such a price as would pay the costs of the liquidation and a composition of 1*s.* in the pound to his separate creditors. This resolution was registered:—Held, that the clause authorizing the trustee to sell the reversionary interest was ultra vires and void; but that the rest of the resolutions were not thereby rendered invalid, and that the liquidation must proceed in the ordinary course. *Browning, Ex parte, Marks, In re*, 9 L. R., Ch. 583; 43 L. J., Bk. 129; 30 L. T. 481; 22 W. R. 638.

When some of the resolutions passed by creditors are ultra vires, the court has power to direct the registration of the rest. *Ashworth, Ex parte, Hoare, In re*, 18 L. R., Eq. 705; 43 L. J., Bk. 142; 30 L. T. 906; 22 W. R. 925.

**— Resolutions may be Registered as to Part.]—**

The creditors of a debtor passed resolutions for liquidation by arrangement, and appointed a

trustee with power to sell the estate at such price as should be sufficient to pay a composition of 7*s.* 6*d.* in the pound to the creditors. The registrar registered the resolutions for the liquidation and the appointment of a trustee, but struck out the remaining resolutions as ultra vires:—Held, that the registrar had full power to strike out the void resolutions, and register the others. *Frampton, Ex parte, Watkins, In re*, 45 L. T. 720.

**Application to register Notice to Creditors.]—**

A creditor who has objected to a proof tendered at a meeting under a liquidation petition, and has had his objection marked upon the proof, ought to have notice given to him, either by the registrar or by the person whose duty it is to register the resolutions passed at the meeting, of the time when and the place where the application for the registration of the resolutions is to be heard. *Lancaster, Ex parte*, 5 Ch. D. 911; 46 L. J., Bk. 90; 37 L. T. 674; 25 W. R. 669—C. A.

A creditor, who had objected to a proof of debt, had no notice given to him of the application to register the resolutions carried by means of that proof, and they were registered in his absence. He afterwards applied to the county court judge to vacate the registration, and upon the hearing of this application he insisted upon some technical objections, but did not ask to have the creditor, whose proof he had objected to, cross-examined, or adduce any evidence to shew the invalidity of the debt:—Held, that the irregularity had been cured, and that the registration ought not to be vacated. *Id.*

**Registrar cannot direct Issue.]—**Upon an application under the 295th Bankruptcy Rule to register the resolutions passed by the creditors, the registrar has no power to direct an issue to be tried by a jury as to the existence of a debt, but must decide the matter himself or refer it to the judge. *Williams, Ex parte, Beetonson, In re*, 46 L. T. 241; 30 W. R. 491.

**Registration of Resolutions after Adjudication.]—**

When there has been a simple adjudication in bankruptcy, without any stay of proceedings, and resolutions are afterwards duly passed in favour of liquidation, it is the duty of the registrar to register such resolutions, whatever may be the consequences of such registration. *Davis, Ex parte, Russ, In re*, 2 Ch. D. 231; 45 L. J., Bk. 61; 34 L. T. 259; 24 W. R. 684. *But see next case.*

The registrar has no power to register a resolution for liquidation or composition after an adjudication of bankruptcy has been made; unless the adjudication has been made under r. 266 of the Bankruptcy Rules, 1870, in which case the adjudication is intended to be merely ancillary to the liquidation. *Davis, Ex parte* (2 Ch. D. 231), overruled. *Milward, Ex parte, Stanley, In re*, 16 Ch. D. 256; 50 L. J., Ch. 166; 44 L. T. 73; 29 W. R. 167—C. A.

After an ordinary adjudication of bankruptcy has been made (not an adjudication merely for the purpose of protecting the debtor's property pending proceedings for liquidation or composition) the creditors have no power to pass resolutions for either liquidation or composition, and such resolutions if passed will be inoperative. *Milward, Ex parte (supra)*, explained and fol-

lowed. *Bennett, Ex parte, Ward, In re*, 16 Ch. D. 541; 44 L. T. 38; 29 W. R. 343—C. A.

**Resolutions adopted without Debtor's Knowledge—Effect of, as a Discharge.]**—In 1877 the trustee in a liquidation, with the consent of the creditors but without the knowledge of the debtor, bought the debtor's estate for such a sum as would pay certain mortgages, a dividend to the creditors of 5s. in the pound, and all the costs of the liquidation. The county court judge approved of this resolution as a "scheme of settlement." The debtor thereupon started another business of a different kind, in the course of which he purchased goods. In 1881 these goods were seized by the trustee on behalf of the creditors:—Held, that there was no scheme of settlement under s. 28; that the sale was of a part of the debtor's estate only, and did not include after-acquired property; that the debtor was a stranger to the whole transaction and was not thereby discharged; and that the trustee was justified in taking possession of the goods. *Greener or Wainwright, Ex parte, Wainwright, In re*, 30 W. R. 62. Affirmed, 19 Ch. D. 140; 51 L. J., Ch. 67; 45 L. T. 562; 30 W. R. 125—C. A.

**Registration—Locus Standi to Oppose.]**—Upon the hearing of an application to register liquidation resolutions, no one has a locus standi to be heard in opposition but a creditor who has previously proved a debt in the mode prescribed by the rules. A person who claims to be a creditor, and in that character to oppose the registration, cannot prove his debt when he comes before the registrar to oppose. If he has not previously proved a debt he cannot be heard. *Bagster, Ex parte, Bagster, In re*, 24 Ch. D. 477; 49 L. T. 272; 32 W. R. 215—C. A.

**Locus Standi of Creditor withdrawing Proof.]**—A person who alleged that he was a creditor tendered a proof of debt at the first meeting of the creditors, but withdrew it. He attended before the registrar to oppose the registration of the resolutions passed by the creditors:—Held, by Bacon, C. J., and semble, per James, L. J., that the objector had no locus standi, and the registrar could not put his proof on the file for the purpose of giving him a locus standi. *Duce, Ex parte, Whitehouse, In re*, 13 Ch. D. 429; 42 L. T. 385; 28 W. R. 601—C. A.

#### b. Validity with Reference to Amount of Assets or Dividends.

**Assets.]**—Where a debtor has practically no assets distributable among his creditors, resolutions for a liquidation by arrangement ought not to be registered, even though they do not include a discharge to the debtor. *Aaronsen, Ex parte, Aaronsen, In re*, 7 Ch. D. 713; 47 L. J., Bk. 60; 38 L. T. 243; 26 W. R. 470—C. A.

The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to 540l., and that his assets were only 32l. The creditors resolved upon a liquidation. One creditor opposed the registration of the resolutions:—Held, that the petition was an abuse of the procedure of the court, and that the registration had been rightly refused. *Staff, Ex parte, Staff, In re*, 20 L. R., Eq. 775; 44 L. J., Bk. 137; 32 L. T. 40; 23 W. R. 950.

A debtor filed a liquidation petition, and the creditors unanimously resolved to accept a composition of 3d. in the pound. The debts were 130l.; the assets amounted to 7l. The registrar refused to register the resolutions, though no creditor opposed, on the ground that there were no "available assets for distribution among the creditors":—Held, that, as all the requirements of the Bankruptcy Act, 1869, and the rules had been complied with, the resolutions must be registered. *Elworthy, Ex parte, Elworthy, In re*, 20 L. R., Eq. 742; 44 L. J., Bk. 123; 32 L. T. 699; 23 W. R. 790.

**Power of Majority not to be Used out of Motives of Kindness to Debtor.]**—The power of the majority of creditors, under the Bankruptcy Act, 1869, s. 126, to resolve to accept a composition which will be binding on the minority must be exercised bona fide for the benefit of the creditors and not out of motives of kindness to the debtor. *Page, Ex parte*, 2 Ch. D. 323; 45 L. J., Bk. 119; 34 L. T. 638; 24 W. R. 502—C. A.

Therefore, where a resolution was passed for the acceptance of an offer by the debtor to pay 1s. in the pound in twelve months, without security, and his own estimate of his assets shewed that he could have paid 5s.:—Held, that the registrar had rightly refused to register the resolution. *Id.*

The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts amounted to 11,358l., while his assets were only 75l. Of the debts the preferential claims amounted to 127l. The creditors, by the proper statutory majority, resolved to accept a composition of 1s. in the pound, to be paid within one month after registration of the resolution, no security for its payment being offered. One of the dissentient creditors opposed the registration:—Held, that the resolution could not have been passed in the interests of the creditors, but must have been passed for the benefit of the debtor; that it therefore was not binding on the dissentient minority, and that the registrar was right in refusing to register it. *Terrell, In re, Sheffield and Rotherham Joint Stock Banking Company, Ex parte*, 4 Ch. D. 293; 46 L. J., Bk. 47; 35 L. T. 646, 648; 25 W. R. 153—C. A.

**Where Debtor has bona fide Claims.]**—Want of bona fides will not necessarily be imputed to liquidation resolutions, however small the assets immediately available may be, if the debtor has substantial bona fide claims which are the subject of pending litigation. *Hope, Ex parte, Hope, In re*, 9 Ch. D. 398; 47 L. J., Bk. 78; 38 L. T. 762; 27 W. R. 7—C. A.

**In Absence of Fraud, Resolutions must be Registered.]**—The statutory majority of the creditors of a liquidating debtor passed a resolution accepting a composition of 6d. in the pound, which was subsequently duly confirmed:—Held, that in the absence of fraud, the resolution must be registered. *Williams, Ex parte*, 36 L. T. 324; 25 W. R. 432.

The creditors of a debtor, whose statement of affairs shewed that his debts amounted to 534l. and his assets to 85l., resolved on a liquidation by arrangement, and gave the debtor an immediate discharge. The registration was opposed by one creditor, who had, after the filing of the petition, seized the whole of the debtor's goods

under a f. fa. :—Held, that the resolutions could not be treated as any abuse of the procedure of the court, or as having been passed *malâ fide*. *Early, Ex parte, Golding, In re*, 13 Ch. D. 300; 42 L. T. 298; 28 W. R. 310—C. A.

**Opposition by Judgment Creditor.**—The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts were 1,759*l.* and his assets 85*l.*, the latter sum being subject to a deduction in respect of preferential debts. The creditors resolved upon a liquidation by arrangement, and gave the debtor an immediate discharge. They also voted 10*l.* for the remuneration of the trustee. The registration of the resolutions was opposed by a creditor who had brought an action against the debtor for 182*l.*, but who had been restrained from proceeding with his action. He was in a position to sign judgment and issue execution so soon as the injunction should be dissolved :—Held, that, notwithstanding the small amount of the assets, the resolutions ought to be registered, the contest being really whether the assets, such as they were, should be distributed among the creditors generally, or be swept away by the judgment creditor, and this although the judgment creditor offered in the Court of Appeal to undertake to present a bankruptcy petition against the debtor. *Matheus, Ex parte, Sharpe, In re*, 16 Ch. D. 655; 50 L. J., Ch. 284; 44 L. T. 117—C. A.

#### c. Vacating or Setting Aside.

**Fraud or Malpractices.**—The court will not rescind the registration of resolutions for composition on the ground of misstatement of assets by the debtor except upon evidence sufficient to convict him of a misdemeanor under the Debtors Act, 1869, s. 11, sub-s. 6. *Law, In re, Hart, Ex parte*, 47 L. J., Bk. 88.

A liquidating debtor whose statement of affairs shewed debts amounting to 5,146*l.*, with assets 3,485*l.*, was proved to have estimated six specified debts at 63*l.* 15*s.* 7*d.* only in his statement of affairs, while in the course of the next two years he recovered 249*l.* 3*s.* 8*d.* in respect of them. On an application by a creditor to rescind the registration of the resolutions on the ground that the debtor had fraudulently misstated his assets :—Held, that the evidence being insufficient to establish an intent to defraud, the application must be dismissed, but without costs. *Ib.*

—**Application not Barred by Delay.**—Held, also, that the application, under the circumstances, was not barred by delay, though made more than two years after the date of the resolutions. *Ib.*

**Creditor accepting Benefits cannot impugn Resolution.**—A creditor who dissents from, but who accepts the composition paid under resolutions adopted for the liquidation by arrangement of a debtor's affairs, cannot, the debtor having duly received his discharge and certificate, on default being afterwards made in the payment of a part of the composition, impugn the validity of the resolutions and sue on the original debt. *Lewis v. Leonard*, 5 Ex. D. 165; 49 L. J., Ex. 308; 42 L. T. 351; 28 W. R. 719—C. A.

**Certificate of Discharge, Effect of.**—The cer-

tificate of discharge given by the registrar to a debtor whose affairs are liquidated by arrangement is conclusive evidence of the validity of the liquidation proceedings. *Ib.*

The defendants filed a petition for liquidation by arrangement or composition under the Bankruptcy Act, 1869, and at the first meeting of creditors a resolution was passed that the defendants' discharge might be granted on a certificate of the committee of inspection and trustee to that effect. At a subsequent meeting of creditors for the purpose of considering a scheme for the settlement of the defendants' affairs, it was resolved that the whole estate should be sold to one of the defendants in consideration of his paying a dividend of 8*s.* in the pound secured by four promissory notes payable at successive dates. The certificate of discharge was granted. The plaintiff was a creditor and proved on the estate to the full amount of his debt. Three of the promissory notes were paid to all the creditors including the plaintiff, but default was made in payment of the fourth :—Held, first, that the certificate of discharge was, by force of the Bankruptcy Act, 1869, ss. 49, 125, conclusive evidence of the validity of the proceedings under the liquidation, and that the discharge was valid. *Ib.*

Held, secondly, that the plaintiff having received and retained a dividend could not be heard to object to the resolutions. *Ib.*

When a resolution to discharge a liquidating debtor has been passed by the statutory majority and registered, the registration will be vacated if it is shewn that any one of the votes of the majority was obtained by a malpractice on the part of the debtor, such as bribing the creditor to give his vote, even though, if the vote thus procured were struck off, the statutory majority in favour of the discharge would remain. *Baum, Ex parte, Baum, In re*, 7 Ch. D. 719; 47 L. J., Bk. 48; 38 L. T. 367; 26 W. R. 568—C. A.

—**Time.**—An application to vacate the registration of a resolution on the ground of fraud or mala fides is not an appeal to which the limit of twenty-one days applies. *Ib.*

—**Jurisdiction of High Court of Justice.**—The High Court of Justice has jurisdiction to inquire and decide whether fraud has been committed in the registration of a resolution for liquidation by arrangement under the Bankruptcy Act, 1869, ss. 125, 127. *Eyre v. Smith*, 2 C. P. D. 435; 37 L. T. 417; 25 W. R. 871—C. A.

Therefore when in an action of debt the defendant pleads that he has liquidated his affairs by arrangement and that the debt sued for is provable under the proceedings, the plaintiff is at liberty to reply and prove that the registration of the resolution for liquidation in the Court of Bankruptcy has been procured by fraud, and is therefore invalid. *Ib.*

**Locus Standi—Appeal against Cancellation of Registration.**—Creditors who have not been heard before the registrar on an application to register have nevertheless a locus standi to appeal against an order cancelling the registration. *Walter, Ex parte, Webb, In re*, 2 Ch. D. 326; 45 L. J., Bk. 105; 34 L. T. 701; 24 W. R. 834—C. A.

## 8. THE TRUSTEE.

## a. Appointment, Powers and Duties.

**Creditor's Vote rejected—Vacation of Appointment.**—If a creditor having a clear right of proof is excluded from voting in the appointment of a trustee and committee of inspection by reason that his proof is rejected, and the proof is afterwards sustained, the court will vacate the appointments so made, and order a new choice. *Crouther, Ex parte, Harrison, In re*, 24 L. T. 330.

**Appointment too late.**—The first meeting of creditors held under liquidation proceedings was adjourned for six months, and at the adjourned meeting resolutions were passed agreeing to a liquidation and appointing a trustee:—Held, that since the trustee had not been appointed until more than six months from the presentation of the liquidation petition, the resolution had no power to vest any estate in him and ought not to be registered. *Wilson, In re, Fenning, Ex parte*, 3 Ch. D. 458; 35 L. T. 830; 25 W. R. 185—C. A.

A trustee can be appointed by the creditors under a liquidation petition, though more than six months have elapsed since the filing of the petition. *Fenning, Ex parte* (3 Ch. D. 455), discussed. *Credit Company, Ex parte, McHenry, In re*, 24 Ch. D. 353; 49 L. T. 385; 32 W. R. 47—C. A.

The last clause of sub-s. 7 of s. 125 relates only to the effect of the appointment of a trustee under a liquidation after he has been appointed, and does not impose on the making of the appointment any limitation similar to that which by s. 6 is imposed on the making of an adjudication of bankruptcy, viz., that the act of bankruptcy on which the adjudication is founded must have occurred within six months before the presentation of the petition for adjudication. *Ib.*

**Removal of Trustee.**—The trustee in a liquidation by arrangement, and any member of the committee of inspection, may be removed, and others appointed, by a special resolution of the creditors, summoned under r. 304 or 305 of the Bankruptcy Rules, 1870. *Hopkins, Ex parte, Hart, In re*, 9 L. R., Ch. 506; 43 L. J., Bk. 127; 30 L. T. 447.

## —Trustee entitled to Notice of Resolution.]

—A trustee in a liquidation is entitled to notice of a meeting at which it is intended to propose a resolution to remove him from office. *Wright, Ex parte, Bagnall, In re*, 27 W. R. 476.

**Payment of Moneys into Bank, and Accounts.]**

—In a liquidation by arrangement the creditors may, under the Bankruptcy Act, 1869, s. 125, sub-s. 8, prescribe the bank into which the trustee is to pay the moneys which he receives without passing any formal resolution for the purpose, and evidence is admissible of their having done so. *Old, Ex parte, Bright, In re*, 17 L. R., Eq. 457; 43 L. J., Bk. 47; 30 L. T. 72; 22 W. R. 365.

Creditors at a first meeting resolved on liquidation and appointed a trustee. At the same meeting the trustee stated to the creditors that he should open an account in his own name, as trustee of the debtor, at a bank of which he was manager, and should pay into that account all

moneys received by him from the debtor's estate. The creditors assented to this arrangement, but no formal resolution was passed confirming it:—Held, that the estate being under liquidation, the creditors had sufficiently prescribed the bank into which the money was to be paid, and that the trustee could not be charged with interest for not having paid it into the Bank of England. *Ib.*

Held, also, that it is the duty of an inspector to see that accounts are filed by the trustee every three months. *Ib.*

The provisions of the Bankruptcy Act, 1869, s. 20, as to the audit of the trustee's accounts, apply to liquidation by arrangement as well as to bankruptcy. *Ib.*

**Disputing Debt.**—The trustee allowed to dispute a debt for which judgment had been recovered against the bankrupt, the defence being one which might have been raised in the action. *Chatteris, Ex parte, Orkney (Earl), In re*, 26 L. T. 174; 20 W. R. 322—L. J.

A. & C., trading at Bremen, had correspondents at Havannah, and also a correspondent in London. A. & C. shipped cheese and also tea by two several shipments to their correspondents at Havannah, and drew bills against these shipments on their correspondent in London, giving notice to their correspondents at Havannah. Subsequently the correspondents at Havannah sent remittances to the correspondent in London, sufficient to meet the bills which the correspondent in London had accepted. The bills were dishonoured; the London correspondent became bankrupt, some of the remittances being still in specie. The Havannah correspondents also became bankrupt:—Held, that the appropriation of the remittances to meet the bills being disputed, the trustee could not be directed to receive the amounts and pay part to A. & C., but that the proper course was to direct an inquiry who were the parties entitled to the remittances. *Richardson, In re*, 20 W. R. 968.

**Duty to form Reserve Fund—Secured Creditor—Claim to Prove for Balance of Debt after Realisation of Securities under Agreement with Trustee, and Payment of Dividend.]**—G. & Co., who were entered upon the debtor's statement of affairs as fully-secured creditors, in April, 1873, commenced negotiations with the trustees in the liquidation for a joint sale of the property comprised in their securities; and a memorandum of the terms was drawn up. In August, 1874, these negotiations ended in a definite agreement being concluded in the terms of the memorandum. One of the terms of this agreement was to the effect, that if the securities held by G. & Co. did not realize sufficient to pay their debt and expenses, they should be entitled to prove for the balance. In May, 1874, a dividend of 2s. 6d. in the pound was paid to all the creditors who had proved their debts, but no notice of the declaration of the dividend or payment was given to G. & Co. Some of the securities having been realized, and the rest being regarded as of no value, Messrs. G. & Co., in September, 1878, sent in a proof for 1,017l. 2s. 9d., the balance of the amount due to them, and claimed to be paid a dividend of 2s. 6d. in the pound thereon:—Held, on appeal, that the trustees having had plain notice of the claim of G. & Co., ought to have set aside a reserve under Bankruptcy Rules,

1870, r. 312, and that the dividend claimed must be paid. *Snell, Ex parte, Cole, In re*, 42 L. T. 62.

**Examination of Trustee.]**—The Court of Bankruptcy has power to order the examination of the trustee in bankruptcy, and where such examination is necessary, will make the order for it upon the application of a creditor. *Crossley, Ex parte, Taylor, In re*, 13 L. R., Eq. 409; 41 L. J., Bk. 35; 20 W. R. 400.

**Release of Trustee does not operate as Removal.]**—The rule in bankruptcy that the release of a trustee operates as a removal of the trustee, and that thereupon the registrar becomes the trustee, does not apply to cases of liquidation. *Witt, Ex parte, Armstrong, In re*, 40 L. T. 836; 27 W. R. 888.

Where a debtor was entitled under a will to property which was not realized until several years after the close of the liquidation and the release of the trustee:—Held, that the trustee was entitled to receive and give a discharge for such property, and that it was his duty to distribute it under the order of the court. *Id.*

**Allowance of Costs and Charges.]**—A trustee is entitled to have out of the estate all expenses properly incurred by him which are not ordered to be paid by other parties; but it is not necessary or proper for any order to that effect to be made by the court. *Lucas, Ex parte, Wood, In re*, 7 L. R., Ch. 302; 41 L. J., Bk. 21.

After a bill, filed on behalf of creditors to set aside as fraudulent and void a voluntary settlement by their debtor, and a composition signed by the creditors in ignorance of such prior voluntary settlement, the debtor was adjudicated bankrupt, and an order was made by the Court of Bankruptcy setting aside the voluntary settlement. The plaintiffs, whose claim to prove under the bankruptcy had been admitted notwithstanding the opposition of the trustees of the settlement, wrote to them proposing to dismiss the bill without costs as against them, and that plaintiffs' costs should come out of the estate. The trustees declined this proposal, but offered to consent to an order staying all proceedings in the suit without costs, or dismissing the bill without costs:—Held, that upon the bankruptcy of the debtor the trustee in bankruptcy should have applied to the court to have stopped the suit, which, though rightly instituted in the first instance, could no longer be prosecuted with benefit to the creditors, and that the plaintiffs were entitled to the costs of suit up to the date of their letter to the trustees of the settlement, out of the estate realized in bankruptcy, and the trustee in bankruptcy to the costs only of realizing the estate. *Tanqueray v. Boules*, 14 L. R., Eq. 151.

Held, also, that the trustees of the settlement who, by their refusal of plaintiffs' offer, had compelled them to bring the suit to a hearing, must pay all plaintiffs' costs incurred since the date of that offer. *Id.*

#### b. Vesting of Debtor's Property.

In cases of liquidation by arrangement under the Bankruptcy Act, 1869, the effect of the resolution is to divest all the property of the debtor and vest it in the trustee; but when the creditors resolve on a composition the property remains in

the debtor. *Malone v. —*, 7 Ir. R., C. L. 473.

**Relation back of Title.]**—A trustee under liquidation has the same powers as a trustee under a bankruptcy; and (though by s. 125, sub-s. 4, "the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee," yet the title of the trustee does not date only from his actual appointment, and there may be dealings with the debtor's property prior to that date which he is entitled to call in question. *Todhunter, Ex parte, Norton, In re*, 10 L. R., Eq. 425; 39 L. J., Bk. 17; 25 L. T. 313; 18 W. R. 890.

**Execution.]**—A sheriff seized the goods of a debtor under an execution, and under judges' orders sold them and paid the proceeds into court. Between the seizure and the sale the debtor filed a petition in liquidation, and notice thereof was given to the sheriff and the execution creditor before the sale. After the sale a trustee in liquidation was appointed, and the execution creditor obtained payment of the money out of court without notice to the trustee:—Held, that the question must be decided as if the petition for liquidation had been a petition in bankruptcy presented before the sale, followed by an adjudication after sale; and that, assuming the filing the petition for liquidation to be an act of bankruptcy, yet the execution creditor having seized before notice thereof was protected by s. 95, sub-s. 3, and was entitled to retain the proceeds against the trustee. *Id.*

In liquidation the title of the trustee to the debtor's property relates back from the date of the trustee's appointment to such filing, though s. 125, sub-s. 4, says that the liquidation shall be deemed to have commenced as from the date of the appointment of the trustee. *Duignan, Ex parte, Bissell, In re*, 6 L. R., Ch. 605; 40 L. J., Bk. 68; 25 L. T. 286; 19 W. R. 1127.

After such a petition had been filed by a trader debtor, his goods were seized and sold under an execution for less than 50*l.* After the seizure, and before the sale, the sheriff and the execution creditor received notice of the filing. After the sale a trustee was appointed:—Held, that the execution was not protected by s. 95, sub-s. 3; and that the goods were the property of the trustee. *Id.*

When a debtor's estate is being liquidated by arrangement, instead of in bankruptcy, the words "date of the appointment of the trustee" must be substituted for the words "date of the order of adjudication" in s. 95, sub-s. 3. *Venus, Ex parte, Gwyn, In re*, 10 L. R., Eq. 419; 39 L. J., Bk. 23; 18 W. R. 979.

The title of the trustee in a liquidation by arrangement relates back to an act of bankruptcy committed by the debtor before the filing of the petition in the same way as that of a trustee in a bankruptcy. *Eyles, Ex parte, Edwards, In re*, 16 L. R., Eq. 99; 42 L. J., Bk. 55; 21 W. R. 574.

On the 8th of February a creditor levied execution upon the goods of his debtor, upon a judgment for less than 50*l.* On the 10th of February, the sheriff not having sold, the debtor filed a liquidation petition, and a receiver was appointed. The debtor had, on the 16th of January, executed a bill of sale, assigning all his property to secure a past debt:—Held, that the title of the



trustee under the liquidation related back to the execution of the bill of sale, and that he was entitled to the goods seized by the execution creditor. *Id.*

**Title as against Execution Creditor.]**—After the sheriff had seized the goods of a debtor, the debtor presented to the county court a petition for liquidation by arrangement, thereby committing an act of bankruptcy, and on the same day obtained an injunction restraining the sheriff from proceeding to a sale. The sheriff, however, sold the goods, and paid the balance of the proceeds of the sale into the county court:—Held, that the execution creditor, and not the trustee, was entitled to the money in court. *Rocke, Ex parte, Hall, In re, 6 L. R., Ch. 795; 40 L. J., Bk. 70; 25 L. T. 287; 19 W. R. 1129.*

The Bankruptcy Act, 1869, s. 125, sub-a. 7, enacts, that "the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy." Nevertheless, the words "notice of a petition for liquidation having been presented" may be substituted for the words "notice of a bankruptcy petition having been presented," in s. 87; and a petition for liquidation has the same effect as a petition in bankruptcy in cases under that section, although the trustee in liquidation be not appointed within the fourteen days there mentioned. *Keys, Ex parte, Skinner, In re, 10 L. R., Eq. 432; 39 L. J., Bk. 28; 25 L. T. 315; 18 W. R. 918.*

Therefore, where the sheriff seized and sold the goods of a trader on a judgment for more than 50*l.*, and after the sale a petition for liquidation was presented, of which the sheriff had notice within fourteen days, an order restraining the sheriff from paying the proceeds to the execution creditor, and directing payment to the trustee when appointed, was affirmed. *Id.*

**—Assignment of Debtor's Property to Trustee.]**—The creditors of a liquidating debtor accepted a composition to be secured by such charge on the debtor's property as the trustee should require. The first instalment of the composition not having been paid, the trustee took possession, and subsequently the debtor by deed assigned all his property to the trustee for the benefit of his creditors. The sheriff having afterwards seized the debtor's property under a *fi. fa.* issued by a judgment creditor:—Held, that from the date of the deed of assignment the trustee was the legal owner of the debtor's property, that the possession taken by him was effectual, and consequently that there was no property of the debtor which the sheriff could seize. *North Eastern Railway Company v. Spark, 37 L. T. 143.*

The creditors of a liquidating debtor resolved upon a liquidation by arrangement, appointed a trustee, and agreed to accept a composition payable by instalments. The debtor and trustee then entered into a deed by which the trustee agreed to sell all the stock-in-trade, chattels, and effects to the debtor for a sum sufficient to pay the composition. The deed provided that the debtor might, under the direction and control of the trustee, carry on his former business; and that the trustee should be at liberty, so long as any part of the composition remained unpaid, at any time without consent of the debtor, "by

forcible entry or otherwise, to enter into and upon any premises" of the debtor where any stock-in-trade or assets of the debtor were, and "to seize and take possession of all and every the chattels and effects there found." The debtor obtained his discharge and recommenced trading, the trustee in no way interfering with him in the conduct of the business, and subsequently filed a second liquidation petition. Some days previously thereto the debtor made default in payment of the second instalment of the composition, whereupon the trustee put a man in charge of the debtor's shop, who remained in possession during the day, but went away to sleep, returning each morning early, the debtor being allowed to have possession of the keys to lock up the shop every night and reopen it in the morning. The night before he filed his second petition the debtor locked up the premises as usual, but next morning went away, taking the keys with him. The shop was not reopened, whereupon the trustee broke in and took forcible possession before the second liquidation petition was filed:—Held, that the possession taken by the trustee was a mere formal possession; that the locking up of the shop by the debtor with the intention not to reopen it constituted, under the circumstances, an act of bankruptcy of which the trustee had notice, and therefore the forcible possession taken by him was invalid. *Nicholson, Ex parte, Anderson, In re, 37 L. T. 40.*

Held, also, that the deed was against the policy of the law, and that therefore the trustee under the second liquidation was, as against the trustee under the first liquidation, entitled to all the debtor's property. *Id.*

**After-acquired Property.]**—The creditors of a manufacturer resolved on a liquidation by arrangement, and appointed a trustee and a committee of inspection. They afterwards passed a resolution accepting an offer by the debtor and B., a friend of his, to purchase "the whole of the debtor's estate and effects" for 6,000*l.*, towards which the debtor was to contribute 200*l.*, payable by instalments. A deed was executed conveying the machinery, stock-in-trade, and all other property then vested in the trustee under the liquidation, or which he had power to dispose of, to B. B. took the debtor into partnership in the business, and the instalments were all duly paid. The debtor then applied for his discharge, but a meeting of the creditors, summoned to consider the question, refused to grant it:—Held, that the sale included all the future property of the debtor, and that the debtor was entitled to an injunction restraining the committee of inspection and other creditors from taking proceedings against property acquired by him since the commencement of the liquidation. *Tinker, Ex parte, France, In re, 9 L. R., Ch. 716; 43 L. J., Bk. 147; 30 L. T. 806. Affirming 43 L. J., Bk. 91; 30 L. T. 615; 22 W. R. 794.*

The creditors of a liquidating debtor in 1877 passed a special resolution authorizing the sale of his estate to the trustee at such a price as would pay a dividend of 5*s.* in the pound to the creditors, and also the costs of the liquidation. The resolution was sanctioned by the court, and was carried out by the trustee. The debtor was not a party to the arrangement, and did not know of it for some time afterwards. The creditors did not pass any formal resolution

fixing the close of the liquidation, or granting the debtor a discharge, but he commenced another business. In 1881 this came to the knowledge of the trustee, and he thereupon took possession of the debtor's stock-in-trade, claiming it on behalf of the creditors under the liquidation:—Held, that the resolution did not amount in substance to a close of the liquidation or a discharge of the debtor, and that consequently the trustee was entitled to the debtor's after-acquired property for the benefit of the creditors. *Wainwright, or Greener, Ex parte, Wainwright, In re*, 19 Ch. D. 140; 51 L. J., Ch. 67; 45 L. T. 562; 30 W. R. 125—C. A. Affirming *S. C.*, 30 W. R. 62.

But held, that, under the circumstances, the costs might properly be the subject of appeal, and that the debtor's costs must be paid out of the estate, and (reversing the decision of Bacon, C. J.) that the trustee's costs must also be allowed out of the estate. *Id.*

### c. Sale of Estate to Debtor.

#### Authority of Trustee to sell Estate to Debtor.]

—The creditors of a liquidating debtor passed a resolution agreeing to the liquidation, appointing a trustee, and directing the trustee to resell to the debtor all the estate, other than a certain debt, in consideration of the debtor's promissory notes for 7s. 6d. in the pound, payable by three equal instalments, and such a sum as would pay the costs of the liquidation. The resolution was subsequently confirmed and registered:—Held, that the clause authorizing the trustee to resell the estate to the debtor was ultra vires and void, and must be rejected, but that the rest of the resolutions were not thereby rendered invalid, and that the liquidation must proceed in the ordinary course. *Dugdale, Ex parte*, 36 L. T. 324; 25 W. R. 468.

**Sale of Debts to Debtor.]**—To an action for goods sold, the defendant pleaded that since the cause of action arose, and before action, the estate of the plaintiff went into liquidation under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and B. was duly appointed trustee. The plaintiff replied that the trustee, for good and valuable consideration, sold, assigned, and transferred to him all the estate vested in him as trustee under the liquidation:—Held, that the sale was warranted by s. 25, sub-s. 3, and the plaintiff entitled to sue in his own name; and that the replication was no departure from the declaration. *Kitsoun v. Hardwicke*, 7 L. R., C. P. 473; 26 L. T. 846.

### 9. SCHEME OF ARRANGEMENT.

The creditors of a firm of liquidating debtors agreed to a scheme of arrangement under the Bankruptcy Act, 1869, s. 28, which was sanctioned by the court. Under this scheme the assets were transferred to a company, which was to carry on the business, and debentures were issued to the creditors for the amount of their proved debts, which were to be payable out of the surplus profits, after meeting certain prior charges. Among the creditors was C., who had accepted accommodation bills to a large amount for the firm, and who afterwards himself filed a liquidation petition, and paid his creditors a composition of 4s. in the pound. The holders of the bills thus accepted proved against C.'s estate,

and received their composition, amounting altogether to about 32,000l. They also proved against the estate of the liquidating firm under the scheme of arrangement. Some of them received the composition before proving, and consequently only proved for 16s. in the pound; the others proved for the whole amount. C. then claimed to stand in the place of the bill-holders as a creditor of the liquidating firm to the extent of what he had paid under the composition, and to have debentures issued to him to the nominal amount of 32,000l. in their stead. His claim to stand in the place of those bill-holders who had received their composition before proving under the scheme of arrangement to the extent of 4s. in the pound was allowed; but as to the others who had proved for the whole amount:—Held, first, that the debentures were not issued to the creditors in satisfaction of their debts, but in substitution for the dividends which under a bankruptcy would have been payable on them. *Turquand, Ex parte, Fothergill, In re*, 3 Ch. D. 445; 45 L. J., Bk. 153—C. A.

Held, secondly, that the scheme of arrangement made no difference in the relation between C. and the liquidating firm, namely, that of surety and principal debtor, and therefore that he had no equity to receive anything out of these assets till the creditors had been actually paid 20s. in the pound. His claim to debentures in respect of that part of the composition was consequently disallowed. *Id.*

The creditors of a bankrupt agreed, under the Bankruptcy Act, 1869, s. 28, to a scheme for the settlement of his affairs, which was afterwards approved by the court. The scheme provided that a composition of 9s. 6d. in the pound should be paid to all the creditors but three; that the bankrupt should take back his estate; and that the adjudication should be annulled. The three excepted creditors agreed to make no claim on the bankrupt or his estate for three years from the date of the annulling the adjudication. On the 20th of April, 1871, the order to annul was made. The composition was paid, the bankrupt took back his estate; he traded again and contracted fresh debts, and on the 1st of October, 1875, he filed a liquidation petition:—Held, that the excepted creditors were entitled to prove in the liquidation and to receive dividends pari passu with the new creditors. *Russell, Ex parte, Winn, In re*, 2 Ch. D. 424; 45 L. J., Bk. 85; 34 L. T. 295; 24 W. R. 802.

The creditors of a trader resolved on a liquidation, and also that, on his entering into a covenant to pay the trustee 5,000l. by ten half-yearly instalments, the trustee should assign to the debtor his household furniture, and allow him to carry on his business, accounting to the trustee for the then stock in hand, and that within a month after the execution of the covenant by the debtor and the registration of the resolution, the discharge of the debtor should be granted to him. The deed of covenant was executed and the debtor was thereupon let into possession of the stock-in-trade and the business, which he carried on for more than two years. His discharge was also granted to him. Ultimately the creditors resolved that the business and stock should be sold, and an offer to buy them for 3,000l. was accepted. The debtor joined in the sale. The 3,000l. having been paid to the trustee, and the debtor having died:—Held, that a creditor whose debt was contracted after the debtor

had resumed his business was not entitled to any lien upon the 3,000*l.* or any part thereof. *Robertson. Ex parte, Magnus, In re*, 8 L. R., Ch. 962; 42 L. J., Bk. 85; 29 L. T. 124; 21 W. R. 875.

**Order approving does not oust Jurisdiction of Court of Bankruptcy.]**—The effect of an order of the Court of Bankruptcy, approving a scheme of settlement under the Bankruptcy Act, 1869, s. 28, of which one of the terms was the annulling of the bankruptcy and vesting the property of the bankrupt in a person appointed therein pursuant to s. 81, is not to take the matter out of the powers of the Court of Bankruptcy so as to prevent the general rules of bankruptcy applying. *West v. Baker*, 1 Ex. D. 44; 45 L. J., Ex. 113; 34 L. T. 102; 24 W. R. 277.

Therefore, in an action brought by such person duly appointed by order, for work done by the bankrupt before bankruptcy:—Held, that the defendant had a right to set off a claim for unliquidated damages which would have been provable under the bankruptcy. *Ib.*

#### 10. EMPLOYMENT OF DEBTOR TO REALIZE ESTATE.

**Power to commit Debtor.]**—On the 8th of October the creditors of two debtors, who were partners in trade, resolved on a liquidation, and appointed trustees, and on the 5th of November they granted the debtors their discharge in respect of their partnership liabilities. The trustees employed the debtors as their servants, at a weekly salary, to realize the estate. After the order of discharge was granted one of the debtors received moneys on account of the partnership estate, and applied them in paying his separate creditors. An order was made by the county court that he should refund the moneys thus misapplied, and he failed to obey the order:—Held, that there was jurisdiction under the Bankruptcy Act, 1869, s. 19, to commit him for contempt of court. *Waters, Ex parte, Waters, In re*, 18 L. R., Eq. 701; 43 L. J., Bk. 128; 30 L. T. 766; 22 W. R. 796.

#### 11. ADJUDICATING LIQUIDATING DEBTOR A BANKRUPT.

**Discretion of Court.]**—When a debtor against whom a petition for adjudication has been presented files a petition for liquidation, the court has a discretion either to postpone the adjudication till after the meeting of creditors, under the Bankruptcy Act, 1869, s. 80, sub-s. 10, or to adjudicate the debtor a bankrupt and suspend the proceedings under the adjudication under r. 266 of the Bankruptcy Rules, 1870, or to adjudicate him a bankrupt simply. *Walton, Ex parte, Dando, In re*, 10 L. R., Ch. 215; 44 L. J., Bk. 37; 32 L. T. 313; 23 W. R. 778.

Seemingly, that r. 266 is only intended to apply to cases where the judge considers that the property would not be sufficiently protected by the proceedings in liquidation. *Ib.*

The power given to the court by s. 125, sub-s. 12 of the Bankruptcy Act, 1869, to adjudge a debtor, who has filed a liquidation petition, a bankrupt, may be exercised even though no liquidation or composition resolutions have been passed by the creditors. *Walker, Ex parte, McHenry, In re*, 22 Ch. D. 813; 52 L. J., Ch. 653; 48 L. T. 291; 31 W. R. 419—C. A.

**No Petition required.]**—When the court is satisfied that proceedings in liquidation cannot proceed without injustice and undue delay of creditors, it may at once adjudicate the debtor bankrupt, without the presentation of any petition for adjudication, or notice to the creditors. *Marland, Ex parte, Ashton, In re*, 20 L. R., Eq. 777; 44 L. J., Bk. 116; 32 L. T. 875; 23 W. R. 951.

**Affidavits need not be Re-sworn when Creditors Resolve on Bankruptcy.]**—When at the first meeting held under a petition for liquidation, the creditors resolve upon a bankruptcy, and a petition for adjudication is accordingly presented, the affidavits of debt made by the creditors under the petition for liquidation need not be re-sworn for the purposes of proofs under the bankruptcy. *Hopkins, Ex parte*, 22 L. T. 450.

The proper course is to transfer the proceedings under the petition for liquidation to the petition for adjudication whereby all the proceedings will be consolidated. *Ib.*

#### 12: SECOND LIQUIDATION.

When a resolution for composition has been passed which is capable of being enforced against a debtor, he cannot present a second petition for liquidation or for composition; and any resolution passed under such a petition is void, and ought not to be registered. *Sydney and Wiggins, Ex parte, Sydney, In re*, 10 L. R., Ch. 208; 44 L. J., Bk. 21; 31 L. T. 714; 23 W. R. 205.

Creditors under a liquidation petition resolved that the liquidation should close, and the trustees be released as from January, 1871, but no order of discharge was given to the debtor. Four years after the debtor filed a second petition, and the creditors again resolved on liquidation:—Held, that the creditors under the second petition need not give notices of their meetings to the creditors under the first petition. *Williams, Ex parte, Williams, In re*, 20 L. R., Eq. 743; 44 L. J., Bk. 122; 32 L. T. 699; 23 W. R. 790.

A debtor having commenced proceedings for liquidation, his creditors passed a resolution that his discharge should be granted to him on his paying 4,000*l.* in a month, and giving a bond for payment of 5,000*l.* more to the trustee by five yearly instalments. In default of payment of any instalment, the whole 5,000*l.* was to become payable at once. The 4,000*l.* was paid, the bond given, and two yearly instalments paid under it, but default was made in payment of the third. The debtor then commenced fresh proceedings for liquidation, and presented a statement of accounts shewing a large amount of debts and hardly any assets. He was in receipt of half-pay as retired officer in the army. The creditors passed a resolution that the affairs of the debtor should be liquidated by arrangement; that until full payment of the debts the debtor should pay to the trustee the excess of his income above 600*l.* a year; and that as soon as a deed had been executed to carry the resolutions into effect the debtor should, without any further resolution, be discharged from the debts. The trustee under the former liquidation proved for the 3,000*l.*, and voted for the resolutions without the consent of the committee of inspection, and without his vote the resolutions would not have been passed. The registrar having refused to register these resolutions:—

Held, that after the 4,000*l.* mentioned in the former resolutions had been paid and the bond given, the future property of the debtor was released, and that the former liquidation was not pending so as to prevent the debtor from instituting fresh proceedings for liquidation. *Russell, Ex parte, Russell, In re*, 10 L. R., Ch. 255; 44 L. J., Bk. 42; 32 L. T. 4; 23 W. R. 817.

Held, also, that the trustee under the former liquidation had all the rights of a creditor for 3,000*l.*, and that his vote in the second liquidation was effectual whether his voting as he did was a breach of trust or not. *Ib.*

Held, that the resolutions under the second proceedings were manifestly not passed for the benefit of the creditors, but for the sake of discharging the debtor, and therefore were not binding on dissentient creditors, and that on this ground they ought not to be registered. *Ib.*

**Effect of, on Property of the Debtor.**—The creditors of a trader who had filed a liquidation petition resolved that he should have his discharge when they had received 2*s.* in the pound on their debts. The estate realized only half that sum. The debtor went into business again and contracted new debts, and afterwards filed a second liquidation petition:—Held, that, in the absence of positive evidence that the trustee or the creditors under the first petition were aware of the subsequent trading, they were entitled in priority to the new creditors to the assets acquired by the debtor in the course of his trading, to the extent necessary to make up the 2*s.* in the pound. *Ford, Ex parte, Caughey, In re*, 1 Ch. D. 521; 45 L. J., Bk. 96; 34 L. T. 634; 24 W. R. 590—C. A. Affirming 45 L. J., Bk. 19.

It could not be assumed that the old creditors intended, when they passed their resolution, that the debtor should trade again in order to be able to pay the 2*s.* in the pound. *Ib.*

At a meeting of creditors held under a petition for liquidation, it was resolved to accept a composition payable by three instalments, the first two of which were to be secured by the acceptances of the debtor, and the third by the acceptances of a surety. The surety required as the condition of giving his acceptances that the debtor should deposit goods to the amount thereof, but this was not known to the creditors. The debtor failed to pay the second instalment, and filed a second petition for liquidation, and the trustee appointed under the second petition applied for an order upon the surety for delivery up of the goods deposited:—Held, that the creditors by accepting the composition had left the debtor absolute owner of the assets, and there was nothing to prevent his depositing them as he had done. *Robinson, In re, Burrell, Ex parte*, 1 Ch. D. 537; 45 L. J., Bk. 68; 34 L. T. 198; 24 W. R. 353—C. A.

An undischarged liquidating debtor filed a second petition, under which resolutions were passed and registered, empowering the trustee to sell the estate to the debtor for a certain sum, on payment whereof the debtor was to be entitled to his discharge. The sale was made, the debtor paid the money, took over the property, traded therewith and acquired other property. The creditors under the first liquidation established their claim to the whole of the purchase-money. All parties having throughout been aware of the facts:—Held, that the debtor had, by paying the money to the trustee, performed the condi-

tion on which he was entitled to his discharge, and that his subsequently-acquired property was free from any claim under the second liquidation. *Caughey, Ex parte*, 4 Ch. D. 533; 46 L. J., Bk. 18; 36 L. T. 25; 25 W. R. 308.

### 13. STAMP DUTY ON ASSETS.

**Where Assets exceed Debts.**—When the assets of a liquidating debtor exceed his debts, stamp duty upon the registration of the special resolution of the creditors is not payable on any amount exceeding the sum estimated as necessary to pay all the creditors in full. *Murray, Ex parte, Forrest, In re*, 16 L. R., Eq. 215; 42 L. J., Bk. 96; 28 L. T. 678; 21 W. R. 768.

**Must be Paid on Debtor's Estimate.**—A debtor filed a liquidation petition, and in his statement he estimated his assets at 4,660*l.* The creditors resolved on a liquidation. When the trustee presented the resolution for registration he had made an affidavit in which he stated that he believed the assets would not realize more than 1,000*l.*, and he had only paid stamp duty on 1,000*l.* It did not appear that the value of the assets, as estimated by the debtor, would be more than enough to pay the creditors in full:—Held, that stamp duty must be paid on the amount of the debtor's estimate. *Berger, In re*, 16 L. R., Eq. 23; 42 L. J., Bk. 97; 29 L. T. 76; 21 W. R. 883.

**Refusal of Registration—Return of Stamp Duty.**—When the registration of liquidation resolutions is refused, the court has no power to order repayment of the ad valorem duty paid on the presentation of the resolutions for registration. The only mode of obtaining a return of the duty is by a memorial to the Commissioners of Inland Revenue. *Izard, Ex parte, Moir, In re*, 20 Ch. D. 703; 51 L. J., Ch. 939; 47 L. T. 212; 30 W. R. 861—C. A.

### 14. JURISDICTION OF COURT OF BANKRUPTCY.

**To restrain Actions—Not before Appointment of Receiver.**—Before the Court of Bankruptcy will grant an injunction in any matter a receiver must be appointed. *Robinson, In re*, 22 L. T. 247.

**Before Appointment of Trustee.**—The court has power to grant an injunction on the application of the receiver under a liquidation by arrangement, before a trustee has been appointed. *Iaao, Ex parte, De Vecchj, In re*, 6 L. R., Ch. 58; 40 L. J., Bk. 19; 22 L. T. 523; 19 W. R. 38.

**Affidavit.**—When an injunction is sought to restrain proceedings in actions brought against the debtor who has presented a petition for arrangement, the nature of the debts in the actions sought to be restrained must be set out in the affidavit filed in support of the application. *Anon.*, 22 L. T. 247.

**Notice to Creditor.**—The court will not, in the case of liquidation upon a debtor's own petition, interfere to restrain creditors from pursuing their legal remedies without proper notice being given to them. *Anon.*, 21 L. T. 685.  
A London tradesman was enjoined by the

county court of Devon from proceeding with an action to try the right to goods claimed as part of the property of a bankrupt. The injunction order was obtained *ex parte* without notice to the creditor, and contained no undertaking on the part of the trustee in bankruptcy to proceed to try the right to the goods or to answer damages arising from the delay caused by the injunction:—Held, that the order was irregular. *Escherich and Barrett, In re, Malet, Ex parte*, 20 W. R. 766.

— **Actions of Contract but not of Tort.**—A creditor brought an action against his debtor, in which he joined counts in contract for breach of promise in not accepting certain bills of exchange, with count in tort for misrepresentations contained in a letter written by the debtor. The debtor afterwards filed a petition for liquidation, and the creditors agreed to a composition:—Held, that the debtor was entitled to an injunction to restrain the plaintiff from proceeding at law on the counts in contract, but that the court had no jurisdiction to restrain him from proceeding on the counts in tort. *Baum, Ex parte, Edwards, In re*, 9 L. R., Ch. 673; 41 L. J., Bk. 25; 31 L. T. 12.

Held, also, that the creditor having elected to proceed at law, could not receive a composition in respect of what he might fail to recover in the action. *Ib.*

— **Debt incurred by Means of Fraud.**—After a liquidating debtor has obtained his discharge, a creditor, whose debt has been incurred by means of fraud, is entitled to sue the debtor at law for the amount of the debt, notwithstanding that the liquidation is not closed, and that he has proved the debt in the liquidation. The Court of Bankruptcy will not, in such a case, restrain the action. *Hemming, Ex parte, Chatterton. In re*, 13 Ch. D. 163; 41 L. T. 513; 28 W. R. 218—C. A.

If the creditor has received any dividends in the liquidation, the debtor will only remain liable for the unpaid balance of the debt; and, if no dividends have been paid, the debtor, if he pays the creditor in full, is entitled to stand in his place in respect of any dividend which may be declared on the debt in the liquidation. *Ib.*

Whether s. 15 of the Debtors Act, 1869, applies to a liquidation by arrangement, *quære. Ib.*

— **Ejectment.**—The court will, upon the motion of the receiver under a petition for adjudication, restrain an ejectment brought against him since the presentation of the petition with the view of saving expense to the estate. *Betts, Ex parte, Figuls, In re*, 22 L. T. 245.

When, after a petition for liquidation filed by a debtor, a mortgagee of his farm brings an ejectment to recover possession of the property, the court has jurisdiction to restrain the action until after the first meeting of creditors. *Jordan, In re*, 18 W. R. 863.

— **Action as to Property.**—Under the Bankruptcy Act, 1869, the Court of Bankruptcy has jurisdiction to restrain the proceedings in an action, the object of which is in effect to determine whether certain goods form part of a bankrupt's estate. *Cohen, Ex parte, Sparke, In re*, 7 L. R., Ch. 20; 41 L. J., Bk. 17; 25 L. T. 473; 20 W. R. 69—L. J.

A trader, in May, 1870, being in want of money, borrowed of C. 55*l.* on the security of two bills of sale, by which he assigned the whole of his property, worth about 600*l.*, to him. It was agreed verbally between them that these bills of sale should be given up within the period limited for registration, and new bills of sale from time to time substituted for them. This was done twice. The last bills of sale were given on the 20th July, 1870. No fresh advance was made on the occasion of the renewal. On the 9th of August, 1870, the trader filed a petition for liquidation by arrangement, and on the next day the bills of sale of the 20th July were registered. The trustee took possession of the goods comprised in the bills of sale, and the mortgagee brought an action against him to recover possession of the goods:—Held, that the Court of Bankruptcy had jurisdiction to restrain the proceedings in the action, and that an injunction restraining these proceedings was rightly granted. *Ib.*

Held, also, that the bills of sale were void as against the trustee. *Ib.*

B. having obtained judgment against J., the sheriff levied upon his goods. He presented a petition for liquidation by arrangement, and the county court granted an interim injunction restraining B. and the sheriff from proceeding further under the execution. Trustees of the bankrupt's estate were appointed, and by mutual arrangement on payment of 25*l.* by the trustees to the sheriff the execution officer was withdrawn, and the court continued the injunction. The trustees proceeded to administer the estate:—Held, that the injunction order be discharged, and that the trustees account for and pay over to B. the net proceeds of the goods sold. *Bailey, Ex parte, Jecks, In re*, 20 W. R. 76.

— **By Bill of Sale Holder.**—The holder of a bill of sale took possession of the goods of the debtor, who, a day or two afterwards, filed his petition under the arrangement clauses. He was subsequently appointed receiver under the petition, and upon his appointment withdrew his man from possession, whereupon the trustee entered, and sold the goods as part of the debtor's estate. He then commenced an action against the trustee to recover the proceeds of the sale:—Held, that the trustee was right, and that the court was justified in restraining the further proceeding in the action. *Macdonald, Ex parte, Beveridge, In re*, 24 L. T. 475; 19 W. R. 717.

— **Chancery Suits.**—The fact of a debtor before a Court of Bankruptcy being the sole defendant in a chancery suit, is not of itself sufficient ground for an application to a Court of Bankruptcy to stay proceedings in the chancery suit. *Hide, Ex parte, Turner, In re*, 20 W. R. 508.

The Court of Bankruptcy will not interfere in such a case except when such interference is requisite for protecting the general interests of the creditors. *Ib.*

— **In the Case of Partners.**—When one partner of a firm files a petition for liquidation by arrangement, the court has no jurisdiction to restrain an action by a creditor of the firm against all the partners. *Isaac, Ex parte, De Vecchj, In re*, 6 L. R., Ch. 58; 40 L. J., Bk. 19; 22 L. T. 523; 19 W. R. 38.

— **English Creditor Suing in Foreign Court.]**

—The court will grant an injunction to restrain the proceedings of an English creditor in a foreign court for a debt incurred in England against the debtor who has filed a petition for liquidation. *Ormiston, Ex parte, Distin, In re*, 24 L. T. 197.

— **Action in Ireland.]**—The court granted an injunction to restrain the prosecution of an action in Ireland upon a claim, which, if due, would be provable under a deed of inspection executed in December, 1869. *Tait, In re*, 13 L. R., Eq. 311; 41 L. J., Bk. 32; 20 W. R. 318.

— **Action in New York.]**—A trader in London, being in difficulties, sent round a letter to his creditors, asking for indulgence; thereupon certain creditors in New York commenced actions in the New York courts in respect of bills accepted, made payable, and dishonoured in London to attach the debts due to him from various New York firms. The trader immediately filed a petition for liquidation, a receiver was appointed, and application made for an injunction to restrain the actions in the New York courts:—Held, that the court would not grant an injunction against the foreign creditors suing abroad. *Chapman, In re*, 15 L. R., Eq. 75; 42 L. J., Bk. 38; 27 L. T. 628; 21 W. R. 104.

— **Foreign Creditor Suing in English Court.]**

But the Court of Bankruptcy has jurisdiction to and will restrain a foreign creditor, who is suing the debtor in an English court, from proceeding in his action, after he has had notice of the filing of a petition for liquidation by the debtor. *Lovering, Ex parte, Thorpe, In re*, 27 L. T. 863; 21 W. R. 327.

— **Restraining Debtor.]**—At the first meeting of the creditors under a liquidation petition, one person who claimed to be the largest creditor was ejected by force and not allowed to vote. Resolutions were passed by the other creditors present, but the registration of them was opposed by the excluded creditor, and the court refused to allow them to be registered. The debtor soon afterwards commenced an action against the excluded creditor for a balance which he alleged to be due to him. At this time no order had been made for the discharge of a receiver, who had been appointed under the petition:—Held, that there was jurisdiction to restrain the debtor from proceeding with his action. *Taylor, Ex parte, Morris, In re*, 13 L. R., Eq. 256; 43 L. J., Bk. 103; 30 L. T. 473; 22 W. R. 613.

But the excluded creditor was required to undertake to apply within a fortnight either for an order to call a fresh first meeting of the creditors under the petition, or for an adjudication of bankruptcy against the creditor. *Id.*

**Distresses.]**—A distress for rent is not “an execution or legal process” within those terms in s. 13, and therefore where a gas company who, by an express section in its special act, was authorized to recover rent and charges due to it for gas “by the same means as landlords may recover rent in arrear,” after notice of filing a petition for liquidation by arrangement distrained upon the goods of the debtors for a sum due for gas supplied, and the county court judge granted an injunction restraining further proceedings in

the distress:—Held, that the injunction had been improperly granted, and that the distress was good against the trustee under the liquidation. *Birmingham and Staffordshire Gas Light Company, Ex parte, Fanshaw, In re*, 11 L. R., Eq. 615; 40 L. J., Bk. 52; 24 L. T. 639; 19 W. R. 603.

The Court of Bankruptcy has jurisdiction to restrain a distress for rent or other legal proceeding against the debtor or his estate in respect of any debt provable, and to decide the question of the landlord's right to distrain. *Russell, Ex parte*, 18 W. R. 763.

A wine warehouseman had been in the habit of receiving wine belonging to other persons, in cask and in bottle, and properly storing and warehousing the same. It was also a part of his business to bottle wine for other persons, and to see that it was properly stored away in bins and kept at a proper temperature, so as to bring it to maturity; and also to receive wine for the purpose of having it bottled and forthwith returned. The landlord of the premises where the wines were deposited having levied a distress for rent, and the warehouseman having filed a petition for liquidation, and applied for an injunction restraining the landlord from proceeding to a sale:—Held, that wine in cask or in bottle could not be deemed “perishable,” and that, inasmuch as it could not reasonably be said that the depositing wine in another person's cellar was an incident to the trade carried on by the owner of the wine, the wine was liable to distress, except as to that portion of it which had been sent in for the purpose of being bottled and returned to the owner at a day named. *Id.*

After a liquidation petition had been filed and a receiver had been appointed, and had taken possession of the debtor's property, the debtor's landlord, without asking the leave of the court, levied a distress for a year's rent due to him. The judge of the county court restrained the landlord from proceeding with his distress, and ordered him to be committed for contempt of court:—Held, that the court could not interfere with the statutory right given to the landlord by the Bankruptcy Act, 1869, s. 34, and the order for committal discharged. *Till, Ex parte, Mayhew, In re*, 16 L. R., Eq. 97; 42 L. J., Bk. 84; 21 W. R. 574.

**Mortgagees.]**—L., in June, 1863, for further securing 1,000*l.*, then advanced by C., assigned to C. his household furniture, farming stock, crops, &c., and the deed contained a power of sale in case of default of payment on demand. In February, 1870, C.'s executor, after demand made and default of payment, seized and sold. In March, 1870, L. filed a petition for liquidation, and obtained an order from a county court restraining C.'s executor from taking further proceedings until further orders, and also restraining the incoming tenant from paying the purchase-money of a portion of the property:—Held, that as the property had become the property of the mortgagee, there was no authority or right in the court to interfere with his possession. *Croft, Ex parte, Lawrence, In re*, 18 W. R. 756.

Under certain circumstances the court will deal with claims between a legal mortgagee and the receiver; as where the debtor, having mortgaged all his property, absconded with the money, the court ordered the property to be sold, and after payment of the principal, interest and costs due to the mortgagee; and the costs of sale, the residue

of the purchase-money to be paid into court. *Betts, Ex parte, Figula, In re*, 22 L. T. 245.

**Petition of Right.**—A person was adjudicated bankrupt under the Bankruptcy Act, 1861. He subsequently presented a petition of right in the Queen's Bench, praying the recovery of a sum of money due to him from the Lords of the Admiralty. An injunction staying all further proceedings in this petition was issued against him by the Court of Bankruptcy under the Bankruptcy Act, 1869. The bankrupt disputed the validity of this order, and proceeded with his petition of right after service of the order:—Held, that he was guilty of a contempt of court in so doing. *Davis, In re*, 21 L. T. 685; 20 W. R. 766.

**Sales by the Sheriff.**—The court will, after the presentation of a petition, interfere to restrain a sale of the property of the bankrupt by the sheriff, although the sheriff was in possession prior to the adjudication. *Tidey, In re*, 21 L. T. 685.

**Sequestration.**—A sequestration in a chancery suit is "legal process" within the Bankruptcy Act, 1869, s. 13. *Hughes, Ex parte, Brown, In re*, 12 L. R., Eq. 137; 40 L. J., Bk. 46; 19 W. R. 771.

Where the usual order directing a sale by the sequestrators had been made by the Court of Chancery, and the owner of the property was adjudicated bankrupt before the sale:—Held, that the Court of Bankruptcy had jurisdiction to restrain the sale. *Ib.*

**Effect of Injunction.**—It is a matter for the exercise of judicial discretion whether or not an injunction shall be granted under Rule 260. *Mills, Ex parte, Manning, In re*, 6 L. R., Ch. 594; 40 L. J., Bk. 89; 24 L. T. 859; 19 W. R. 912.

M. & B. jointly accepted a bill: before the bill matured M. petitioned for arrangement of his affairs by liquidation. The creditors resolved upon liquidation, and a trustee was appointed. Afterwards the holder of the bill, which had been meanwhile dishonoured, sued M. & B. upon it. They pleaded non-acceptance. Notice of trial was then given; subsequently to which an injunction was granted by the registrar, restraining further proceedings in the trial against M.:—Held, that the application for an injunction ought to have been made at once before pleading in the action; and that the proper order now was merely to restrain execution against M. *Ib.*

An injunction is merely for the protection of the debtor's estate, and has no effect on the rights of the creditors, inter se. *Roche, Ex parte, Hall, In re*, 6 L. R., Ch. 795; 40 L. J., Bk. 70; 25 L. T. 287; 19 W. R. 1129.

#### 15. TRANSFER FROM ONE DISTRICT TO ANOTHER.

Liquidation proceedings were begun by mistake in a county court, when the debtor lived beyond the limits of its district. The mistake was not discovered till just before the second meeting of creditors, and thereupon they passed a resolution to transfer the proceedings to the proper court. The registrar refused to register the resolutions, on the ground that all the proceedings were a mere nullity. On appeal he was directed to register the resolutions, and the pro-

ceedings were transferred. *Buckland, Ex parte*, 15 L. R., Eq. 221; 42 L. J., Bk. 32; 21 W. R. 291.

An extraordinary resolution presented to the registrar under the Bankruptcy Act, 1869, s. 126, must be properly stamped and also verified by affidavit before the registrar can receive it for the purpose of registering or filing it. *Davis, Ex parte, Davis, In re*, 7 L. R., Ch. 526; 41 L. J., Bk. 69; 27 L. T. 53; 20 W. R. 791.

A direction to transfer the proceedings to another court is part of the resolution in which it is inserted, and has no validity till such resolution has been registered. *Ib.*

#### Meetings of Joint and Separate Creditors.

The proceedings under a liquidation petition filed by partners cannot be transferred from the court in which they were commenced to another court, unless a resolution directing the transfer is passed, not only by a general meeting of the joint creditors, but also by separate general meetings of the separate creditors of each partner. Rule 285 applies to all cases in which meetings of creditors have to be held under a liquidation petition by partners, and in all such cases separate meetings must be held of the joint creditors, and of the separate creditors of each partner. *Horrocks, Ex parte, Wood, In re*, 19 Ch. D. 367; 51 L. J., Ch. 261; 45 L. T. 692; 30 W. R. 298—C. A. Affirming 45 L. T. 559.

#### 16. COSTS OF LIQUIDATION.

**Costs a First Charge.**—The costs of the receiver under a liquidation petition ought to be paid out of the estate in priority to the costs of the debtor's solicitor. The first charge on the assets is for the costs of realizing them. *Royle, Ex parte, Johnson, In re*, 20 L. R., Eq. 780; 32 L. T. 39; 23 W. R. 908.

A trustee in a liquidation who had paid the costs of the debtor's solicitor out of the assets, which were insufficient to pay both those costs and the costs of the receiver, was ordered to pay the receiver's costs personally. *Ib.*

**Where Debtor adjudicated Bankrupt.**—A debtor filed a petition for liquidation of his affairs by arrangement, but no resolution was come to by the creditors. The debtor was subsequently adjudicated bankrupt:—Held, that the costs of the liquidation proceedings must, in the absence of proof that the debtor had acted from corrupt or improper motives, be paid out of the estate. *Haves, In re, Jeffery, Ex parte*, 9 L. R., Ch. 144; 43 L. J., Bk. 27; 29 L. T. 859; 22 W. R. 287. Affirming 17 L. R., Eq. 61; 43 L. J., Bk. 1; 29 L. T. 433; 22 W. R. 57.

A liquidation by arrangement was rejected by the creditors, but a receiver appointed under the liquidation remained in office when the debtor was adjudged a bankrupt:—Held, that the proceedings in liquidation were pending so as to enable the court, under r. 292 of the Bankruptcy Rules, 1870, to direct the trustee of the bankruptcy to pay the costs of the liquidation. *Ib.*

**Accountant's Charges.**—A debtor, prior to filing a petition for liquidation of his affairs by arrangement, employed an accountant to make up his books, and deposited a sum of

money with him. Three days afterwards the petition was filed, and the accountant was appointed receiver. The registrar ordered the receiver to pay over the balance of the sum deposited with him after deducting only the taxed amount of his charges as receiver in liquidation, and refused to allow him to make any deduction in respect of his services rendered to the debtor during the three days before the petition was filed:—Held, that the accountant was entitled to a reasonable remuneration for those services, and that the registrar ought to have ascertained what was a reasonable remuneration with the assistance of the taxing master, though it would not be a formal taxation, as charges in respect of services rendered prior to the commencement of the liquidation did not come within the 5th rule of the Bankruptcy Rules, 1871. *Banks, Ex parte, Prince, In re*, 31 L. T. 530—L. J.

## XVIII. COMPOSITION UNDER THE BANKRUPTCY ACT, 1869.

### 1. GENERAL PRINCIPLES.

**Distinction between Bankruptcy and Composition.**—A bankruptcy and a composition arrangement under s. 126 of the Bankruptcy Act, 1869, differ materially from each other. *Breslawer v. Brown*, 3 App. Cas. 672; 47 L. J., C. P. 729; 39 L. T. 67; 26 W. R. 536.

A resolution to accept a composition and the acceptance of it have not the same effect as a discharge in a regular bankruptcy. *Ib.*

**Provisions for Protection of Debtor.**—The provisions for the protection of a debtor in s. 12 of the Bankruptcy Act, 1869, and r. 289 of the Bankruptcy Rules, 1870, do not apply to a composition. *Pashler v. Vincent*, 8 Ch. D. 825; 27 W. R. 2—C. A.

**Jurisdiction to Commit for Contempt.**—Sect. 96 of the Bankruptcy Act, 1869, does not apply to composition proceedings; and when resolutions for a composition have been registered there is no jurisdiction to examine anyone under that section. *Willey, Ex parte, Wright, In re*, 23 Ch. D. 118; 52 L. J., Ch. 546; 48 L. T. 380; 31 W. R. 553—C. A. Reversing 48 L. T. 79; 31 W. R. 383.

**Distinction between Liquidation and Composition.**—The rights of a debtor and his creditors are wholly different in the two cases of liquidation by arrangement under s. 125, and composition under s. 126, though both proceedings are begun by the debtor filing a petition and a declaration of his inability to pay his debts. *Birmingham Gaslight and Coke Company, Ex parte, Adams, In re*, 11 L. R., Eq. 204; 40 L. J., Bk. 1; 24 L. T. 42; 19 W. R. 123.

**Rights of Debtor over Property.**—A debtor who has filed a petition for liquidation and has effected a composition with his creditors, has complete dominion over his property, and full power to dispose of it until, upon action taken by his creditors under the Bankruptcy Act, 1869, s. 126, the composition has been set aside and the debtor adjudged a bankrupt: and a purchaser from him is not bound to inquire as to

the payment of instalments under the composition. *Kearley and Clayton's Contract, In re*, 7 Ch. D. 615; 47 L. J., Ch. 474; 38 L. T. 92; 26 W. R. 324.

When a resolution to accept a composition has been duly passed and registered the property of the debtor is not taken from him, or vested in a trustee, or distributed in the same manner as in bankruptcy; and there is no power to deprive secured creditors of their securities. *Ib.*

Under a statutory power to levy money due by distress and sale a creditor seized his debtor's goods. The debtor then filed in the county court a petition for liquidation and obtained an injunction restraining the creditor from selling. A resolution to accept a composition was afterwards duly passed by the requisite majority of creditors and registered. The county court having made an order on the creditor to deliver the goods to the debtor:—Held, that the order must be discharged. *Ib.*

**Secured Creditor proving for Balance of Debt above assessed Value of Security.**—The effect of Rule 272 of the General Rules, 1870, read together with s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), is that in composition proceedings under s. 126, a secured creditor, who proves for the balance of his debt after deducting the assessed value of his security, and afterwards realizes the security, must pay to the debtor any surplus realized above the assessed value, after allowing interest upon the assessed value from the assessment until the realization. *Société Générale de Paris v. Geen*, 8 App. Cas. 606; 32 W. R. 97.

**Composition after Adjudication — Rights of Execution Creditor.**—Goods were seized by the sheriff under a *fi. fa.* The debtor was adjudicated bankrupt. His creditors resolved to accept a composition:—Held, that the resolution did not revert the title to the goods in the debtor; but that the execution creditor was restored to his position. And the Court of Bankruptcy enjoined the debtor from prosecuting an action against the sheriff for not delivering up the goods that had been seized. *England, In re*, 12 L. R., Eq. 207; 40 L. J., Bk. 65; 24 L. T. 519. Affirmed, 24 L. T. 860; 19 W. R. 914.

### 2. STAYING BANKRUPTCY PROCEEDINGS.

F. filed a petition for adjudication against P., who shortly afterwards filed a petition for liquidation by arrangement or composition. Before any meeting of creditors had been held, an adjudication was made by consent on F.'s petition, with a stay of proceedings under it till a certain day, before which the creditors duly passed resolutions for accepting a composition, which were afterwards duly registered. Orders had been made, by which the proceedings under the adjudication were from time to time stayed until after the registration:—Held, that r. 266 of the Bankruptcy Rules, 1870, applies to a case where the petition for adjudication precedes the liquidation petition; that the order for the adjudication must be regarded as made under that rule; and that, resolutions for accepting a composition having been duly registered, the adjudication ought to be annulled. *Foster, Ex parte, Pooley, In re*, 10 L. R., Ch. 59; 44 L. J., Bk. 22; 31 L. T. 397; 23 W. R. 145.



### 3. MEETINGS OF CREDITORS.

**Presence of Debtor.**—The meaning of s. 126 of the Bankruptcy Act, 1869, is that the debtor must as a rule be personally present at the meetings of his creditors to consider a proposed composition, and personally produce his statement of affairs. It is not sufficient that he should be in a room immediately adjoining that in which the meeting is held, ready to be called in if the creditors wish to examine him, even though the creditors are informed of this. If he is not actually present in the room, he is bound to shew that he was prevented by sickness, or that the creditors, for some other cause satisfactory to them, excused his presence. If he does not do this, any resolutions passed accepting a composition will be invalid and cannot be registered. *Grunelins, Ex parte*, W. N. (1876), 244, considered. *Best, Ex parte, Best & Marshall, In re*, 18 Ch. D. 488; 45 L. T. 95—C. A.

Fresh meeting of creditors refused as there had been no slip in the proceedings. *Ib.*

**Presence of Shorthand Writer—Duty of Chairman.**—Inasmuch as the answers given by a debtor to questions put to him at the meetings of his creditors under a liquidation petition form part of his statement of affairs, it is essential that a written record of those answers should be made, and therefore a creditor who desires to examine the debtor is entitled to have a shorthand writer present at the meeting to take notes of the examination, though, if several creditors wish to employ a shorthand writer, the meeting has power to limit the number who may be present. It is no part of the duty of the chairman of the meeting to take notes of the debtor's examination. *Solomon, Ex parte, Tilley, In re*, 20 Ch. D. 281; 51 L. J., Ch. 677; 47 L. T. 57; 30 W. R. 603—C. A.

A meeting of creditors under a liquidation petition refused to allow a shorthand writer to be present on behalf of one of the creditors to take notes of the debtor's examination by him, and no note of the examination was taken. The debtor's written statement of his affairs was, in the opinion of the court, grossly insufficient. Resolutions accepting a composition were passed by the statutory majority:—Held, that the proceedings were irregular, and that the resolutions ought not to be registered. *Ib.*

**Adjourned Second Meeting.**—The creditors at a second meeting duly convened in accordance with 126th sect. of the Bankruptcy Act, have power to adjourn such meeting beyond the fourteen days specified in that section. Where, therefore, resolutions for a composition were passed at the first meeting, held on the 7th January, and at the second meeting duly convened to confirm those resolutions, the creditors adjourned it until the 24th, when they passed resolutions for liquidation by arrangement:—Held, that such resolutions should be registered. *Knowles, Ex parte, Jones, In re*, 44 L. T. 160; 29 W. R. 584.

**Composition under s. 28—Notice of Meeting.**—The notice of meeting for the purpose of approving of a scheme under s. 28 should state clearly and fairly the nature of the proposals to be brought forward. *Straubridge, Ex parte, Hickman, In re*, 32 W. R. 173—C. A.

**Fresh Meeting.**—When the registration of resolutions is refused, but there is no proof of mala fides, and the large majority of the creditors have shewn that they desire to have a composition, a fresh meeting ought to be summoned. And leave may be given to use at the fresh meeting the proofs and proxies which were already on the file. *Best, Ex parte (supra)*, explained. *Solomon, Ex parte, Tilley, In re, supra.*

See further, LIQUIDATION.

### 4. DEBTOR'S STATEMENT OF AFFAIRS.

**Must be produced at each Meeting.**—Unless a debtor complies with clause 3 of the 126th section of the Bankruptcy Act, 1869, and produces at each meeting of the creditors a statement of his assets and debts, with the names and addresses of his creditors, a resolution to accept a composition cannot be registered. *Sidcy, Ex parte*, 24 L. T. 401.

**Contingent Liabilities.**—If an estimate of a contingent debt can be made so as to be inserted in the statement, the statute throws the burden of making it on the debtor. If its amount could not be estimated in any way, the resolution of the creditors agreeing to a composition on other debts could not affect it. *Breslau v. Brown*, 3 App. Cas. 672; 47 L. J., C. P. 729; 39 L. T. 67; 26 W. R. 536. Affirming the decision of the Court of Appeal, nom. *Wilson v. Breslau*, 2 C. P. D. 314; 46 L. J., C. P. 593; 37 L. T. 24; 25 W. R. 818, which reversed the decision of the Common Pleas Division, 36 L. T. 18.

W. had given a bond as surety for B. for the payment of any costs and damages which might be found to be due from B. in an admiralty suit in which he was defendant. While the suit was proceeding he filed a petition for liquidation of his affairs by arrangement or composition under the Bankruptcy Act, 1869. In his statement of affairs he inserted the name and address of W. as a creditor for a certain sum of money lent to him, and the creditors resolved to accept a composition. W. claimed and proved a larger debt due, signed the composition deed, and received the composition agreed upon, no mention being made of the contingent liability on the admiralty bond. After the composition had been paid he was called upon to pay the amount secured by the bond:—Held, that an action could be maintained against B. for the amount paid on the bond. *Ib.*

**Bill of Exchange—Holder unknown.**—The requirements of the Bankruptcy Act, as to the entry in a statement of affairs of a debt due upon a bill of exchange, where the holder is unknown to the debtor, are substantially complied with if it can be proved that the entry was such that notices sent in accordance therewith were actually received by the creditor. *Wood v. Bates*, 46 J. P. 280.

**Debtor in Partnership—Solvent Partner.**—A debtor who carries on one business alone, and another in partnership, must when he files a liquidation petition (his partner being solvent) set forth in his statement of affairs the assets and liabilities of the partnership business in detail, as well as his own separate assets and liabilities;

i. e. in each case he must give the names of the creditors, with the amount due to each, and the names of the debtors, with the amount due from each. He must also state the account between himself and his partner, so as to shew the balance (if any) due to him. If he does not give these particulars, his statement of affairs will be insufficient, and any liquidation or composition resolutions founded on it cannot be registered. If for any reason it is impossible for the debtor to make such a statement of the affairs of the partnership, he cannot have a liquidation of his affairs by arrangement or a composition, but must submit to bankruptcy. If without setting out the above particulars in his statement of affairs, the debtor refers (in such a way as to incorporate it with his statement) to a report made by an accountant which contains the necessary information, and which is produced to the meetings of creditors:—*Semble*, that this would be a sufficient statement. *Amor, Ex parte, Amor, In re*, 21 Ch. D. 594; 52 L. J., Ch. 138; 48 L. T. 16; 31 W. R. 282—C. A.

**Where Statement insufficient.**—The meaning of r. 301 of the Bankruptcy Rules, 1870, is, that, on the presentation of a special resolution for liquidation by arrangement to the registrar for registration, the passing of the resolution is conclusive evidence that the debtor's statement of affairs is sufficient, and the registrar has no power to inquire into the sufficiency of the statement. *Webb, In re, Walter, Ex parte*, 2 Ch. D. 326; 45 L. J., Bk. 105; 34 L. T. 701; 24 W. R. 834—C. A.

If, however, it is clear *ex facie* that the statement produced by the debtor is one which the majority of the creditors could not have accepted *bonâ fide* in the interest of the creditors, this may be taken as an objection to the registration of the resolution, but it cannot be raised after registration. *Ib.*

If the statement is a fraudulent one, the proper course for a dissentient creditor to take is to move, after the resolution has been registered, to have the registration vacated. *Ib.*

Creditors who have not been heard before the registrar on an application for the registration of resolutions, or before the chief judge on an application to reverse the order for registration, have a *locus standi* to appeal from the order of the chief judge. *Ib.*

The registrar may register resolutions for liquidation, omitting from them, with the debtor's consent, a resolution for an immediate discharge. *Ib.*

**Effect of Insufficiency.**—If for any reason a debtor who files a liquidation petition is unable to produce a proper statement of his affairs, he cannot have a liquidation by arrangement or a composition, but must submit to be made a bankrupt. *Solomon, Ex parte, Tilley, In re*, 20 Ch. D. 281; 51 L. J., Ch. 677; 47 L. T. 57; 30 W. R. 603—C. A.

##### 5. OMISSION TO INSERT CREDITOR'S NAME AND DEBT IN STATEMENT OF AFFAIRS.

**Omission of one Debt.**—Under s. 126 of the Bankruptcy Act, 1869, a debtor must, in order to bind a non-assenting creditor by a composition, shew in his statement the whole of every debt due to the creditor, so that if the debtor states

one and omits another of the debts, the creditor is not bound in respect of the debt stated. *Macdonald v. Chesney*, 50 L. J., Q. B. 87—C. A.

**Wrong Amount—Too little.**—On the 24th of April, B. in an action recovered judgment for 53*l.* and costs. On the 25th of April the debtor filed a liquidation petition. In his statement of affairs he inserted B. as a creditor for the 53*l.*, but made no mention of the costs. The first meeting of the creditors was held on the 19th of May. B. attended and proved a debt of 203*l.*, being the 53*l.*, and 150*l.*, the estimated amount of the costs. The meeting was adjourned to the 29th of May, when the creditors resolved to accept a composition, B. voting in the minority. On the 8th of June the costs of the action were taxed at 147*l.*. On the 9th of June B. gave notice to the debtor that he withdrew his proof, and the same day he issued execution against the debtor for the judgment debt and costs. On the 11th of June the second meeting of the creditors was held, and B. then gave written notice that he withdrew his proof, without prejudice to again proving on a subsequent occasion. The chairman refused to take the proof off the file. The composition resolutions were confirmed. B. took objections to the resolutions, and opposed their registration, but the registration was made:—Held, that, by reason of the insufficient statements of B.'s debt in the debtor's statement, B. was not bound by the composition, and that he was not estopped by his conduct from enforcing his execution against the debtor. *Lang, Ex parte*, 5 Ch. D. 971; 37 L. T. 449; 26 W. R. 68—C. A.

A liquidating debtor, in his statement of affairs, by mistake inserted the amount of the debt due by him to one of his creditors as 17*l.*, the amount being really 17*l.* 15*s.*:—Held, that the creditor was not bound by composition resolutions which were passed by the statutory majority, but to which he did not assent. *Engelhardt, Ex parte, Engelhardt, In re*, 23 Ch. D. 706; 52 L. J., Ch. 748; 49 L. T. 281; 31 W. R. 802—C. A.

By a mortgage deed of an advowson, the mortgagor covenanted to pay the sum of 2,200*l.*, part of the purchase-money remaining on mortgage, at a specified date, with interest at 5 per cent. if the same should remain unpaid at that date. The interest being in arrear, the mortgagee, on the 17th July, 1882, issued a writ for the amount claimed under the mortgage deed, and upon the 29th July signed judgment for 2,285*l.* 13*s.* 4*d.* for debt, interest and costs. Upon the 14th November the mortgagor filed a liquidation petition under which composition resolutions were passed, and registered on the 6th January, 1883. In the statement of affairs the mortgagee was entered as a fully-secured creditor for 2,317*l.* 10*s.* 7*d.*, for debt and interest at 4 per cent., upon the judgment to the date of the petition. A writ of sequestration was issued at the instance of the mortgagee on the 27th January, 1883, and on the 15th March following the bishop was absolutely restrained from taking any further proceedings thereunder:—Held, on appeal, that the rights of the mortgagee under the mortgage deed not having been extinguished by the judgment, interest at 5 per cent. was due under the mortgage, and that therefore the debt was inaccurately set out in the statement of affairs, and the mortgagee was not bound by the composition resolutions. *Oxford (Bishop), Ex parte, Sneyd*,

*In re*, 52 L. J., Ch. 724; 48 L. T. 616; 31 W. R. 675. Reversed, 50 L. T. 109—C. A.

— **Injunction—Delay.**—After a delay of four months from the time when the debtor first became aware of a mistake, the court will not restrain the creditor from proceeding with an action for the debt, even for the purpose of enabling the debtor to summon a general meeting of his creditors, under r. 306, in order to obtain their assent to the correction of the mistake in the statement of affairs. *Engelhardt, Ex parte, Engelhardt, In re*, 23 Ch. D. 706; 52 L. J., Ch. 748; 49 L. T. 281; 31 W. R. 802—C. A.

Per Fry, L. J.:—Whether, having regard to the negative words of s. 126, an injunction could be in any case granted for such a purpose, *quare. Ib.*

— **Too much.**—The plaintiff entered into a composition with his creditors, under s. 126 of the Bankruptcy Act, 1869. In his statement of affairs presented at the meeting of creditors, he set down the defendants as his creditors for a certain amount, but set down a second debt really due to them as due to some one else. The defendants attended the meeting, tendered proof of the second debt, which was admitted, took part in the discussion, opposed the resolution for a composition, and when it was carried, declined to accept the amount of the composition:—Held, that the defendants were not bound by the resolution for composition as to this debt, because the plaintiff had not complied with the requirements of s. 126 of the Bankruptcy Act, that there had been no waiver by the defendants, and that the case was governed by *Lang, Ex parte* (5 Ch. D. 971). *Oppenheim v. Jackson*, 48 L. J., C. P. 441; 41 L. T. 193. Affirmed, 49 L. J., C. P. 216—C. A.

**Bills of Exchange—Holder not bound.**—The acceptor of two bills of exchange, which had not to his knowledge been negotiated, took proceedings for liquidation by composition, and in his list of creditors entered the drawer as his creditor for the amount of the bills, without stating that the debt was due on bills of exchange. The bills had, in fact, been negotiated, and the holder received no notice of the meeting of creditors:—Held, that the holder was not bound by the resolutions at the meeting, and was entitled to pursue his remedies irrespectively of them. *Mathewes, Ex parte, Angel, In re*, 10 L. R., Ch. 304; 44 L. J., Bk. 128; 32 L. T. 631; 23 W. R. 730.

The resolution for a composition was confirmed on the 8th of October, 1874; the holder commenced an action on one of the bills on the 5th of November, and the first instalment of the composition was payable on the 9th of January, 1875:—Held, that it was too late after this for the debtor to have time allowed him to remedy the mistake under the Bankruptcy Act, 1869, s. 126. *Ib.*

**Name of Drawer inserted—Subsequent Indorsement by Holder to Drawer and his Partner.**—A debtor under a composition inserted in his statement of affairs the names of certain creditors as drawers of certain bills of exchange. The bills were actually held by a bank, but were after the date of the petition indorsed to a firm consisting of the drawers and another person, which firm

sued upon them:—Held, that the composition was a good defence to the action. *Forwood v. Walker*, 36 L. T. 21.

**Amount of Bills given for Debt inserted, but not Amount of Debt—Bills dishonoured.**—Being indebted to the plaintiff for goods sold to the amount of 143l. 12s. 9d., the defendants gave him bills for the sum, less discount, but adding interest, so that the amount of the bills was 142l. 7s. 3d. These bills were dishonoured. The defendants compounded with their creditors under s. 126 of the Bankruptcy Act, 1869, and, in the statement of debts, entered the amount of the debt due to the plaintiff, a non-assenting creditor, as 142l. 7s. 3d., viz., the amount of the bills. The plaintiff sued for 143l. 12s. 9d., the original debt. The defendants pleaded the composition:—Held, by Lopes, J., that the original cause of action was suspended but not satisfied by the bills, and revived when they were dishonoured; that, therefore, at the date of the composition, the amount of the debt due to the plaintiff was 143l. 12s. 9d., and as it was not correctly shewn in the statement, the composition was no bar to his action. *Burliner v. Royle*, 5 C. P. D. 354; 43 L. T. 254; 41 J. P. 831.

**Insertion of a Creditor's Debt—Non-assenting Creditor claiming a larger Sum—Default of Debtor and Trustee.**—At a meeting of creditors in a liquidation under ss. 125 and 126 of the Bankruptcy Act, 1869, a statement of assets and debts was produced by the debtor, the defendant, in which the plaintiffs were inserted as creditors for 150l., and it was resolved that a stated composition payable in four instalments at stated intervals from the date of the registration of the resolutions, should be accepted and be secured by the joint and several promissory notes of the defendant and a named surety, and that X. be appointed a trustee to receive and distribute the composition notes, and such resolutions were duly registered. The plaintiffs did not attend the meeting, but had notice of the resolutions, nor did they assent to the amount alleged in the defendant's statement to be due to them, but claimed and sent in a proof for a larger sum. After registration of the resolutions, the defendant delivered to the trustee the joint and several promissory notes of himself and the surety for the composition instalments payable at the stated periods, filled up with the correct amounts in all cases where the creditors were satisfied with the defendant's statement of such amounts, which notes were distributed to such creditors and were duly honoured. The plaintiffs, however, claiming a larger sum than the debt admitted to be due, the notes intended for them were delivered in blank to the trustee, who had authority from the defendant and the surety to fill them up with the correct amount of the composition instalments, when the amount of the debt was settled, and to hand them so filled up to the plaintiffs. After receiving these notes, the trustee by letter requested from the plaintiffs particulars of their claim in order to the completion of the composition notes, in reply to which the plaintiffs referred him to their solicitors for information, to whom, however, no application was ever made, nor were any other steps taken to adjust the debt, nor were the notes ever filled up or tendered to the plaintiffs, nor was any tender or offer to pay the composition upon the admitted

debt of 150*l.* ever made. In an action by the plaintiffs for the amount claimed by them to be due from the defendant, Hawkins, J., before whom it was tried without a jury, found as facts, that the instalments of the composition were due to those bound by it before action brought; that the trustee was willing to fill up and deliver the notes to the plaintiffs for the composition on 150*l.*, but not on any larger amount unless agreed on, which it never was; that the plaintiffs did nothing to prevent the defendant or the trustee from filling up and tendering to the plaintiffs the notes as a composition upon 150*l.*, and never waived the performance of anything it was incumbent upon the defendant or the trustee to do, unless the facts before mentioned amounted in law to such waiver, which the learned judge held they did not. After argument before him on further consideration, it was further held, by Hawkins, J., that owing to the defendant's omission to tender to the plaintiffs, or to deliver to the trustee, the composition to which he admitted the plaintiffs were entitled, the plaintiffs were in a position to maintain the action for the full amount of their admitted original debt, and judgment for that amount (150*l.*), and costs was given for them accordingly. *Tea Company v. Jones*, 43 L. T. 255.

Held, also, that it is not enough for a debtor to say to his creditor, "I am ready and willing to pay your composition upon the debt I admit, if you are content to receive it as a composition upon the amount due to you," or "when we can agree upon the sum upon which the composition is to be calculated." To be discharged from liability for debts included in his statement, he must pay or tender unconditionally to his creditor the composition payable upon the admitted debt, giving the creditor the opportunity of accepting or rejecting it, and failing to do so, he cannot in an action by the creditor avail himself of the composition arrangement, nor is the merely handing blank notes to the trustee to be filled up by the amount he should deem to be correct any discharge of the obligation cast upon the debtor. *Ib.*

**Waiver by Creditor.**—The conditions respecting the statement of the names and addresses of creditors, which a debtor seeking to obtain a composition under s. 126 of the Bankruptcy Act, 1869, is bound to make, are for the benefit of the creditors, not of the debtor, and consequently may be waived by any creditor. *Breslauer v. Brown*, 3 App. Cas. 672; 47 L. J., C. P. 729; 39 L. T. 67; 26 W. R. 536.

**Amount Uncertain—Reference.**—Upon composition proceedings under s. 126 of the Bankruptcy Act, 1869, the names of the plaintiffs were inserted in the statement of the debtor produced at the meetings, as "Creditors claiming to hold security," and the amount of their claim was stated to be 94,000*l.* To this was appended a note: "Under legal advice, this claim was resisted, and became the object of an action and reference, which reference is now pending." After the resolutions accepting a composition had been passed, the award was made by the arbitrator, by which he found for the plaintiffs in the action, with damages 40*s.*, and, as to the matters in difference, that a sum of 3,320*l.* was due to the plaintiffs. The plaintiffs having brought an action on the award, the

defendant set up the composition resolutions as a defence:—Held, that the above facts did not bring the case within s. 126, and consequently that the plaintiffs were not barred from proceeding at law to recover the full sums awarded. *Melhado v. Watson*, 2 C. P. D. 281; 46 L. J., C. P. 502; 36 L. T. 724; 25 W. R. 562. Reversing 46 L. J., C. P. 349; 36 L. T. 18.

## 6. EXAMINATION OF DEBTOR.

**Prima facie Case of Fraud.**—After the creditors of a debtor have resolved to accept a composition, and the resolutions have been registered, the court has jurisdiction, if a dissentient creditor makes out a prima facie case of fraud on the part of the debtor, to order him to be examined as to his affairs. *Jones, Ex parte*, 16 L. R., Eq. 386; 23 L. T. 679; 21 W. R. 768.

A mere categorical denial by the debtor, unsupported by any other evidence, of the charges of fraud, is not a sufficient answer to the prima facie case made against him. *Ib.*

**Declining to Answer without Solicitor's Advice.**—At a meeting of creditors under a petition for liquidation the solicitor of a creditor asked the debtor whether a certain letter was in his handwriting. He replied that it was not. He was then asked whether it had been written by his authority. His solicitor thereupon asked to see it. This was refused, and the debtor, under the advice of his solicitor, declined to answer the question, and the examination was dropped, without the nature of the letter being made known to the meeting. Resolutions for accepting a composition were then passed:—Held, that there had been no such refusal by the debtor to give information as would render the resolutions invalid. *Mackenzie, Ex parte, Helliwell, In re*, 10 L. R., Ch. 88; 44 L. J., Bk. 14; 31 L. T. 421; 23 W. R. 121. Affirming 20 L. R., Eq. 758; 44 L. J., Bk. 117; 33 L. T. 59.

## 7. RESOLUTIONS.

### a. Generally.

**Where in Debtor's Favour.**—A creditor who votes for a composition with a debtor is bound to vote bona fide for the benefit of the creditors, and not for the benefit of the debtor. *Cobb, Ex parte, Sedley, In re*, 8 L. R., Ch. 727; 42 L. J., Bk. 63; 29 L. T. 123; 21 W. R. 777.

A creditor voted at a first meeting of creditors for a resolution for liquidation by arrangement. A requisite majority not having been obtained, the resolution was not registered; but the registrar, on the application of the debtor, directed a fresh first meeting to be called. Before that meeting was held the creditor sold his debt to T. for 10*s.* in the pound. At the meeting he, by T.'s direction, voted for a composition of 2*s.* 6*d.* in the pound, and by his vote the resolution was carried:—Held, that, inasmuch as it was clear that the vote in respect of T.'s debt was given for the benefit of the debtor, and not of the creditors, the vote ought to be rejected, and the resolution was accordingly set aside. *Ib.*

**Debt Bought in order to Vote.**—When the passing of a resolution in favour of a composi-

tion has been obtained by the vote of a creditor who has purchased the debt, in respect of which he votes, in order to vote in favour of the composition, such a fraud taints the whole of the proceedings for a composition, and the court will make an order of adjudication of bankruptcy against the debtor on the petition of a duly-qualified creditor in spite of the pendency of the proceedings for a composition. *Fore Street Warehouse Company, Ex parte, Burrs, In re*, 30 L. T. 624—L. J.

— **Resolutions Voidable, not Void.**—P. having filed a petition for liquidation by arrangement or composition under the Bankruptcy Act, 1869, his creditors, except G., resolved to accept a composition of 5s. in the pound, payable by instalments. W. became surety for the composition, and P. assigned his property to W. by a duly-registered bill of sale. W. bought the debt due to G., and was thereby enabled to vote in his name at the second meeting of creditors. The resolutions for composition had not been set aside. The plaintiff having obtained judgment against P., seized a stack of hay comprised in the bill of sale.—Held, that the resolutions not having been set aside, the bill of sale could not be impeached, and the plaintiff could not enforce his execution against the property assigned to W. *Seymour v. Coulson*, 5 Q. B. D. 359; 49 L. J., Q. B. 604—C. A.

#### When a Resolution becomes Extraordinary.]

—A resolution accepting a composition does not become an extraordinary one until it has been confirmed at the second meeting of the creditors, and it has no validity whatever until it is registered. *McLaren, Ex parte, McCollin, In re*, 16 Ch. D. 534; 50 L. J., Ch. 203; 44 L. T. 36; 29 W. R. 389—C. A.

**Composition under s. 28.**—In giving or withholding the approval of the court to a composition with creditors, accepted by the proper majority under s. 28 of the Bankruptcy Act, 1869, the judge is exercising a judicial discretion, and is bound to consider the objections brought before him by a dissentient creditor, and to give his decision judicially upon sufficient reasons. *Merchant Banking Company of London, or Murray, Ex parte, Durham, In re*, 16 Ch. D. 623; 50 L. J., Ch. 606; 44 L. T. 358; 29 W. R. 363—C. A. Reversing 43 L. T. 799.

The power of the court under s. 28 is not limited, as in the case of a composition accepted by the resolution of two meetings of creditors under s. 126, to setting aside the resolution on the ground of fraud in the proceedings. *Ib.*

The propriety of the resolutions is to be judged of by the court upon the facts as they appear at the time when its approval is sought, not as they appeared at the time when the resolutions were passed. *Ib.*

The exercise of the discretion by the judge is subject to appeal, but the Court of Appeal ought not to interfere unless it is clearly shewn that the judge has exercised his discretion wrongly. *Ib.*

The fact that by composition resolutions under s. 28 no security was given for some of the instalments, and the management of the assets was intrusted to a debtor who for several years previously had indulged in recklessly extravagant

refusing to give the approval of the court to the resolutions. *Ib.*

**Registration of Resolutions after Adjudication.**—The registrar has no power to register a resolution for liquidation or composition after an adjudication of bankruptcy has been made; unless the adjudication has been made under r. 266 of the Bankruptcy Rules, 1870, in which case the adjudication is intended to be merely ancillary to the liquidation. *Davis, Ex parte* (2 Ch. D. 231), overruled. *Milward, Ex parte, Stanley, In re*, 16 Ch. D. 256; 50 L. J., Ch. 166; 14 L. T. 73; 29 W. R. 167—C. A.

After an ordinary adjudication of bankruptcy has been made (not an adjudication merely for the purpose of protecting the debtor's property pending proceedings for liquidation or composition) the creditors have no power to pass resolutions for either liquidation or composition, and such resolutions if passed will be inoperative. *Milward, Ex parte (supra)*, explained and followed. *Bennett, Ex parte, Ward, In re*, 16 Ch. D. 541; 44 L. T. 38; 29 W. R. 343—C. A.

The creditors of a bankrupt, at a meeting held pursuant to s. 28 of the Bankruptcy Act, 1869, passed resolutions for the payment of the costs incurred in the bankruptcy proceedings; for the acceptance of a composition of 2s. 6d. in the pound; and for the annulment of the bankruptcy upon such payments being made. The bankrupt's father was the principal creditor. There were no assets. The confirmation of the resolutions was opposed, and the county court judge refused to sign them, considering that they had been passed out of sympathy with the debtor, and not bona fide in the interests of the creditors.—Held, upon appeal that the motive of sympathy was a legitimate one, provided it did not injure anyone else, and that, as there was no probability of the creditors getting more than 2s. 6d. in the pound out of the estate, the resolutions ought to be confirmed and registered. *Hickman, Ex parte, Tamlyn, In re*, 48 L. T. 913.

In giving its approval to resolutions for a scheme of settlement under s. 28 of the Bankruptcy Act, 1869, the court will consider not only the pecuniary interests of the creditors, but the whole of the circumstances, and if there are any grounds for suspecting that any discreditable transactions have taken place, though there is no proof of fraud, the court will not approve resolutions which would have the effect of preventing a full investigation. The functions of the court in this respect are different under s. 28 from those under ss. 125, 126. *Strauchbridge, Ex parte, Hickman, In re*, 32 W. R. 173—C. A.

**Amount of Composition reduced by Extraordinary Resolution.**—Creditors have power by means of an extraordinary resolution to reduce the amount payable under a composition; and creditors who had agreed to the original resolution, but dissented from the resolution for the reduction, are nevertheless bound by the latter resolution when duly passed. *Radcliffe Investment Company, Ex parte, Glover, In re*, 17 L. R. Eq. 121; 43 L. J., Bk. 4; 29 L. T. 694; 22 W. R. 235.

The word "persons" in the Bankruptcy Act, 1869, s. 126, does not include creditors. *Ib.*

**Registration closes Proceedings.]**—After the registration of composition resolutions the composition proceedings are no longer pending. *Pashler v. Vincent*, 8 Ch. D. 825; 27 W. R. 2—C. A.

**b. Validity with reference to Amount of Assets and Dividends.**

**Small Amount of Composition.]**—The statement of a debtor who had filed a liquidation petition shewed that his debts amounted to 1,257l., and that his assets were worth 371l. The creditors resolved to accept a composition of 1s. in the pound, to be paid in twelve months. One creditor opposed the registration of the resolution:—Held, that, having regard to the amount of the assets, the resolution could not have been passed *bonâ fide*, and that registration of it had been rightly refused. *Page, In re, Page, Ex parte*, 2 Ch. D. 323; 45 L. J., Bk. 1; 34 L. T. 638; 24 W. R. 502—C. A.

When the registrar is satisfied, either from the small amount of composition offered or otherwise, that resolutions accepting a composition have been passed in the interest of the debtor, and not for the benefit of the creditors, it is his duty to refuse to register them, even though no creditor opposes the registration. Resolutions accepting a composition of 2d. in the pound, payable in three months, and not secured in any way, were passed by the statutory majority of a debtor's creditors. His statement of affairs shewed that he had no assets:—Held, that the resolutions must have been passed in the interest of the debtor, not of the creditors; that they could not therefore bind the dissentient creditors; and that the registrar was right in refusing to register them, though no creditor opposed the registration. *Williams, Ex parte, Williams, In re*, 18 Ch. D. 495; 50 L. J., Ch. 741; 45 L. T. 96—C. A.

The statement of affairs of a debtor, who had filed a liquidation petition, shewed that his debts amounted to 1,293l., and that he had no assets. At the first meeting of his creditors he admitted in answer to questions put to him that he was in the receipt of a salary of 5l. a week. The creditors resolved by the proper statutory majority to accept a composition of 6d. in the pound, to be paid within a month after the registration of the resolutions, and to be secured to the satisfaction of the chairman of the meeting. The resolutions were confirmed at the second meeting:—Held, that the proceedings were an abuse of the process of the court, and that the resolutions ought not to be registered. *Ball, Ex parte, Parnell, In re*, 20 Ch. D. 670; 51 L. J., Ch. 911; 47 L. T. 213; 30 W. R. 738—C. A.

The question in all such cases is whether the creditors, in accepting the composition offered, have acted *bonâ fide*, i.e., in the interest of the creditors, and not merely with a view to benefit the debtor. *Hudson, Ex parte, Walton, In re*, 22 Ch. D. 773; 52 L. J., Ch. 584; 47 L. T. 674; 31 W. R. 372—C. A.

There is no hard and fast line as to the amount of composition which may be accepted, except that the sum must not be so small that no reasonable man would accept it, for in such a case the amount would in itself be evidence of want of *bona fides*. *Id.*

The creditors of a debtor whose debts amounted

to 304l. 18s., and whose assets were only 8l. 13s., resolved to accept a composition of 3d. in the pound, the payment of which was to be secured by one of the creditors. The registration of the resolutions was opposed by a dissentient creditor:—Held, that, having regard to the small amount of the composition, the resolutions must have been passed solely in the interest of the debtor; that they were an abuse of the process of the court, and that they ought not to be registered. *Russell, Ex parte, Robins, In re*, 22 Ch. D. 778; 47 L. T. 675; 31 W. R. 442—C. A. Reversing 47 L. T. 338.

Held, that resolutions accepting a composition of 1s. in the pound ought to be registered, the debtor having no assets, but the payment of the composition being secured by a third person. *Id.*

The statement of affairs produced by a debtor, who had filed a liquidation petition, shewed that his debts amounted to 2,500l., and his assets to 70l. The creditors at the first meeting resolved to accept a composition of 6d. in the pound, to be paid within one month after the registration of the resolutions, but without any security. These resolutions were subsequently confirmed. A judgment creditor having opposed the registration:—Held, that the proceedings were irregular, and that the resolutions not having been *bonâ fide* in the interest of the creditors, ought not to be registered. *Pulbrook, Ex parte, Lloyd, In re*, 48 L. T. 128.

**c. Vacating or Setting Aside.**

**Fraud or Malpractices.]**—The court will not rescind the registration of resolutions for composition on the ground of mis-statement of assets by the debtor except upon evidence sufficient to convict him of a misdemeanor under the Debtors Act, 1869, s. 11, sub-s. 6. *Law, In re, Hart, Ex parte*, 47 L. J., Bk. 88.

**Delay by Debtor.]**—A debtor will not be allowed, by delaying registration of the resolutions, to postpone payment of a composition which has been accepted by his creditors. Accordingly a delay of more than three weeks, owing to non-payment by inadvertence of the fees for stamps, in obtaining the registration of resolutions for a composition, is ground for vacating, on the application of a creditor, the registration. *Whitnall, Ex parte, Whitnall, In re*, 20 Ch. D. 438; 46 L. T. 775.

**8. PROOF OF DEBTS.**

**No Preferential Debts.]**—The Bankruptcy Act, 1869, s. 32, with respect to the proof of preferential debts, has no application to the case of a composition. *Walter, Ex parte, Heath, In re*, 15 L. R., Eq. 412; 42 L. J., Bk. 49; 21 W. R. 523.

**Unascertained Debt.]**—When a compounding debtor puts in his statement an amount (by estimate) for an unascertained debt, he must tender the composition on such amount. The creditor is not bound to prove his debt if he is content with the amount set down, unless he desires to vote. *Peacock, Ex parte, Duffield, In re*, 8 L. R., Ch. 682; 42 L. J., Bk. 78; 28 L. T. 830; 21 W. R. 755.

A claim for untaxed costs in an action is a provable debt, and is within the Bankruptcy Act, 1869, s. 126. *Ib.*

A debtor who made a composition with his creditors under the Bankruptcy Act, 1869, s. 126, was liable to a creditor for payment of untaxed costs in an action, and the debtor inserted them in his statement at an estimated amount. The costs were not taxed at the time appointed for payment of the composition; and accordingly the debtor did not tender the composition to the creditor. The creditor then signed judgment, and had the costs taxed, and levied execution against the goods of the debtor for the whole amount. The debtor applied for an injunction to restrain the creditor:—Held, that the debtor ought to have paid the composition on the estimated amount of the debt, and that the creditor was entitled to proceed with his execution notwithstanding the composition. *Ib.*

**Plaintiffs' Costs up to Passing of confirming Resolution.**—A plaintiff in the action was allowed to add to his debt his costs in the action up to the day when the confirmatory resolution accepting the composition was passed. *Härtel, Ex parte, Thorpe, In re*, 42 L. J., Bk. 34; 27 L. T. 863.

**Creditor whose Name Omitted.**—A creditor whose name and the amount of whose debt are not entered in the statement of a compounding debtor, and who is, therefore, not bound by the composition, may nevertheless take advantage of the composition, and prove his debt, and claim a share in the fund in the hands of the trustee. *Curuc, Ex parte, Curuc, In re*, 10 L. R., Ch. 308; 44 L. J., Bk. 67; 32 L. T. 318; 23 W. R. 459.

A resolution having been passed at a meeting of creditors to accept a composition from a debtor, the debtor paid a sum of money to the trustee which was more than sufficient to pay the composition to all the creditors whose names and debts were entered in his statement. Other creditors who were not bound by the composition had previously filed a bill in chancery against the debtor and certain persons, charging them with a breach of trust. They did not come in and prove this debt in the composition, but simply gave notice to the trustee of their claim. After all the creditors who were bound by the composition had been paid, the debtor applied to the court to order the trustee to pay back the surplus of the fund to him:—Held, that the court had jurisdiction to entertain the application under the Bankruptcy Act, 1869, s. 72, and to take the necessary accounts between the trustee and the debtor. *Ib.*

Held, that the plaintiffs in the chancery suit had a right to take advantage of the composition, although they were not bound by it, and that the court would not make an order as to the disposal of the surplus until a decree had been made in the chancery suit. *Ib.*

After the registration of simple composition resolutions (by which no trustee is appointed for the receipt and distribution of the composition and no security is given for its payment) the proceedings are at an end, and the Court of Bankruptcy has no jurisdiction to entertain an application by a creditor, who was omitted from the debtor's statement of affairs, and who has taken no part in the proceedings, for the admis-

sion of a proof of his debt. *Lacey, Ex parte, Lacey, In re*, 16 Ch. D. 131; 50 L. J., Ch. 207; 43 L. T. 579; 29 W. R. 299—C. A.

**Composition under s. 28—Locus standi of Bankrupt to apply to reduce Proof of a Creditor.**—After the creditors of a bankrupt have resolved, under s. 28 of the Bankruptcy Act, 1869, to accept a composition offered by the bankrupt, the bankrupt, though undischarged, has a locus standi to apply to the court to reduce the amount of the proof of a creditor, and the mere fact that the proof has been upon the file of the proceedings in the bankruptcy for upwards of a year does not estop the bankrupt from making the application. *Bacon or Bond, Ex parte, Bond, In re*, 17 Ch. D. 447; 44 L. T. 834; 29 W. R. 574—C. A. Affirming *S. C.*, 43 L. T. 798; 29 W. R. 292.

**Rejection of Proofs by Trustee.**—The trustee appointed under r. 279 of the Bankruptcy Rules, 1870, to receive and distribute a composition, has no power to reject in toto the proof of a creditor who is included in the debtor's statement. *Botting, Ex parte, Bostel, In re*, 19 L. R., Eq. 261; 44 L. J., Bk. 47; 31 L. T. 736; 23 W. R. 536.

But, if the amount of the debt is in dispute between the debtor and the creditor, the trustee is entitled to an inquiry to ascertain what is really due. *Ib.*

## 9. EFFECT OF COMPOSITION.

**Composition may be pleaded in bar of Actions.**—A resolution under the Bankruptcy Act, 1869, s. 126, by the requisite majority of creditors to accept in satisfaction from the debtor a composition upon the debts due, payable at a future time or by instalments, may be pleaded in bar to an action for the original debt, brought before any default on the debtor's part by a creditor bound by the resolution. *Slater v. Jones, Capes v. Ball*, 8 L. R., Ex. 186; 42 L. J., Ex. 122; 29 L. T. 56; 21 W. R. 815.

**Effect of Joint Composition on Joint and Several Liability.**—The acceptance of a composition under the Bankruptcy Act, 1869, ss. 126 and 127, in respect of the joint debt due by the makers of a joint and several promissory note, is not a satisfaction of the separate liability of one of the makers on the note. *Simpson v. Henning*, 10 L. R., Q. B. 406; 44 L. J., Q. B. 143; 33 L. T. 508—Ex. Ch.

The plaintiff, being the holder of a joint and several promissory note of the defendant and H., sued the defendant on the note. The defendant pleaded that the note was given by him and H. to the plaintiff on account of a partnership debt; and that afterwards the defendant and H. as partners, being unable to pay their debts, instituted proceedings, which took place under the Bankruptcy Act, 1869, ss. 126 and 127, according to the forms given in the schedule; and, thereupon, an extraordinary resolution of the creditors of the defendant and H., that a composition of 8s. 6d. in the pound, payable by instalments, should be accepted in satisfaction of the debts due from them to their creditors, was passed; that the provisions of the composition became binding on the plaintiff and on all the creditors of the defendant and H., and that the debts due to the

plaintiff and to all other creditors became and were satisfied within the meaning of the Bankruptcy Act, 1869, ss. 126 and 127:—Held, that the acceptance of a composition on the joint debt under s. 126 was not a satisfaction of the defendant's separate liability, and, therefore, that the plea was bad. *Ib.*

**On Debt fraudulently Contracted.]**—When an attorney brought an action, knowing he had no authority from the plaintiff, and on judgment for the defendant a rule was granted ordering him, the attorney, to pay the defendant's costs, and then such attorney, under 32 & 33 Vict. c. 71, entered into a composition with his creditors:—Held, that he was not discharged from such payment, as the case was one of fraud within 32 & 33 Vict. c. 71, s. 49. *Jenkins v. Feraday*, 7 L. R., C. P. 358; 41 L. J., C. P. 152; 27 L. T. 37; 20 W. R. 781.

A creditor who alleges that his debt has been contracted fraudulently by his debtor may, after receiving a composition from him under the Bankruptcy Act, 1869, s. 126, commence an action against him for the balance of the debt, without being obliged to prove to the Court of Bankruptcy a *prima facie* case of fraud. *Halford, Ex parte, Jacobs, In re*, 19 L. R., Eq. 436; 44 L. J., Bk. 53; 32 L. T. 103; 23 W. R. 442.

The Court of Bankruptcy has no jurisdiction to interfere with such an action. *Ib.*

**On Debt, Proof of which has been Disallowed.]**—Upon a liquidation by arrangement, a meeting of creditors, by resolution passed, agreed to accept a composition. This resolution was duly confirmed at a second meeting. A creditor present at both meetings sent in a claim for a debt and law costs which was not allowed. No circular and tender of the composition were sent to him as to the other creditors. The creditor then brought an action in the county court to recover the amount of his claim, but the debtor obtained an injunction from the county court sitting in bankruptcy restraining execution:—Held, that the resolution was regular, and must be enforced. *Hemingway, Ex parte, Howard, In re*, 26 L. T. 298; 20 W. R. 572.

**On Rights against Co-Debtors and Sureties.]**—When resolutions formally agreed to by creditors under the Bankruptcy Act, 1869, ss. 125, 126, contain no reservation of any rights against co-debtors or sureties, the reservation of such rights by a subsequent deed of composition is inoperative. *Wilson v. Lloyd*, 16 L. R., Eq. 60; 42 L. J., Ch. 559; 28 L. T. 331; 21 W. R. 507. *But see next case.*

In 1869, A. retired from a partnership which had been carried on between him, B., and C., B. purchasing A.'s share in the business, and covenanting to indemnify him against all partnership debts and liabilities. The liabilities then existing included two bonds given to secure moneys advanced to the firm for partnership purposes, on which A. and B. had become jointly and severally liable to D. In August, 1871, B. and C. made an arrangement with their creditors under the Bankruptcy Act, 1869. Resolutions were passed by the creditors, including D., who proved for his debt, to accept a composition of 15s. 3d. in the pound, payable by instalments extending over two years; and an inspectorship deed releasing B. and C., and reserving to the

creditors their rights against any surety or person other than B. and C., liable in respect of the debts thereby released, was executed by the creditors, including D.:—Held, that the effect of the composition under which time had been given to B. and C., as principal debtors, without the consent of A., was to discharge him. *Ib.*

When the acceptor of a bill of exchange presents a petition for liquidation or composition under the Bankruptcy Act, 1869, s. 126, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is not thereby discharged from his liability. In such a case it makes no difference whether the bill-holder is present at the meeting or not, or whether he votes in favour of the resolution or against it. *Jacobs, Ex parte, Jacobs, In re*, 10 L. R., Ch. 211; 44 L. J., Bk. 34; 31 L. T. 745; 23 W. R. 251.

**Bequest by Creditor to Compounding Debtor.]** D., who was indebted to his father L., on a bill of sale, and a promissory note, was adjudicated bankrupt. At a meeting of the creditors of D. a composition of 2s. 6d. in the pound was accepted in satisfaction of the debts due to them, and the bankruptcy was annulled. L., who did not prove his debt, and was not paid the composition, died, having bequeathed to D. a share of his estate. The executors who proved the will (D. being an executor, who did not prove) did not prove the debt under the composition. D. assigned his share of the estate to B., who brought an action for the administration of L.'s estate. The executors claimed a right of retainer against B. for the debt:—Held, that the amount of composition was substituted for the provable debts, whether such debts were proved by the creditors or not; and that the executors were not entitled to the right of retainer against the bequest of the share of the estate for the whole debt, but only for the composition on the debt and interest, six years' arrears of interest on the promissory note, and the whole arrears on the bill of sale. *Orpen, In re, Beswick v. Orpen*, 16 Ch. D. 202; 50 L. J., Ch. 25; 43 L. T. 728; 29 W. R. 467.

**Reservation of Rights of Secured Creditors.]**—Two partners filed a liquidation petition. Their joint creditors resolved to accept a composition of 10s. in the pound in satisfaction of their debts. Among the creditors who voted in favour of the resolution was a banking company, who held security for their debt upon the separate estate of one of the partners. The affidavit by which they proved their debt stated their security, but they voted in respect of their whole debt. The resolutions contained no provision reserving the right of creditors who held collateral securities to retain them, but a provision to that effect was inserted in a deed afterwards executed to carry out the arrangements of the composition. The composition was duly paid to the bank:—Held, that the bank was entitled to retain their security. *Manchester and Liverpool District Banking Company, Ex parte, Littler, In re*, 18 L. R., Eq. 249; 43 L. J., Bk. 73; 30 L. T. 339; 22 W. R. 567.

**On Securities obtained by Creditor between Petition and Meeting.]**—A resolution for com-



position has no retrospective effect so as to invalidate securities obtained by a creditor in the interval between the filing of the petition and the first meeting of creditors. *Jones, Ex parte, Jones, In re*, 10 L. R., Ch. 663; 44 L. J., Bk. 124; 33 L. T. 116; 23 W. R. 886.

**Liability of Execution Creditor for Failure to withdraw Sheriff after Composition—Malice.]**—In the absence of malice, no action will lie against a judgment creditor for not withdrawing the sheriff from possession after the judgment creditor has become bound by a composition of the debt. According to the statement of claim, A., having recovered a judgment against B., issued a writ of fi. fa., under which the sheriff entered into possession of B.'s goods. B. filed a petition of insolvency, and A. proved for the amount of his judgment against B.'s estate. Resolutions for a composition were passed and registered. The sheriff refused to withdraw from possession without A.'s instructions, which were not given by A. No malice was alleged as against A.:—Held, on demurrer, that, in the absence of malice, A.'s failure to instruct the sheriff to retire gave B. no right of action against A. *Phillips v. General Omnibus Company*, 50 L. J., Q. B. 112.

**Composition under s. 28.]**—When a bankruptcy has been annulled under the Bankruptcy Act, 1869, s. 28, and a scheme of arrangement of the bankrupt's affairs has been approved of by the court, the bankrupt is discharged from his debts, and no action is maintainable against him in respect of any debt provable under the bankruptcy. *Gilbey v. Jeffries*, 11 Q. B. D. 559; 52 L. J., Q. B. 601; 48 L. T. 699—C. A. Affirming 52 L. J., Q. B. 116; 31 W. R. 381; 47 J. P. 102.

#### 10. PAYMENT OF COMPOSITION AND EFFECT OF FAILURE TO PAY.

**Enforcing Payment by Surety.]**—The Court of Bankruptcy has no jurisdiction to enforce the payment of a composition by a surety who has covenanted with a trustee on behalf of the creditors for its payment. *Mirabita, Ex parte, Dale, In re*, 20 L. R., Eq. 772; 44 L. J., Bk. 119; 33 L. T. 60; 23 W. R. 864.

**Court of Bankruptcy may compel Trustee to sue Surety.]**—If the surety fails to pay, it is the duty of the trustee to sue him at law on his covenant; and if the trustee neglects this duty, the Court of Bankruptcy has power to compel him to perform it. *Id.*

**Trustee Indemnified against Costs.]**—Under composition resolutions a trustee was appointed, and a surety for the debtor covenanted with the trustee to pay two of the instalments of the composition. These instalments were not paid when they became due:—Held, that, upon the application of a creditor, the court had jurisdiction under the Bankruptcy Act, 1869, s. 126, to order the trustee to sue the surety upon his covenant, but that the order should provide for the indemnity of the trustee against the costs of the action. *Monkhouse, Ex parte, Dale, In re*, 1 Ch. D. 287; 45 L. J., Bk. 71; 33 L. T. 614; 24 W. R. 800.

**Security given by Debtor to Surety.]**—The creditors of a debtor resolved to accept a composition payable in three instalments, the third instalment being guaranteed by a surety. Before the resolution was passed, the debtor had agreed with the surety to indemnify him against any liability which he might incur under his guarantee by depositing goods with him. This agreement was not made known to the creditors. After the resolutions were registered the surety accepted bills of exchange for the amount of the third instalment of the composition, and certain goods were deposited with him by the debtor. The debtor paid the first instalment, but failed to pay the second, and thereupon he filed a liquidation petition. Afterwards the surety paid the third instalment:—Held, that the agreement with the surety was valid, and that he was entitled to retain the goods as against the trustee under the liquidation. *Burrell, Ex parte, Robinson, In re*, 1 Ch. D. 537; 45 L. J., Bk. 68; 34 L. T. 198; 24 W. R. 353—C. A.

The distinction between composition and liquidation by arrangement explained. *Id.*

**After Default in Payment.]**—Two partners in trade filed a liquidation petition, under which a trustee of their property was appointed. Afterwards the creditors, under the provisions of s. 28 of the Bankruptcy Act, 1867, passed resolutions authorizing the trustee to accept a composition from the debtors, and the arrangement was approved by the court. The composition was to be paid in four instalments, part of the last of which was to be secured by a surety. One of the debtors, who was about to carry on the business alone, agreed to pay 30l. to the trustee weekly, until he should have paid the amount of the composition. In case of his making default, the trustee was to be at liberty to take possession of his stock-in-trade, assets and effects, and realize them for the benefit of the creditors of the firm. The discharge of the debtors was to be granted, the liquidation closed, and the trustee released, so soon as the trustee should certify to the court that a sum sufficient to pay the composition had been paid to him by the debtor. The first instalment was duly paid, but the debtor afterwards made default, and the trustee took possession of his stock-in-trade and effects. It then appeared that the debtors had, shortly before the seizure, executed a deed assigning the outstanding book debts of the firm to the surety and another person, as security for moneys advanced by them, and also as a security to the surety against his liability in respect of the last instalment of the composition. The advances had been made since the passing of the resolutions, to enable the debtor to carry on the business and to pay the first instalment of the composition:—Held, that the resolutions of the creditors gave an implied authority to the debtor to carry on the business in the ordinary way, and to pledge the assets in order to raise money for the purposes of the business, or for the purpose of paying the composition, and that the assignees were entitled to the book debts as a security for the advances which they had made. *Allard, Ex parte, Simons, In re*, 16 Ch. D. 505; 44 L. T. 35; 29 W. R. 406—C. A.

But, held, that the resolutions did not authorize the pledging of the assets as an indemnity to the surety against his liability in respect of the last instalment of the composition, and that

the deed could not stand as a security in that respect. *Burrell, Ex parte* (1 Ch. D. 537), disapproved. *Id.*

— **Estate assigned to Surety—No resulting Trust.**—Resolutions were passed in favour of a composition; all the estate of the debtor was to be assigned to D., he becoming surety for the payment of the composition and being appointed trustee. Afterwards a deed was executed by the debtor, the creditors and D., embodying these resolutions, but not declaring any trusts:—Held, that he was absolutely entitled to the surplus of the estate after the payment of the composition and the costs, and that there was no resulting trust in favour of the debtor. *Wilcocke, Ex parte, Wilcocke, In re*, 44 L. J., Bk. 12; 31 L. T. 520.

**Default in Payment by Debtor.**—When, by resolutions under the Bankruptcy Act, 1869, s. 126, the creditors agreed to accept a composition payable by instalments, and the debtor made default in payment of an instalment to a creditor:—Held, that the creditor could maintain an action against the debtor for the balance of the whole debt remaining unpaid, and would not be restrained by the Court of Bankruptcy. *Hutton, In re, Hodge, Ex parte*, 7 L. R., Ch. 723; 42 L. J., Bk. 12; 27 L. T. 396; 20 W. R. 978.

So, when by an extraordinary resolution under the Bankruptcy Act, 1869, s. 126, creditors resolve to accept a composition in satisfaction of their debts, but the debtor fails to pay the composition, the creditors are entitled to bring actions for their original debts. *Edwards v. Coombe*, 7 L. R., C. P. 519; 41 L. J., C. P. 202; 27 L. T. 315; 21 W. R. 107.

When by a resolution under the Bankruptcy Act, 1869, s. 126, the creditors of a debtor agree to accept a composition payable by instalments, and the debtor makes default in payment of an instalment, a non-assenting creditor is entitled to maintain an action for the whole debt. *Goldney v. Lording*, 8 L. R., Q. B. 182; 42 L. J., Q. B. 103; 21 W. R. 543.

— **Creditors restored to former Rights.**—The non-payment by a debtor of a composition according to the terms of a resolution, passed pursuant to the Bankruptcy Act, 1869, s. 126, revives not only the debt but also the rights and remedies of the creditor in respect thereof as they would have existed if no such composition had been agreed to. *Newell v. Van Praagh*, 9 L. R., C. P. 96; 43 L. J., C. P. 94; 22 W. R. 377.

Therefore, where after a judge's order had been made under the Debtors Act, 1869, for the payment of a judgment debt by instalments, the judgment debtor took proceedings for liquidation under the Bankruptcy Act, 1869, and a resolution binding on the judgment creditor was passed according to s. 126, to accept a composition, and the debtor subsequently failed to pay the composition, according to the terms of the resolution:—Held, that the judgment creditor was entitled to proceed upon the judge's order for the payment of the debt by instalments as if there had been no composition, and accordingly to apply under the Debtors Act, 1869, s. 5, for the debtor's committal in case of his not paying such instalments when he had the means of paying. *Id.*

— **Even where there is a Surety for Payment.**—Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the debtor or the surety, in respect of the composition, and not merely for the amount of the unpaid instalments of the composition. *Gilbey, Ex parte, Bedell, In re*, 8 Ch. D. 248; 47 L. J., Bk. 49; 38 L. T. 728; 26 W. R. 768—C. A.

— **Surety cannot recover from Creditors.**—The surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the composition arrangement in toto or reject it in toto. *Id.*

Where default is made in payment of a composition, and bankruptcy supervenes, the fact that one of the instalments of the composition was guaranteed and paid by a surety in no way affects the right of the creditors to prove under the bankruptcy for the whole amount of their original debts, after giving credit for the instalments they have received. In such a case the surety must be taken to have entered into the contract subject to the known law that the creditors are remitted to their original rights on default in payment of any instalment. He cannot therefore recover back from the creditors the instalment he has paid to them. His proper remedy is to prove under the bankruptcy for the instalment he has paid. *Id.*

— **Giving Notes for Composition is no Satisfaction.**—A debtor having filed a petition for liquidation under the Bankruptcy Act, 1869, s. 126, at a meeting duly convened (the plaintiffs being assenting creditors), resolutions were passed that a composition of 3s. in the pound should be accepted by the creditors in satisfaction of their debts, that such composition should be payable by instalments at three, six, and twelve months, and that the security of S. should be accepted for the whole of the composition: and a trustee was appointed. Joint and several promissory notes of the debtor and S. for the composition, payable at the National Provincial Bank of England at Birmingham, were given to the plaintiffs and the other creditors, and receipts signed by them, expressing it to be in "discharge of their debts." The first note was presented at the bank at maturity, and dishonoured, but no demand was made upon S. or the trustee:—Held, that the plaintiffs were remitted to their right to sue for their original debt, the mere giving of the notes, without payment, not being satisfaction within the terms of the resolution or of the receipt. *Edwards v. Hancher*, 1 C. P. D. 111; 33 L. T. 575.

After the defendant had been adjudicated a bankrupt, his creditors, amongst whom were the plaintiffs, agreed to accept a composition, and bills of exchange were given to the plaintiffs for the amount; the bills having been dishonoured:—Held, that the mere giving the bills, without payment, was not a discharge of the original debt, and that the plaintiffs were remitted to

their right to sue for it. *Erskine v. Moreland*, 10 Ir. R., C. L. 243.

— **Payment by Debtor to his Solicitor—Default by Solicitor.**—The day before a composition fell due the debtor paid to his solicitor, who had the conduct of the proceedings, and who also held his bill for the whole amount of the composition, sufficient to pay the composition to all the creditors. The solicitor had received a written authority from a judgment creditor to pay his composition to R., his solicitor. The solicitor did not pay R. immediately, but retained the composition, intending to pay him in a few days, when he was going to meet him on other business. The judgment creditor proceeded to levy execution for his original debt:—Held, that the composition not having been paid on the day named, the judgment creditor was remitted to his original rights, and that an injunction would not lie. *Masters, Ex parte, Winson*, *In re*, 1 Ch.D. 113; 45 L.J., Bk. 18; 33 L. T. 613; 24 W. R. 113.

— **Creditor's Debt Unascertained—Reference—Award.**—The creditors of debtors who had filed a liquidation petition resolved to accept a composition, and appointed a trustee to receive and distribute it. In the debtors' statement it was mentioned that two persons claimed to be creditors for a large sum, but that their claim was the subject of an action, which had been referred to an arbitrator, the reference being still pending. These persons attended the meetings of the creditors (of which notice had been sent to them) and tendered a proof, but their proof was objected to, and they were not allowed to vote. Several months afterwards the arbitrator made his award, finding a large sum due to them. The composition not having been paid or tendered to them, they commenced an action against the debtors for the amount of the award:—Held, that the action ought not to be restrained. *Watson, Ex parte*, 2 Ch. D. 63; 34 L. T. 778; 24 W. R. 592—C. A.

— **Creditor suing for Composition, cannot afterwards sue for Original Debt.**—Under a composition arrangement, the debtor was to pay by four instalments, each secured by the promissory note of himself and his sureties; having made default in payment of the third instalment the creditor sued upon the promissory note for that instalment, and was paid it; the creditor then sued for the original debt, less by the amount of the three instalments paid, and seized the debtor's goods in execution:—Held, that, the creditor having elected to sue for the amount of the instalment, and been paid it, was not entitled to revert to his right to sue for the original debt, and that he should be restrained from levying under the execution. *Butler, In re*, 1 Ir. R., Ch. D. 225.

**Default in Payment by Trustee.**—When under a composition arrangement a trustee is appointed by the creditors, the debtor is not liable for any default of the trustee in paying the composition. *Waterer, Ex parte, Taylor, In re*, 43 L. J., Bk. 25; 29 L. T. 907; 22 W. R. 426.

A creditor holding a security of uncertain value, was inserted in the debtor's statement for an estimated balance. The trustee did not pay or tender the composition on the amount, but

(wrongly) required the creditor to prove his debt. The creditor having commenced an action for his original debt against the debtor:—Held, that it ought to be restrained. *Id.*

— **Trustee need not Tender Composition.**—The trustee under a composition is not bound to tender the composition. *Id.*

To an action by the indorsees of a bill of exchange against the acceptors, they pleaded that the necessary proceedings for a composition by the acceptors under the Bankruptcy Act, 1869, s. 126, had been taken, and that a trustee on behalf of the creditors had been appointed by the extraordinary resolution for receipt and distribution of the composition, and that a sum sufficient to pay the composition had been duly paid to the trustee for the purpose of his paying the same pursuant to the resolution. The plaintiffs replied that the amount of the composition due to them was not paid or tendered to them, but the trustee, by the direction, request, and procurement of the acceptors, refused to pay the same to the plaintiffs:—Held, a bad replication, on the ground that the acceptors were discharged on the payment to the trustee of money applicable and sufficient to pay the composition. *Campbell v. Im Thurn*, 1 C. P. D. 267; 45 L. J., C. P. 482; 35 L. T. 265; 24 W. R. 675.

The mere non-payment by the trustee does not defeat the composition, and the money being impressed with a trust for the benefit of the creditor, any direction by the debtor with respect to it is a nullity. *Id.*

Semble, that the trustee is entitled before paying over the composition to a creditor to investigate the validity of his claim. *Id.*

**Non-payment due to Creditor's Neglect.**—Where the creditors of a liquidating debtor have duly passed resolutions for a composition payable by instalments at certain definite times, and have appointed a trustee under the 279th of the Bankruptcy Rules; and at the time when the first instalment of the composition became due the debtor, who had sent cheques to all the creditors, had also placed in the hands of the trustee funds sufficient to pay the amount of that instalment to a particular creditor, who, however, neglected to present the cheque or apply to the trustee for the amount; such creditor is not entitled to institute bankruptcy proceedings against the debtor with a view to having him adjudicated a bankrupt, upon the ground that he did not in fact receive the instalment of his composition upon the day named in the resolutions for payment. *Ortelli, Ex parte, Sherratt, In re*, 45 L. T. 799.

## 11. ADJUDICATING DEBTOR A BANKRUPT.

**Does not require Act of Bankruptcy.**—The power given to the court by s. 120 of the Bankruptcy Act, 1869, to adjudge a compounding debtor a bankrupt, is a discretionary power, and is independent of the commission by him of an act of bankruptcy, and it may be exercised more than six months after the filing of the liquidation petition. *Charlton, Ex parte*, 6 Ch. D. 45; 46 L. J., Bk. 110; 37 L. T. 45; 25 W. R. 800—C. A. Affirming 36 L. T. 561; 25 W. R. 633.

A declaration by the debtor of his inability to pay one of the instalments of the composition at

the time appointed is a sufficient ground for the exercise of this power. *Ib.*

By resolutions for composition creditors agreed to accept 5s. in the pound, payable in two instalments of 4s. and 1s. at six months' and two years' date respectively. The debtor, who continued trading, was unable to meet the second instalment. Thereupon a creditor, to whom the sum of 13l. was due under the second instalment, applied that the debtor might be adjudicated a bankrupt under s. 126 :—Held, that it was not a proper case to make the adjudication. *Shiers, In re, Shiers, Ex parte*, 7 Ch. D. 416; 47 L. J., Bk. 31; 37 L. T. 724; 26 W. R. 216.

**Rights of Creditors on Revival of Bankruptcy through failure of Composition.**—J. claimed to be a secured creditor of S., a bankrupt, and to be entitled to the whole of the property set forth by S. in his statement of affairs by virtue of two bills of sale. The securities were disputed by the trustee, and ultimately the creditors passed resolutions under the 28th section of the Bankruptcy Act, 1869, that the offer of J. to pay 620l. to the trustee be accepted, that the bankruptcy be thereby annulled, and that J. releasing his claim upon the estate, his securities be not disputed by the trustee. This compromise was entered into on the basis that the property held by J. comprised the whole of the debtor's estate, and was carried into effect. S. having subsequently come into possession of property which he had omitted in his statement of affairs, the order annulling the adjudication was discharged, and the bankruptcy was revived. J. thereupon tendered a proof for the balance which remained due to him after he had realized his securities, which was rejected :—Held, on appeal, that the effect of the order reviving the bankruptcy was to destroy the resolutions in toto, and that all parties were remitted to their original rights and position. *Spanton, In re, Jarvis, Ex parte*, 10 Ch. D. 179; 48 L. J., Bk. 45; 39 L. T. 651; 27 W. R. 297—C. A.

## 12. SECOND COMPOSITION.

When creditors have resolved, under the Bankruptcy Act, 1869, s. 126, to accept a composition in satisfaction of the debts due to them from their debtor, the debtor cannot make a new composition with his creditors under that section until all the instalments of the old composition have been paid. *Sydney, Ex parte, Sydney & Wiggins, In re*, 10 L. R., Ch. 208; 44 L. J., Bk. 21; 31 L. T. 714; 23 W. R. 205.

Where nothing further remains to be done under composition resolutions, and the rights of the creditors thereunder are in no way interfered with, the court will not refuse to register resolutions for a composition under a second petition by the same debtor, notwithstanding that all the creditors have not been paid their composition under the first petition. *Lomas, Ex parte, Davies, In re*, 42 L. T. 595.

## 13. JURISDICTION OF COURT OF BANKRUPTCY.

**To restrain Actions on original Debt.**—When an action is brought by one of the creditors of a compounding debtor against the debtor for his original debt, the Court of Bankruptcy ought to restrain the action if it can see clearly that it is

vexatious and without foundation, even though the question in dispute concerns only the debtor and the creditor who is suing. *Lopez, Ex parte*, 5 Ch. D. 65; 46 L. J., Bk. 95; 36 L. T. 275; 25 W. R. 419—C. A.

But, if there is a substantial question to be tried, the action ought to be allowed to proceed. *Ib.*

In February, 1871, a debtor effected a composition with his creditors. The proof of K. was disputed, and was only settled by the judge on the 29th of July, 1873. The composition on the amount as settled was not then paid at once, but the solicitors of both parties waited till the order was drawn up and signed by the registrar. On the 22nd of August, 1873, the debtor asked to be allowed to pay the composition partly in cash and partly in bills at two and four months. This request was refused, and K. then said that the composition not having been paid he should commence an action for the whole debt. On the 27th of August the registrar signed the order, and on the same day the debtor tendered payment of the composition in cash. This was refused, and an action for the original debt commenced on the 29th of August :—Held, that it would be inequitable to allow K. to proceed with the action. *King, Ex parte, Harper, In re*, 17 L. R., Eq. 332; 43 L. J., Bk. 41.

**— To try Validity of Resolutions.**—Where resolutions accepting a composition payable by the debtor have been duly passed and registered under the Bankruptcy Act, 1869, a creditor will be restrained from proceeding at law in order to try the validity of the resolutions. *Thorpe, In re, Härtel, Ex parte*, 8 L. R., Ch. 743; 42 L. J., Bk. 34; 28 L. T. 530; 21 W. R. 428.

When a creditor objects to be bound by an arrangement with creditors, on grounds personal to himself and not applicable to the rest of the creditors, he will not be restrained by the Court of Bankruptcy from trying the question in an action. *Paper Staining Company, Ex parte, Bishop, In re*, 8 L. R., Ch. 595.

A creditor refused to be bound by a resolution for a composition registered under the Bankruptcy Act, 1869, s. 125, on the ground that his name was not duly inserted in the debtor's statement of debts, and that the composition had not been tendered to him within the prescribed time :—Held, that he ought not to be restrained from suing the debtor at law. *Ib.*

**— By Debtor against Sheriff.**—The Court of Bankruptcy has jurisdiction to restrain an action of trespass brought by an arranging debtor, after the registration of a resolution duly passed and confirmed by the creditors to accept a composition, against the sheriff, who, before the date of the petition upon which the composition was based, had levied upon the goods of the debtor under a fi. fa., and had continued in possession twelve clear days after service of notice of the registration and to withdraw. *England, In re, Middlesex (Sheriff), Ex parte*, 12 L. R., Eq. 207; 40 L. J., Bk. 65; 24 L. T. 519. Affirmed, 24 L. T. 860; 19 W. R. 914—L. J.

**To re-open Proceedings.**—Even after a resolution for a composition has been registered, the Court of Bankruptcy has jurisdiction, on a proper case being shewn, to re-open the question,

and, with that object, to order the examination of the debtor. *Davis, In re*, 19 W. R. 524.

But a creditor invoking the exercise of this jurisdiction must shew a *prima facie* case of fraud against the debtor in procuring the composition. It is not sufficient to allege that the assenting creditors were friendly to the debtor. *Ib.*

**Court of Equity will only Interfere in Special Cases.]**—A Court of Equity will not interfere upon any question arising out of a creditors' composition deed, or other proceedings in bankruptcy, except under special circumstances. *Graham v. Winterson*, 16 L. R., Eq. 243; 42 L. J., Ch. 633; 28 L. T. 803; 21 W. R. 722.

**No Jurisdiction to order Sale of Security at instance of Equitable Mortgagees.]**—In a case of composition the Court of Bankruptcy has no jurisdiction to make an order for sale at the instance of an equitable mortgagee of the estate of the debtor. *Manchester and Liverpool District Banking Company, Ex parte, Littler, In re*, 18 L. R., Eq. 249; 43 L. J., Bk. 73; 30 L. T. 339; 22 W. R. 567.

**Composition under s. 28—Sale of Security at instance of Secured Creditor—Jurisdiction.]**—Where the trustee of a liquidating debtor had with the sanction of the creditors accepted a composition under s. 28 of the Bankruptcy Act, 1869:—Held, that the Court of Bankruptcy had no jurisdiction upon the application of a secured creditor, who had not proved in the liquidation, to order the sale of his security. His proper course was to realize his security as a mortgage in the usual manner in the High Court and then prove for any deficiency that might ensue in the Court of Bankruptcy. *Holmes, In re, Woods or Holmes, Ex parte*, 43 L. T. 447; 29 W. R. 124.

#### 14. COSTS OF COMPOSITION.

The costs of a composition are not governed by Bankruptcy Rules, 1871, r. 8, which provides for the taxation of costs in "bankruptcy or liquidation" on a lower scale when the provable debts and assets respectively are under certain amounts. *Castle, Ex parte, Meikle, In re*, 1 Ch. D. 111; 45 L. J., Bk. 13; 24 W. R. 143.

The creditors of a liquidating debtor accepted a composition, payable by instalments, secured by the joint and several promissory notes of the debtor and a surety. The debtor and his surety being unable to pay the composition, the debtor obtained leave to summon a general meeting of his creditors to vary the terms of the composition, but proceeded in all respects as if a fresh first meeting was being convened. At the new meeting resolutions were duly passed accepting a smaller composition, but the registrar refused to register the resolutions, and the debtor was subsequently adjudicated bankrupt. The debtor's solicitor applied to the court for payment of his costs incurred under the proceedings to vary the composition:—Held, that the registrar having refused to register the resolutions, and no appeal having been brought from his order, there were no proceedings pending within the meaning of r. 292 of the Bankruptcy Rules, 1870; and that even if the proceedings were pending within the meaning of the rule, the costs in relation to the proceedings were in the discretion of the judge, and that the exercise of his discretion in that

respect would not be interfered with. *Hopper, Ex parte, Elliott, In re*, 37 L. T. 725. Affirmed, 8 Ch. D. 53; 47 L. J., Bk. 41; 38 L. T. 366; 26 W. R. 488—C. A.

### XIX. COMPOSITION DEEDS.

#### I. GENERAL CHARACTERISTICS AND INCIDENTS.

##### a. What are.

**Deed assigning whole Property to Trustees for Creditors—No Creditors Parties to Deed.]**—

Under a will, S. was entitled on the death of A. to a share of a fund. By deed made by him, being the tenant for life, he assigned stock-in-trade, scheduled, and all his real and personal estate, using very general language, to a trustee to sell for the payment of his creditors. No creditors were parties, but some were paid under it. Afterwards the trustee sold the residue. The will contained a clause that on any legatee becoming bankrupt, or mortgaging or anticipating his share, or compounding with his creditors, his share should go over:—Held, that the deed was not a composition deed, and was not a forfeiture within the meaning of the will. *Waley, In re*, 3 Drew. 165; 8 Eq. R. 380; 24 L. J., Ch. 499; 1 Jur., N. S. 338. See *Sharp v. Cosserat*, 20 Beav. 470.

**Trusts not kept—Creditors have no Remedy.]**—A person conveyed to trustees personal property upon trust to sell the same, and

after satisfying certain specified charges and claims in a prescribed order out of the proceeds, to divide the residue among his scheduled creditors, not any of whom were parties or privy to the execution of the deed. The trustees, after partially executing the trusts, by making sales and paying off the specified charges and claims in the order directed, concurred with the grantor in doing several acts inconsistent with the subsequent trusts:—Held, that, after the death of the grantor, a scheduled creditor had no equity against the trustees to enforce the execution of the trust, the conveyance being in the nature of a private arrangement for the personal convenience of the grantor, and vesting no right in the creditors. *Gerrard v. Lauderdale (Lord)*, 2 Russ. & Mylne, 451.

**Deed made without Knowledge of Trustee.]**—

A. executed a deed, conveying all his property to a creditor, B., in trust for B. and the other creditors of A. A. sent this deed to B., with whom he had not previously communicated on the subject. B. received the deed on the next day, and on that day a judgment creditor of A. delivered a *fi. fa.* to the sheriff. On the next day, B. wrote to A. signifying his assent. On an issue between B. and the judgment creditor, the jury found that the deed was honest and *bona fide*:—Held, that B. was entitled to the property, the deed not being revocable by A., inasmuch as it was for the benefit in part of the trustee B., and B.'s assent not being necessary to vest the property in himself for the same reason. *Siggers v. Evans*, 5 El. & Bl. 367; 3 C. L. R. 1209; 24 L. J., Q. B. 705; 1 Jur., N. S. 851.

**Requirements under 17 & 18 Vict. c. 36.]**—If a deed of assignment for the benefit of creditors purports in its language to be and is intended for the benefit of all the creditors, it is sufficient to

bring it within the exception of the 17 & 18 Vict. c. 36 (Bills of Sale Act), so as not to require registration under that act, although the deed does not appear to be executed by all the creditors. *General Furnishing and Upholstery Company v. Venn*, 2 H. & C. 153; 32 L. J., Ex. 220; 9 Jur., N. S. 550; 8 L. T. 432.

**Letter of Licence.**—A letter of licence by deed made between a debtor and his assenting creditors was not a deed capable of binding non-assenting creditors of the debtor by force of the Bankruptcy Act of 1861. *Latham v. Lafone*, 2 L. R., Ex. 115; 36 L. J., Ex. 17; 15 L. T. 627; 15 W. R. 453.

#### b. Validity.

##### As against a subsequent Execution Creditor.]

—At 10 o'clock a.m., on the 3rd December, 1862, a debtor assigned all his estate and effects to trustees, to pay rateably all debts due to his creditors, being such persons as would have been entitled to rank as creditors in bankruptcy if the debtor had been adjudicated bankrupt upon a petition for that purpose, filed on the 25th of November, 1862. All the statutory requirements as to trust deeds for the benefit of creditors were complied with, and the trustees took possession of the debtor's estate and effects. At 11.30 on the same 3rd of December, a creditor signed judgment in an action against the debtor, and shortly afterwards a *fi. fa.* was delivered to the sheriff, under which he took in execution the debtor's goods:—Held, that the deed was not fraudulent under 13 Eliz. c. 5, as hindering and delaying creditors, since the execution creditors might obtain under it a composition in respect of the costs of the judgment. *Evans v. Jones*, 3 H. & C. 423; 11 L. T. 636.

Held, also, that the trustees were entitled, as against the execution creditors, to the proceeds of the execution. *Id.*

##### Defective under 23 & 24 Vict. c. 134—Good at Common Law.]

—A deed by which a debtor assigned all his property to a trustee for the benefit of his creditors, was expressed to be intended to operate under the Bankruptcy Act, 1861. By reason of some of the written assents necessary to make up the required majority being invalid the deed could not operate under the act:—Held, that it was nevertheless good at common law to pass the property of the debtor to the trustee, that it was not invalid for want of registration as a bill of sale, and could not be regarded as a mere execution. *Johnson v. Ossenton*, 4 L. R., Ex. 107; 38 L. J., Ex. 76; 19 L. T. 793; 17 W. R. 675.

**Deed not executed by Creditor—Pleading.]**—A plea to an action against the defendant, as acceptor of several bills of exchange, stated, that, after the time of payment, he being resident in Scotland, in consideration that certain of his creditors should forbear to sue, made his deed according to the law of Scotland, by which he assigned his personal property in Scotland for the benefit of his creditors; that notice of the deed was given to the plaintiff, and that plaintiff, by a writing effectual by the law of Scotland, nominated R. H. as his attorney, to concur in and adopt the deed, and to receive the dividends. The plea then stated that R. H. adopted the deed; that

divers other creditors accepted the assignments; that the causes of action arose before the execution of the deed; and that all the proceedings were in conformity with the law of Scotland; whereby the defendant, by the law of Scotland, hath become absolutely discharged from the causes of action. Replication, that the defendant has not become, nor is, discharged:—Held, that the law of Scotland was put in issue; secondly, that the plea did not disclose a defence by the law of England, as it did not appear that the plaintiff had executed the deed, or induced any other creditor so to do, or in any way precluded himself from suing on the original debt. *Woodham v. Edwards*, 1 N. & P. 207; 5 A. & E. 771; 2 H. & W. 443.

**Wholly in Favour of Debtor.]**—To a plea setting up a composition deed, the plaintiffs replied, upon equitable grounds, that the deed was not executed or assented to by them; that the defendant at the time the deed was made was in possession of available assets sufficient for the payment of a much larger composition than that agreed upon; that the agreements in the deed were not *bonâ fide* made for the equal benefit of all the creditors; that the agreements were made solely from motives of benevolence and kindness to and for the defendant, and for his sole and only benefit, and without any just regard to the rights or interests of the other creditors, and to give the defendant a release and discharge from his debts on the payment of his composition; that such composition was only a nominal composition, and wholly disproportioned to the assets of the defendant which were available to the payment of the said creditors, their debts and demands:—Held, that the replication was good, and an answer to the plea. *Hart v. Smith*, 4 L. R., Q. B. 61; 38 L. J., Q. B. 25; 19 L. T. 419; 17 W. R. 158; 9 B. & S. 543.

#### c. What Property Passes.

**Cattle on Farm.]**—An assignment for benefit of creditors, by a trader and farmer, of all her "effects, stock, books, and book debts," conveys the cattle on the farm. *Lewis v. Rogers*, 1 C., M. & R. 48; 5 Tyr. 872.

**Policy of Insurance.]**—A. conveyed all his property to trustees, for the benefit of his creditors. The conveyance contained general words; amongst others, "all and singular the personal estate and effects whatsoever," and all writings belonging to the same. He was possessed at the time of a policy on his own life, the existence of which was not known to the trustees, and which remained in his possession. He died, and the trustees having afterwards learned the existence of the policy, claimed it from his executor, who refused to deliver it up, and obtained the money from the insurance office:—Held, that the legal property in the policy, and the beneficial interest in the contract, passed to the trustees by the deed; that they might maintain trover for the policy against the executor; and that the proper measure of the damages, under the circumstances, was the amount of the money obtained by it. *Watson v. McLean*, El. Bl. & Bl. 75—Ex. Ch.

**Contingent Interest.]**—Under an assignment to creditors by a debtor of all his stock-in-trade, book, and other debts, goods, securities, chattels

and effects whatsoever, except the wearing apparel of himself and his family, a contingent interest in the residuary estate of a testator (to which the debtor was entitled in the event of his sister dying without a child) passes. *Iverson v. Gassiot*, 3 De G., Mac. & G. 958.

**Mortgage of Leasehold Premises.**—A deed of assignment by A. of all his personal estate and effects whatsoever to trustees, for the benefit of creditors, passes a deed of assignment of leasehold premises made to A. by way of mortgage, with power of sale. *West v. Steward*, 14 M. & W. 47.

**Term of Years.**—A debtor (by a deed executed after the repeal of the Bankruptcy Act, 1861) assigned to a trustee for the benefit of his creditors, "All his goods and chattels, personal estate, substance and effects whatsoever, and all his right, title, property, benefit, claim and demand whatever therein:"—Held, that these words were sufficient to pass a term of years in certain premises. *White v. Hunt*, 6 L. R., Ex. 32; 40 L. J., Ex. 23.

Held, also, that the trustee having executed the deed of assignment and put a man in possession of the premises, and never having disclaimed the lease (though he had not expressly accepted it) was liable to the lessor as assignee of the term for rent. *Id.*

**Benefit derived from Contract between other Parties—After-acquired Property.**—By a deed of inspectorship, registered under the Bankruptcy Act, 1861, s. 192, it was provided that all the estate and effects of the debtor should be administered in accordance with the bankrupt law. At the date of the deed there was in existence an agreement between railway companies, to which the debtor was no party, by which it was agreed that the contract for the execution of the works therein referred to should be let to the debtor or his nominee. The debtor afterwards and during the continuance of the inspectorship nominated contractors, and received from them the sum of 3,500*l.* for so doing:—Held, that this sum was no part of the estate and effects of the debtor at the date of the deed; also, that upon the construction of the deed after-acquired property was not included therein. *Piercy, Ex parte, Piercy, In re*, 9 L. R., Ch. 33; 43 L. J., Bk. 9; 29 L. T. 559; 22 W. R. 65.

#### d. Preliminary Agreements for Composition.

**Agreement to accept Part of Debt.**—Composition arrangements with creditors form an exception to the rule that an agreement to accept part of a debt in discharge of the whole is no legal satisfaction of the remainder. *Pfeffer v. Browne*, 28 Beav. 391.

**Agreement to Execute—Accord and Satisfaction.**—An agreement between the plaintiff and the defendant, and the other creditors of the plaintiff, to execute a composition deed, is no accord and satisfaction. *Lowe v. Eginton*, 7 Price, 604.

**Where Debt ascertained and Fund provided.**—Where there is an agreement between a debtor and his creditors for the latter to accept a com-

position if the debt has been ascertained by the agreement, and a fund provided, and all the creditors are bound to forbear, it seems that a plea of that fact will be good to an action brought by one of the creditors for his whole demand. *Heathcote v. Crookshanks*, 2 T. R. 24.

**Agreement with Portion of Creditors.**—An agreement entered into between a debtor and any number of his creditors less than the whole number to take a composition for their debts is binding upon those who enter into the agreement. *Norman v. Thompson*, 4 Ex. 755; 19 L. J., Ex. 193.

And where a man being embarrassed, all his creditors signed an agreement to give him time to pay by instalments, and to take his notes for the amount:—Held, that this agreement was binding on each of them, the signing of the others being a sufficient consideration, and that they could not sue for their original cause of action without proving that the agreement had been broken on the part of the debtor. *Boothby v. Sowden*, 3 Camp. 175. And see *Anstey v. Marden*, 1 N. R. 124; 2 Smith, 426.

**Agreement in Consideration of General Composition—Refusal of some Creditors.**—An agreement for a composition entered into by one creditor, in contemplation and in consideration of a general composition being entered into by all the creditors, is not binding on him if the others refuse to come in. *Reay v. Richardson*, 2 C., M. & R. 422; 1 Gale, 219; 5 Tyr. 931.

**Deed executed on Faith of Agreement.**—A creditor who agrees to take a composition from his debtor, on the faith of which the debtor executes a deed of assignment of all his property to a trustee for the benefit of his creditors, will not be allowed, by refusing to execute such deed, to sue his debtor for the whole of his demand. *Butler v. Rhodes*, 1 Esp. 236; Peake, 238.

Where, at a meeting of the creditors of a deceased insolvent, called by his executor, they agreed to a rateable distribution, on the faith of which he executed a deed of assignment of all the assets which had come to his hands, for the benefit of the creditors:—Held, that one of them could not afterwards refuse to come in under the deed, and bring an action for his debt against the executor. *Brady v. Sheil*, 1 Camp. 147.

**Assignment by Debtor—Subsequent Agreement as to Carrying on Business.**—A., being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next Michaelmas, and that then the property should be divided among them: the insolvent assigned his effects; at the next Michaelmas several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time:—Held, that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. *Cork v. Saunders*, 1 B. & A. 46.

**Tender of Composition agreed on.**—Where a man's creditors agree to take a composition on their debts, to be secured partly by the accept-

ances of a third person, and partly by his own notes, and to execute a composition deed containing a clause of release, he cannot be sued for the original debt due to a creditor who had promised to come in under the agreement, to whom the acceptances and notes were regularly tendered, and who refused to execute the composition deed after it had been executed by all the other creditors. *Bradley v. Gregory*, 2 Camp. 383.

**Omission to Tender.**—Where a plaintiff, the drawer of a bill, accepted by the defendant, agreed with him and the rest of his creditors to take a composition of 8s. in the pound, to be secured by promissory notes to be given by the defendant, payable on days certain; and that he should assign to the creditors certain debts, upon which they should execute a general release; and the assignment was executed, and all the creditors, except the plaintiff, received their composition and executed the release, and the plaintiff might have received his notes if he had applied for them, but it did not appear that the defendant had ever tendered them to the plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the notes had expired, sued the defendant on the bill of exchange:—Held, that he was not precluded by the agreement from recovering. *Cranley v. Hilliary*, 2 M. & S. 120.

**What Amounts to an Agreement.**—To an action on a bill by the executors of the indorsee against the acceptors, they pleaded that the acceptance was an accommodation acceptance for the drawer with the knowledge of the indorsee; and that the drawer became insolvent, and the indorsees, the defendants, and two other creditors, agreed among themselves, as his friends, to release their several back debts and liabilities. The plea averred that the defendants and the two other creditors did discharge and release their several debts, and then went on to state that the indorsee, in consideration of the premises, and that certain other creditors would release, abandon, and never enforce payment of their debts, agreed with the defendants that he would never ask for, sue for, demand, or enforce payment of the bill of exchange. There was an averment that the other creditors had released their debts. The evidence was that the indorsee at first promised to sign the account, if some more signatures were obtained to it; but, after they were obtained, he refused to sign it, but said on one occasion that he knew the bill was an accommodation bill, and he should not call on the defendants to pay it; and on another, that the bill should not come against any of the parties, but that he himself would come in as the rest of the creditors. The agreement signed by the creditors contained these words: "We, the undersigned, do hereby agree to accept of a release from E. A. (the drawer) of the equity of redemption, &c.; and we agree, upon the execution of such deed, to execute releases." The indorsee died, and the action on the bill was brought by the executors:—Held, that the allegations in the plea were not sustained by the evidence. *Deacon v. Stodhart*, 9 C. & P. 685.

— **Conditional Promise to Sign.**—The defendant, being in difficulties, called a meeting of his creditors, one of whom was the plaintiff, and proposed a composition to them, which, however,

was not arranged. A witness, who was clerk to an accountant employed by the defendant, proved that he afterwards showed to the plaintiff a composition paper, which had already been signed by some of the creditors, and asked him to sign it also. The paper purported to be a memorandum, by which each of the undersigned creditors, in consideration of the agreement therein contained on the part of the others, agreed with the others, and also with the defendant, to accept a composition of 10s. in the pound. The plaintiff being informed that L., one of the creditors, had not signed, said that he would not sign until L. had done so. The witness left the plaintiff on the understanding that he was to get L. to sign, and then that he (the plaintiff) would sign. The witness did get L. to sign, but the plaintiff could not be induced to keep his promise, and never did sign:—Held, in an action by the plaintiff to recover the amount of his debt, that these facts did not constitute any defence, as no such agreement can operate as a defence if made merely between the debtor and a single creditor; and also that there was no agreement with the plaintiff, as the composition paper was expressly confined to those who had signed it. *Boyd v. Hind*, 1 H. & N. 938; 26 L. J., Ex. 164; 3 Jur., N. S. 566.

Held, also, that there was no evidence that the plaintiff authorized the witness, as his agent, to make any representations to L. that he would sign if L. signed. *Id.*

Held, also, that the plaintiff might, perhaps, be liable to an action on the breach of the promise to sign the paper. *Id.*

**Right to Sue for other Debts.**—It may be doubtful whether a creditor accepting a composition on certain bills, the debtor and the other creditors not supposing that he is the holder of any other bills for which the debtor is liable, can sue upon such other bills; but if he induces others to agree to the composition, on the faith of his false representation that he is not the holder of the other bills, or that the bills for which he accepts the composition are the only bills of the debtor which he holds, he cannot afterwards sue the debtor upon them. *Blackstone v. Wilson*, 26 L. J., Ex. 229.

**Signing Preliminary Resolutions—Refusal by Trustees to allow Creditor to come in under Deed.**—The plaintiff attended a meeting of the defendants' creditors, and concurred in certain resolutions for the execution of a release to the defendants, on their executing an assignment of all their effects to trustees for distribution amongst their creditors. The defendants and the trustees at first disputed the amount of the plaintiff's debt, but subsequently altogether refused to allow him to come in under the deed:—Held, that his having signed the preliminary resolutions was, under the circumstances, no bar to his right to sue the defendants for his original debt. *Garrard v. Woolner*, 1 M. & Scott, 327; 8 Bing. 258; 4 C. & P. 471.

#### e. Time and Mode of Accession.

**What is an Accession.**—A creditor cannot be said in any sense to have acceded to the provisions of a composition deed unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed.



*Forbes v. Limond*, 4 De G., Mac. & G. 298; 18 Jur. 33.

— **Acquiescence.**—It is not, in equity, necessary that a creditor should execute a creditors' deed; if he does some act which amounts to acquiescence, he is entitled to the benefit of it; but it is not sufficient in him merely to stand by and take no part in the matter. *Biron v. Mount*, 24 Beav. 642; 27 L. J., Ch. 191; 4 Jur., N. S. 43.

A debtor executed an assignment to trustees for the benefit of his creditors, in consideration of their covenanting not to take any proceedings against him for three years; and it was provided that those creditors who should not execute the deed within six months should be excluded from the benefits conferred thereby. One of the creditors neglected to sign the deed, but acquiesced in it, and took no proceedings against the debtor:—Held, that such creditor, having treated the deed as valid, and acquiesced in its provisions, was entitled to the benefits conferred by it. *Baber, In re*, 10 L. R., Eq. 554.

— **Form of Assent.**—A proposal having been made to creditors to accept "a composition, payable in equal instalments at three, six, and nine months, the two last instalments to be secured," certain creditors assented, on the 27th of May, in the following form:—"We agree to the composition proposed, and authorize you to sign such deed on our behalf, and undertake to execute the deed of release if tendered for that purpose."—Held, that assents in this form were not sufficient to bind the creditors to a deed not executed till the 7th of August or registered till the 11th under the Bankruptcy Act, 1861, because they did not state how the instalments were to be secured, or from what time the periods of three, six, and nine months were to be calculated; and also because the deed was not executed within a reasonable time after the assents were given. *Birks v. Clarke*, 5 L. R., Ex. 197; 39 L. J., Ex. 166; 23 L. T. 162; 18 W. R. 814.

•  
— **Not Assenting within Time limited.**—Upon a composition deed, the benefits of which were in terms limited to creditors who should come in and accede to the deed within a limited time, certain creditors, who neither assented to nor dissented from the deed during such time, were, under the circumstances, afterwards admitted to share in the benefit of the composition, together with those who had acceded before the expiration of the stipulated time. Although the deed contained no release or stipulation that the dividend was to be taken in full satisfaction of the debts:—Held, that satisfaction ought to be inferred, as the deed constituted a *cessio bonorum*. *Whitmore v. Turquand*, 3 De G., F. & J. 107; 30 L. J., Ch. 335; 7 Jur., N. S. 377; 4 L. T. 38; 9 W. R. 488.

A creditor assigned property to trustees upon trust to sell and apply the clear proceeds in payment of the debts owing by him to such of his creditors as should, before a certain day, execute the deed, and the surplus, if any, to the assignor, and the deed contained a release by the creditors. The assignor and the trustees, who were also creditors, executed the deed at once. No other creditor executed before the stipulated day; but notice of the deed was given to them all, and

they forebore to sue, and fifteen years afterwards some were permitted to execute, the trustees meanwhile having taken possession of and sold part of the property:—Held, that the deed was binding on the assignor, and that the creditors were entitled to have the trusts of it carried into effect. *Nicholson v. Tutin*, 2 Kay & J. 18; 1 Jur., N. S. 1201.

— **Duty of Trustees to enlarge Time.**—A creditors' deed contained a proviso, that such creditors as should not execute or assent in writing to the deed on or before a certain day, or within such further time, not exceeding thirty days, as the trustees should appoint, should be excluded from the benefit of the deed. The trustees issued an advertisement, which stated their power of extending the time for execution. The debtor owed his son a large sum of money. The son was in America at the date of the deed. A solicitor, who had acted for him when in England, on the last day for execution wrote to the trustees on behalf of the son, signifying his assent to the deed. Subsequently he received from the son a power of attorney to execute the deed, and before the end of the period for which the trustees might have enlarged the time for executing the deed, he applied to them to permit him to execute on behalf of the son:—Held, that the son was entitled, under these circumstances, to the benefit of the deed, because it was the duty of the trustees to enlarge the time, so as to allow his attorney to execute the deed. *Raworth v. Parker*, 2 Kay & J. 163; 25 L. J., Ch. 117.

— **Time of Essence of Promise.**—A voluntarily covenanted to raise a fund for payment of a composition on the debts, owing by his father and his grandfather, to all such of their creditors as should execute the deed of composition within a limited time. Certain creditors executed within the time stipulated, and a sum sufficient to satisfy their claims was charged by the covenantor, by way of mortgage to the trustees of the composition deed, on his real estate:—Held, that time was of the essence of the promise, and that, as against creditors who had executed in due time, others who had failed to execute were not entitled to have the benefit of the deed. *Williams v. Mostyn*, 33 L. J., Ch. 54; 9 L. T. 476; 12 W. R. 69.

— **Mortgagee.**—A debtor assigned all his property to trustees for the benefit of his creditors, with a proviso, that, in case any creditor should not come in under the deed for six months after its date, he should be peremptorily excluded from the benefit of it:—Held, that a mortgagee of part of the property, whose solicitor corresponded with the trustees on the subject of the mortgage, but who did not express any intention to come in under the deed for some years afterwards, was not entitled to the benefit of the trust. *Gould v. Robertson*, 4 De G. & S. 509.

— **Equitable Relief.**—Though a creditor, who is prevented by accident signing a composition deed within the period specially appointed for that purpose, may obtain equitable relief, yet it will not be extended to one who has delayed making his claim, and has set up a title adversely to the deed. *Watson v. Knight*, 19 Beav. 369.

Whatever may be the general rule, if there is any, as to extending indulgence to a creditor

under a composition deed, who does not claim the benefit of the deed within the time specified therein, that rule does not apply to a creditor who actively refuses to come in under or assent to the deed within the time limited, and who does not retract such refusal within that time. *Johnson v. Kershaw*, 1 De G. & S. 260; 11 Jur. 553, 795.

An agreement to guarantee a composition to all the creditors of a third person who should, before a day specified, sign a release to the debtor of their respective claims, is an agreement entered into with such creditors only as actually sign before that day, and cannot be enforced in favour of a creditor, who, in consequence of a misapprehension by both parties of their respective rights, failed to sign the release before the day specified. *Emmet v. Dewhurst*, 3 Mac. & G. 587; 21 L. J., Ch. 497; 15 Jur. 1115.

— **Judgment Creditor.**—Trust deeds were prepared for the benefit of creditors, and a time was fixed within which the creditors were to execute or be excluded from the benefit of such deeds, the trustees having discretion to allow creditors to sign after the period fixed. A judgment creditor relying upon his claim as paramount to the deeds, declined to execute during twenty-two years. The judgment subsequently turned out to be invalid, and he petitioned the court, in a suit instituted for carrying into effect the trusts of the deeds, to be allowed the benefit of such deeds, and offered to execute them:—Held, that there was no such case of mistake or misapprehension as to constitute an equity. *Brandling v. Plummer*, 27 L. J., Ch. 188.

W. entered into a composition deed, by which the creditors should accept a composition of 10s. in the pound, secured by the joint and several promissory notes of the defendant and W.; the notes to be delivered seven days after the registration of the deed; the whole of W.'s estate to belong to the defendant, and to be realized for his benefit. The plaintiff agreed to assent to the deed and afterwards refused to be bound by it, on the ground that his assent had been obtained by fraud. The deed was duly registered, and the notes were tendered to the plaintiff, but he refused to accept them. The plaintiff then brought an action for his debt against W., who pleaded the composition deed, which was a valid deed on the face of it, and the plaintiff replied that the assents were obtained by fraud. The action was referred, and the defendant being unable to prove the sufficiency of the assenting creditors, so as to satisfy the statute, consented that an award should be made by which the verdict should be entered in the plaintiff's favour. W. was afterwards adjudged bankrupt. The defendant had realized W.'s estate. The plaintiff then brought an action against the defendant for the amount of the notes given by the defendant for the composition due to the plaintiff under the deed:—Held, that the action was not maintainable, and that whether the deed was invalid or not could not be determined, and that his proper remedy was by application to the Court of Bankruptcy, which had power to do complete justice between the parties. *Latter v. White*, 5 L. R., H. L. 578; 41 L. J., Q. B. 342. *Affirming S. C.* in Ex. Ch., 6 L. R., Q. B. 474; 40 L. J., Q. B. 162; 25 L. T. 658; 19 W. R. 1149; *Reversing S. C.*, 5 L. R., Q. B. 622; 40 L. J., Q. B. 9; 23 L. T. 242; 19 W. R. 63.

**Creditor coming in After.**—A creditor who has, as between himself and the debtor, successfully contested in a court of law the validity of a creditors' or composition deed executed by his debtor, is not thereby precluded from afterwards coming in under the deed, and obtaining the benefits which he would only be entitled to on the footing that the deed was valid. *Id.*

#### f. Amount and Nature of Debt.

**Debt left Blank.**—Where a creditor signs a deed of composition leaving the amount of his debt in blank, he binds himself to all existing debts. *Harry v. Wall*, 1 B. & A. 101; 2 Stark. 195. See *Margetson v. Aitkin*, 3 C. & P. 338.

**Debt erroneously Understated.**—And an indemnity against a debt owing by a person, which is erroneously understated, covers the whole amount. *Hancock v. Clay*, 2 Stark. 100.

**Filling up Blank after Execution.**—A debtor executed a deed conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demand were stated in the deed; a blank was left for one of the principal debts, the exact amount of which being subsequently ascertained was inserted in the blank the next day in the debtor's presence, and with his assent; he afterwards recognized the deed as valid in various ways, as by letters, and particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed:—Held, that the deed was valid notwithstanding the filling up of the blank after execution. *Hudson v. Revett*, 5 Bing. 368; 2 M. & P. 663.

**Blank filled up with wrong Amount.**—To an action against an acceptor of a bill for 337l., he pleaded a release. The plaintiff replied, non est factum; and that a blank was left in the deed for the plaintiff's debt, which, after execution by him, was filled up erroneously, without his authority. The evidence was, that, after the acceptance, the plaintiff became indebted to the defendant in 142l. for goods sold; that afterwards the plaintiff signed the deed, which recited that the defendant was indebted to certain persons, parties thereto, in the sums set opposite to their names in the schedule; and in consideration of a guarantee of 10s. in the pound by a third party, the creditors, parties thereto, released the debts then owing to them. The plaintiff executed the deed, but a blank was left opposite to his name, which afterwards, without his authority, was filled up with the sum of 337l. The jury found that the debt which the parties meant to be released was the balance, after deducting the 142l. from the 337l.:—Held, that on these facts the plaintiff was entitled to a verdict on the issues on both replications. *Fazakerly v. McKnight*, 6 El. & Bl. 795; 26 L. J., Q. B. 30; 2 Jur., N. S. 1020.

**Signing without Prejudice to Securities.**—A., a creditor of a firm, held securities from one of its members for money advanced by him at different times to the firm, but claimed a balance beyond what those securities would cover; all the creditors of the firm agreed to accept a composition of 7s. for every 20s. due to the creditors respectively. A. was the first to sign this deed,

but added to his signature the words, "without prejudice to any securities whatever that I hold;" the other creditors signed in their respective order under A.'s signature:—Held, that such a composition, thus accepted, did not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity. *Duffy v. Orr*, 1 C. & F. 253; 5 Bligh, N. S. 620.

**What Debts released—Dilapidations.]**—A rector of a parish died insolvent, leaving the rectory-house dilapidated. He was indebted to W., who, with other creditors, received a composition for their debts from the widow and administratrix of the deceased rector, and they executed a general release by signing their names against the amount stated in a schedule. W. succeeded to the rectory, and he made a further claim of 200*l.* against the estate of the insolvent for dilapidations. The insolvent's widow, afterwards, by her will, charged her real and personal estate with payment of her husband's debts. In a suit in equity for the administration of her estate:—Held, that the release discharged all the claims of W. against the estate of the insolvent, and that the claim for dilapidations was not payable under the will of the testatrix. *Bisnott v. Burgess*, 23 Beav. 278; 26 L. J., Ch. 697; 2 Jur., N. S. 1221.

**Fraud—Right to follow Goods.]**—H., a commission agent, being employed by B. to effect sales of goods at B.'s risk, had goods consigned to him by B., to be forwarded to W. H. fraudulently sent these goods to R. on his own account, and afterwards assigned his property to trustees for the benefit of his creditors. A balance was due from R. to H.:—Held, that B. was entitled to the balance due from R., in part discharge of the amount due to him (B.) from H., and to prove under the assignment for the balance. *Broadbent v. Barlow*, 30 L. J., Ch. 569; 7 Jur., N. S. 479; 4 L. T. 193.

#### **g. Creditors must be treated on an Equal Footing.**

A composition deed must appear on the face of it to be for the benefit of all the creditors. *Ilderton v. Jewell*, 33 L. J., C. P. 148; 10 Jur., N. S. 747; 9 L. T. 815; 12 W. R. 530—Ex. Ch.

The deed of arrangement contemplated by 24 & 25 Vict. c. 134, s. 192, is one which is made for the benefit of all the creditors of the debtor, and to which all may become parties. *Berridge v. Abbott*, 13 C. B., N. S. 507; *S. P., Copeman v. Hart*, 14 C. B., N. S. 91; *Dewhurst v. Kershaw*, 1 H. & C. 726; 32 L. J., Ex. 146; 7 L. T. 720; 11 W. R. 315.

**Where executing Creditors are in a worse Position than the Others.]**—The position, that a deed is not good unless it puts all the creditors on an equal footing, does not extend to cases in which the executing creditors voluntarily put themselves in a worse position than those whom they seek to bind. *Hidson v. Barclay*, 3 H. & C. 361; 34 L. J., Ex. 217; 12 L. T. 353; 13 W. R. 583—Ex. Ch.

Creditors who execute or accede to a valid composition deed may, by a separate deed,

enter into a collateral engagement with the debtor, provided they do not obtain any benefit not conferred on dissenting creditors. *Id.*

**Deeds held Good.]**—A deed of composition was made between a debtor and the several persons who subscribed the schedule thereto, "on behalf of themselves and all and every other the creditors" of the debtor, and shewed a clear intention that all creditors should be equally benefited:—Held, that all the creditors were parties; that there was no inequality, and that the deed was good. *McLaren v. Baxter*, 2 L. R., C. P. 559; 36 L. J., C. P. 247; 16 L. T. 521; 15 W. R. 1017.

A composition deed, containing a covenant with all the creditors for paying the composition, and a release by the parties of the first part, was expressed to be made between "the several parties whose names were subscribed and seals affixed, creditors of the debtor on behalf of themselves and all and every other the creditors of the debtor of the one part, and the debtor of the second part":—Held, that all the creditors were parties to the deed, and could sue on the covenant, and that there was, therefore, no inequality. *Isaacs v. Green*, 2 L. R., Ex. 352; 36 L. J., Ex. 253; 16 L. T. 633.

A deed between the debtor of the first part, D., a surety, of the second part, and the several persons, creditors of the debtor, whose names were thereunto subscribed, and all other the creditors of the debtor, of the third part, after reciting that the debtor was indebted "to the said several creditors in the several sums of money set opposite to their respective names in the schedule" thereunder written; and that it had been agreed by the requisite majority in number and value of the said several creditors to accept the composition and security therein expressed in full satisfaction of their respective debts, witnessed that, in consideration of the joint and several promissory notes of the debtor and D. for the payment of such composition "on the respective sums of money aforesaid," they, the creditors, parties thereto of the third part, released to the debtor all actions, suits, debts, claims and demands, which they had against him, and accepted the stipulated composition in full satisfaction of the debts and sums due to them specified in the schedule; and the debtor and D. covenanted with each and every of the creditors, parties thereto, of the third part, to pay the composition "upon their respective debts as aforesaid," and to make and deliver to them the promissory notes:—Held, that there was no inequality in the deed, as on the true construction of it all the creditors, whether their debts were scheduled or not, were equally entitled to the benefit of the covenants therein contained. *Tutley v. Wanless*, 2 L. R., Ex. 275; 36 L. J., Ex. 153; 16 L. T. 601; 15 W. R. 356—Ex. Ch.

By a deed expressed to be made between a debtor of the one part, and all his creditors of the other part, he covenanted with all his creditors to pay them a compensation by instalments, and also that, "as soon as the deed should be delivered to him, signed and sealed by the said several creditors, he would give to each of them, the said several creditors, promissory notes or acceptances for the payment of the instalments, signed or indorsed by two sureties":—Held, that the latter covenant, if operative at all,

would have the effect of giving the promissory notes to all the creditors without distinction, and that therefore it created no inequality. *Peel v. Webster*, 36 L. J., Ex. 188; 16 L. T. 598.

A deed purported to be made by the debtor of the first part, H., a creditor, of the second part, J., trustee, of the third part, the executing creditors of the fourth part, and the non-executing creditors of the fifth part. After reciting that the creditors had agreed to accept 10s. in the pound by way of composition, the deed contained a joint and several covenant by the debtor, and H. with J., that immediately upon registration, they would pay him such a sum as would be sufficient to pay to all the creditors an instalment of 7s. 6d. in the pound upon their debts, with a proviso, that the separate estate of H. should be primarily liable under the covenant; secondly, a similar covenant to pay to J. a sum sufficient to pay the remaining instalment of 2s. 6d. in the pound within twelve months to all the creditors (other than H.); thirdly, a covenant by the debtor with H. to pay to him, on registration of the deed, and within twelve calendar months, the instalments of 7s. 6d. and 2s. 6d. in the pound in respect of his debt; fourthly, a declaration that J. should stand possessed of the sums so paid in respect of the instalments, in trust, after the registration of the deed, upon demand in writing by H. and the other creditors, to pay to them the instalments; and, fifthly, a general release by H. and the parties of the fourth part of the debts due to them from the debtor.—Held, that the deed was valid, there being no such inequality in favour of H. as to avoid the same; and that the deed was pleadable as a release in bar to an action by a non-assenting creditor. *Wells v. Hacon*, 5 B. & S. 196; 33 L. J., Q. B. 204; 10 Jur., N. S. 862; 10 L. T. 411; 12 W. R. 790.

A composition deed between the debtor of the first part, and all his creditors of the second part, after reciting that it was intended to relate to the debtor's liabilities and his release therefrom, and to operate equally for the benefit of, and to bind all the creditors assenting or dissenting, the debtor covenanted with the parties of the second part to pay them a composition on the amounts of their debts. The deed also contained a release to the debtor from all debts:—Held, that dissenting creditors, although not named therein, were made parties to the deed by description, and that the deed was valid. *Reeves v. Watts*, 1 L. R., Q. B. 412; 35 L. J., Q. B. 171; 12 Jur., N. S. 565; 14 L. T. 478; 14 W. R. 672.

A composition deed made between a debtor of the one part and all his creditors of the other part, and containing a covenant whereby the debtor covenanted to pay all his creditors a composition upon their debts and in consideration of such covenant they release their debts, is good, inasmuch as it makes all creditors parties, and any creditor may sue upon the covenant, though he may not have executed the deed. *Gresty v. Gibson*, 1 L. R., Ex. 112; 35 L. J., Ex. 74; 12 Jur., N. S. 319; 13 L. T. 676; 14 W. R. 284; 4 H. & C. 28.

By a deed between the debtors of the first part, trustees of the second part, and "the several persons, joint and separate creditors of the debtors, whose names and seals are hereunto set and affixed," of the third part, after reciting that the parties of the first part stood indebted

on their joint account to the several persons and in the several sums set opposite their names in the schedules thereunder, and were also indebted to certain other persons, and that, being unable to pay their joint and separate creditors the whole of their demands, they had agreed to convey all their joint and separate estate to the parties of the second part in trust for themselves and the rest of the creditors rateably and in such manner as the joint and separate estate would be distributable under a fiat of bankruptcy, and that the parties of the second and third parts had agreed to release the debtors; the parties of the first part, "by and with the consent of the creditors parties hereto," conveyed all their estate to the parties of the second part, upon trust to convert the same, and "to pay and apply so much of the trust moneys as should arise from the conversion of the partnership property of the debtors in and towards payment and discharge of the several debts due and owing to the several joint creditors of the debtors, or so much of the same debts as the same trust moneys will extend to pay rateably and in proportion, but so as the same shall be paid and applied in the same way as would be done in bankruptcy;" and to pay and apply so much of the trust moneys as arose from the conversion of the separate property of the debtors in payment of their separate debts. The deed contained also a covenant by the trustees to make a faithful distribution of the moneys "unto and amongst the several joint and separate creditors of the debtors, according to their rights and interests and the true intent and meaning of these presents;" a release of the debtors by the parties of the second and third parts, and a declaration that the trustees should take all possible steps for making the deed "binding upon all the creditors of the joint and separate estates of the debtors, whether parties to the deed or not." It was admitted that the deed, which was duly registered, was executed by all the joint creditors, but no sums or amounts were set opposite their names, and it was not suggested that there was any creditor who had not taken his benefit under it. In an action by the trustees under the deed, for a debt accruing due from the defendant to the debtors before the date of the deed:—Held, that the evident intention on the face of the deed being that it should be a good deed under the Bankruptcy Act, 1861, and one by which all the creditors would be entitled to benefit, the words appended to the description of the parties of the third part, apparently limiting its operation to the creditors "whose names and seals are hereunder set and affixed," might be rejected as falsa demonstratio, and that they did not control or overrule the general intention of the deed that all the creditors, and not a portion of them only, were to be benefited. But that at all events the deed, as against the defendant, who was not a party to it, was good to pass a chose in action, and the trustees might sue in their own names. *Durant v. Robinson*. 34 L. T. 617.

A deed between A. and his creditors, reciting that A. was unable to pay 20s. in the pound, and had applied to his creditors to receive and take a composition of 2s. 6d. in the pound, proceeded, "which we, the several creditors signing these presents, have agreed to, and being a majority in number, representing three-fourths in value of the creditors whose debts amount to 10l. and

upwards, have agreed to accept, and in consideration, and on payment thereof, or whenever thereafter called upon for the purpose, severally undertake and agree to execute to A. a good and sufficient release in law of our claims upon him," is a valid deed, as affording the same remedy to those of the creditors who had not, as to those who had, signed the same. *Clapham v. Atkinson*, 4 B. & S. 722; 33 L. J., Q. B. 81; 10 Jur., N. S. 357; 9 L. T. 679; 12 W. R. 342. Affirmed, 4 B. & S. 722, 730; 34 L. J., Q. B. 49; 11 Jur., N. S. 217; 10 L. T. 908; 12 W. R. 1062—Ex. Ch.

**Preference given to Creditor guaranteeing Composition.]**—A debtor assigned his property for realization and distribution to a creditor, who covenanted, as surety, with the general body of creditors, to pay to them by instalments 5s. in the pound on their debts, which sum he was also himself to receive, provided that he should not be liable under such covenant for a greater amount in the whole than 3,000*l*. The deed provided that the surety should apply any surplus, which might remain after the payment of the composition, towards the payment of the remaining 15s. in the pound on his own debt, it being stipulated that he "should have the advantage of this security for the remainder of his debt, in consideration of his undertaking the liability of suretyship."—Held, that this stipulation created no such inequality as to avoid the deed. *Bisnell v. Jones*, 4 L. R., Q. B. 48; 38 L. J., Q. B. 2; 19 L. T. 262; 17 W. R. 49; 9 B. & S. 884.

The deed also provided, that if the surety should arrange with any creditor to make an immediate payment of the composition payable to him, with a deduction therefrom by way of discount in consideration of such immediate payment, the surety should be at liberty to repay himself out of the trust fund the full amount of the composition payable to such creditor, without deducting the sum allowed to the surety for discount:—Held, that this created no such inequality as to avoid the deed. *Id*.

By a deed between N. of the first part, D., a creditor of N., of the second part, and all N.'s creditors of the third part, N. & D. covenanted with all the other creditors for payment to them of a composition of 4s. in the pound on their debts; and all the creditors released N. from the original debts, subject to a proviso making the deed void on default in payment of the composition, and N. assigned over his property to D. absolutely:—Held, that this deed was not on its face void as giving an undue advantage to D. *Nicholson, Ex parte*, 5 L. R., Ch. 332; 22 L. T. 286; 18 W. R. 411.

**— Promissory Notes given to Executing Creditors—Covenant to give them also to Others.]**

—By a composition deed entered into between a debtor of the first part, the creditors who executed the deed of the second part, S. of the third part, and a trustee, on behalf of creditors not parties to the deed, of the fourth part, the debtor covenanted with the creditors who executed the deed to deliver to them certain promissory notes as security for the payment of the amount of the composition settled by the deed. He also covenanted with the trustee that he would deliver like notes to the creditors who were not parties to the deed:—Held, that the

advantage which the former class of creditors acquired over the latter class, by reason of their being able to sue in their own names in respect of a breach of the covenant, while the latter could only sue in respect of such a breach of covenant by using the name of the trustee, was not such an advantage as would make the deed bad upon the ground of inequality. *Soury v. Law*, 3 L. R., Q. B. 281; 37 L. J., Q. B. 96; 16 W. R. 145, 725.

A deed of composition, containing a release in consideration of payment by promissory notes, is not unequal, because the non-assenting creditors have not the notes tendered to them, and have no direct notice. *Blumberg v. Rose*, 1 L. R., Ex. 232; 35 L. J., Ex. 144; 12 Jur., N. S. 378; 14 L. T. 365; 14 W. R. 657; 4 H. & C. 311.

**— Non-executing Creditors to demand Composition in Writing.]**—A deed of arrangement between a debtor and his creditors, containing a clause that, in case any dividend should be declared before all the creditors had executed or assented to the deed, the inspectors should retain a sufficient sum for the purpose of paying the dividends of non-assenting creditors and creditors whose dividends had not been ascertained, the amount of which should be paid to them upon their request in writing, imposes no unreasonable condition on those creditors. *Herrnulewicz v. Jay*, 6 B. & S. 697; 34 L. J., Q. B. 201; 11 Jur., N. S. 581; 12 L. T. 494; 13 W. R. 807; *S. P.*, *Strick v. De Mattos*, 3 H. & C. 22; 33 L. J., Ex. 276; 10 Jur., N. S. 753; 10 L. T. 590; 12 W. R. 963. Affirmed, nom. *Woods v. De Mattos*, 1 L. R., Ex. 91; 35 L. J., Ex. 664; 12 Jur., N. S. 78; 14 W. R. 226; 3 H. & C. 987—Ex. Ch.

To an action against the acceptor of a bill of exchange he pleaded an inspectorship deed, which provided, that in case any dividend should be declared before all the creditors had executed or assented to the deed, the inspectors should retain a sufficient sum for the purpose of paying a dividend to any creditor who should not have executed the deed; upon his request in writing:—Held, that this provision did not make the deed bad. *Bailey v. Bowen*, 3 L. R., Q. B. 133; 37 L. J., Q. B. 61; 17 L. T. 470; 16 W. R. 396.

The deed also provided, that if any of the creditors should at any time thereafter while the deed was in force prosecute any action against the debtor in respect of their respective debts, the deed should have the same force and effect as an order of discharge granted under an adjudication in bankruptcy, and should be pleadable in bar as a defence, and that a certificate given by the inspectors of the conclusion of the winding up of the estate should be conclusive evidence of the facts therein certified, and that the debtor should be absolutely released:—Held, that this provision was unobjectionable. *Id*.

The deed also provided, that the inspectors might authorize or require the debtor to enter into or undertake new contracts in the way of his trade or business:—Held, that the reasonableness of such a provision was a matter for the consideration of the creditors themselves, and that there was nothing in it upon which the court could hold that the deed was not a good deed. *Id*.

**Deeds held Bad.]**—A deed of composition which purports to be made between the debtor

and such of his creditors as shall execute the same, and which either expressly or impliedly excludes from its benefits and provisions non-executing creditors, is not a valid deed. *Ilder-ton v. Castrique*, 14 C. B., N. S. 99; 32 L. J., C. P. 206; 9 Jur., N. S. 993; 8 L. T. 537; 11 W. R. 753.

The 192nd section of the 24 & 25 Vict. c. 134, applies only to deeds which contain provisions for the benefit of all the debtor's creditors, and this requisite is not fulfilled by a deed, the trusts of which are for the benefit of such of the debtor's creditors as shall execute the deed within a limited time. *Morgan, Ex parte*, 1 De G., J. & S. 288; 32 L. J., Bk. 15; 9 Jur., N. S. 559; 7 L. T. 729; 11 W. R. 316.

To an action upon a bill of exchange by in-dorsee against acceptor, he pleaded a composition deed, which contained a covenant to pay all the creditors the several sums of money placed opposite to their names in the schedule of the deed. The plaintiff's debt was not scheduled:—Held, that there being no provision made for debts not scheduled, the deed was no answer to the action. *Bucelot v. Mills*, 1 L. R., Q. B. 104; 35 L. J., Q. B. 3; 13 L. T. 321; 14 W. R. 98.

A composition deed was made between the scheduled creditors on behalf of themselves and all the other creditors of the one part, and the debtor of the other part. The debtor agreed to pay a composition to all the creditors at a future day, and the creditors agreed to accept the composition, and released the debtor:—Held, that only the scheduled creditors could sue for the composition, and therefore the deed was unequal, and not binding upon non-assenting creditors. *Gurrie v. Kopera*, 3 H. & C. 694; 34 L. J., Ex. 128; 11 Jur., N. S. 491; 12 L. T. 432; 13 W. R. 843.

A deed of composition being made between the persons whose names were in the schedule, creditors of H., of the first part, H. of the second part, and sureties of H. of the third part, and containing covenants on the part of the parties of the first part, and all other, if any, the creditors of H., that the deed should, in consideration of a covenant by H. to pay 10s. in the pound, operate as a release of his debts to them, and a covenant by H. to pay the composition at a future day:—Held, first, that the non-executing and non-assenting creditors could not sue on the covenant to pay the composition. *Chesterfield, Midland, and Silkstone Company v. Hawkins*, 3 H. & C. 677; 34 L. J., Ex. 121; 11 Jur., N. S. 468; 12 L. T. 427; 13 W. R. 840.

Held, secondly, that the non-executing and non-assenting creditors were not in the same position, and the deed was void as against a non-assenting creditor. *Id.*

— **Composition Paid to Executing Creditors on Execution.**—A deed, by which, in consideration of a composition paid to the creditors executing the deed, those creditors released the debtor, and the debtor covenanted to pay a like composition to parties not executing, is bad, on the ground that the creditors who did not execute are placed in a worse position than those who did. *Cockburn, Ex parte*, 33 L. J., Bk. 17; 10 Jur., N. S. 573; 10 L. T. 252; 12 W. R. 673.

A deed, in which the creditors are entitled to the composition "on signing the deed," places the non-signing creditors in a disadvantageous position, and is void on that account. *Martin*

*v. Gribble*, 3 H. & C. 631; 34 L. J., Ex. 108; 11 Jur., N. S. 490; 12 L. T. 395; 13 W. R. 690; *S. P., Kilby v. Wright*, 18 C. B., N. S. 272.

— **Covenant to pay "present Creditors."**—A composition deed should be so framed as to give to the assenting and non-assenting creditors equal rights under it. *Broadhurst v. Benham*, 3 H. & C. 472; 34 L. J., Ex. 61; 11 Jur., N. S. 20; 11 L. T. 537; 13 W. R. 183—Ex. Ch.

A composition deed recited that the debtor was indebted to the several creditors, parties to the deed; and the debtor covenanted with "the several persons parties thereto of the other part respectively," that he would pay "unto all and every the present creditors of him," the debtor, 5s. in the pound on the several amounts of their debts; and in consideration of the premises, and until default made, "each of them doth hereby, for himself and herself, so far as relates to his and her own acts, covenant with (the debtor), that they will not sue:"—Held, that this covenant being with the assenting creditors only, the non-assenting creditors were not in so good a position as those assenting, and therefore, that the deed was bad. *Id.*

— **Covenant to pay Parties to Deed.**—Declaration on a bill of exchange against the acceptor. Plea, that by deed between the acceptor of the first part, two creditors and trustees for themselves and other creditors of the second part, and the other undersigned creditors of the acceptor of the third part, he assigned all his estate to trustees, to pay a composition of 2s. 6d. in the pound upon the amount of the debts due to the several parties to the deed of the third part:—Held, that the deed confined its benefits to the parties, and not to the creditors generally, and was therefore bad. *Davis v. Raphael*, 11 Jur., N. S. 140; 11 L. T. 539; 13 W. R. 185—Ex. Ch.

**Creditors under £10 to be paid when Trustee thinks Fit.**—A composition deed, by virtue of which the statutory majority of creditors agrees to accept a composition, payable by instalments at the end of two, four, and six months respectively, containing a proviso empowering the trustees to pay those creditors whose compositions do not exceed 10l., in one sum, at such time as they should think fit, is unequal and unreasonable. *Thompson v. Knight*, 2 L. R., Ex. 42; 36 L. J., Ex. 30; 15 L. T. 285; 15 W. R. 283.

**Construction of Deed.**—A composition, "between all and every, the creditors and creditor, hereinafter called the creditors" of E. of the one part, and E. of the other part, after reciting his inability to pay his debts in full, and the agreement of the creditors to accept a composition of 12s. in the pound, of which 10s. in the pound were to be secured by promissory notes, and an instalment of 2s. in the pound in cash, to be paid "at or immediately before the execution of these presents," witnessed, that in consideration of the premises and of the delivery to the creditors of the promissory notes, "and of the payment by E. to the creditors on their execution thereof, of 2s. in the pound, which delivery and payment the creditors hereby acknowledge," they, the creditors, released unto E. all actions, suits, debts, &c.:—Held, by Cockburn, C. J., and Crompton J., that the proper construction of the deed was,

that the promissory notes and the 2s. in the pound were secured to these only of the creditors who executed the deed; and that, therefore, the deed was not a valid one; but, by *Blackburn, J.*, and *Mellor, J.*, that the effect of the deed was to confer the like advantages upon executing and non-executing creditors, and that it was, therefore valid, and binding upon the latter. *Dingwall v. Edwards*, 4 B. & S. 738; 33 L. J., Q. B. 161; 10 Jur., N. S. 386; 10 L. T. 132; 12 W. R. 597.

#### **h. Reasonable and Unreasonable Provisions.**

**In Case of Non-execution—Non-execution is not a Refusal.**—Where there was a proviso, "that if all and every the creditors should refuse to execute or otherwise consent to the deed within six months from the date thereof, it should be void:" and some of the creditors did not execute the deed, but there was no evidence of their refusing to do so:—Held, that such non-execution was not a refusal within the meaning of the proviso, and did not make the deed void. *Holmes v. Love*, 5 D. & R. 56; 3 B. & C. 242; R. & M. 138.

**—Concurrence a Condition Precedent.**—An agreement, whereby a debtor undertook to convey his property to trustees for the benefit of his creditors, contained a proviso that the agreement was to be void, unless the creditors, whose names and descriptions were stated on the other side of the agreement, should concur in the arrangement:—Held, that this was not a condition precedent, the performance of which the debtor was bound to aver on setting up the agreement as an answer to an action by one of his creditors. *Matthews v. Taylor*, 2 M. & G. 667; 3 Scott, N. R. 52; 5 Jur. 321.

**—What is Equivalent to Signing.**—Where a composition deed is entered into with a clause that, if certain creditors do not sign, it shall be null and void; if such creditors accept of the composition, or the security for it, though they do not actually sign the deed, it is valid and good. *Jolly v. Wallis*, 3 Esp. 228.

**—Onus on Creditor to prove Refusal.**—A debtor agreed to assign all his property in trust for his creditors, upon the usual covenants, and to be void if not signed before a given day by all the creditors; and the trustees sold the property, and paid sixteen shillings in the pound, and a creditor had not executed within the given time mentioned, nor would the debtor execute:—Held, that an action could not be maintained by a creditor who had executed, until it was ascertained that the other creditor would not execute. *Tutlock v. Smith*, 6 Bing. 339; 3 M. & P. 676.

**—Delivery without Condition—Escrow.**—Previously to the execution of a composition deed, it was agreed in the presence of a surety for the payment of the composition that it should be void unless all the creditors executed it: a creditor at the same interview, but subsequently to such agreement, executed the deed in the ordinary way, and without saying anything at the time of the execution. The deed was then delivered to one of the creditors, who was to get it executed by the rest:—Held, that the condition previously

expressed, although not introduced into the act of delivery, was sufficient to make this a delivery of the deed as an escrow, and that all the creditors not having executed it the surety was not bound thereby. *Johnson v. Baker*, 4 B. & A. 440.

#### **—Creditors to be paid in Full need not Sign.]**

—A composition deed by which a tradesman assigned all his effects for the benefit of his creditors, recited that he was indebted to his landlord in a specific sum for rent; to the crown in a certain sum for excise duties, and to A. & B. by name, as judgment creditors, in 400*l.*; and then recited that one of the trustees was to pay these specific demands, and all debts under 10*l.* in full; then followed a proviso for avoiding the deed, "if any creditor or creditors whose respective debts should amount to 100*l.* or upwards, or any two creditors whose debts should amount to 150*l.* or upwards, should not duly execute the deed within three calendar months from the date, or in case any commission of bankruptcy should in the meantime be awarded." A. and B., whose judgment debt was to be paid in full, having refused to execute the deed upon request, one of the general creditors, who had executed, brought an action to recover the amount of his demand against the debtor:—Held, that the deed was a bar to the action, and that the execution by A. & B. was not necessary to render it valid. *Wells v. Greenhill*, 1 D. & R. 493; 5 B. & A. 869.

**—Non-execution by Trustees.**—A debtor assigned all his effects to four of his creditors, in trust for themselves and the rest of the creditors; in the deed there was a proviso that the trustees, and the rest of the creditors, should execute within a certain time; two only of the trustees executed. The non-execution by the other two trustees within the time will not make the deed void. *Small v. Marwood*, 4 M. & R. 181; 9 B. & C. 300.

**For Retention of Securities.**—A creditor, holding a security for his debt, may stipulate to have the benefit of it, in addition to the amount of the composition offered by a debtor to his creditors; but he must either hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them. *Cullingworth v. Lloyd*, 2 Beav. 385.

The creditors of an insolvent agreed, by an instrument (not under seal), that they would accept in full satisfaction of their debts, 12*s.* in the pound, payable by instalments, and would release him from all demands; one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person: the money due on this bill having afterwards been paid by the acceptor:—Held, that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt. *Thomas v. Courtney*, 1 B. & A. 1. See *Cooper v. Green*, 7 M. & W. 638; *Nichols v. Norris*, 3 B. & Ad. 41, n.

**Saving Rights against Surety.**—Payee against maker of a promissory note. Plea, that the note was made by the defendant and G., and that the plaintiff afterwards, by deed-poll, released G.,

whereby the defendant was released. Replication, non est factum. The deed, by which the creditors of G. agreed to accept a composition, contained a clause that it should not extend to invalidate notes upon which other parties might be jointly liable with G., or prejudice the claim of any creditor against a surety of G. :—Held, first, that the replication put in issue the construction of the deed as alleged in the plea; secondly, that the deed did not release the defendant. *North v. Wakefield*, 13 Q. B. 536; 18 L. J., Q. B. 214; 13 Jur. 731.

An action by a non-assenting creditor is barred by a plea setting out the deed of composition, in which creditors have "agreed to accept 2s. 6d. in the pound in discharge, so far as they can, without prejudice to the rights of third parties and sureties;" and alleging a tender to the plaintiff of the amount due. *Garrod v. Simpson*, 34 L. J., Ex. 70; 11 Jur., N. S. 227; 11 L. T. 777; 13 W. R. 460.

To an action by a drawer of a bill against the acceptor, he pleaded a deed, whereby his creditors agreed to accept a composition in discharge of their claims, and did freely, clearly and absolutely exonerate and discharge, and for ever quit claim unto, the debtor all and singular their respective debts and claims: proviso, that the acceptance of the composition should not in anywise prejudice the right of any of the creditors from claiming or realizing any security held by them, or from suing any person or persons other than the debtor liable to payment thereof:—Held, a good plea. *Keyes v. Elkins*, 5 B. & S. 240; 34 L. J., Q. B. 25; 11 Jur., N. S. 111; 11 L. T. 474; 13 W. R. 190.

**Court will not assume Existence of Sureties.**—The court will not assume the existence of sureties, the effect of which might be to invalidate a composition deed in which there is no reservation of rights against sureties. *Johnson v. Barrett or Barratt*, 1 L. R., Ex. 65; 35 L. J., Ex. 15; 11 Jur., N. S. 1023; 13 L. T. 597; 14 W. R. 194; 4 H. & C. 16.

**Bill of Exchange—Drawer consenting to Indorsee executing the Deed.**—Action by the indorsee against the acceptor of a bill of exchange. Plea: A composition deed registered under the Bankruptcy Act, 1861; the deed contained no reservation of rights against sureties. Replication: That the bill was accepted for value and indorsed to the plaintiff for value, and that if he had assented to the deed he would have discharged the drawers. Rejoinder: That before the registration of the deed the drawers consented to the plaintiff executing and becoming bound by the deed. The issue upon the rejoinder having been found for the defendant:—Held, that as by reason of such consent the plaintiff might have come in for the composition and have held the drawers liable for the balance, he was in the same position as if the right to have recourse to the drawers had been reserved to him in the deed, and therefore he was bound by it. *Pool v. Willats*, 4 L. R., Q. B. 630; 38 L. J., Q. B. 255; 20 L. T. 1006; 17 W. R. 1009; 9 B. & S. 957.

**Effect of Proviso.**—In a mortgage deed by the principal debtor a third party entered into a covenant to pay interest only on the money thereby secured. Subsequently the principal executed a deed under the Bankruptcy Act,

1861, s. 192, which amounted to a cessio bonorum, and contained a general release from his creditors, followed by a proviso reserving any rights they might have against any other persons in respect of any debt due by the debtor, either alone or jointly with any other person:—Held, that the surety was not discharged from payment of interest which had accrued due since the date of the composition deed. *Green v. Wynn*, 4 L. R., Ch. 204; 38 L. J., Ch. 220; 20 L. T. 131; 17 W. R. 385.

A deed of arrangement under the Bankruptcy Acts, 24 & 25 Vict. c. 134, and 32 & 33 Vict. c. 71, contained a release of the debtor, subject to a proviso reserving the rights of creditors holding securities:—Held, that this operated as a covenant not to sue, and not as an extinguishment of the debt so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all the debtor's property and effects to the trustees, and also provisions for enabling them to carry on the trade for the benefit of the estate. *Bateson v. Gosling*, 7 L. R., C. P. 9; 41 L. J., C. P. 53; 25 L. T. 560; 20 W. R. 98.

**Surety called upon to Pay is bound by the Deed.**—In an action by the drawer against the acceptor of a bill, he pleaded a composition deed executed by him before the bill was due. The deed contained a clause reserving the rights of creditors against sureties. In the declaration the bill was stated to be payable to the plaintiff, without shewing that it was a negotiable instrument. The replication alleged that the bill was payable not to the plaintiff only, but to the plaintiff or order; that he had indorsed the bill; that the holders of the bill at the time of the making and registration of the deed presented the bill for payment, and it was dishonoured by the defendant. The plaintiff never assented to the deed, and was compelled to pay the amount of the bill to the holders, upon which he became the holder. The replication concluded, that "the plaintiff, except as in the replication mentioned, was not a creditor of the defendant in respect of his claim on the bill:—Held, that there was no departure from the declaration, but that the replication was bad because the plaintiff was a creditor and was barred by the deed. *Hooper v. Marshall*, 21 L. T. 639.

To an action on a bond the defendant pleaded that F. made the bond, and the defendant made it as his surety; and that F., being unable to meet his debts, entered into a deed with his creditors, of whom the plaintiff was one, by which he assigned all his property for the benefit of the plaintiff and his other creditors to trustees; and that the plaintiff covenanted with F. that the plaintiff would not at any time thereafter commence or prosecute any action or other proceeding against F., for or by reason of any debt then due and owing by him to the plaintiff; and thereby the plaintiff gave time to F., in respect of the debt and bond in respect whereof the defendant was such surety. The plaintiff replied by setting out the deed. The deed contained a proviso that nothing therein contained should prejudice or affect any claim, demand or remedy which the several parties and creditors of F. then had or should have by virtue of any mortgage, lien, charge or other incumbrance against any person who might be liable for the payment of any of the debts of F. in the character of a surety or



otherwise; and in consideration of the assignment the parties thereto and creditors of F. covenanted with F. that they would not at any time commence or prosecute any action or other proceeding against him for any debt then due from him to them; and that in case of any such action or suit being commenced or prosecuted by them contrary to the terms of the deed, the deed might be pleaded as a release in bar:—Held, that the replication was good, inasmuch as it admitted the effect of the deed as alleged in the plea, but avoided it by the terms of the proviso. *Stevens v. Stevens*, 5 Ex. 306.

— **Right of Surety against Principal.**—A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. *Close v. Close*, 4 De G., Mac. & G. 176.

The plaintiff, being a shareholder in a banking co-partnership, became security for money advanced by the bank to the defendant, who afterwards by a deed, to which the plaintiff and the bank were parties, assigned his property to trustees for the benefit of his creditors. By this deed the rights of the creditors against sureties were reserved:—Held, that the plaintiff, who had been compelled to pay the debt to the bank, was entitled to recover the amount from the defendant. *Kearseley v. Cole*, 16 M. & W. 128; 16 L. J., Ex. 115.

**For Carrying on Debtor's Trade.**—An assignment to trustees, for the benefit of all creditors who may execute the deed, is not valid as against creditors who do not execute, if it authorizes the trustees to carry on the debtor's trade, and contains such terms, that the creditors subscribing would become partners in the business. *Owen v. Body*, 5 A. & E. 28; 2 H. & W. 31; 6 N. & M. 448.

The trade in question being that of an hotel keeper, it was no objection to such an assignment, that the debtor, when it was executed, had not a licence for retailing excisable liquors, there being no evidence that the trustees contemplated selling, or in fact sold, any liquors without such licence, and a licence having been procured two days after the execution of the deed. *Id.*

**For Accounting by Trustees.**—A covenant not to sue if the trustees fairly accounted for the effects, does not operate as a release of the creditor's debts if the trustees refuse to account. *Kesterton v. Sabery*, 2 Chit. 541. And see *Small v. Marwood*, 4 M. & R. 181; 9 B. & C. 300.

**Against Molestation—Action.**—A., a trader, entered into an arrangement by deed with his creditors, by which it was agreed that he should have a letter of licence for five years, during which period he should carry on the trade under the inspection of persons therein named; and it was provided, that if any creditor should, during the continuance of the licence, molest or interfere with A., A. should thereupon be relieved, exonerated, acquitted and discharged of and from all debts and demands of the creditor by whom the letter of licence should be so contravened, and that the deed should or might be

pleaded in bar to such respective debts or demands accordingly:—Held, that the bringing of an action by a creditor, party to the deed within the five years, was a molestation or an interference with A., within the proviso, and that the deed operated as a defeasance, and was pleadable in bar as such. *Gibbons v. Vouillon*, 8 C. B. 483; 7 D. & L. 266; 19 L. J., C. P. 74; 14 Jur. 66.

— **Not a Release.**—A debtor conveyed his life interest in property in trust for creditors, parties to the deed; and the creditors, in consideration thereof, granted to the debtor licence to reside and attend to his affairs in any place he might think proper, without suit or molestation in his person or his goods, chattels, and effects, by any such creditors; and that in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such licence, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar:—Held, that this amounted only to a licence by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate. *O'Brien v. Osborne*, 10 Hare, 92; 16 Jur. 960.

**Proviso for Avoidance of Deed — Debtor's Solicitor not allowed to insist on Proviso.**—A debtor entered into a compromise with his creditors, among whom was his solicitor, who called the meeting of creditors, attended the same, and prepared the deed of composition. The creditors and the solicitor executed the deed. In the deed was contained a covenant by the debtor to assure his life forthwith, and keep it assured during three consecutive years for 1,500*l.*, a sum equal to which was covenanted by the debtor to be paid to the trustees for division among the creditors by monthly payments, or otherwise as the trustees might require. If the debtor should fail in any payment covenanted to be made, or in assuring or keeping assured his life according to his covenant, the deed should be void. There was a private agreement between the debtor and the solicitor that the latter should be paid his debt in full. The debtor did not assure his life till a year after the deed, when he paid 500*l.* the amount covenanted to be paid within that period, and assured his life for 1,000*l.*, all that was then due. The policy was deposited with one of the trustees. Two other instalments were subsequently paid to the trustees according to the terms of the deed. The solicitor subsequently brought an action against the debtor for his whole demand:—Held, that it was the duty of the solicitor to explain to the debtor, or to ascertain whether he understood, the legal and equitable obligations imposed by the deed; and that the solicitor could not be allowed, in a court of justice, to say, that he had believed that a policy for 1,500*l.* had been effected. *Watts v. Hyde*, 17 L. J., Ch. 409; 10 Jur. 127. *S. C.*, at law, 1 D. & L. 479; 12 M. & W. 254; 13 L. J., Ex. 41.

Held, also, that the solicitor could not insist on the proviso for making the deed void, and that the debtor had a clear equity to restrain the action. *Id.*

**Certain Charges to be Paid in Full.**—A provision in a deed of assignment of a debtor's estate to trustees, for the benefit of his creditors,

that the trustees shall stand possessed of the estate upon trust in the first place to defray the expense of preparing and registering the deed and procuring the assents of the creditors to it, is not unreasonable so as to prevent the deed from binding a non-assenting creditor. *Jacobson v. La Mert*, 2 L. R., Ex. 394; 36 L. J., Ex. 221; 16 L. T. 569.

A deed of inspectorship contained the following clause:—The proceeds of the estate shall be applied, first, in paying the costs incurred, or to be incurred, or relating to the suspension of payment of the debtor; secondly, in paying rent for which the debtor's estate could be distrained, wages, or salaries; thirdly, in paying rateably the debts of creditors, with interest:—Held, not unreasonable. *Strick v. De Mattos*, 3 H. & C. 22; 33 L. J., Ex. 276; 10 Jur., N. S. 753; 10 L. T. 590; 12 W. R. 963. Affirmed, nom. *Woods v. De Mattos*, 1 L. R., Ex. 91; 35 L. J., Ex. 664; 12 Jur., N. S. 78; 14 W. R. 226; 3 H. & C. 987—Ex. Ch.

A deed of arrangement provided for the payment in full of the costs of a previous deed of inspectorship, and all costs, charges and expenses incurred by the inspectors for the benefit of the estate, including the costs of an execution creditor, in consideration of the execution being withdrawn:—Held, that the deed was valid on the grounds, first, that the inspectors had an equitable lien for those costs on the bankrupt's estate; and secondly, that payment of a doubtful claim is not ultra vires, or alien to the payment of the debts of the debtor and his release therefrom, and the winding up of his estate. *Fitzpatrick v. Bourne*, 3 L. R., Q. B. 233; 37 L. J., Q. B. 265; 16 W. R. 766; 9 B. & S. 157. Affirmed, 3 L. R., Q. B. 446; 37 L. J., Q. B. 266; 18 L. T. 731; 16 W. R. 849; 9 B. & S. 157—Ex. Ch.

**Creditors to verify Debts.**—The following clause is not unreasonable:—Each creditor, before becoming entitled to any dividend, shall (if required by the inspectors) deliver to them a statement in writing, signed by him, of his debt, and verify it by solemn declaration. *Strick v. De Mattos*, *supra*.

A clause by which the trustee is empowered to require any creditor of the debtor to verify the nature and amount of his debt, with full particulars, by statutory declaration proved before the commissioners of bankruptcy, "or otherwise as the trustee may think fit," is reasonable, and a deed with such a clause is binding on a non-assenting creditor. *Coles v. Turner*, 1 L. R., C. P. 373; 35 L. J., C. P. 169; 12 Jur., N. S. 688; 14 W. R. 402—Ex. Ch. See *Thickmott v. Simmonds*, 14 W. R. 882.

**Trustees' Discretion as to Payment of Dividends.**—A discretion to determine the amount of dividends, and to pay them at such place and in such manner as the trustee may think fit, is reasonable. *Id.*

So there is nothing unreasonable in empowering the trustees to determine the amount of dividend to be from time to time paid to the creditors, and pay such dividend in such place and in such manner as they shall think fit. *Jacobson v. La Mert*, *supra*.

**Covenant not to Sue except to prevent Discharge of third Parties.**—Held that a clause:—And in consideration of the premises, it is

agreed and declared (but each of the creditors of the debtor who shall have executed, or acceded to, or be bound by, these presents, agreeing and declaring for himself and his partners, and so far as relates to his and their acts and defaults) that the creditors of the debtor who shall have executed, or otherwise acceded to, or been bound by, these presents, shall not, nor their partners nor assigns, at any time (except in respect of the covenants or agreements herein contained, or any one of them) commence or prosecute any action at law or in equity, or other proceedings, against the debtor, on account of any part of the debts now due from him to the creditors who shall have executed, or otherwise acceded to, or be bound by, these presents, and that this agreement may be pleaded to any action brought contrary to this agreement, as if the same were an actual release, was not unreasonable and void, since it amounted to a simple covenant not to sue, except so far as necessary to prevent the discharge of third parties. *Hudson v. Barclay*, 3 H. & C. 361; 34 L. J., Ex. 217; 12 L. T. 353; 13 W. R. 583—Ex. Ch.

**Not to Sue for a limited Time.**—A covenant in a composition deed not to sue the debtor for a limited time is not unreasonable, neither is a power to revoke a letter of licence. *Walker v. Nevill*, 3 H. & C. 403; 34 L. J., Ex. 73; 11 Jur., N. S. 246; 11 L. T. 774; 13 W. R. 523.

**Nothing unauthorised to bind Non-assenting Creditors.**—Held, that a clause:—That if there is anything in the deed not authorized by the Bankruptcy Act of 1861, it shall be obligatory upon those persons only who shall have executed or acceded to it, is not unreasonable. *Id.*

A deed containing several provisions which would be bad as against non-assenting creditors; and declaring that it was intended to operate as a trust deed under the act, and to bind all existing creditors, but if there should be anything not authorized by the provisions of the act, such unauthorized thing should be obligatory upon assenting creditors only, is valid, as it does not attempt to bind non-assenting creditors by any unreasonable provisions. *Somerville, Ex parte*, 1 L. R., Ch. 21; 35 L. J., Bk. 1; 11 Jur., N. S. 1029; 13 L. T. 350; 14 W. R. 113.

A deed contained the following provisions:—These presents are intended to be a deed of inspectorship within the provisions of the Bankruptcy Act, 1861; but in case they cannot so operate, they shall be binding on creditors executing or assenting to them. 32. The estate and effects of the debtor shall be administered on the principles of the bankrupt law, and if there is anything in the deed inconsistent with those principles, it shall be read as if such inconsistent matter were expunged:—Held, that neither of these provisions was unreasonable, and that the deed was binding on non-assenting creditors. *Strick v. De Mattos*, col. 1305.

**Minority to be Bound by Majority.**—The following provisions are not unreasonable:—1. That a resolution signed by the majority in number and value of the creditors, parties to the deed or bound by it, shall be binding on all persons parties to the deed or bound by it, and effectual for the allowance and passing of the accounts of the trustees, and for discharging them from the trusts of the deed, and all claims

and demands in respect of it. 2. That in case the trustees appointed by the deed, or any of them, or any trustee to be appointed as afterwards mentioned, should die, or should refuse or decline, or become incapable to act in the matters and things entrusted to them by the deed, a majority in number and value of the creditors present at a meeting convened by circular, sent by any creditor of the debtor by post or otherwise, might nominate or choose such other person or persons as they should think fit to be trustee or trustees, in the place of any such trustee or trustees. *Bond v. Weston*, 1 L. R., Q. B. 169; 35 L. J., Q. B. 7.

**Power to Trustees to employ and pay Debtor.]**

A clause, authorizing the trustees of the deed to employ the debtor, or any other person, in winding up his business, and in realizing the property comprised in the deed, and to pay a salary to him, does not invalidate the deed against a non-assenting creditor. *Russell v. Murphy*, 16 Ir. Ch. Rep. 54.

An assignment to a trustee for the benefit of creditors, which empowers the trustee to employ the debtor or other person in winding up his affairs, and collecting and getting in his estate and carrying on his trade, is not void as against creditors within 13 Eliz. c. 5, if it appears from the deed that the main object is to wind up the business for the benefit of the creditors, and not to carry on the trade with a view of future profits. *James v. Whitbread*, 11 C. B. 406; 20 L. J., C. P. 217; 15 Jur. 612; *S. P.*, *Coates v. Williams*, 7 Ex. 205; 21 L. J., Ex. 116.

**Power to Sell to Debtor—Dividends not to be disturbed by Creditor of whose Demand Trustees have no Notice.]**—A deed giving the trustees power to sell to the debtor himself, with or without security, and providing that no former dividend should be disturbed, or liability incurred in consequence of such dividend, by reason of any debt due to any creditor of whose claim the trustees had no notice before they began to pay such dividend, does not contain unreasonable provisions. *Greenberg v. Ward*, 1 L. R., C. P. 585; 35 L. J., C. P. 316; 12 Jur., N. S. 524; 14 L. T. 760; 14 W. R. 795.

**Provision affecting Assenting Creditors only.]**

—A trust deed contained the following clause:—No creditor who shall have executed or otherwise acceded to these presents shall negotiate any bills of exchange or other negotiable instruments on which the debtor is liable, without having first indorsed thereon a memorandum of the execution of or other accession to these presents by such creditor:—Held, that the clause was not unreasonable and void, since it bound only those creditors who executed or otherwise assented to the deed. *Hidson v. Barclay*, col. 1306.

**Debts not to be Paid for two Years.]**—A deed is not to be deemed unreasonable on the ground that it postpones the payment of the debts for two years, although it gives no benefit to the creditors, except the covenant of the debtor. *Richmond Hill Hotel Company, In re, King, Ex parte*, 4 L. R., Eq. 566. Affirmed, 3 L. R., Ch. 10; 38 L. J., Ch. 541; 17 L. T. 188; 16 W. R. 57.

**Trustees to be Indemnified against Costs.]**

A provision that the trustees shall, upon the request and at the cost of the creditors, take proceedings for enforcing performance of the covenants, upon being indemnified against the costs, is not unreasonable. *Hidson v. Barclay*, col. 1306.

**Discretion of Trustees.]**—So, a discretion to give time for the payment of debts, or to compound for or abandon such debts as the trustees might consider bad. *Coles v. Turner*, col. 1305.

**Valuation of Securities.]**—So also, a clause for ascertaining the value of securities held by creditors by a valuer to be appointed by either party or an umpire. *Id.*

**Power to pay Debts under £10 in full—Power nugatory.]**—A deed for the benefit of creditors contained a power to the trustees to pay in full the demands of all creditors under 10l.:—Held, that although such a power might be inconsistent with the bankrupt law, it did not invalidate the deed, but the power was simply nugatory. *Spyer, Ex parte*, 1 De G., J. & S. 318; 32 L. J., Bk. 62; 9 Jur., N. S. 949; 8 L. T. 743; 11 W. R. 1008.

**Deed in Substitution of another Avoided on Failure to pay Composition.]**—A debtor, by deed, registered on the 2nd of November, 1866, covenanted to pay his creditors 2s. 6d. in the pound within two months from the registration; and the creditors released their debts, subject to a proviso for avoiding the deed on default in payment of the composition. Default was made, and on the 3rd of January, 1867, a similar deed was registered, with the assent of the requisite majority of creditors, by which the debtor covenanted for payment of 2s. 6d. in the pound within seven days after the expiration of four months. A non-assenting judgment creditor applied for leave to issue execution, on the ground that the deed was unreasonable, for that the composition, having regard to the state of the debtor's affairs, was unreasonably small, and that the second deed provided for payment only of the same composition as the first deed, after a longer time, and without any additional security. The commissioner gave leave to issue execution:—Held, that the deed was not *ex facie* void; the circumstance that it had been immediately preceded by the other deed being not decisive against its validity, but only a circumstance rendering strict investigation proper; and that the order for leave to issue execution ought to be discharged, and the case remitted to the commissioner for further investigation. *Roots, Ex parte*, 2 L. R., Ch. 559; 36 L. J., Bk. 38; 15 W. R. 728.

A debtor, being in difficulties, assigned all his property to B. for the benefit of his creditors, and summoned a meeting of his creditors. No creditor was a party to the assignment, and at the meeting it was resolved to have a new deed, with two trustees nominated by the creditors, and B. and the debtor accordingly executed an assignment, which was duly registered:—Held, that the first deed was only intended to be operative, in case of the creditors adopting it, and that, as they refused to adopt it, it did not invalidate the second deed. *Somerville, Ex parte*, 35 L. J., Bk. 1; 11 Jur., N. S. 1029; 13 L. T. 350; 14 W. R. 113.

**Forfeiture of Debt on Creditor Suing.**—A deed of composition containing a covenant that if any creditor should sue the debtor, unless and until default should be made in meeting at maturity bills of exchange and promissory notes given as a security for the composition, the debtor's estate and effects should be thenceforth absolutely released and discharged from the debt, is unreasonable and void. *Dell v. King*, 2 H. & C. 84; 33 L. J., Ex. 47; 10 Jur., N. S. 427; 12 W. R. 280.

A deed contained a covenant by the debtor with trustees for the creditors to pay the full amount of his debts by instalments, with the usual clause of release; and also a covenant that if any creditor should "act or do contrary to the covenant, he, the debtor, shall be and is hereby for ever acquitted and released of and from all sums of money, bonds, accounts, and demands whatsoever due, owing, or belonging to, or which may or might be asked, claimed or demanded by such of the creditors so acting or doing contrary to the covenant:"—Held, in an action by a non-assenting creditor, that he was not barred, for that the covenant vitiated the deed as regarded such creditor. *Thompson v. Gunthorpe*, 11 L. T. 708.

**Action on a bill of exchange.** Plea, a deed of arrangement containing a covenant by the creditors, parties to the deed, not to sue or impede the debtor in respect of their several debts, and that if any of them should do so, that the debtor should be discharged from all demands whatsoever of the creditors by whom he should be sued:—Held, that if the clause of forfeiture was intended to bind non-executing creditors, the deed was bad, and if not binding on non-executing creditors, the deed was no defence to the action, the plaintiff not having executed the deed. *Lyne v. Wyatt*, 18 C. B., N. S. 593; 34 L. J., C. P. 179; 11 Jur., N. S. 446; 12 L. T. 383; 13 W. R. 688.

**Creditor to verify Debt within limited Time.**—A stipulation that any creditor who fails, within a certain time, to verify his debt is disentitled to claim his dividend, is unreasonable. *Giddings v. Penning*, 1 L. R., Ex. 325; 35 L. J., Ex. 191; 12 Jur., N. S. 634; 14 L. T. 667; 14 W. R. 940.

A clause in a composition that the trustees may require the creditors to verify the amount of their debts in such manner as they may deem expedient, and the creditors failing or refusing to do so, should lose all benefit under the deed, is unreasonable. *Leigh v. Pendlebury*, 15 C. B., N. S. 815; 33 L. J., C. P. 172; 10 Jur., N. S. 296; 10 L. T. 30; 12 W. R. 468.

So is a clause that all creditors whose debts do not exceed 10*l.* shall be paid in full. *Id.*

**Composition Payable after Trustee has certified Assent of sufficient Majority.**—A deed is void for containing a provision that the composition should be paid "as soon as a trustee shall, in writing under his hand, certify" that the requisite number of creditors has assented to the deed. *Boulnois v. Mann*, 1 L. R., Ex. 28; 35 L. J., Ex. 58; 11 Jur., N. S. 1006; 13 L. T. 531; 14 W. R. 181; 4 H. & C. 9.

**Composition to become due Ten Days after Notice of Assent of Creditor.**—A deed purporting to be made between the debtor and the

whole of his creditors, containing a covenant to pay each creditor 10*s.* in the pound with this proviso: "In case any creditors should not at the date of the deed assent to it, the composition should be considered to become due to them within ten days from their assent being received or left at the debtor's abode," is by reason of such proviso not binding on non-assenting creditors. *Armitage v. Baker*, 10 L. T. 526.

**Indemnity of Debtor against Liability on Bills of Exchange.**—A deed containing the following covenant: "And all creditors to whom bills or other negotiable instruments may have been given by the debtor for the debts due to such creditors, should indemnify the debtor and his estate against all claims or demands by other persons than themselves in respect of such bills or instruments, and all losses, damages, and costs, by reason or in respect thereof: and should, if any such bills had been indorsed or transferred to any other persons, take the same up, and retire the same before or when they should become due, so as to prevent any claim or demand in respect thereof being made upon the debtor or his estate," is an unreasonable clause, and not binding upon a non-assenting creditor. *Balden v. Pell*, 5 B. & S. 213; 33 L. J., Q. B. 200; 10 Jur., N. S. 916; 10 L. T. 493; 12 W. R. 1004; *S. P.*, *Woods v. Foote*, 1 H. & C. 841; 32 L. J., Ex. 199; 9 Jur., N. S. 178; 7 L. T. 836; 11 W. R. 383—Ex. Ch.; *Inglebach v. Nichols*, 14 C. B., N. S. 85; 9 Jur., N. S. 1015; 8 L. T. 318; 11 W. R. 697; *Nicholson v. Potts*, 10 L. T. 192; 12 W. R. 440—Ex. Ch.

A composition deed, containing a covenant by the creditors, limited by each creditor to his own acts, to indemnify the debtor from payment of any sum of money relating to any bill of exchange, promissory note, or other security or securities which the debtor may have given to the creditors respectively, is a covenant that invalidates the deed, and the defect is not cured by an averment in a plea that there were no creditors other than assenting creditors to whom the covenant could apply. *Oldis v. Armston*, 2 L. R., Ex. 406; 36 L. J., Ex. 181; 16 L. T. 601; 15 W. R. 965.

**Liability imposed on Non-assenting Creditors.**—Traders assigned all their estate and effects to trustees, for the benefit of all the creditors, with power to the trustees to call in and compound all debts, to sell all or any of the stock, works, &c., and in the meantime to carry on the business of the debtors for such period as they should think fit; and there was a clause that "the trustees should be indemnified out of the estate of the debtors, or otherwise by the creditors, in proportion to the amount of their respective debts, against and in respect of all transactions and personal engagements, matters and things whatsoever, which they shall lawfully do or cause to be done, or enter into or order or direct in and concerning the management or conduct of the business:"—Held, that, as this clause imposed a personal liability on the non-assenting creditors beyond the loss of their debts, it was ultra vires, and the deed was not within s. 192. *Wigfield v. Nicholson*, 3 L. R., Q. B. 450; 37 L. J., Q. B. 155; 18 L. T. 323; 16 W. R. 1038; 9 B. & S. 261.

**A Deed Void in certain Events is Voidable at Election of Party not in Default.**—A composition deed contained a covenant by the debtor and his sureties, to pay 7s. 6d. in the pound, by three instalments. The deed provided that, as between the sureties and the creditors, the sureties should be considered principal debtors, and that in case the debtor should be adjudicated bankrupt before all the instalments were paid, then the deed and all its clauses to be at an end and void:—Held, that by the word "void" was meant "voidable," at the election of the parties not in default. *Hughes v. Palmer*, 19 C. B., N. S. 893; 34 L. J., C. P. 279; 11 Jur., N. S. 876; 12 L. T. 635; 13 W. R. 974.

### i. Covenants to Pay Composition.

**Covenant to pay Instalments to Trustee—To extend over Seven Years.**—A deed, in which a debtor covenants to pay instalments to a trustee for the creditors, is not void for want of a covenant with the creditors that they shall be paid. Nor because the instalments are to extend over seven years. *Stone v. Jellicoe*, 3 H. & C. 263; 34 L. J., Ex. 11; 10 Jur., N. S. 976; 11 L. T. 140; 12 W. R. 922.

**Covenant by Surety alone.**—A debtor assigned to a surety all his stock-in-trade, goods, chattels, and effects whatsoever and wheresoever, absolutely, and the surety covenanted with the creditors of the debtor to pay them a composition of 6s. 8d. in the pound on their debts by two instalments of 3s. 4d. each, at the expiration of three and six months, to be secured by the joint and several promissory notes of the debtor and the surety. And the creditors accepted the composition in satisfaction and discharge of their debts, and released the debtor from all claims whatsoever:—Held, a valid deed. *Dewhurst v. Jones*, 3 H. & C. 60; 33 L. J., Ex. 294.

**Composition Payable before Period allowed for Registration.**—It is no objection to a deed that the composition is payable before the expiration of the twenty-eight days allowed for registering the deed. *Brooks v. Jennings*, 1 L. R., C. P. 476; 12 Jur., N. S. 341; 14 L. T. 19; 14 W. R. 440.

**Recital amounts to Covenant.**—A recital in such a deed, that the debtor has agreed to pay a composition of a given amount to all his creditors, amounts to a covenant. *Id.*

### j. Schedule of Creditors.

**Schedule Unnecessary.**—It is not essential to the validity of a deed of composition that it should contain a schedule of creditors. *Stone v. Jellicoe*, 3 H. & C. 263; 34 L. J., Ex. 11; 10 Jur., N. S. 976; 11 L. T. 140; 12 W. R. 922.

**Schedule added after Execution vitiates Deed.**—A deed was expressed to be made between the debtor, a surety, and scheduled creditors. At the time of registration no schedule was annexed, but a schedule was afterwards added by the debtor:—Held, that the addition of the schedule vitiated the deed. *Sellin v. Price*, 2 L. R., Ex. 189; 36 L. J., Ex. 93; 16 L. T. 21; 15 W. R. 749.

### k. Verification of Debts.

**Affidavit may be dispensed with.**—The affidavit of the debtor usually required upon the registration of a deed of assignment for the benefit of creditors may be dispensed with. *Trump, In re*, 14 W. R. 494.

**Requisites of Affidavit.**—A statement in the affidavit by the debtor, that the amount in value of his property, credits, estate, and effects comprised in a deed of arrangement is under a certain value, is sufficient compliance within the 5th condition of s. 192. *Russell v. Murphy*, 16 Ir. Ch. Rep. 54.

**Joint and Separate Creditors.**—The affidavit required by the 5th condition of s. 192 need not distinguish between the joint and separate creditors. *Walker v. Nerill*, 3 H. & C. 403; 34 L. J., Ex. 70.

### l. Examination of Debtor.

**Discretion of Commissioner.**—The Court of Bankruptcy will not interfere with the discretion of a commissioner as to the examination by a non-assenting creditor of a debtor who has executed an inspectorship deed. *Redway, Ex parte*, 35 L. J., Bk. 20; 12 Jur., N. S. 365; 14 L. T. 389; 14 W. R. 664—L. J.

**Dissenting Creditor may Examine.**—A dissenting creditor to a trust deed is on the same footing as an assenting creditor, and has, therefore, equally the right to examine the debtor, although such examination may tend to shew the invalidity of the deed, provided such creditor is not detaining the debtor in prison, or claiming any portion of the property subject to the trusts of the deed, or defending an action in which the debtor or his assignee is plaintiff. *Brooks, Ex parte*, 33 L. J., Bk. 41; 10 Jur., N. S. 621; 10 L. T. 552; 12 W. R. 924.

**Examination of Debtor as to Validity.**—Creditors of a debtor, who has executed a simple composition deed, containing no assignment of property, are entitled to examine the debtor for the purpose of impeaching the deed. *Fackiri, In re*, 2 L. R., Ch. 368; 36 L. J., Bk. 10; 16 L. T. 371; 15 W. R. 472.

### m. Right of Debtor to Allowances.

A debtor who has executed a trust deed for the benefit of his creditors, is not, in the absence of express stipulation, entitled to receive the allowances directed to be made to bankrupts in the event of their estates realizing certain dividends. *Gibbins, Ex parte*, 34 L. J., Bk. 39; 12 L. T. 786; 13 W. R. 1001; *S. P., Turner, Ex parte*, 12 L. T. 770.

### n. Re-assignment of Property to Debtor.

**Cannot Sue on old Debt without Order from Court.**—A debtor executed a composition deed in 1869, by which he assigned to trustees all his property, including moneys and securities for money, debts, &c., with a power to sue for the same, covenanting to pay to the creditors a composition of sixteen shillings in the pound, and the creditors released the debtor from all actions,

&c. By a subsequent deed in 1870, after reciting a proviso for re-conveyance in the former deed, and that the full amount of the composition had been paid, the trustees re-assigned to the debtor all the real and personal estate, securities for money, debts, &c., assigned to them, except such as had been disposed of in pursuance of the former deed:—Held, that he could not maintain an action in his own name for a debt due before the date of the original deed without first obtaining an order from the court, under 12 & 13 Vict. c. 106, s. 197. *Lockwood v. Jenkinson*, 25 L. T. 698; 20 W. R. 182.

#### **o. Form of Release.**

**Deed containing no Release.**—A composition deed, by which the debtor conveys all his property to trustees for the benefit of his creditors, but which does not contain a release to him, is not good as a defence on equitable grounds to an action against the debtor. *European Central Railway Company v. Westall*, 6 B. & S. 970.

**Release of all Claims—Release governed by Recital.**—To an action by a non-assenting creditor a plea that by a deed the creditors agreed to accept a composition in full satisfaction of their debts, containing a general release of all actions, suits, contracts, damages, claims, or demands, in respect of any debt, sum of money, bills, bonds, notes, securities for money, contracts, provisos, agreements, reckonings, accounts, dealings, or transactions between the debtor and his creditors from the beginning of the world to the date of the deed, is good, and the release, being governed by the recital, is not too general. *Haseigrove v. House*, 1 L. R., Q. B. 101; 35 L. J., Q. B. 1; 12 Jur., N. S. 333; 13 L. T. 462; 14 W. R. 128; 6 B. & S. 975.

**Release not restrained by Covenant not to Sue.**—A deed of inspectorship contained, in different parts of the instrument, a general release of the debtor from all claims, &c. (except under the provisions of the deed), and a covenant by the creditors not to sue the debtor for a limited time in respect of any debt or demand provable under the deed, and that if any of them did so the deed should operate and have the effect of an order of discharge, and be pleadable in bar to every such action:—Held, that the release was not restrained by the covenant not to sue. *Bond v. Weston*, 1 L. R., Q. B. 169; 35 L. J., Q. B. 7.

**General Release—Scheduled Debts.**—In a composition deed, the limitation of the consideration for the release to creditors whose debts are scheduled, does not affect the absolute and unconditional character of the release, it being manifest from the whole deed that payment of the composition to the whole body of the creditors was contemplated and provided for by the deed. *Tetley v. Wanless*, 15 L. T. 255.

Where creditors release the debtor from all debts, such release is absolute and general, notwithstanding a subsequent statement in the deed that the creditors have accepted the composition in discharge of the debts specified in the schedule only. *Id.*

A composition deed releasing all the claims of the creditors against the debtor does not operate to deprive non-assenting creditors of their

remedy against a co-debtor. *Andrew v. Macklin*, 4 B. & S. 566; 34 L. J., Q. B. 89; 11 Jur., N. S. 409; 13 W. R. 291.

**Conditional Release.**—By a composition deed, executed in March, 1867, the debtor, after assigning all his effects for the benefit of his creditors, contracted to pay them a composition of 7s. 6d. in the pound on their debts in three instalments of 2s. 6d. each; the first and second instalments to be secured by his own promissory notes at three and six months; and the third instalment by the joint and several note of himself and a surety. The deed contained a conditional release by the creditors of the debtor from his debts, and a covenant by the creditors not to sue, and also a proviso that if the notes or either of them were not paid when due, the conditional release and covenant should be absolutely void. The notes became due on the 4th June, the 4th September, and the 4th December, 1867. After the second note had become due, namely, on the 17th September, certain creditors, who had not executed the deed, assented to the deed, and took from the debtor three promissory notes, under its provisions, for the amount of the composition on their debt. Two of such notes, namely, those for the first and second instalments were then overdue, but were not paid to these creditors until some three or four weeks after the 17th September:—Held, that as the release was expressly made conditional on the punctual payment of the notes, and the debtor had failed to pay the first and second of such notes, which were payable instantan on their delivery to these creditors, for some three or four weeks after delivery, according to the strict letter of the deed the release became inoperative, and could not be pleaded as an answer to the action for the balance of their debt. *Milligan v. Salmon*, 18 L. T. 887.

To an action for the recovery of a debt, the debtor pleaded a deed, dated the 25th June, 1867, whereby he and a surety covenanted to deliver to the creditors, on the day of the date of the deed, promissory notes signed by the debtor and a surety for a composition upon their debts, and the creditors, in consideration of the premises, released the debtor from all debts due to them. The release was accompanied by the following clause: "Provided that if the debtor and the surety shall not, within two calendar months from the 17th June, 1867, make and deliver the promissory notes unto the creditors, according to the true intent and meaning of these presents; then and in such case these presents shall thereupon become absolutely void and of no effect, and the creditors shall be restored to their original rights as if these presents had not been made, provided that the creditors shall personally or otherwise apply for their notes." The debtor did not deliver the notes, either on the day of the date of the deed, or within two months after the 17th June, 1867, but the creditors never personally or otherwise applied for them:—Held, that the release was not avoided by the non-performance of the covenant to deliver the notes on the day of the date of the deed, being wholly independent of the performance thereof; that the release was not avoided by the non-delivery of the notes within the two months, inasmuch as the creditors had not applied for them; and that there was nothing unreasonable in the proviso with respect to the application for the notes, and the deed

was therefore good. *Solomon v. Laverick*, 18 L. T. 545.

— **Creditor with Secret Advantage.**—A composition deed contained a release of the debtor, subject to a proviso making the release void on non-payment of any of the instalments covenanted to be paid by the deed:—Held, that, as against a creditor who had acceded to the deed, but by means of a secret arrangement had received more than the amount of the whole composition, the release was absolute, although the instalments had not been paid according to the covenant. *Oliver, Ex parte*, 4 De G. & S. 354.

**Release—Deed Executed under Mistake of Law.**—Where a deed of composition with, and assignment in trust for creditors was construed to include a release of debt guaranteed:—Held, in an action against the surety, to be no answer, either on legal or on equitable grounds, to a plea setting out the release; that the plaintiffs executed, not as creditors, but as trustees, and solely for the purpose of accepting and declaring the trusts, and not with the intention of releasing the debt guaranteed; that they did not sign the list of creditors; and that if the deed operated to release the debt, it was executed by mistake, and in ignorance that such would be its legal effect and operation. *Tred v. Johnson*, 25 L. J., Ex. 110.

— **Creditor loses Right to retain Security.**—By the release of a debt by a composition deed the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore, the relinquishment of such security for the benefit of the debtor forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition reserved under the deed. *Cowper v. Green*, 7 M. & W. 638. But see *Thomas v. Courtney*, 1 B. & A. 1.

— **Agreement to pay Debt barred.**—If by a deed of composition, a creditor releases his debt, a subsequent agreement, not by deed, between the creditor and debtor, that the former shall be paid in full, cannot stand, unless for a valuable consideration beyond the mere fact of the release of the debt. *Watts v. Hyde*, 17 L. J., Ch. 409; 10 Jur. 127.

#### p. Execution of Deed obtained by Misrepresentation.

**Misrepresentation by Debtor.**—If, in consequence of a debtor representing to one of his creditors, that, if he will agree to accept a composition for his debt, all the other creditors will do the same, such creditor does agree, the agreement is not binding on him if that representation is untrue. *Cooling v. Noyes*, 6 T. R. 263. See *Reay v. Richardson*, 2 C., M. & R. 422; 5 Tyr. 931; 1 Gale, 219; *Lewis v. Jones*, 8 D. & R. 567; 4 B. & C. 506.

If a party obtains the benefit of a trust deed executed by his creditors, and in it is contained a consideration, that he will make a full disclosure of his property, but he conceals a portion of it, the creditors signing the deed may still proceed against him. *Wenham v. Fowle*, 3 D. P. C. 43.

— **Allowing Creditor to remain under False**

**Impression.**—Where a creditor compounds with his debtor under a false impression, in which the debtor knowingly leaves him, as to the extent of the debtor's estate, the creditor is not estopped from suing for the balance of his debt. *Vine v. Mitchell*, 1 M. & Rob. 337.

— **Creditor a party to a Fraud practised on other Creditors.**—Action for a debt. Plea, a release. Replication, that the release was obtained from the plaintiff by the fraud, covin and misrepresentation of the defendants. It appeared that the defendants, being indebted to several persons, and amongst others to the plaintiff, whose debt amounted to 989l. 7s., proposed a composition of 6s. 8d. in the pound, which was agreed to by a majority of the creditors in number; but the plaintiff, who was not present when the 6s. 8d. was agreed to at a meeting of creditors, refused to concur, unless he was paid 13s. 4d. in the pound upon part of the debt, and the other part was paid in full. Upon receiving notes for the full amount agreed upon, and the positive assurance of the defendants that no other creditor than himself was preferred, and that no one of them was to have a farthing beyond the 6s. 8d., he signed a release for his whole debt. The assurance of the defendants that no other creditor was preferred was untrue:—Held (by Wightman, J.) that upon this issue it was no answer to the action to shew that the plaintiff had contracted for a preference in fraud of the other creditors; and that the defendants could not be allowed to set up a counter-fraud by them and the plaintiff, by which they colluded to deceive other persons, as an answer to a charge of fraud practised by the defendants upon the plaintiff, which would have the effect of depriving him of part of his original just right. *Mallalieu v. Hodgson*, 16 Q. B. 689; 20 L. J., Q. B. 339; 15 Jur. 817.

Held (by Coleridge and Erie, JJ.), that the stipulation by the plaintiff for a preference, being a fraud upon the other creditors, was void, and no part of it could be legally relied on by him as forming a material inducement for the deed; and that the replication was not supported by shewing that the plaintiff was deceived by the misrepresentation of the defendants that no other creditor should have a preference, and that he would not have executed the deed if he had not been so deceived. *Id.*

#### Misrepresentation by Debtor and one Creditor

— **Absence of Fraud.**—A plaintiff holding two bills drawn by the defendant, one for 400l., the other for 156l. 19s. 10d., executed a composition deed, containing a general release of the defendant, and a schedule of the sums due to various creditors who executed the deed. After the plaintiff's name was put the sum of 156l. 19s. 10d. only, at the request of the defendant, who expected the plaintiff would recover the bill for 400l. by suing the acceptor. The other creditors were not told that the plaintiff had a debt of 400l. as well as 156l. 19s. 10d.:—Held, he could not afterwards sue the defendant on the bill for 400l. *Britten v. Hughes*, 5 Bing. 460; 3 M. & P. 79. See *Margetson v. Atkins*, 3 C. & P. 338.

— **Vendor agreeing not to enforce Contract—Deposit Money.**—A. agreed to purchase an estate, and paid a deposit; B., the seller, was unable

to make a good title by the stipulated day. A. afterwards, upon negotiating a compromise with his creditors, stated his apprehension that he might be compelled by B. to complete the purchase, and applied to B. to cancel the contract and return the deposit. B. refused to do either, but said that he would never take any steps against A. to enforce the contract. Upon this footing the composition proceeded, C. engaging to secure 7s. in the pound. It would be a fraud upon the creditors, and upon C., if B. were to seek to enforce the contract; and, therefore, A. cannot maintain an action against B. for the deposit. *Clark v. Upton*, 3 M. & P. 89.

#### q. Private Agreement with particular Creditors.

**When void.**—A corrupt bargain between a debtor and some of his creditors, whereby they are induced to execute a composition deed, renders the deed void as a fraud against a creditor not a party to it, and it is not necessary that it is any part of the corrupt bargain that the preferred creditors are to have an undue share of the assets of the debtor. *Daughish v. Tennent*, 2 L. R., Q. B. 49; 36 L. J., Q. B. 10; 15 W. R. 196; 8 B. & S. 1.

**— For better Security.**—A trust deed was proposed to the creditors at large of an insolvent, whereby they all engaged to accept payment of their whole debts by instalments; the first four of which were to be guaranteed by collateral security, the two last to remain upon the single security of the insolvent: several of the creditors refused to sign unless the plaintiffs did; and the plaintiffs stipulated privately with the insolvent, as the condition of their signature, that he should procure them collateral security for the two last instalments, as well as the prior ones, conceiving that they had collateral security originally to cover their debt; and upon the faith of such private agreement, they signed the trust deed, which was then signed by the rest of the creditors:—Held, that such private agreement was a fraud upon the other creditors, and void, although the effect of it was not to secure to the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum. *Leicester v. Rose*, 4 East, 372; 1 Smith, 41.

By a deed of composition between a trader and his creditors, it was agreed that the trader should give them his bills, accepted by a friend, for ten shillings in the pound, payable in certain portions at fixed periods, and his own promissory notes for the remaining five shillings, and that the creditors should be at liberty to take his own notes only for their full demands if they pleased; one of the creditors, who signed the deed, took bills from the debtor, accepted by his friend, for the whole fifteen shillings in the pound, payable at the same respective times as the bills agreed to be given by the deed of composition: the payment of these bills was resisted, upon the ground that it was a security beyond that agreed for, and greater than the other creditors obtained; but the transaction was adjudged fair, the creditor not receiving by it more than the others. *Feise v. Randall*, 6 T. R. 146; 1 Esp. 224.

**— Assigning Security held by Creditor.**—Defendants holding as security, for a debt due

to them from D., a policy of assurance effected by D., refused to join in a composition deed, by which D. was to be released from his debt on paying 8s. in the pound, unless D. assigned the policy to them; D. assigned it, and the defendants then executed the composition deed:—Held, that such assignment was a fraud, and D. having become bankrupt, that his assignees were entitled to recover from defendants the money they had received on the policy, notwithstanding the 8s. in the pound were never paid. *Alsager v. Spalding*, 4 Bing. N. C. 407; 6 Scott, 204; 1 Arn. 181.

**— Agreement to keep up Insurance for ultimate Payment of Debt.**—If, upon a composition between a man and his creditors, one accepts the composition, and, in addition, agrees that the debtor shall keep up a policy on his life for the ultimate payment of the remainder of the debt, such an agreement is void, unless every creditor assents, and the policy belongs to the representatives of the debtor. *Pfleger v. Browne*, 28 Beav. 391.

**— When Creditor is Surety for Composition.**—A creditor executed a deed of composition, and, as part of the transaction, became surety for the dividend. He received from the debtor two bills of exchange for the full amount of certain sums due from the debtor to him as a consideration for his joining as surety; and this fact was not known to the other creditors:—Held, that the transaction was void, as giving the creditor-surety an undue advantage over the other creditors. *Wood v. Barker*, 1 L. R., Eq. 139; 35 L. J., Ch. 276; 11 Jur., N. S. 905; 13 L. T. 318; 14 W. R. 47.

**— Creditor persuading others to execute Deed.**—Where a creditor agreed with his debtor that if he would secure his debt by a promissory note, he would endeavour to prevail on the rest of the creditors to accept a composition, and the transaction was to be kept secret from them:—Held, that a note so given was void on account of the fraudulent consideration. *Wells v. Gilling*, 4 Moore, 78; 1 B. & B. 447.

**— Time of making Agreement.**—An insolvent assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors who did not execute it before a given day should be paid to the insolvent; an agreement made between the insolvent and a creditor, after that day, that the latter should sign the deed, and the former pay the remainder of the whole debt, is fraudulent and void. *Jackson v. Lomas*, 4 T. R. 166.

A plea stating that the plaintiff, and the defendant's other creditors, agreed to accept a composition and release their debts; that several creditors, relying upon the agreement, executed a release; and that the plaintiff afterwards obtained and accepted the bond in suit for the residue of the plaintiff's debt, by fraud and covin, and without the knowledge or consent and in fraud of the other creditors, is tantamount to an allegation not of fraud and covin generally, but of fraud and covin effected by the particular means described in the inducement: and, as the facts stated do not shew any stipulation for the giving of the bond contemporaneously with the agreement for the composition, the



plaintiff is entitled to judgment non obstante verdicto after an issue upon the fraud and covin found in favour of the defendant. *Tuck v. Tooke*, 4 M. & R. 393; 2 B. & C. 437; *S. C.*, nom. *Tooke v. Tuck*, 4 Bing. 224; 12 Moore, 435.

**Creditor the Solicitor preparing Deed.**—A debtor entered into a compromise with his creditors, among whom was his solicitor, who called the meeting of creditors, attended the same, and prepared the deed of composition. The creditors, and the solicitor, executed the deed. In the deed was contained a covenant by the debtor to assure his life forthwith, and keep it assured during three consecutive years for 1,500*l.*, a sum equal to which was covenanted by the debtor to be paid to the trustees for division among the creditors by monthly payments, or otherwise, as the trustees might require. If the debtor should fail in any payment covenanted to be made, or in assuring or keeping assured his life according to his covenant, the deed should be void. There was a private agreement between the debtor and the solicitor, that, notwithstanding the deed, the latter should be paid his debt in full. The debtor did not assure his life till a year after the deed, when he paid 500*l.*, the amount covenanted to be paid within that period, and assured his life for 1,000*l.*, all that was then due. The policy was deposited with one of the trustees. Two other instalments were subsequently paid to the trustees, according to the terms of the deed. The solicitor subsequently brought an action against the debtor for his whole demand:—Held, that the agreement that the deed should not, as between the solicitor and his debtor, have its full effect, could not be effectual either at law or in equity. *Watts v. Hyde*, 17 L. J., Ch. 409; 10 Jur. 127; *S. C.*, at law, 1 D. & L. 479; 12 M. & W. 254; 13 L. J., Ex. 41.

**Ratification of Agreement.**—If all the creditors consent to accept a composition upon an assignment of effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtains from the debtor a promissory note for the residue of his demand, by refusing to execute till such note is made, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action. *Cockshott v. Bennett*, 2 T. R. 763.

The defendant, being indebted to the plaintiff and other creditors, in order to induce the plaintiff to accept a composition, agreed to pay him an additional composition, which was secured by a bill of exchange drawn by the plaintiff upon and accepted by the defendant's brother. The bill being dishonoured, and the plaintiff having threatened legal proceedings, the defendant by deed assigned to the plaintiff a policy of assurance as a security for payment of the bill:—Held, that the indenture was tainted with the illegality of the original transaction, and therefore could not be enforced. *Geere v. Mare*, 2 H. & C. 339; 33 L. J., Ex. 50; 8 L. T. 463; *S. P.*, *Clay v. Ray*, 17 C. B., N. S. 188.

**Composition cannot be recovered.**—Where a party refused to sign an agreement to accept of his debtor a composition of 10*s.* in the pound, but the debtor's brother, offering to supply him with coals to the amount of the other 10*s.*, he signed

the composition agreement; and the other creditors knew nothing of the coal transaction:—Held, that he could not recover upon a promissory note for the amount of the 10*s.* composition. *Knight v. Hunt*, 5 Bing. 429; 3 M. & P. 18.

Where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take the defendant's bills at long dates for their respective debts, stipulated, without their knowledge, for a bill of exchange, to be indorsed to him by the defendant for a further sum—the whole agreement between the plaintiff and defendant is void, as being fraudulent upon the other creditors; and the latter cannot recover upon the defendant's bills for the amount of the composition money, even although he has received nothing on the bill indorsed to him by the defendant. *Hovden v. Haigh*, 3 P. & D. 661; 11 A. & E. 1033.

**Debtor may recover from Creditor Money paid in accordance with Agreement.**—The plaintiff, being in embarrassed circumstances, offered his creditors a composition of 5*s.* in the pound. The defendant, a creditor, refused to accept it unless the plaintiff paid him 50*l.*, and gave him a bill of exchange for 108*l.* The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50*l.* and gave him the bill of exchange, and the defendant then executed the composition deed:—Held, that the plaintiff might recover back the money in an action for money had and received. *Atkinson v. Denby*, 6 H. & N. 778; 30 L. J., Ex. 361; 7 Jur., N. S. 1205; 4 L. T. 252; 9 W. R. 539. Affirmed, 7 H. & N. 934; 31 L. J., Ex. 362; 8 Jur., N. S. 1012; 7 L. T. 93; 10 W. R. 389—Ex. Ch.

Where a creditor at the time of signing the composition deed under the Bankruptcy Act, 1861, s. 192, took from the debtor a private agreement that the debtor should make future payments on his account:—Held, that the agreement was so far fraudulent that the debtor could recover back from the creditor the payments subsequently made thereunder. *Lenzberg, Ja. r.*, 7 Ch. D. 650; 47 L. J., Ch. 178; 26 W. R. 258.

— **Even if paid to Third Parties.**—Where a defendant being a creditor of the plaintiff, entered into a composition deed with other creditors to receive 10*s.* in the pound, under an agreement with the plaintiff that he would give the defendant his promissory notes for the remainder of the debt, which notes were accordingly given, and the composition was paid to the defendant, and he negotiated the notes, the holder of one of which enforced payment from the plaintiff by action:—Held, that the plaintiff might recover back the amount from the defendant in an action for money had and received. *Smith v. Cuff*, 6 M. & S. 160. See *Wilson v. Wray*, 2 P. & D. 253; 10 A. & E. 82.

Where the defendant, being a creditor of the plaintiff, entered into a composition deed with the other creditors to receive 10*s.* in the pound, under an agreement with the plaintiff that he would give the defendant his promissory note for the remainder of the debt, which the defendant should keep in his own hands, and the note was accordingly given and the composition paid to the defendant, and he negotiated the note, the holder of which enforced payment from the plaintiff:—Held, that the plaintiff might recover from the defendant the sum so paid by him in as

action for money paid. *Horton v. Riley*, 11 M. & W. 492; 13 L. J., Ex. 81.

**When Creditor estopped from alleging Invalidity of Composition Deed.**—Action upon three several notes. Plea, that the defendants were indebted to the plaintiff in 989*l.* 7*s.*, and had accepted four bills for the amount, drawn by him, and payable to his order; that the defendants compounded with their creditors, and that the plaintiff agreed to the composition, receiving a preference beyond the other creditors, and executed a release of his debt; that it was his duty to take up the four bills, but that he neglected to do so, and the holder of the bills threatened to sue the defendants, who, in order to induce the plaintiff to take them up, gave him the notes:—Held, that the fraudulent preference of the plaintiff did not make the composition void as against him; consequently that there was no sufficient consideration for giving the notes, as the plaintiff ought to have indemnified the defendants from the consequences of liability upon the bills. *Mallalieu v. Hodgson*, 16 Q. B. 689; 20 L. J., Q. B. 339; 15 Juf. 817.

**When not.**—A declaration stated, that by a deed between the persons whose names and seals were thereunto subscribed and affixed, and who were creditors of the plaintiff, of the first part, the plaintiff of the second part, and M. of the third part, it was recited that the plaintiff was indebted to the persons of the first part in sums secured by bills accepted by the plaintiff, and being unable to pay them in full he had agreed to give his creditors a composition in the pound, to be guaranteed by bills drawn by M. upon and accepted by the plaintiff, and that such composition bills had been given; and by the deed, such of the creditors to whom the plaintiff might have given, or who might be holders of bills of exchange of the plaintiff, covenanted with him that they would indemnify him against and in respect of such bills, and all actions by reason thereof. That the defendant, as a creditor, subscribed his name and affixed his seal to the deed, and that at that time the plaintiff was indebted to the defendant and his partner in an amount secured by two bills, accepted by the plaintiff, and which were then outstanding; that when the bills became due, the holder sued the plaintiff for their amount, and in order to stay the action he paid a large sum of money; breach, that the defendant did not indemnify the plaintiff. Plea, that before the defendant executed the deed, the plaintiff was indebted to him and his partner, and the other persons, creditors and parties to the deed of the first part, and the plaintiff, being unable to pay the defendant and his partner, and the creditors, their debts in full, offered to deliver to each of them a composition bill, upon the terms and conditions in the deed mentioned, provided they would execute the deed; and thereupon the plaintiff represented to the other creditors, that the defendant and his partner had agreed to accept the composition bills for the same proportionate amount, and upon the same terms and under the same conditions as the other creditors; and that upon the faith of such representations, the other creditors were induced to execute the deed, whereas, in truth and in fact, at the time such representations were made, it was agreed between the plaintiff and the defendant and his partner, that the plaintiff should

pay the defendant and his partner the full price of goods before then sold and delivered by the defendant and his partner to the plaintiff, and which formed part of the sum due from the plaintiff to the defendant and his partner, and that the plaintiff would further pay in cash, to the defendant and his partner, 5*s.* in the pound upon the whole amount due from the plaintiff to them, in lieu of delivering to them composition bills; and that for the purpose of inducing the other creditors to believe that the representations were true, the defendant should, for himself and his partner, make and execute the deed, which agreement was, at the time of the other creditors executing the deed, unknown to them:—Held, first, that the plea sufficiently stated that a fraud was intended to be committed by the plaintiff and defendant on the other creditors, by a bargain unknown to them, to give and receive more than they were to receive. *Higgins v. Pitt*, 4 Ex. 312; 18 L. J., Ex. 488.

Held, secondly, that the plaintiff could not sue on this covenant, which was part of the same fraudulent executory agreement, and therefore void as against the creditors, and that the defendant might set up such defence, although a party to the fraud. *Id.*

**Preferential Payment—In consideration of Annuling Prior Adjudication.**—Messrs. P., being debtors to the plaintiff in 4,161*l.*, were adjudicated bankrupts upon his petition. He held two policies upon the life of one of the bankrupts as a security for a portion of his debt. The defendant entered into a composition with his creditors other than the plaintiff, who had proved their debts, of 3*s.* 6*d.* in the pound, and they upon that amount being paid or secured, signed their consent to a petition to annul or supersede the bankruptcy. The plaintiff at first refused to sign the petition, but by a written agreement entered into between himself and the defendant, and after reciting these facts, the plaintiff undertook to sign the petition and to execute a release from all demands upon the bankrupts upon payment by the defendant, within one month after the bankruptcy had been superseded or annulled, of 167*l.* as a composition for 1,453*l.*, parcel of the debt of 4,161*l.*, and upon a transfer to him (the plaintiff) of the two policies of insurance. The other creditors were wholly ignorant of this agreement:—Held, that these facts did not support a plea which alleged that the agreement was entered into in fraud of the other creditors, and that it was therefore fraudulent and void. *Smith v. Salzmann or Saltzman*, 9 Ex. 535; 23 L. J., Ex. 177.

**—To Creditors Suing—Payment under Pressure.**—At a meeting of the defendant's creditors, the following agreement, to which the plaintiff was an assenting party, was made and signed by all the creditors present:—"We the undersigned creditors of W. B., in consideration of 10*s.* in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said W. B.: the whole of the creditors receiving not exceeding a like sum in discharge of their debts."—At the time of entering into this agreement, it was known that the debtor was being sued in a county court by one P. as executor of a creditor for a

small sum which was afterwards paid in full the day before the cause was ripe for trial:—Held, that the agreement was limited to the creditors signing it; and that, even if it were not so, the payment to P. being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void. *Carey v. Barrett*, 4 C. P. D. 379.

## 2. UNDER THE BANKRUPTCY ACT OF 1849.

### a. Under Control of the Court of Bankruptcy.

**Statutory Majority—Joint Debts.**—The three-fifths of the creditors required by 12 & 13 Vict. c. 106, s. 216, to give effect to an arrangement with creditors, might include creditors to whom debts were due from the arranging debtor jointly with others. *Heath, Ex parte*, 4 De G. & S. 593.

**Grounds for disturbing Decision of Commissioner.**—In the accounts of an arranging debtor, his stock in trade was valued at 472*l.*, his good credits at 499*l.*, the doubtful at 276*l.*, and the bad at 1,808*l.* His debts were 3,900*l.* There were uncontradicted affidavits that, if the estate was realized under a bankruptcy, a dividend of 2*s.* in the pound only would be paid. A proposal for immediate payment of a dividend of 2*s.* 6*d.* in the pound, and for the delivery of the debtor's own promissory notes for 2*s.* 6*d.* more on a future day, had been assented to by three-fifths of the creditors:—Held, that there was not sufficient ground for disturbing the decision of the commissioner, who declined to confirm the proposal as being not reasonable, and adjudicated the debtor a bankrupt. *Perrins, Ex parte*, 1 De G., F. & J. 299; 29 L. J., Bk. 12; 6 Jur., N. S. 206.

**What a discontinuance of Proceedings.**—A debtor petitioned the Bankruptcy Court, under 12 & 13 Vict. c. 106, s. 211. Protection was granted, and a private sitting appointed, but the sitting was adjourned; at the second sitting the proceedings were adjourned into open court. The debtor then appealed to the Lords Justices, who remitted the case to the commissioner for further consideration. The commissioner further adjourned the first sitting:—Held, that there was no discontinuance of the proceedings by the adjournment into court. *Naylor v. Mortimore*, 17 C. B., N. S. 207; 23 L. J., C. P. 273; 10 Jur., N. S. 1001; 10 L. T. 903; 13 W. R. 47.

### Letters of Attorney need not be under Seal.]

—It was not necessary that letters of attorney, under 12 & 13 Vict. c. 106, s. 217, should be under seal, nor need letters of attorney authorizing public officers of companies to consent be under the seal of the companies. *Id.*

**Tender of Composition.**—By an agreement or a resolution under the control of the Bankruptcy Court, in pursuance of the arrangement clauses of the act of 1849, a composition was proposed, and between the first and second meetings a creditor told the debtor that he would be paid in full, and that he need not trouble himself to come and offer the proposed composition:—Held, that it was the duty of the debtor, after the confirmation of the agreement or resolution at

the second meeting, to tender the composition to the creditor. *Jeffries v. Onions*, 13 L. T. 606; 14 W. R. 145—Ex. Ch.

A debtor assigned all his effects to trustees for all his creditors, parties to the assignment, who should assent thereto within three months from its date. The execution of the assignment by the debtor and the trustees was attested by a solicitor, as required by 12 & 13 Vict. c. 106, s. 68, and notice of it was given in the London Gazette and otherwise, as required by that section:—Held, that the assignment was within the provisions of the 68th section, and therefore valid. *Harris v. Pettit*, 31 L. J., Ch. 552; 9 Jur., N. S. 68; 6 L. T. 572; 10 W. R. 599.

**Petition—Act of Bankruptcy.**—Where a trader presented a petition for arrangement with his creditors, and no arrangement being effected, he was adjudicated bankrupt on that petition:—Held, that the petition for arrangement created a valid act of bankruptcy. *Harrison, Ex parte*, 26 L. J., Bk. 30; 3 Jur., N. S. 228—L. J.

But where a trader petitioned for arrangement, and filed an account of debts, and made a proposal, and at an adjourned meeting he did not attend, and neither the proposal, nor any modification of it, was accepted; whereupon the meeting was adjourned to the public court, and he was adjudged bankrupt, but the adjudication was not founded on the petition of a creditor, nor was the petition dismissed:—Held, that the filing the petition for arrangement was not an act of bankruptcy, that petition never having been actually dismissed, and no petition for an adjudication of bankruptcy having been filed within two months in pursuance of s. 76. *Mont v. Sharp*, 2 H. & N. 540; 27 L. J., Ex. 29; 3 Jur., N. S. 1327.

**Certificate of Commissioner—On whom binding.**—A certificate granted by a commissioner in bankruptcy to a petitioning trader under 12 & 13 Vict. c. 106, s. 221, was binding on those persons only who were creditors at the time of the petition, and had notice of the sittings of the court, as required by the act. *Wasson v. Allcard*, 8 Ex. 260; 22 L. J., Ex. 45—Ex. Ch.

**—Not conclusive Evidence.**—The certificate of a commissioner under 12 & 13 Vict. c. 106, s. 221, was not conclusive evidence that the resolution therein mentioned has been carried into effect, and that the creditors have been satisfied; and where those facts are disproved, will not operate as a bar to an action by a creditor. *Jeffries v. Onions*, 13 L. T. 606; 14 W. R. 145—Ex. Ch.

**Appeal—Conduct of Creditors—Estoppel.**—Debtors arranged with their creditors for payment to them of 10*s.* in the pound by instalments, and, to secure the payment of those instalments, they assigned all their estate and effects to trustees, to carry on the business until payment, or until default in payment of any instalment. The assignment provided, that, if the proceeds of the trade were insufficient, the trustees were to convene a meeting of the creditors, and either to sell the estate and divide the proceeds, or wind up the estate in such manner as should be agreed on by three-fifths of the creditors. The arrangement was to be in satisfaction of the debts. The instalments were not all paid, and the creditors concurred in a sale of the debtors' estate, after

which the debtors obtained a certificate from the district commissioner under 12 & 13 Vict. c. 106, s. 221. The creditors moved for an order to set aside that certificate, but failed. They then appealed:—Held, that the certificate was correct, and the appeal must be dismissed, the creditors having by their own conduct precluded themselves from disputing the certificate. *Foster, Ex parte*, 6 Jur., N. S. 664—L. J.

#### b. By Deed.

**Whole Property must be given up.**—A deed of arrangement between a trader and his creditors executed by six-sevenths in number and value of the creditors whose debts amounted to 10*l.*, was not binding on a creditor, not a party to the deed, unless the deed provided for the distribution of the whole of the trader's estate among his creditors. *Tetley v. Taylor*, 1 El. & Bl. 521; 21 L. J., Q. B. 346; 17 Jur. 130—Ex. Ch.; *S. P., Drew v. Collins*, 6 Ex. 670; 20 L. J., Ex. 369; 15 Jur. 584; *Fisher v. Bell*, 12 C. B. 363; 21 L. J., C. P. 228.

Nor was such a deed valid, though it conveyed the debtor's whole estate to trustees, if it empowered them to give back to the debtor effects to the value of 20*l.* *Cooper v. Thornton*, 1 El. & Bl. 544; 22 L. J., Q. B. 145.

A deed which excepted from the assignment the wearing apparel of the debtor and his family, was void. *March v. Warwick*, 1 H. & N. 158; 25 L. J., Ex. 334.

But a deed of arrangement was not rendered void by an exception out of the assignment to the trustees of the necessary wearing apparel of the debtor, his wife and family; or of a leasehold house held by the debtor at a rack-rent, and recited to be of no value, the deed containing a covenant by the debtor to assign it to the trustees when he should be required to do so. *Spitzer v. Chaffers*, 14 C. B., N. S. 686; 33 L. J., C. P. 7; 10 Jur., N. S. 258; 8 L. T. 665; 11 W. R. 914.

A deed of arrangement, which provided for the distribution of the debtor's estate in the same manner "as if he had become bankrupt" on a certain day, was void; since a deed of arrangement must provide for the distribution of all the debtor's estate, but a bankrupt is entitled to retain certain excepted articles. *Snodin v. Boyce*, 4 H. & N. 391; 28 L. J., Ex. 245; 33 L. T. 164.

A deed of arrangement, under 12 & 13 Vict. c. 106, s. 224, which provided for the winding-up of a trader's estate by him under the superintendence of inspectors, contained a clause that the estate, with the exception of such allowances and payments of effects or moneys to the debtors as the inspectors or inspector for the time being might, in their or his discretion, authorize or direct, but not exceeding in quantity or amount the allowances which might have been made to the debtors out of their estate and effects under the statute relating to bankrupts, in case a petition for adjudication of bankruptcy had been filed against them on a certain day and they had been thereunder adjudicated bankrupts, and which allowances and payments to the quantity and amount aforesaid, or to any less quantity or amount the inspectors or inspector for the time being might direct and authorize, should be administered as nearly as circumstances would admit, having regard to the provisions hereof, upon the principles and according to the rules and prac-

tice of the bankruptcy law, and as if such petition for adjudication of bankruptcy had been filed and such adjudication made as aforesaid, was void. *Cruger v. Dunlop*, 7 H. & N. 525; 32 L. J., Ex. 42; 7 L. T. 132; 10 W. R. 801—Ex. Ch.

— **Even if Debts to be paid in full.**—A deed of inspectorship, containing a covenant by a debtor for payment of his debts in full by instalments, and a covenant on the part of the creditors executing the deed not to sue in the meantime, but not providing, except in certain events, for the assignment of all the debtor's estate, was not a deed of arrangement within the 12 & 13 Vict. c. 106, s. 224. *Wilkes, Ex parte*, 5 De G., Mac. & G. 418; 24 L. J., Bk. 6.

**In favour of all Creditors.**—The deed of arrangement must have provided for the distribution of all the debtor's estate and effects, and amongst all his creditors. *Irving v. Gray*, 3 H. & N. 34; 27 L. J., Ex. 273; 4 Jur., N. S. 380.

But a deed providing for the distribution of all the debtor's estate amongst all his creditors, who would have been creditors under an adjudication of bankruptcy on the day of the meeting of creditors, treating such creditors as creditors for the sums they would on that day be entitled to prove for in bankruptcy, was not invalid, because, first, it did not contain an express assignment by the debtor of his estate, but only a covenant to assign it when required by the inspectors; secondly, because it made no provision for creditors who might become so between the day of the meeting and the date of the deed, it not appearing that there were any creditors who became so between those times; thirdly, because it contained a letter of license which was absolute and not conditional; and, fourthly, because it did not contain a provision rendering it absolutely void if the debtor did not perform the covenants contained in it. *Id.*

A plea of arrangement by deed, under 12 & 13 Vict. c. 106, s. 224, was not good unless it shewed on the face of it that the deed was for the distribution of the whole of the debtor's estate, and enured for the benefit of all the creditors, and not only of those who should execute the deed. *Bloomer v. Darke*, 2 C. B., N. S. 165; 26 L. J., C. P. 214.

In an action on a bill of exchange, the defendant pleaded a deed of arrangement with his creditors, to which the plaintiff was not a party. The plea stated, that it was provided by the deed (which was made subsequently to the 12th February, 1856), that the estate of the defendant should be administered and the assets payable and distributable amongst the creditors in the same manner as they would be payable and distributable, as if he had been adjudicated a bankrupt on the 12th of February, 1856, and as if the debts of the creditors, parties thereto, had been proved on the 12th of February. The deed contained a covenant that the creditors would not commence any proceedings at law or in equity against the defendant on account of their debts, and that if any creditor failed to observe that covenant, his debts should be extinguished, and the covenant might be pleaded as a release. The plea averred, that no person became a creditor between the 12th of February, 1856, and the time of making the deed; and that three calendar months had elapsed since the plaintiff had

notice from the defendant of his suspension of payment, and of the deed:—Held, first, that the deed did provide for a distribution of the entire estate and effects of the defendant amongst all his creditors, since the words "as if the debts of the creditors, parties thereto, had been proved on the 12th of February," did not limit the operation of the previous words, so as to make the estate and effects distributable amongst those creditors only who were parties to the deed. *Macnaught v. Russell*, 1 H. & N. 611; 26 L. J., Ex. 192.. See *Swayne, Ex parte*, 3 De G. & J. 53.

Held, secondly, that as the plea averred that no person became a creditor between the 12th of February, 1856, and the time of making the deed, the deed was not open to the objection that it contained no provision in respect of persons who might become creditors in the intermediate time. *Ib.*

The plaintiff could not object that the covenant not to sue was unreasonable, for he was not a party to it. *Ib.*

It was not necessary to allege that three months had elapsed since the plaintiff had notice that the deed was signed by six-sevenths of the creditors; for, according to the true construction of the statute, the three months ran from the time that notice was given of the suspension of payment and of the deed of arrangement. *Ib.*

**Partners—Joint and Separate Debts—Creditors executing Deed.]**—A deed of arrangement, by which A. and B., traders, assigned all their joint and several real and personal estate to trustees for the benefit of their creditors, after providing for the payment of the expenses of the deed, declared the trusts as to the distribution of the estate as follows:—"To pay and divide all the remainder of the trust moneys unto and amongst all the creditors of A. and B. rateably, and in proportion to the amount of their debts, without any preference whatsoever, until the whole of such debts be fully paid and satisfied, or so much thereof as the residue of the moneys will extend to; and upon further trust to pay the ultimate surplus of such moneys (if any), and also the dividends of such of their creditors as shall not come in and execute these presents, unto A. and B., their executors, administrators, and assigns:—Held, that the deed was void, first, because it did not provide that the joint estate should be distributed to the joint creditors, and the separate estate to the separate creditors, according to the law of bankruptcy; and, secondly, because it did not provide for the distribution of the estate among all the bankrupt's creditors, but only amongst those who executed the deed. *Leonard v. Sheard*, El. & El. 667; 28 L. J., Q. B. 183; 5 Jur., N. S. 1050; 33 L. T., O. S. 9.

**Covenant binding Executing Creditors only.]**

—To an action against the acceptors of a bill of exchange, they pleaded a plea founded upon a deed of arrangement made by them with their creditors under 12 & 13 Vict. c. 106, s. 224, which had not been signed by the plaintiff, but which was said on the part of the debtors to be nevertheless binding on him by reason of its being executed by six-sevenths in number and value of their creditors. The instrument was not a composition deed, but it contained a clause by which each of the creditors, parties to or bound by the

deed, covenanted not to sue, impede or molest the debtors; and then followed another clause, to the effect that if any creditor, by whom or on whose behalf the deed should have been actually executed, should act contrary to that covenant, the debtors should be absolutely discharged from all claims and demands, both at law and in equity, by such creditor:—Held, that this latter clause was not binding upon the plaintiff, it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. *Legg v. Cheesebrough*, 5 C. B., N. S. 741; 28 L. J., C. P. 209; 5 Jur., N. S. 795.

**What Instrument sufficient.]**—To a scire facias suggesting a breach of a bond, the defendant pleaded that, before issuing the scire facias, he was a trader and indebted, and suspended payment; and that thereupon "a memorandum of arrangement within the meaning and according to 12 & 13 Vict. c. 106, s. 224, was made between him and the several persons whose names were thereunto subscribed, being creditors, &c.; that all things were performed and done as required by the statute to make the memorandum of arrangement an obligatory instrument within the statute upon all the creditors of the defendant;" that the plaintiffs were creditors, and after the memorandum of arrangement had been signed, and before the scire facias, had notice, and that the defendant and the parties of the other part had at all times since making the memorandum of arrangement well and truly observed the agreements therein; and that by reason of the premises, and by force of the statute, the memorandum of arrangement became and was and is obligatory on the plaintiffs, as if they had signed the same:—Held, that the plea was bad, inasmuch as it disclosed nothing to shew that the memorandum of agreement was a bar to the action. *Tabor v. Edwards*, 4 C. B., N. S. 1; 27 L. J., C. P. 183; 4 Jur., N. S. 339.

**Provisions causing Inequality.]**—A composition deed, purporting to provide for the distribution of the whole of the debtor's property, contained a clause professing to defeat any action brought by a creditor (whether one who had signed the deed or not), by making such action ipso facto a release of the debt; and another clause enabling any creditor, with the inspector's leave, and notwithstanding the former clause, to bring an action, and, in case of success, to receive dividends on the amount recovered:—Held, that the conjoint effect of those clauses was to establish a double inequality, and so the deed did not relate to the equal distribution of the debtor's assets amongst the creditors in payment of their debts only, so as to be within the operation of the 12 & 13 Vict. c. 106, s. 224, and to bind dissenting creditors. *Gardner v. Chapman*, 8 C. B., N. S. 317; 29 L. J., C. P. 281; 6 Jur., N. S. 1254.

**Made before passing of Act.]**—A deed of arrangement, though executed by six-sevenths in number and value of the creditors of an insolvent estate, was not binding on the rest, if executed so as to be capable of being carried into effect before the passing of the 12 & 13 Vict. c. 106. *Larpernt v. Bibby*, 5 H. L. Cas. 481; 24 L. J., Q. B. 301; *S. P., Noble v. Gaddan*, 5 H. L. Cas. 504.

**12 & 13 Vict. c. 106, s. 224—"Creditors."**—In 12 & 13 Vict. c. 106, s. 224, the word "creditors" included those creditors with whom the arrangement had been entered into. *Culvert, Ex parte*, 3 De G. & J. 95; 27 L. J., Bk. 42; 4 Jur., N. S. 1258.

**Proof of Execution.**—In order to prove a deed of arrangement, the defendant produced from the Court of Bankruptcy a certificate of the inspectors, filed there in conformity with 12 & 13 Vict. c. 106, s. 126, and an account and an affidavit of the defendant in conformity with s. 227. The account included the debts and names of the creditors mentioned in the schedule to the deed. The certificate and other documents were not filed until after action brought. The defendant also proved that the deed was for some time before the commencement of the action in the same state as to the execution thereof by the several parties as when produced at the trial, with the exception of two creditors, without whom six-sevenths in number and value appeared to have executed.—Held, sufficient evidence of the due execution of the deed. *Wing v. Gray*, 3 H. & N. 34; 27 L. J., Ex. 273; 4 Jur., N. S. 380.

**Tender or Payment of Composition.**—The mere agreement to accept a composition under 12 & 13 Vict. c. 106, s. 230, without the payment or tender of the amount, did not release the bankrupt from liability. *Hazard v. Mare*, 6 H. & N. 435; 30 L. J., Ex. 97; 5 L. T. 743; 9 W. R. 252.

### 3. UNDER THE BANKRUPTCY ACT OF 1861.

#### a. Requirements of Act.

##### i. Majority of Creditors.

**Nature of Debts—Bills indorsed by Debtor.**—Outstanding bills indorsed by the debtor are properly included in considering whether three-fourths in value of the debtor's creditors executed the deed. *Ilderton v. Castrique*, 13 L. T. 506.

**Who should assent.**—A debtor executed an inspectorship deed by which it was provided that, in the case of debts due from him on negotiable instruments, either the original holder, or the present or ultimate holder, or any intermediate indorsers, might execute or assent to the deed, but that the ultimate holder should be deemed the creditor and party to the deed. The debtor was liable on acceptances on bills drawn by S., who was returned as an assenting creditor in respect of them; but, in fact, S. was, at the time of the registration, the holder of only a small part of those bills, the rest being in the hands of his bankers, who had discounted them. After the registration all the bills came into the hands of S.:—Held, that the bankers were the proper parties to have been returned as creditors in respect of the bills in their hands, and that S. had no right to assent in respect of his contingent liability as drawer; and, as striking out of these bills turned the scale of assents and dissents, the deed was void. *Petrie, Ex parte*, 3 L. R., Ch. 232; 37 L. J., Bk. 13; 18 L. T. 169; 16 W. R. 467.

The bills having been given in respect of a speculation the result of which was not ascertained:—Held, that S. could not be deemed a

creditor in respect of his estimated loss in the transaction. *Id.*

**Company—Liability to Calls.**—A contributory of a company in course of winding up executed a deed of arrangement with his creditors, and entered the company as creditors only for a call of 5*l.* per share which had been made. He was liable to be called on for 35*l.*, per share more, and calls to that amount were afterwards made. If the company had been entered as creditors for this whole amount, the dissenting creditors would have been the majority in value. The debtor subsequently alleged a set-off against the calls, which he had not stated on the application for registration:—Held, that the company ought to have been entered as creditors for the estimated amount of the future calls, as well as the call already made, being the amount provable in bankruptcy according to the Companies Act, 1862, s. 75; that the deed, therefore, was not assented to by the majority required by the Bankruptcy Act, 1861, s. 192; and was not binding on a dissentient creditor. *Pickering, Ex parte*, 4 L. R., Ch. 58; 38 L. J., Bk. 1; 19 L. T. 369; 17 W. R. 38.

**Disputed Debt.**—In estimating whether the deed has been assented to by the proper majority in number and value of the creditors, all the creditors and debts returned in the schedule must be taken into consideration, whether such debts are disputed or not. *Middleton, Ex parte*, 3 De G., J. & S. 201; 33 L. J. Bk. 36; 10 L. T. 82, 571.

**Secured Creditors.**—The word creditors in the first condition specified in the 192nd section means and extends to creditors holding security, good or bad, sufficient or insufficient, as well as creditors wholly without security; and in reckoning the proportion of assenting creditors, the debts due to secured as well as unsecured creditors must be taken into account. *Godden, Ex parte*, 1 De G., J. & S. 260.

If, in ascertaining whether three-fourths in value of the creditors have signed a composition deed, both secured and unsecured creditors are included in the whole amount, the creditors, parties to the deed, must be taken to have signed in respect of both their secured and unsecured debts, and the proportion ought to be calculated accordingly. The names and the amount of the debts of all the creditors must appear, whether secured (wholly or in part) or unsecured. *Turquand v. Moss*, 17 C. B., N. S. 15; 33 L. J., C. P. 355; 10 Jur., N. S. 824; 10 L. T. 574; 12 W. R. 960; *S. P., Smith, Ex parte*, 10 L. T. 803; *King v. Randall*, 14 C. B., N. S. 721; 11 W. R. 1031.

In ascertaining whether a deed of composition has been executed by a majority of creditors, all the creditors must be taken into account, whether or not they have security for their claims. *Whittaker v. Lowe*, 11 Jur., N. S. 530; 12 L. T. 500; 13 W. R. 723. Affirmed, 1 L. R., Ex. 74; 35 L. J., Ex. 44; 12 Jur., N. S. 375; 13 L. T. 469; 14 W. R. 197; 4 H. & C. 109—Ex. Ch.

A deed of arrangement may be registered as if assented to by a majority in number representing three-fourths in value of the creditors without deducting the amount of the securities held by such creditors as are secured. *Stark, In re*, 1 L. R., Ch. 150; 35 L. J., Bk. 15; 12 Jur., N. S. 40; 13 L. T. 573; 14 W. R. 255.

Goods were contracted to be sold, with a condition that they should not be delivered unless the vendors chose or the goods were required by the purchaser for the actual purposes of his business until payment of a bill of exchange which was given by the purchaser for the full value of the goods. The bill of exchange having been dishonoured and the goods nearly all remaining undelivered, the purchaser executed a trust deed, and the vendors assented thereto for a sum which included the value of goods contracted to be sold:—Held, that upon the facts of the case the contract for sale and purchase was absolute and not conditional, and that the retention of the goods was to operate as a security for the payment of the bill of exchange, and that the vendors could, if they chose, assent to the deed for an amount of which the sum so secured formed part. *Midleton, Ex parte*, 3 De G., J. & S. 201; 33 L. J., Bk. 36; 10 L. T. 82, 517.

— **Under 31 & 32 Vict. c. 104.**—The 31 & 32 Vict. c. 104, s. 3, which enacts that "no creditor shall be reckoned in the computation of the requisite majority" of creditors executing a deed under the Bankruptcy Act, 1861, s. 192, unless he proves his debt, "and in the computation of the requisite value of such creditors," the amount due to each creditor, after deducting the value of the securities held by him on the debtor's property, shall alone be reckoned, is not retrospective. *Ellis v. McCormick*, 4 L. R., Q. B. 271; 38 L. J., Q. B. 127; 20 L. T. 223; 17 W. R. 506; 10 B. & S. 83.

A debtor in 1864 executed a deed of assignment of his property to trustees for the benefit of his creditors; it contained a clause empowering the trustees to carry out contracts which he had entered into, but not a release. The deed was executed by the requisite majority of creditors in value if the debts were reckoned exclusively of secured debts, but not if they were included:—Held, that the deed was void. *Id.*

**Who may assent—Bank Manager.**—The manager of a bank has no authority, as such, after the bank has ceased to carry on business, to assent to a deed of arrangement between a debtor of the bank and his creditors. *Pinder v. Coqui*, 15 W. R. 22.

— **On behalf of Incorporated Companies.**—An arranging debtor's creditors were public unincorporated companies and banking companies, incorporated under 7 Geo. 4, c. 46, or 7 & 8 Vict. c. 113. These creditors were represented at the meetings, and assented to the resolution under 12 & 13 Vict. c. 106, made at a private meeting, by a person who acted for them under powers of attorney (not under seal) executed by their managers, secretaries or public officers, who did not appear to be authorized under seal to grant such powers of attorney, or otherwise than by virtue of their being such managers, &c.; but the banks which they represented had ratified their acts by receiving the composition:—Held, that the assents were properly given. *Naylor v. Mortimore*, 17 C. B., N. S. 207; 33 L. J., C. P. 273; 10 Jur., N. S. 1001.

— **Liquidator of Company.**—A joint-stock company, in the course of being wound-up compulsorily, appeared among the assenting creditors in the name of the official liquidator, G.:—Held,

that the debtor must prove that G. was in fact the official liquidator, and was duly authorized to assent to the deed. *Drew v. Myers*, 19 L. T. 740.

— **Assignor of Debt.**—Where a creditor has assigned his debt to another, an assent in writing by the original creditor is not a sufficient assent. *Id.*

**Assent when given.**—The majority of assenting creditors required for the purpose of making a deed binding on dissenting creditors, must be constituted by creditors who have assented before registration of the deed. *Raistrick, Ex parte*, 37 L. J., Bk. 12; 18 L. T. 41; 16 W. R. 388; *S. P., Beddall v. King*, 4 L. R., C. P. 549; 38 L. J., C. P. 249; 20 L. T. 325; 17 W. R. 614.

— **Before Deed drawn up.**—A creditor may assent in writing before the deed is prepared or executed by the debtor; and if the assent is to a deed of composition only, it will be sufficient, although the deed, when prepared, also contains a release. *Waddington v. Roberts*, 3 L. R., Q. B. 579; 37 L. J., Q. B. 253; 18 L. T. 853; 16 W. R. 1040; 9 B. & S. 697.

The assent of creditors to a deed may be given before the deed is executed or even prepared; all that is necessary is, that the deed when drawn up should substantially correspond with the terms of the deed specified in the assent. *Rutty v. Benthall*, 2 L. R., C. P. 488; 36 L. J., C. P. 194; 16 L. T. 287; 15 W. R. 744.

The assent is not rendered invalid by the mere fact that the document containing it also professes to empower a third person to execute the deed for the creditor, and is not stamped as a power of attorney. *Id.*

The creditors of a debtor assented to a letter of licence being granted to him. Subsequently a deed was executed carrying out the arrangement; but in addition there was recited in it, as part of the arrangement, a deed of the previous day conveying certain of the debtor's property to a trustee selected by himself, for the benefit of all his creditors:—Held, that the deed was not in conformity with the assents, and so, not being assented to by the requisite number of creditors, was bad under the Bankruptcy Act, 1861. *Styring v. Waters*, 22 L. T. 541; 18 W. R. 808.

**Conditional Assent.**—A conditional assent on the part of a creditor to a deed cannot, so long as the condition remains unfulfilled, be reckoned in calculating the statutory majority of creditors. *Rawlins, Ex parte*, 1 De G., J. & S. 225.

The assents of creditors to a composition deed must, when the deed is registered, be unconditional; but they will not be rendered invalid by their containing a condition which is fulfilled by the deed itself. *Horsfall v. Swan Bank and Brick Works Company*, 18 L. T. 409; 16 W. R. 934.

**Qualified Assent.**—A written assent to a deed, appearing on its face to be given "without prejudice to the creditor's rights under a former deed," is invalid, because qualified and not absolute. *Johnson v. Ossenton*, 4 L. R., Ex. 107; 38 L. J., Ex. 76; 19 L. T. 793; 17 W. R. 675.

**Creditor's right to inspect.**—A creditor has a

right to demand inspection at common law of the written assents to a deed, they being by virtue of the statute part of the deed itself. *Andrew v. Pell*, 2 L. R., C. P. 251.

**Creditor's right to impeach Deed on ground of Assent by insufficient Majority.]**—A creditor may shew that the affidavit delivered to the registrar on the registration of a deed contains an untrue statement as to the majority of creditors required by the act having assented to or approved of such deed. *Beddall v. King*, 4 L. R., C. P. 549; 38 L. J., C. P. 249; 20 L. T. 325; 17 W. R. 614.

**Proof of Assents.]**—Upon a plea of composition and release:—Held, that the production of the deed and certificate of registration, and sealed copies of the affidavits required by s. 192, and by the General Rules of 1862, will not dispense with proof that a majority in number representing three-fourths in value of the creditors of 10*l*. and upwards have in writing assented to or approved of the deed. *Bramble v. Moss*, 3 L. R., C. P. 458; 37 L. J., C. P. 209; 18 L. T. 241; 16 W. R. 649.

The affidavit made on the registration of an inspektorship deed is not sufficient evidence of the assent of the creditors. *Phillips v. Furber*, 5 L. R., Ch. 746; 22 L. T. 707; 18 W. R. 985.

Inspectors claiming under a deed of inspektorship registered under the Bankruptcy Act, 1861, must prove the assents to the deed of the creditors. *Id*.

**Only two Creditors for amounts over 10*l*.]**—A trust deed, which has been assented to by the only two creditors for amounts above 10*l*., will be received for registration as assented to by a majority of such creditors. *Hammond, In re*, 12 Jur., N. S. 460; 14 L. T. 692.

## ii. Execution by Trustees.

**Trustee not necessary.]**—A deed of composition is good as a defence against an action of a non-executing creditor, though it appoints no trustee. *Deuchurst v. Jones*, 3 H. & C. 60; 33 L. J., Ex. 294; 10 Jur., N. S. 753; 10 L. T. 538; 12 W. R. 885.

A deed of composition between all the creditors of the first part and the debtor of the second part, in which no trustee is appointed, and which provides no security for the payment of the composition, is valid, since, if the composition is not paid, each creditor has his action. *Brooks v. Jennings*, 1 L. R., C. P. 476; 12 Jur., N. S. 341; 14 L. T. 19; 14 W. R. 440.

**Three Trustees—Execution by Two.]**—At a meeting of the creditors of a debtor, it was resolved that there should be an assignment of the debtor's estate, and that two creditors who were present should be appointed the trustees. At the instance of the solicitor of an absent creditor, his client was also nominated one of the trustees. The deed was subsequently prepared, and executed by the two original trustees, but the third refused to sign it:—Held, that the Court of Bankruptcy had no power to direct the deed to be registered without his signature. *King, Ex parte*, 34 L. J., Bk. 20; 11 Jur., N. S. 4; 11 L. T. 466; 13 W. R. 330.

## iii. Attestation of Execution by Debtor.

**Power of Attorney given by Debtor residing abroad.]**—A debtor resident abroad executed a power of attorney authorizing a person in this country to execute a deed of composition with his creditors. The execution of the power of attorney by the debtor and of the composition deed by the attorney was attested by solicitors:—Held, that the terms of the third rule of sect. 192 had been sufficiently complied with, and that the deed ought to be registered. *Bell, In re*, 2 De. G., J. & S. 672; 34 L. J., Bk. 36; 12 L. T. 752; 13 W. R. 1002.

## iv. Registration of Deed.

**What Deeds.]**—The 24 & 25 Vict. c. 134, s. 194, applies not only to deeds which comply with, and are framed under, the 192nd section, but to every deed whatever which is or professes to be, or is obviously on the face of it intended to be, a deed of arrangement between a debtor and the whole body of his creditors. *Hodgson v. Wightman*, 1 H. & C. 810; 32 L. J., Ex. 147; 9 Jur., N. S. 308; 7 L. T. 832; 11 W. R. 574.

Every such deed, therefore, which is not registered in the Court of Bankruptcy, under the provisions of the 194th section, is inadmissible in evidence. *Id*.

A deed of composition purported to be entered into between a debtor and the creditors who executed the deed, and the creditors (stated therein to be, or representing at the least, three-fourths in value) in consideration of the payment of a composition which the debtor covenanted to pay to them, by two instalments on specified days, released their debts. It did not appear whether all the creditors, or what proportion of them in number and value, executed the deed. In an action by one of the executing creditors against the debtor, the deed of composition being offered in evidence by the debtor in support of a plea of release:—Held, that this was a deed intended to be executed by, or binding on, the whole body of creditors, and that being unregistered it could not be given in evidence. *Id*.

A deed whereby A., a debtor, assigned his estate to trustees upon trust out of the proceeds to pay rateably to the parties thereto of the third part, who should execute the deed within twenty-one days from its date (being respectively creditors of A.) the several debts set opposite their names in the schedule; with a proviso that such creditors as should not execute or assent in writing to take the benefit of the deed within the limited time, should be excluded from all benefit thereunder, is a deed between the debtor and all his creditors, and, as such, requires registration, and is, therefore, in default of such registration, inadmissible in evidence. *Prichard v. Timothy*, 35 L. J., Ex. 165; 14 L. T. 443.

**Deed registered under s. 194.]**—A deed registered under s. 194, in order to operate under s. 197, must be registered with all the formalities required by s. 192. *Pearson v. Pearson*, 1 L. R., Ex. 308; 35 L. J., Ex. 172; 12 Jur., N. S. 589; 4 H. & C. 316.

**Deed under s. 185.]**—In an action by a debtor for an arrest, after the execution of a deed of arrangement, under s. 185 of the 24 & 25 Vict. c. 134, by a creditor who had not executed such



deed, the absence of an allegation in the declaration, that the deed was registered under s. 187, before action, is a fatal defect. *Renwick v. Dale*, 8 L. T. 366.

**Deed registered under s. 194.**—The registration of trust deeds under 24 & 25 Vict. c. 134, ss. 192, 194, although in practice performed by the same officer, are distinct and have different operations; and where, for the want of the papers required by the orders, registration under the former section had been refused by the officer, and the applicant had registered the deed under s. 194.—Held, that the registration did not prevent the deed, which was an assignment of all the debtor's property, from being an act of bankruptcy. *Morgan, Ex parte*, 1 De G., J. & S. 288; 32 L. J., Bk. 15; 2 Jur., N. S. 559; 7 L. T. 729; 11 W. R. 316.

**Enlarging Time for Registration.**—The Court of Bankruptcy has no power to order the registration of a trust deed seeking to bind creditors who have not executed, where the twenty-eight days after the signature of the debtor have elapsed. The power of extending the time, under s. 194, is applicable only to deeds not seeking to bind the minority. *Skinner, In re*, 34 L. J., Bk. 9; 10 Jur., N. S. 1137; 11 L. T. 354; 13 W. R. 114.

The power of a commissioner of bankruptcy to extend the period of registration does not cease at the expiration of the twenty-eight days, but may be exercised subsequently, so as to make a deed registered within the enlarged time receivable in evidence. *Wishart v. Fowler*, 4 B. & S. 674; 33 L. J., Q. B. 125; 10 Jur., N. S. 633; 9 L. T. 608; 12 W. R. 307.

A trust deed under s. 192 must be registered within twenty-eight days after execution by the debtor, and where a commissioner, within the twenty-eight days, refused to direct the registration, on the ground of informality:—Held, after the expiration of the twenty-eight days, that he had no jurisdiction to direct the registration. *Power, In re*, 1 L. R., Ch. 153; 11 Jur., N. S. 985; 13 L. T. 451.

**Discretion of Commissioner to refuse Registration.**—Where a commissioner has refused to allow the registration of a trust deed, on the ground that the affidavit upon which the application to register had been made was insufficient:—Held, that the matter was discretionary with the commissioner. *Anon.*, 11 Jur., N. S. 69; *S. C.*, nom. *Groome, Ex parte*, 13 W. R. 302.

**Stamping—Secured Debts.**—An inspectorship deed of a debtor's estate is sufficiently stamped if, in addition to the ordinary deed stamp, it bears an ad valorem stamp calculated at the rate of 5s. upon every hundred pounds of the whole amount of the debts uncovered by security; and the amount of the secured debts need not be taken into consideration in calculating the stamp duty. *Grates v. Lovett*, 18 L. T. 297.

**Inadequate Stamp.**—The trustees under a deed of arrangement put in the deed, which was in the form given in Schedule (D.) of the Bankruptcy Act of 1861, for the purpose of proving their title to certain machines, of the value of 300*l.*, alleged to have belonged to the bankrupt. The deed was stamped with a stamp,

calculated upon a valuation of the property transferred, not exceeding 700*l.*, although, on the face of it, it purported to pass all the bankrupt's property; and it was admitted that the trustees had received property under the deed, exclusive of the value of 650*l.* at the least:—Held, that the trustees were not precluded, by the inadequacy of the stamp, from contending that the machines also passed by the deed. *Gregory v. Baillon*, 4 F. & F. 1069.

**Cancellation of Registration.**—The Court of Chancery has jurisdiction to order the registration of a deed of arrangement with creditors under the Bankruptcy Act, 1861, s. 192, to be cancelled. *Greaves, Ex parte*, 5 L. R., Ch. 326; 22 L. T. 184; 18 W. R. 363.

**On what Grounds.**—When a creditor's deed has been registered without having been assented to as required by the act, the court will not necessarily order the registration to be cancelled; but it will do so where the deed is fraudulent, and one to which the assenting creditors must be supposed to have assented, on the assumption that it would not be registered unless the requisite amount of assents were obtained. *Ib.*

A creditors' deed, under the Bankruptcy Act, 1861, s. 192, may be impeached for inadequacy of composition, importing fraud. *Williams, Ex parte, Pullen, In re*, 10 L. R., Eq. 57; 39 L. J. Bk., 1; 18 W. R. 406.

Such a deed, when registered, is in the nature of a record, and the court has power to order the registration to be vacated. *Ib.*

**Delay in Applying for Cancellation.**—Mere delay in applying to set aside a creditor's deed for fraud, is in itself no ground for refusing such an application, if the position of the parties be not altered. *Ib.*

After a year's delay a judgment creditor is not entitled to ask the Court of Bankruptcy to rescind an order made for the registration of a deed nor for leave to issue execution notwithstanding the deed, although the order for registration may have been made upon a state of facts not altogether satisfactory. *Banfield, Ex parte*, 1 L. R., Ch. 154; 35 L. J., Bk. 12; 12 Jur., N. S. 37; 14 L. T. 239; 14 W. R. 153.

**Proof of Registration.**—A memorandum written on the face of a composition deed, stating the day and the hour of the day on which the deed was brought to the office of the chief registrar for registration, and that it was duly registered pursuant to the provisions of the Bankruptcy Act, 1861, is *prima facie* evidence that an affidavit, pursuant to clause 5 of s. 192, was delivered to the chief registrar, together with the deed; and it is unnecessary to prove the truth of the affidavit. *Waddington v. Roberts*, 3 L. R., Q. B. 579; 37 L. J., Q. B. 233; 18 L. T. 855; 16 W. R. 1040; 9 B. & S. 637.

The memorandum of registration in the margin of the deed, under s. 196, is sufficient proof that the registration was completed in the requisite time; and the seal of the Bankruptcy Court attached to each of the documents required by the fifth clause of s. 192 is sufficient proof that the provisions of that clause have been satisfied. *Morgan v. Sarin*, 16 L. T. 457; 15 W. R. 865.

A joinder of issue to a plea of a deed of ar-

rangement necessitates the formal proof of all the requisites to the validity of such deed laid down in the act; and a special replication is not necessary for that purpose. *Morgan v. Savin*, 16 L. T. 333.

—**Certificate of Registration.**—The certificate of registration of an inspectorship deed is *prima facie* evidence of the filing of the affidavits required by the Bankruptcy Act, 1861, ss. 192, 197; but is not evidence of the facts alleged in those affidavits. *Phillips v. Furber*, 5 L. R., Ch. 746; 22 L. T. 707; 18 W. R. 985.

**Alteration of Deed after Registration.**—A deed was expressed to be made between the debtor and certain persons named in a schedule as creditors, and all his other creditors, and was executed by a majority in number, representing three-fourths in value of the debtor's creditors, and was then registered; after registration, the names of two additional creditors of the debtor were inserted in the schedule:—Held, that there was no material alteration of the deed, and, that, as the requisite number had assented before registration, the insertion of the names of the two creditors after registration did not affect the validity of the deed. *Wood v. Slack*, 3 L. R., Q. B. 379; 37 L. J., Q. B. 130; 18 L. T. 510; 16 W. R. 859.

#### v. Surrender of Debtor's Property.

##### Deed not include Whole Property of Debtor.]

—An assignment or a surrender of a debtor's estate is not necessary to the validity of a deed of composition or release, but to render such a deed binding on the minority of creditors, who have not executed or assented to or approved of it, it is necessary that they should stand under the deed in the same situation and with the same advantages as the creditors forming the majority. *Cockburn, Ex parte*, 33 L. J., Bk. 17; 10 Jur., N. S. 573; 10 L. T. 252; 12 W. R. 673; *S. P., Rawlins, In re*, 32 L. J., Bk. 27; 9 Jur., N. S. 316; 7 L. T. 582; 11 W. R. 157; *Morgan, Ex parte*, 1 De G., J. & S. 288; 32 L. J., Bk. 15; 9 Jur., N. S. 559; 7 L. T. 729; 11 W. R. 316.

A *cessio bonorum* is not necessary in order to render a deed binding. *Clapham v. Atkinson*, 4 B. & S. 722; 34 L. J., Q. B. 49; 11 Jur., N. S. 217; 10 L. T. 908; 12 W. R. 1062—Ex. Ch.

It is no objection to the validity of an arrangement under the Bankruptcy Act, 1861, s. 110, that it does not provide for the entire distribution of the bankrupt's estate among his creditors. *Symes v. Hughes*, 9 L. R., Eq. 475; 39 L. J., Ch. 304; 22 L. T. 462.

##### Assignment must be in accordance with Deed.]

—The 7th condition of s. 192 of the Bankruptcy Act of 1861 does not mean that the debtor's property must be given up to the trustee, but that if the deed provides for its being given up, in order to bind non-assenting creditors, the property must be given up in accordance with the terms of the deed. *Johnson v. Barratt*, 1 L. R., Ex. 65; 35 L. J., Ex. 15; 13 L. T. 597; 14 W. R. 194; 4 H. & C. 16.

A deed of composition is not invalid because it contains an assignment of all the debtor's estate and effects to a trustee absolutely, with a proviso that until default in payment of the composition the debtor may hold and enjoy the

estate and effects, and use and deal with the same. *Id.*

**Declaration for breach of an agreement**, whereby, in consideration that the plaintiff would assign all his estate to the defendants, two of his creditors, as trustees for the equal benefit of all his creditors, and would disclose to the defendants all his estate, the defendants promised, upon the realization of his estate, to return and pay to the plaintiff 50l.:—Held, that the declaration was bad, inasmuch as the agreement therein set forth, being made without the consent of the creditors, was illegal as a fraud on their rights. *Blacklock v. Dobie*, 1 C. P. D. 265; 45 L. J., C. P. 498; 35 L. T. 338; 24 W. R. 574.

**Where Debtor has no Property.**—Where a debtor, being sued by a creditor on a dishonoured bill of exchange, and having no present assets, and only the deferred possibility of the accrual of a trifling sum on a balance of accounts between the debtor and his late partner, such possibility being dependent upon the result of legal proceedings taken by the partners to obtain relief against payments made by them, executed a trust deed in the form given in Schedule (D), which was registered:—Held, that the deed was invalid as a fraud upon the act, and that a dissentient creditor ought to have leave to issue process against the debtor, notwithstanding the registration of the deed. *Morrison, Ex parte*, 3 De G., J. & S. 232. Affirmed, 33 L. J., Bk. 47; 10 Jur., N. S. 787; 10 W. R. 1093.

##### Where Majority of Creditors neglect to secure Part of Assets.]

—Where an officer in the army retired upon half-pay, receiving for so doing a sum of money equal to about half the selling value of his commission, and then executed a deed of composition with his creditors, giving them 10s. in the pound upon the amount of their debts, the court, finding that the majority of creditors (the largest of whom was the debtor's sister) had taken no pains to secure any part of the debtor's half-pay for the benefit of the creditors:—Held, that the deed was not binding on a dissentient creditor. *Deacon, Ex parte*, 19 L. T. 438; 17 W. R. 129.

#### b. Deeds in Form of Schedule D.

**Affidavit—Requisites.**—An affidavit for obtaining the registration of a deed made in the form of Schedule (D), that the deponent had been informed, and believed, that negotiable securities had been negotiated, and that he was unable to ascertain in whose hands they were, is insufficient in not stating the grounds of belief, and the steps taken to ascertain who were the holders of the securities. *Dobson, Ex parte*, 10 Jur., N. S. 812; 10 L. T. 802; 12 W. R. 1094.

##### Insufficient Majority—May be good at Common Law.]

—A debtor executed a trust deed in the form given in Schedule (D). The deed was registered, but was not assented to by a majority of creditors:—Held, that this deed was good at common law, and subject to the provisions of ss. 194 and 197 of the Bankruptcy Act of 1861. *Symons v. George*, 4 H. & C. 996; 34 L. J., Ex. 187; 11 Jur., N. S. 713; 13 L. T. 190; 13 W. R. 922—Ex. Ch. Affirming 3 H. & C. 68; 33 L. J., Ex. 231; 10 Jur., N. S. 637; 10 L. T. 424; 12 W. R. 827.

**Date.]**—The date of a trust deed in the form in the Schedule (D.) is that of the supposed adjudication to which the 197th section refers. *Mendel, Ex parte*, 1 De G., J. & S. 330.

**Title of Trustees.]**—By a deed in the form given in Schedule (D.), to which the required majority of the creditors assented, a debtor assigned all his effects to a trustee, to be applied and administered for the benefit of the creditors in like manner as if the debtor had been at the date thereof duly adjudged a bankrupt:—Held, that the title of the trustee dated from the execution of the deed; and that a distress for rent levied between that time and the day of registration could not be made available for more than one year's rent. *Selby v. Greaves*, 3 L. R., C. P. 594; 37 L. J., C. P. 251; 19 L. T. 186; 16 W. R. 1127.

**Unliquidated Damages.]**—Although a trust deed does not in terms extend to creditors in respect of unliquidated damages, they can come in under a deed in the form of schedule D. *Wilmot, Ex parte*, 2 L. R., Ch. 795; 36 L. J., Bk. 17.

**Cannot be pleaded in Bar.]**—A deed of assignment in the form given in Schedule (D.) cannot be pleaded in bar of an action, as it contains no release, and there is in the statute no provision that it shall operate as a bar. *Clarke v. Williams*, 3 H. & C. 508; 34 L. J., Ex. 60; 11 L. T. 611; 13 W. R. 294. Affirmed, 3 H. & C. 1001; 34 L. J., Ex. 189; 13 W. R. 923.—Ex. Ch. *S. P. Jones v. Morris*, 34 L. J., Q. B. 90; 11 Jur., N. S. 481; *Eyre v. Archer*, 16 C. B., N. S. 638; 33 L. J., C. P. 296; 10 Jur., N. S. 802; 10 L. T. 615.

**No Defence against Non-assenting Creditor.]**—A deed made in the form given in Schedule (D.), without any release, affords no equitable defence to an action by a non-assenting creditor. *Wright v. Jelley*, 4 L. R., Ex. 9; 38 L. J., Ex. 22; 19 L. T. 384; 17 W. R. 164.

**Deed executed by Partners—Joint and Separate Estates pass.]**—When in accordance with the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 192, and in the form of Schedule (D.) to that act, two partners had conveyed all their estate and effects to trustees for the benefit of their creditors:—Held, that as well the separate estate as the joint estate of the partners passed under the deed. *Eastwood v. Ward*, 35 L. T. 502—C. A.

#### 4. DEEDS IN CASES OF PARTNERSHIP.

**Deeds compounding for Joint and Separate Debts—No Separate Estate.]**—By a deed made between two debtors in partnership of the first part, trustees of the second part and the persons and firms whose names were subscribed, and all other the creditors of the debtors, of the third part, the two debtors and each of them conveyed all their and each of their estate and effects to the trustees absolutely, to be administered for the benefit of the joint and separate creditors of the two debtors, in like manner as if they had been duly adjudged bankrupt. The deed contained no recitals. This deed was duly registered on the 24th of November. On the 28th of November, one of the debtors was adjudged a bankrupt on the petition of a creditor, who, out

of six separate creditors, was the only dissentient. The commissioner having refused a motion to have the petition dismissed, on the ground that it appeared there was no separate estate, and hence nothing to bind any dissentient separate creditor, order reversed on appeal. *Oldfield, Ex parte*, 11 L. T. 756.

By the statute, joint and separate creditors must deliberate and decide together, and there is nothing to warrant the conclusion that separate creditors may not constitute a binding majority within the statute, even although there may be no separate estate. *Id.*

**Joint Debts and Separate Debts of one Partner only.]**—To an action on a note, the defendants James and Frances pleaded a deed, whereby, after reciting that they had carried on business in partnership, all their property was assigned to trustees to pay a composition to the joint creditors of the two, and to the separate creditors of James; and the plea averred that the requisite majority in number and value of the joint creditors of the two, and of the separate creditors of James, had assented to the deed, and that there were no separate creditors of Frances. The plaintiffs replied, setting out the note, which was the joint and several note of the two defendants; the defendants rejoined that the note was given on account of and by way of security for a debt due to the plaintiffs from the defendants jointly:—Held, by Byles, Keating, and Montague Smith, JJ. (Bovill, C. J. dissenting), that, there being no separate creditor of Frances distinct from the joint creditors, but only a liability on her part to be sued separately upon a note given by way of security for a joint debt, the deed, which discharged the joint debt, necessarily discharged the several liability also. *Rixon v. Emery*, 3 L. R., C. P., 546; 37 L. J., C. P. 243; 18 L. T. 637; 16 W. R. 1171.

Held, by Bovill, C. J., that the effect of the note being to create a separate legal debt on the part of Frances, the deed was no discharge as to that debt, and that, as the deed did not bind all the creditors, it did not bind any non-assenting creditors. *Id.*

**Joint and Separate Creditors placed on same footing.]**—A deed of composition is not invalid as against non-assenting creditors, because there are joint and separate creditors, and joint and separate estates, and the deed places both classes of creditors on the same footing as regards the composition. *Walker v. Ncrrill*, 3 H. & C. 408; 34 L. J., Ex. 70; 11 Jur., N. S. 246; 11 L. T. 774; 13 W. R. 523.

An averment in a plea that the requisite majority of creditors, and each of them, executed the deed, is a sufficient averment that it was executed by both joint and separate creditors. *Id.*

The affidavit required by the fifth condition of sect. 192, need not distinguish between the joint and separate debts. *Id.*

**Joint Debts only.]**—A deed of composition made between two partners and their joint creditors only cannot bind a non-assenting creditor. *Tomlin v. Dutton*, 3 L. R., Q. B. 466; 37 L. J., Q. B. 153; 18 L. T. 815; 16 W. R. 1167; 9 B. & S. 251.

A deed of composition, made by the members of a partnership with the creditors of the partnership, is not binding on the separate creditors

of each partner. *European Central Railway Company v. Westall*, 1 L. R., Q. B. 167; 35 L. J., Q. B. 9; 14 W. R. 177; 6 B. & S. 970.

**Deed by one Partner only.]**—Three partners were sued upon a note given by them for a partnership debt, and judgment was recovered against them. After action, but before judgment, C., one of the partners, executed a deed, by which he assigned all his estate to trustees for the benefit of his creditors, no reference being made to the partnership or its assets or its liabilities. The deed was duly registered, and a certificate obtained and notice given. C. was arrested under the judgment:—Held, that he was protected from arrest as well from joint as from separate creditors. *Castleton, In re*, 31 L. J., Bk. 71; 6 L. T. 705; 10 W. R. 851—L. J.

**By remaining Partner after Dissolution.]**—To the validity of a composition deed, executed by a single member of a dissolved firm after the dissolution, objection was taken on the part of creditors of the firm, on the ground that the joint creditors were insufficiently represented in the computation of the majority of assenting creditors:—Held, that the objection could not be entertained in the absence of evidence shewing the existence of joint estate at the date of the execution of the deed, and that the onus lay upon the objectors to produce such evidence. *Cockburn, Ex parte*, 3 De G., J. & S. 175; 33 L. J., Bk. 17; 10 Jur., N. S. 573; 10 L. T. 252; 12 W. R. 673.

When a partnership existing between two persons had been dissolved fifteen months before, and one of the partners in the late firm executed a composition deed under the Bankruptcy Act, 1861, s. 192, the fact that the other partner had not executed the deed did not constitute a valid objection to registration. *Hendry, In re*, 18 W. R. 295.

**What Property should be assigned.]**—A trust deed for the benefit of the creditors, intended to be executed by debtors in business together as co-partners, and to be brought within the provisions of s. 192, is properly framed when its terms embrace all possible estate and property which not only does, but also may or might, belong to the partners jointly or to either of them separately. *Oldfield, Ex parte*, 3 De G., J. & S. 251.

**Under old Law.]**—If partners assign all their partnership effects to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void. *Eckhardt v. Wilson*, 8 T. R. 140.

##### 5. RIGHTS, DUTIES, AND LIABILITIES OF TRUSTEES AND INSPECTORS.

**Deed not executed by Creditors although communicated to some of them.]**—Where a deed of assignment of a debtor's personal property to a trustee for the benefit of all his creditors who should execute or accede to the deed was bona fide made and executed by both the debtor and the trustee, and the property taken possession of under it, and afterwards the trustee by his agent communicated the contents of the deed and all that had been done to three of the creditors, each

of whom expressed himself satisfied with the arrangement, but neither they nor any others of the creditors signed the deed or did any act under it:—Held, that the deed was valid and binding, and passed the property to the trustee as against an execution creditor, although not one of those to whom the contents of the deed had been made known. *Harland v. Binks*, 15 Q. B. 713; 20 L. J., Q. B. 126; 14 Jur. 979.

**When Trustees are mere Mandatories.]**—Where a debtor conveys property, in trust for creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the conveyance operates not as an assignment, but only as a power to the trustees, which is revocable by the debtor. *Smith v. Keating*, 6 C. B. 136; *S. P., Acton v. Woodgate*, 2 Mylne & K. 492.

To a bill filed in equity by a trustee under an assignment for the benefit of creditors to recover from third parties property alleged to be vested in him by virtue of the deed, a demurrer will not lie, either on the ground that the creditors are not alleged to have executed the deed, or on the ground that they are not made parties to the suit. *Glegg v. Rees*, 7 L. R., Ch. 71; 41 L. J., Ch. 243; 25 L. T. 621; 20 W. R. 193.

A bill filed in 1871 alleged that, previously to a debtor's conviction for felony, by an indenture made in 1862 between himself of the first part, a trustee of the second part, and the several other persons whose names and seals were, or were intended to be, thereunto subscribed and set, being creditors of the debtor, of the third part, the debtor assigned all his personal estate and effects to the trustee upon trust in favour of his creditors; and that the indenture was duly executed by the debtor and the trustee, and registered under the Bankruptcy Act, 1861, s. 194, and the bill prayed for a declaration that the defendant, who had, in 1858, purchased a house in trust for the debtor, was a trustee of the house for the trustee of the deed:—Held, that although there was no sufficient allegation in the bill that the deed was executed by any creditor, still it did allege an assignment to the plaintiff, and that enabled him to sue third persons who had the property in their possession, and there was enough on the bill to require an answer. *Id.*

A man conveyed all his property to trustees upon trust to pay thereout 5,000*l.* which they were to raise on his behalf, and all other debts due from the assignor, including a debt due to the plaintiff. The trustees realized the property of the assignor, and alleged that they had paid some of the debts out of the proceeds. The plaintiff brought an action against the trustees, asking for an account of the property, and that the debts of the plaintiff and the other creditors might be satisfied thereout. The statement of claim contained no allegation that the assignment had been communicated to the plaintiff. The trustees demurred:—Held, that they were not trustees for the plaintiff, and that the demurrer must be allowed. *Johns v. James*, 8 Ch. D. 744; 47 L. J., Ch. 853; 39 L. T. 54; 26 W. R. 821—C. A. Reversing, 37 L. T. 778; 26 W. R. 276.

By a trust deed, executed by a debtor, it was declared the moneys, assured by certain policies on his life, should be held by the trustees (who were also creditors) as security for the payment to certain creditors (parties to the deed) of the

several debts therein mentioned. S., one of these creditors, never executed the deed; and it was never communicated to him:—Held, that, after the death of the debtor, his executor was at liberty to revoke the trusts of the deed as against S., though a party to it, it never having been communicated to him. *Sanders, In re*, 47 L. J., Ch. 567.

The doctrine that a conveyance of property to trustees in favour of creditors operates as a mere power to mandatories or agents, revocable until communicated to or assented to by the creditors, does not apply where the trustee himself takes a beneficial interest under the deed. *Siggers v. Evans*, 5 El. & Bl. 367; 24 L. J., Q. B. 305; 1 Jur., N. S. 851.

Semble, that where a deed of assignment has been executed to a stranger as trustee for creditors, a communication of the trust to a creditor, by reason of which he may not have pursued his remedy, or his position may have been altered, will render the deed irrevocable by the assignor, without any actual assent by any creditor. *Ib.*

A., on the 19th of August, bonâ fide executed a deed of assignment to the plaintiff (who was a creditor of A.), as trustee for the benefit of such of his creditors as should sign the deed, and placed it in the hands of his own attorney, undertaking to communicate himself with the plaintiff. Accordingly, on the 22nd, A. wrote to the plaintiff, informing him that he had executed the deed, and asking him to act as trustee. This letter was received by the plaintiff on the 23rd, about one o'clock p.m.; and on the 24th the plaintiff replied, accepting the trust, and on the 30th executed the deed. About four o'clock, p.m., on the 23rd, a fi. fa., at the suit of the defendant against A., was delivered to the sheriff:—Held, first, that the assignee being a creditor taking a beneficial interest under the deed, and not a mere mandatory, the deed did not operate as a voluntary conveyance, revocable by A., until the assent of some third party as creditor. *Ib.*

**Title vests on Execution of Deed.**—Held, secondly, that the title to the property vested in the plaintiff immediately upon the execution of the deed, and therefore prevailed against the defendant's execution. *Ib.*

A conveyance by a debtor of his goods to two creditors for the benefit of themselves and the other creditors passes the property at once, on the execution of the deed by the debtor, without any assent on the part of the trustees; but the knowledge of the debtor, at the time of making the deed, that a writ of execution is out against his goods, must be taken to be the knowledge of the trustees within the proviso of s. 1 of the 19 & 20 Vict. c. 97; and, consequently, the trustees' title is not protected by that section, and the goods are bound by the delivery of the writ to the sheriff. *Hobson v. Thelluson*, 2 L. R., Q. B. 642; 36 L. J., Q. B. 302; 15 W. R. 1037; 8 B. & S. 476.

**Same Rights as Assignees in Bankruptcy.**—Trustees to whom by the deed all the debtor's property is assigned for the benefit of his creditors, have, upon the registration of the deed, the same rights over the property as assignees in bankruptcy would have, and their title has relation back to and overrides any fraudulent transfer of the debtor's property made before the execution of the deed. *Exley v. Inglis*, 3

L. R., Ex. 247; 37 L. J., Ex. 145; 18 L. T. 645; 16 W. R. 938.

— **Including Power to Summon Witnesses.**—Trustees and creditors under a trust deed duly registered are entitled to the same powers, rights and privileges as are possessed by assignees and creditors under an adjudication in bankruptcy, including the power of summoning witnesses. *Alexander, Ex parte*, 1 De G., J. & S. 311; 32 L. J., Bk. 55; 9 Jur., N. S. 880; 8 L. T. 748; 11 W. R. 924.

**Right to Sue.**—Trustees need not, as in the case of a bankruptcy, obtain the sanction of the court to justify them in commencing or continuing an action against a debtor to the estate. *Trevilco, In re*, 13 W. R. 391.

When a debtor has executed a composition deed containing a covenant with a trustee to whom no cessio bonorum is made, the debtor himself, and not the trustee, is the proper party to a suit respecting a liability contingent at the date of the deed, but which has since become absolute. *Moye v. Sparrow*, 22 L. T. 154; 18 W. R. 400.

**Right to Sell limited by Deed.**—A debtor assigned his house and business in trust for payment of his debts, retaining to himself the management of the business, under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees assembled at a general meeting:—Held, that a sale afterwards made by the trustees, without further notice, was unauthorized and unlawful. *Tomney v. White*, 3 H. L. Cas. 49.

**Right to continue Contract of Debtor.**—The trustees of a deed of composition, executed by a debtor for the benefit of his creditors, and duly registered, are not entitled to claim to complete a building contract entered into by the debtor prior to the date of such deed, where the debtor only contracted that he, "his executors and administrators" (omitting "assigns") would execute the works, the subject of the contract. *Knight v. Burgess*, 33 L. J., Ch. 727; 10 Jur., N. S. 166; 10 L. T. 90.

— **To have Bank Stock transferred.**—A debtor executed a deed vesting all his property in trustees, to be applied for the benefit of his creditors, in like manner as if he had been adjudged bankrupt. The deed was duly registered. Shortly afterwards he died, leaving bank stock standing in his name, and there was no personal representative:—Held, that, in the case of bankruptcy, the court could have made an order under 12 & 13 Vict. c. 106, s. 128, directing the Bank of England to transfer the stock into the names of the assignees, without the bankrupt or his personal representative signing a transfer; that the Bankruptcy Act of 1861, s. 197, gave the trustees of such a deed as the present the same rights in this respect as if they had been assignees in bankruptcy; and that an order might be made upon the bank for transfer into the names of the trustees, upon which the bank could act without the concurrence of a personal representative.

**Cannot recover Money from Debtor who has Paid under Garnishee Order.]**—In an action by the trustees, under a deed of assignment to recover a debt due from the defendant to the assignor, it was alleged and admitted upon the record that a garnishee order for payment of the debt was served upon the defendant before he had notice of the deed and before the registration of it, and that he paid the debt to the judgment creditor in order to avoid execution, and because he could not otherwise avoid it:—Held, that this payment was a good defence to the action, as being compulsory, and under the sanction of a court of competent authority; that the allegation must be taken to mean either that the defendant had no notice of the deed at the time of payment, or, if he had, it was under such circumstances that he was unable to get the order set aside before he was compelled to pay under the immediate threat of an execution, and to save its being actually levied; and that it was unnecessary to decide whether the payment was good for all purposes, so as to enable the judgment creditor to get his debt in full, and to resist an action by the trustees for money had and received. *Wood v. Dunn*, 2 L. R., Q. B. 78; 36 L. J., Q. B. 27; 15 L. T. 411; 15 W. R. 180; 7 B. & S. 94—Ex. Ch.

**Right to retain Costs of Acting under an Invalid Deed.]**—A debtor by a deed duly registered assigned all his estate and effects to trustees for the benefit of his creditors. The deed was not in fact executed by the requisite number of creditors, and therefore was invalid, but the trustees had received assets:—Held, that a trustee could not be allowed to retain his costs of acting under the deed. *Smith v. Dresser*, 1 L. R., Eq. 651; 35 L. J., Ch. 385.

**Right to Expenses.]**—A trader assigned his property to trustees for the benefit of his creditors, and was afterwards declared bankrupt. The trustees, after the execution of the deed of assignment, but before any sale, had, in the management of the property, incurred certain expenses bona fide, but from which no particular benefit accrued to the estate:—Held, that such expenses must be repaid to them out of the estate. *Tomlinson, Ex parte*, 30 L. J., Bk. 41; 7 Jur., N. S. 982; 5 L. T. 13—L. J.

A. deposited goods with B. for sale, and then assigned his property to trustees for his creditors; the trustees, at B.'s request, paid the duties on the goods, which, when sold, did not produce sufficient to repay them:—Held, that the trustees were entitled to recover the money advanced by them, though A. had, before the assignment, agreed that it should go in liquidation of a claim which B. had upon him. *Livesey v. Willis*, 1 Marsh, 130; 5 Taunt. 446.

**Indemnity by Creditors.]**—Where a call had been made upon the creditors, who had executed a deed of insolvency, for the purpose of indemnifying the trustees, a creditor who had not only proved a debt under the deed, but had also received payment of a separate debt in consideration of suspending proceedings in bankruptcy, was only liable to contribute in respect of the debt

**Several Covenant—Right to Contribution.]**—The creditors, parties to an inspection deed, severally covenanted to indemnify, to a certain extent, the inspectors against liabilities incurred in carrying on the business of the debtor, which they were empowered to do. One of the creditors who had executed the deed, and to whom the inspectors had incurred a debt for goods supplied and advances made for the purpose of the business, filed a bill in equity against the inspectors, the debtor, and all the other acceding creditors, to have the inspectorship wound up, and the accounts taken, and to have the assets applied in payment of his claim, and the deficiency made good by rateable contributions of all the acceding creditors (including the plaintiff) in proportion to their debts:—Held, that there was no right to contribution. *Selwyn v. Harrison*, 2 John. & H. 334; 12 W. R. 98.

**Purchase of Debtor's Property by Trustees.]**—When a trustee for creditors under a deed of composition bona fide sold the property to a stranger from whom he subsequently re-purchased it at the same price, and the sale was confirmed by all the creditors who had executed the deed, and by two out of three of the assignees, a bill by the third assignee to set aside the sale was dismissed without costs. *Dorer v. Buck*, 5 Giff. 57.

**Duties—To ascertain Validity of Claims against Debtor.]**—Trustees, before they allow a creditor to sign a composition deed, are bound to ascertain the validity of his claim, as by signing he becomes a cestui que trust, and the trustees, except in cases of fraud, cannot refuse to pay such dividends as may be declared. *Lancaster v. Elce*, 31 Beav. 325; 31 L. J., Ch. 789; 8 Jur., N. S. 1167; 7 L. T. 123; 10 W. R. 824.

**To Account to Creditors.]**—A trustee, under a deed executed by a debtor and duly registered, is bound, upon the reasonable application of creditors, to give them full information with respect to his receipts and payments under the deed, and if he refuses or neglects to do so, he is liable to be fixed personally with the costs incurred by the creditors in obtaining such information. *White, Ex parte*, 13 L. T. 24; *S. P., Edis, In re*, 13 W. R. 1068.

**To Submit to Examination.]**—A trustee under a deed of trust stands in the same relation to the creditors that an assignee does, under an adjudication, to creditors who have proved under a bankruptcy, and he is bound to submit to the examination required by 24 & 25 Vict. c. 134, s. 136. *Lawrence, Ex parte*, 32 L. J., Bk. 61; 9 Jur., N. S. 835; 8 L. T. 407; 11 W. R. 705.

**Not bound to accept Onerous Property.]** Assignees of all a debtor's property, in trust for the creditors, are not bound to accept a lease of which they were ignorant when they executed the assignment, and which they think likely to be injurious to the creditors. *Carter v. Warner*, M. & M. 479; 4 C. & P. 191.

They are entitled to a reasonable time to ascertain whether property, held under a lease by

the debtor, can be made available for the benefit of the creditors, or not; but if they act in such a way as to render the premises of less value to the lessor, or deal with the property as if the lease was vested in them, they will, by that conduct, make themselves personally liable as assignees for the payment of rent and performance of covenants. *Id.*

A debtor executed a deed of trust whereby he conveyed all his property to trustees for the benefit of his creditors, and whereby his creditors released their debts; and such deed was duly registered:—Held, that 24 & 25 Vict. c. 134, s. 197, had the effect of making 12 & 13 Vict. c. 106, s. 145, applicable to such deed, that the trustees had an election as to whether they would take a lease granted to the debtor, and that on their not so electing, the debtor might give up the same to the lessor under the provisions of such section. *Porter v. Kirkus*, 2 L. R., C. P. 590; 36 L. J., C. P. 311; 17 L. T. 85; 15 W. R. 1018.

Trustees who have executed and acted under a deed for the benefit of creditors are upon the same footing as trustees under a bankruptcy or an insolvency; and the execution of the deed, acceptance of the trusts, and general action under it do not of themselves constitute an acceptance of any particular asset. *Levi v. Ayres*, 3 App. Cas. 842; 47 L. J., P. C. 83; 38 L. T. 725.

L. held shares in a company as nominee of a firm in which he was a partner; the company was wound up, and he became liable to pay calls on the shares standing in his name. The firm afterwards became insolvent, and assigned its assets to trustees for the benefit of its creditors;—Held, that L. had no equity against the trustees to be indemnified by them for the calls so paid by him. *Id.*

**Liabilities—Payment for Services.**—An inspector will be liable personally to pay for services of persons whom he employs in and about the business of an arrangement, unless he expressly excludes such liability. *Wardell v. Jackson*, 1 F. & F. 452.

**Confined to Accounting.**—Independently of any question of fraud or misconduct, the liability of inspectors and managers under a creditors' deed is confined to accounting for all moneys received by them, or by their order or for their use. *Chaplin v. Young*, 33 Beav. 330; 11 L. T. 10.

**For what Moneys accountable.**—If they have the exclusive management and control of the whole establishment, and if all the subordinate managers, workmen and servants are appointed by them and are removable at their pleasure, in that case money paid to their cashier or to any person in the establishment, in the ordinary course of business, would be money paid for their use, for which they would be accountable. *Id.*

But if, by the arrangement, the trader is continued in the management of his business, and cannot be removed by the inspectors, then the inspectors would only be liable for the moneys actually paid to them or to their agent. *Id.*

The trustees of an insolvent's estate are not liable, after they have made a final dividend, in an action for money had and received, for money

paid to them by mistake. *Fyddell v. Clark*, 1 Esp. 447.

**Carrying on Debtor's Business.**—S. & C., in business as ironmasters, being in embarrassed circumstances, assigned to trustees all their stock, &c., the deed containing powers for the trustees to carry on the business under the name of the Stanton Iron Company until the debts of the firm were paid. The deed was made for the benefit of creditors, and with their assent, and contained clauses authorizing the creditors to accept the resignation of the trustee, and to alter the trusts or direct the works to be discontinued. All the trustees were creditors of S. & C. The trustees who acted did carry on the business, and in the course of it their agent accepted bills in this form: "Per pro. Stanton Iron Co."—Held, that the creditors, through these acts of the trustees, were not liable, as partners in the company, upon such bills given to those who supplied the company with goods. *Cow v. Hickman*, 8 H. L. Cas. 268; 9 C. B., N. S. 47; 30 L. J., C. P. 125; 7 Jur., N. S. 105; 8 W. R. 754.

**Goods Ordered by Debtor.**—A debtor and his creditors entered into a deed of inspection under the Bankruptcy Act, 1861. Before the deed was executed by the debtor he had ordered of the plaintiff certain goods, and after the plaintiff had informed the debtor that they were ready for delivery, the inspectors, by an order to which they signed their names for the debtor, requested the plaintiff to send the goods:—Held, that the inspectors were not personally liable for payment of the goods. *Redpath v. Wigg*, 1 L. R., Ex. 335; 35 L. J., Ex. 211; 12 Jur., N. S., 903; 11 L. T. 764; 14 W. R. 806; 4 H. & C. 432—Ex. Ch.

P. executed an inspectorship deed. He afterwards ordered goods of the plaintiff in the way of his trade. The plaintiff sued the trustees of the deed for the value of the goods:—Held, that as there was no liability on the trustees in respect of an ostensible authority, for the plaintiff gave credit to P.; and that, as there was no liability in respect of authority in fact apart from the deed, for the deed was carried into effect according to its terms; and that, as the deed did not create any authority to pledge the trustees' credit, for it only subjected P. to their control as to how the business was to be carried on by him upon his own resources, or in respect of advances made by them; and that, as it did not make him their servant, so that they could discharge him, the trustees were not liable. *Eastbrook v. Barker*, 6 L. R., C. P. 1; 40 L. J. C. P. 17; 23 L. T. 535; 19 W. R. 208.

**When Debtor Agent of Trustees.**—A trader executed a deed of inspection under the Bankruptcy Act, 1861, by which he assigned all his property (but not his business) to trustees for the benefit of his creditors. The deed contained a covenant by him to carry on his business to the best of his ability under the inspection and control of the trustees, to whom he was to pay all moneys received by him; a provision that the trustees should be liable as against each other for their own defaults only; and an express declaration that the deed was intended to operate as a deed of inspection and composition under the act. The trustees derived no benefit under



the deed other than that which they shared in common with the other creditors. After the deed was registered, the plaintiffs supplied goods, upon written orders, expressed to be for him, to the place where he had carried on his business previously to the execution of the deed, and where the business was still being carried on under his management. The trustees regularly supplied him with money for the current expenses weekly in advance, and they had no personal knowledge of the orders given to the plaintiffs, who, on the other hand, were not shewn to have had any knowledge of the deed:—Held, that the real intention of the parties, as appearing by the deed, was that he should carry on the business as his own, subject to the inspection and control of the trustees; and that the relation of master and servant or of principal and agent did not exist between them and him, and consequently that they were not liable to the plaintiffs for the price of the goods supplied on his orders. *Id.*

Where a newspaper proprietor carried on business under the control of inspectors, who were empowered by the deed to pay costs, and reimburse themselves out of moneys they might receive, there being nothing in the deed to import personal liability:—Held, that they were not personally liable to an attorney who had defended a suit relating to the business at the order of the trader, without any direction from them, unless there was anything in their previous communications with him to lead him to suppose they meant to make themselves personally liable for such claims. *Steele v. Low*, 2 F. & F. 772.

— **For Default of Person employed to collect Moneys owing to Debtor.**—By a creditors' deed, which provided that the debtor should carry on his business under the supervision of inspectors, the debtor covenanted with the inspectors that he would allow C., "who was intended by the inspectors to be employed as an accountant, or such other person as they might employ in lieu of C.," to collect and receive the moneys due to the debtor, and pay the balance into the bank. C. made default in payment of a large sum received by him:—Held, that he was not the agent of the inspectors, and that they were not liable to account to the debtor for his misfeasance. *Hobson v. Jones*, 9 L. R., Eq. 456; 39 L. J., Ch. 245; 22 L. T. 143; 18 W. R. 477.

— **Allowing Solicitor to deal with Debtor's Estate.**—Among the assets of a debtor who executed a creditors' deed under the Bankruptcy Act, 1861, s. 192, was a bill of exchange which the debtor had deposited with his solicitor as a security for his professional charges. The bill was dishonoured at maturity, at which time the solicitor had received from other sources sufficient to pay all his charges then due. The trustee, however, allowed the bill to remain in the solicitor's hands, who brought an action on it against the acceptor, but nothing was recovered in consequence of the acceptor's insolvency. The creditors sought to charge the trustee with the loss of the money, on account of his allowing the solicitor to keep the bill and treat it as his own, instead of himself dealing with the acceptor and effecting a compromise:—Held, that there was no ground for charging the trustee on this account. *Ogle, Ex parte, Smith, Ex parte, Pilling, In re*, 3 L. R., Ch. 711; 42 L. J., Bk. 99; 21 W. R. 938.

— **Over-payment of Dividends.**—A creditor signed the deed for a debt due on bills for which the debtor was liable. Before making formal proof of the debt, the creditor received dividends from the estates of other persons who were liable on some of the bills, but the trustee nevertheless paid him dividends on the full amount of the bills. The other creditors sought to surcharge the trustee with the dividend thus overpaid:—Held, that, considering the uncertainty of the law at the time, the trustee ought not to be surcharged for the over-payment of the dividends. *Id.*

— **Allowing Property to remain in Debtor's Possession.**—The trustee allowed wine and spirits to the amount of 130*l.* to remain in the debtor's possession, which was eventually lost to the estate:—Held, that the trustee must personally make good the loss with interest at 5*l.* per cent. *Id.*

**For Rent.**—A deed of assignment for the benefit of creditors was executed the 13th March. On the 21st March the trustee took possession of premises held by the debtor under a lease. On the 25th March he paid the reserved rent to that day. On the 26th April he gave notice that he elected not to take the lease. He remained in possession till the 24th June. He took and held possession for the purpose of realizing the trust estate:—Held, that the trustee was not liable as assignee of the lease to pay the reserved rent, but only for use and occupation for the time he was in possession. *Mallett v. Levin*, 16 L. T. 531; 15 W. R.\* 929.

By a deed for the benefit of creditors (executed after the repeal of 24 & 25 Vict. c. 134), the debtor assigned to a trustee all his personal estate, and the trustee executed the deed, and acted under it. In the personal estate was included a lease as to which the trustee did no act specifically accepting it. In an action by the landlord for rent:—Held, that the lease had passed to the trustee, and that he was therefore liable. *White v. Hunt*, 6 L. R., Ex. 32; 40 L. J., Ex. 23; 23 L. T. 559.

— **Commissioner has no Jurisdiction to oust Trustees.**—Disputes having arisen between the trustees of a deed of arrangement, an application was made to the commissioner upon the subject, who made an order directing the official assignee to act as assignee of the trust estate in the same manner as he would have done if under a bankruptcy of the debtors:—Held, that the commissioner had no jurisdiction to make such an order. *Ruck, Ex parte*, 32 L. J., Bk. 9; 8 Jur., N. S. 1219; 7 L. T. 405; 11 W. R. 126.

## 6. LIABILITY OF SURETIES FOR PAYMENT OF COMPOSITION.

**Proviso for Release on Debtor being Adjudicated Bankrupt under Provisions of Deed—Adjudication by Creditor not Party.**—B., having presented a petition for the liquidation of his affairs, the statutory majority of his creditors passed a resolution accepting a composition payable in three instalments, the last instalment to be guaranteed by a surety. The surety signed a guarantee accordingly, and a deed was made



between B., the surety, and certain persons called "the inspectors." The creditors of B. were also made parties to the deed, but some of them did not execute it. By the deed, after reciting that it had been agreed that, until payment of the composition, B. should carry on his business under the inspectors, it was provided that if he should make default in the payment of it, or if it should appear to the inspectors, from the state of his business or otherwise, that the instalments would not be duly met, it should be lawful for them to apply to the Court of Bankruptcy to adjudge him a bankrupt, and without prejudice to this right it should be lawful for them in any such event to require him to assign all his property to them, as if they were trustees under liquidation proceedings; and further that, "in the event of his being adjudicated bankrupt, or of a conveyance or assignment of his property being made or required under the provisions of the deed before full payment of the composition, the surety should be released from his guarantee." B. having made default in payment of the second instalment, was made bankrupt on the petition of a creditor who was not bound by the resolution, and had not executed the deed. After the bankruptcy he made default in payment of the third instalment:—Held, that the surety was liable; as he could only be released from his guarantee by a bankruptcy procured by the inspectors under the provisions of the deed. *Glegg v. Gibbey*, 2 Q. B. D. 6; 46 L. J., Q. B. 7; 35 L. T. 761; 25 W. R. 42. Affirmed on appeal, 2 Q. B. D. 209; 46 L. J., Q. B. 325; 35 L. T. 927; 25 W. R. 311—C. A.

#### 7. PROOF OF DEBTS UNDER TRUST DEEDS.

**Generally.**—The word "creditor" throughout the 24 & 25 Vict. c. 134, is used in the sense of a person having a claim which can be proved under the bankruptcy, whether it is strictly a debt or not; and in s. 192, it must be understood to mean all persons who had at the time of the execution of the deed a claim against the debtor, provable against his estate, if he then became bankrupt. *Woods v. De Mattos*, 1 L. R., Ex. 91; 35 L. J., Ex. 664; 12 Jur., N. S. 78; 3 H. & C. 987—Ex. Ch.

The drawer of a bill executed in 1866 a deed of arrangement with his creditors. The bill had been indorsed to the B. Company, and by the B. Company to the D. Company, and then by the D. Company to C. C. proved against the estates of both companies, which were being wound up, and received dividends from both, leaving only a small sum due. The liquidator of the D. Company paid the remainder, took up the bill, and applied under the drawer's deed of arrangement for a dividend on the whole amount of the bill:—Held, that, according to the true construction of the Bankruptcy Act, 1861, s. 197, creditors are not, for the purpose of ascertaining the dividend to which they are entitled, to be treated as having proved at the time of the registration of the deed, but at the time when they go in to make their claims against the estate; and that the liquidator, therefore, was not entitled to a dividend on the whole amount of the bill, but only for what the D. Company had paid upon it. *Joint Stock Discount Company, Ex parte, Daunt, In re*, 6 L. R., Ch. 455; 24 L. T. 306; 19 W. R. 667.

**Breach of Contract must be before Deed.**—There can be no proof, under a deed of trust for damages on a contract, unless the contract was broken before the execution of the deed. *Halliday, Ex parte*, 2 De G., J. & S. 312; 11 Jur., N. S. 817; 12 L. T. 624; 13 W. R. 905.

H. & Co. purchased a cargo, the buyers to name the port of delivery. On the arrival of the ship they declined to name the port of delivery, and signified their inability to perform the contract. The sellers, therefore, named the port and sold the cargo at a loss; but before this was done H. & Co. executed a deed of trust:—Held, that the contract was still subsisting at the date of the deed, and that the sellers could not prove for the loss. *Ib.*

**Unliquidated Damages.**—The effect of the 197th section of the Bankruptcy Act of 1861 is to enable a creditor under a trust deed to apply, under s. 153, to have unliquidated damages assessed. *Townsend, Ex parte, Penton, In re*, 1 L. R., Ch. 158; 35 L. J., Bk. 17; 12 Jur., N. S. 303; 14 L. T. 3; 14 W. R. 321.

But where a creditor, instead of coming in under the deed, obtained judgment against the debtor:—Held, that the amount of the damages having been thus ascertained, he was precluded from subsequently applying under the deed, and (the debtor having in the meantime become bankrupt) must prove under the bankruptcy. *Ib.*

A person who has a claim for unliquidated damages is not a creditor within the meaning of ss. 192 and 197 of the Bankruptcy Act of 1861. *Wilmot, Ex parte*, 2 L. R., Ch. 795; 36 L. J., Bk. 17.

Where a trust deed does not in terms extend to creditors in respect of unliquidated damages, they cannot come in under the deed by virtue of s. 153. *Ib.*

A composition deed executed and registered, containing a release by the creditors of their debts, claims, and demands, is no bar to an action for unliquidated damages for a breach of contract, the amount of which damages has not been ascertained and assessed under s. 153. *Robertson v. Goss*, 2 L. R., Ex. 196; 36 L. J., Ex. 251; 16 L. T. 566; 15 W. R. 965; *S. P. Sharland v. Spence*, 2 L. R., C. P. 456; 36 L. J., C. P. 230; 16 L. T. 355; 15 W. R. 767.

To a declaration containing a count for wrongful dismissal, the defendant pleaded a composition deed, executed after the accrual of the claim, containing a recital of the defendant's inability to pay his creditors in full; a recital of the willingness of a majority in number, representing three-fourths in value of the creditors whose debts amounted to 10l. and upwards, to accept a composition; a covenant by the defendant and certain sureties for the payment of the composition, and a release by the creditors of their debts and claims, except in respect of the covenant and certain promissory notes given to secure payment of the composition:—Held, that the defendant's liability to pay unliquidated damages for breach of contract, was not such a debt as was contemplated by the Bankruptcy Act of 1861, s. 192, or by the parties to the composition deed in agreeing to the release. *Hoggarth v. Taylor*, 2 L. R., Ex. 105; 36 L. J., Ex. 61; 15 W. R. 588.

**Interest on Debts.**—In the absence of an agreement to the contrary, a specialty creditor is entitled to interest upon his debt up to the

creditors together; for registration is equivalent to bankruptcy. *Turner, Ex parte*, 11 L. T. 352, 13 W. R. 104.

**Calls.]**—Future calls in respect of shares in a company may be proved under a deed of composition, in the same way as under a bankruptcy. *Richmond Hill Hotel Company, In re, King, Ex parte*, 4 L. R., Eq. 506; 36 L. J., Ch. 718, 16 L. T. 783. Affirmed, 3 L. R., Ch. 10; 38 L. J., Ch. 541, 17 L. T. 188; 16 W. R. 57.

A., being the holder of shares in a company, executed an inspectorship deed. After the execution of the deed, a call was made on A.'s shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding-up of the company commenced.—Held, that the call was not barred by the deed. *Financial Corporation v. Lawrence*, 4 L. R., C. P. 731; 38 L. J., C. P. 305; 17 W. R. 534.

Two shareholders in a company ordered to be wound up voluntarily executed as debtors a deed of inspectorship, to which the debtors, the inspectors, and all creditors who would have been entitled to prove against the debtors under an adjudication of bankruptcy, were expressed to be parties. The deed contained no actual assignment of the estate of the debtors, but contained provisions for converting their estate into money, and applying it in payment of the debts due to the creditors; and also contained provisions for a release being given to them in certain events. The deed was duly registered:—Held, that the Court of Chancery ought not to make an order in the winding-up upon the debtors for payment of calls, though the calls were made since the deed was executed, but that the calls were debts provable under the deed of inspectorship. *Bank of Hindustan, China and Japan, In re, Mitchell's case*, 5 L. R., Ch. 400; 39 L. J., Ch. 530.

**Rent, Right to Distrain.]**—After the registration of a valid deed of arrangement, a distress cannot be levied upon the effects of the debtor for more than one year's rent due prior to the date of such registration. *Williams v. Cadbury*, 2 L. R., C. P. 453; 36 L. J., C. P. 233; 16 L. T. 354; 15 W. R. 905.

**Costs.]**—B. having sued W., an arrangement was come to by which he should be entitled to sign judgment on a stated day, before which he executed and registered a composition deed. On the stated day B., to whom notice of the deed had been given, signed judgment for the debt, and costs. The composition reserved by the deed was tendered on the debt only, but was refused in respect of the costs, upon which liberty was given to B. to issue execution against W.:—Held, that these costs could not have been moved against his estate if he had been adjudged bankrupt on the day when the deed was registered; and that, as under such a deed, the act put all parties upon the same footing as under a bankruptcy, the debtor was entitled to the composition upon the debt alone, and the order could not be sustained. *Weller, Ex parte*, 17 L. T. 125; 15 W. R. 1186.

**Secured Creditors—Value of Securities.]**—A

afterwards under the Liquidation Act, 1868, a scheme was settled under which the Court of Chancery ascertained the value of the securities held by the secured creditors, which value was to be taken by those creditors in part discharge of their debt, and they were to be at liberty to prove for the deficiency:—Held, that the value must be taken as a discharge pro tanto of the principal and interest due at the date of the deed, and not in discharge of any subsequent interest, so that the balance only of such principal and interest due at the date of the deed could be proved under the deed. *Savin, In re*, 7 L. R., Ch. 760; 42 L. J., Bk. 14; 27 L. T. 466; 20 W. R. 1027.

By a composition deed, dated the 4th of November, 1864, and duly registered under the Bankruptcy Act, 1861, a debtor, in consideration of a covenant on the part of himself and a surety to pay a composition of 10s. in the pound, obtained a release from his scheduled debts by a statutory majority of his creditors. The deed contained a proviso that every secured creditor should have the full benefit and advantage of his security, and should be entitled to the composition after allowing for the value of such security. Amongst the secured creditors was one for 229l. 8s. 5d., whose security was a policy of assurance on the life of the debtor. The creditor valued the policy at 16l.; and for the difference, namely, 213l. 8s. 5d., he received the composition of 10s. in the pound. The policy having fallen in after some premiums had been paid by the creditor:—Held, upon the construction of the deed, that the creditor, upon the execution of the deed, remained a creditor for 16l. only, and that (the composition having been duly paid) the proceeds of the policy, after payment of 16l. and interest, belonged to the debtor's estate, subject to repayment with interest to the creditor of premiums which he had paid. *Bolton v. Ferro*, 14 Ch. D. 171; 49 L. J., Ch. 569; 42 L. T. 529; 28 W. R. 578.

*See further, XI. PROOF OF DEBTS.*

**Time when Debt sought to be set off accrued.]**

—The claims and debts of an insolvent pass into the hands of the trustees of a trust deed by the registration, not by the execution, of the deed; and therefore, rent falling due from the insolvent in the interval may be set off in an action by the trustees for money payable to the insolvent. *Stanger v. Miller*, 1 L. R., Ex. 58; 38 L. J., Ex. 49; 11 Jur., N. S. 1003; 13 L. T. 331; 14 W. R. 108; 4 H. & C. 1.

A proportionate part of the rent due up to the day when the trustees' title enures may be set off by the landlord against a claim by the trustees. *Id.*

A trading firm assigned their estate, stock, and debts due to the firm to trustees, for sale and distribution, with power to carry on the business; but the trustees did not thereby undertake to discharge the liabilities of the firm. The assignment contained a proviso making it void if the firm became bankrupt before a certain day. The plaintiffs, who were at the date of the assignment creditors of the firm, afterwards became indebted to the trustees, who continued to carry on the business. The firm becoming bankrupt before the day named:—

Held, that the plaintiffs had no right to a set-off; but that the result would have been different if they, instead of being creditors, had been debtors at the date of the assignment, and had afterwards become creditors of the trustees. *Hunt v. Jessel*, 18 Beav. 100.

**Lien of third Party.**—An adjudication in bankruptcy obtained by D. against C. was set aside, and D. was ordered to pay C. his costs, for which, if not paid when taxed, C. was to be at liberty to issue execution. D. then executed an assignment to trustees for his creditors in the form of Schedule D. to the Bankruptcy Act, 1861. The costs were afterwards taxed. C., at the date of the deed, owed D. a sum exceeding the amount of the taxed costs. If C., who had not acceded to the deed, was reckoned as a creditor of D. for the amount of taxed costs, the deed was not assented to by the requisite majority of creditors. C.'s solicitor had not been paid his bill of costs in the bankruptcy proceedings, and claimed his lien on the costs payable by D. :—Held, that C.'s solicitor was entitled to a lien on the costs ordered to be paid to C. by D., and that therefore the debt due from C. to D. could not be set off against them. *Cleland, Ex parte*, 2 L. R., Ch. 808; 36 L. J., Bk. 45; 17 L. T. 187; 15 W. R. 1160.

Held, also, that C. ought to be allowed to issue execution for the costs, for that if he was, in respect of those costs, a creditor of D. within the meaning of the Bankruptcy Act of 1861, s. 192, the deed was not assented to by the majority requisite to bind non-assenting creditors; and if he was not such a creditor, the deed did not apply to his claim, so that in neither view could he be affected by the deed. *Id.*

**Right of setting off Calls.**—When a contributory, who is also a creditor of a company which is being wound up, becomes bankrupt or executes a creditors' deed under the Bankruptcy Act, 1861, after the commencement of the winding-up, the debt must be set off against the calls, whether the claim be made in the bankruptcy or in the winding-up. And if the contributory had before his bankruptcy assigned his debt to a third party, the assignee will stand in the same position as the contributory would have done as to the right of set-off. *Universal Banking Corporation, In re, Strang, Ex parte*, 5 L. R., Ch. 492; 22 L. T. 219; 18 W. R. 475.

See further, XII. MUTUAL CREDITS, DEBTS, AND DEALINGS.

## 8. TENDER OR PAYMENT OF COMPOSITION.

**Payment or Tender necessary.**—Where, at a meeting of creditors of A., it is agreed that a composition of 6s. in the pound should be accepted, and that promissory notes for the amount "shall be given within fourteen days, the creditors assenting thereto within that time," and A. is sued for a debt due to one of the parties to the agreement, unless A. can shew a delivery or a tender of the notes, he is liable for the whole debt. *Oughton v. Trotter*, 2 N. & M. 71.

Although a debtor, compounding with his creditors, gives them the security of a third person for payment of part of the stipulated dividend, he is not discharged upon payment of that part

only, if the residue continues unpaid. *Walker v. Seaborne*, 1 Taunt. 526.

To an action on a foreign bill of exchange, the defendant pleaded a composition deed not executed by the plaintiff, by which he covenanted with his creditors to pay 5s. in the pound on a given day, and the creditors, in consideration, released him from all claims, but in case of non-payment within fourteen days, the release was to be void. Averment, that the defendant was ready and willing to pay :—Held, that the plea was bad, for not averring a payment or a tender of the composition. *Fessard v. Mugnier*, 18 C. B., N. S. 286; 34 L. J., C. P. 125; 11 Jur., N. S. 283; 11 L. T. 635; 13 W. R. 388.

— **And must be made at precise Time agreed on.**—To counts by drawer against acceptor of two bills of exchange for 30*l.* and 41*l.* 16*s.*, a plea as to 13*l.* 3*s.* 2*d.*, parcel of 30*l.*, in the first count, and as to the second count, that the defendant was in embarrassed circumstances, and indebted to the plaintiff, in respect of the causes of action in the introductory part of the plea mentioned, in 54*l.* 19*s.* 2*d.*, and to B. in another sum of money, and was unable to pay the plaintiff and B. their debts in full; and thereupon the defendant agreed with the plaintiff and B. to pay them respectively; and the plaintiff and B. mutually agreed with each other and the defendant to accept of him 10*s.* in the pound, as a composition upon, and in satisfaction and discharge of, their debts. The plea then averred readiness and willingness to pay, with a tender of the amount of the composition, and concluded with payment of it into court. It appeared that default had been made in payment of the instalments. The judge, at the request of the defendant's counsel, amended the plea accordingly :—Held, that the plea as amended was bad, even after verdict, for not stating that the payments were made at the precise times agreed on, or at least a tender made of them. *Brown v. Povey*, 1 Ex. 601; 11 Jur. 1043.

Semble, that, if the plea had been that a new mutual agreement between the plaintiff, the defendant and other creditors, binding on each at the time when it was made, was given as a substitution for, or in satisfaction of, the debt due from the defendant to the plaintiff, such plea would have been good; and in that case it would have been for the jury to decide whether the plaintiff agreed to accept the agreement itself, not the performance of it, as a satisfaction for his debt. *Id.*

## — Release must be tendered for Execution.]

—To an action on a bill of exchange, a plea that it was agreed between the plaintiff and other creditors of the defendant, that 4*s.* 6*d.* in the pound should be paid by the defendant to the plaintiff and the other creditors, and that, upon receiving the money, the plaintiff and other creditors should execute a release of their debts; that a release was prepared for execution; and that the creditors, except the plaintiff, received the composition and executed the release; and that the defendant had always been ready and willing to pay the plaintiff the 4*s.* 6*d.* in the pound upon the plaintiff executing such release, is bad for want of an averment that the defendant tendered a release to the plaintiff for execution. *Rosling v. Muggerridge*, 4 D. & L. 298; 16 M. & W. 181; 16 L. J., Ex. 38.

**When Tender excused.]**—The original contract was made with the plaintiff when a resident abroad, and the deed of composition was entered into, and the debt became due also when the plaintiff was abroad:—Held, that his absence abroad was no excuse for non-payment. *Ib.*

Absence of the creditor from England affords an excuse for the want of an averment of tender or payment by the debtor only where the former has gone abroad after the making of the contract. *Ib.*

**When Tender dispensed with.]**—In an action by an attorney for his bill of costs, the defendant, in his plea, set out a composition deed which was not executed by the plaintiff, in which the creditors who signed the deed, in consideration of, and on payment of, the composition, covenanted with the defendant to execute a good and sufficient release, and the defendant covenanted with all his creditors to pay them the composition. The plea averred that the defendant had always been ready and willing to pay the composition according to the deed, but the plaintiff would not receive the same:—Held, that the averment in the plea amounted to an averment that the plaintiff had dispensed with a tender of the composition, and that the plea was good. *Ilderton v. Custrique*, 13 L. T. 506.

A composition deed contained covenants for the debtor forthwith to deliver to his creditors bills of exchange, to be drawn by the creditors on, and to be accepted by the debtor, and in default the deed to be void. The deed was executed on the 21st of April, 1865, and registered on the 16th of May. On the 8th of June, the debtor's solicitors wrote to inform A., a judgment creditor, that the acceptances were ready, and, the first bill becoming due on the 24th of October, tender of it and of cash to the amount was made to A., but was refused by him. In November, 1866, he obtained leave from the Court of Bankruptcy to issue execution on his judgment against the debtor, on the ground, mainly, that the bills had not been delivered forthwith:—Held, that the first tender having been refused, there was no need to tender subsequent instalments. *Sullivan, Ex re*, 36 L. J., Bk. 1; 15 L. T. 434.

In an action against the defendants as acceptors of a bill of exchange for 1,039*l.*, it appeared that they owed the plaintiffs a balance of 321*l.*, that the defendants failed, and their creditors, amongst whom were the plaintiffs, agreed to take a composition of five shillings in the pound on their debts, by notes of four and eight months; there was a dispute as to the balance due to the plaintiffs, and they promised to adjust their account with one of the defendants, and said they would do as the other creditors did; the defendants insisted for some time that 250*l.* 9*s.* 7*d.* was the balance due, but the defendants' attorney called on the plaintiffs' attorney, and told him that the defendants were ready to pay the composition on 321*l.*, the sum really due, but the plaintiffs' attorney refused, and said they must have the whole; no actual tender was made of the notes or of cash for the amount of the composition:—Held, that a tender was not necessary under the circumstances, and that the plaintiffs could only recover the amount of the composition on the balance. *Reay v. White*, 1 C. & M. 748; 3 Tyr. 597.

**Creditor dispensing with Tender or Payment.]**—Declaration for goods sold and delivered. Plea on equitable grounds: a composition deed; with an averment that the defendant was ready and willing to pay to the plaintiff the first instalment of the composition, but the plaintiff refused to accept it, and discharged the defendant from paying or tendering it:—Held, good, without payment of money into court. *Bamford v. Clewes*, 3 L. R., Q. B. 729; 9 B. & S. 539.

To a declaration, the defendant pleaded as to all except 20*l.* 9*s.* non assumpsit; and as to this sum, that the defendant being in embarrassed circumstances, the plaintiff and other creditors agreed to take 5*s.* in the pound, and that the defendant was ready and willing to pay the amount of the composition, but the plaintiff refused to receive it, and discharged the defendant from payment of it:—Held, that the plea was no answer to the sum agreed to be taken for composition, because no consideration was stated for the plaintiff discharging the defendant from paying it, and that therefore the agreement as to that was void. The plea was allowed to be amended by paying that sum into court. *Cropper v. Phillips*, 3 D. P. C. 196; 1 C., M. & R. 649; 5 Tyr. 166.

**To whom to be made.]**—A tender of the composition must be made to the creditor, or to some one having authority to represent him. A tender to a mere workman or a servant will not suffice. *Hoadley v. Jenkins*, 16 L. T. 389.

**Deducting Income-Tax from Composition.]**—A debtor who executes a deed providing for payment of a composition of 8*s.* in the pound, cannot deduct from the balance due to a cash creditor the income-tax from year to year becoming payable upon the amount of interest due to such creditor, and which might have been deducted provided such interest had been regularly paid. *Turner, Ex parte*, 11 L. T. 352; 13 W. R. 104.

**Effect of accepting Composition—Parol Agreement.]**—A creditor who has agreed with his debtor, by parol, to take part as a composition for his whole demand, and has actually received money from the debtor in part payment of the composition, is not bound thereby, but may still proceed for his whole demand, unless it can be shewn that he has, by entering into such agreement and taking part of the composition, induced some other creditor also to compound with the debtor, so as that his subsequently proceeding for and recovering the whole amount of his own debt might be considered a fraud upon such other creditor. *Greenwood v. Lidbetter*, 12 Price, 183.

**— Agreement not under Seal.]**—Where a man's creditors entered into an agreement with him, not under seal, to take 20*l.* per cent. upon their debts in satisfaction of the whole; 10*l.* per cent. to be paid within a month, and the remaining 10*l.* per cent. to be secured by the acceptances of a third person at five and nine months; and the composition was paid pursuant to the agreement:—Held, that a creditor who had signed the agreement and received the composition could not afterwards bring an action for the residue of his debt. *Steinman v. Magnus*, 11 East, 390; 2 Camp. 124.

— **Right of Debtor to recover Money paid to Holder of Bill on which Creditor has received Composition.**—The plaintiff was indebted to the defendant in 50*l.* upon a bill of exchange drawn by the latter upon and accepted by the former. Before the bill arrived at maturity the plaintiff called a meeting of his creditors, which was attended by B. on the part of the defendant. At this meeting it was agreed that the several creditors of the plaintiff should receive a composition on their debts; and, accordingly, a deed of composition and release was prepared and executed (amongst others) by B. on behalf of the defendant, and the amount of the composition was afterwards paid to the defendant. The holder of the plaintiff's acceptance afterwards sued the plaintiff thereon, and compelled him to pay the amount, with 6*l.* 13*s.* for interest, and 2*l.* 10*s.* for costs:—Held, that the plaintiff was entitled to recover from the defendant the amount of the bill and interest. *Hawley v. Beverley*, 6 Scott, N. R. 837.

— **Right to recover Amount paid in excess of Composition.**—A., being a creditor of B., executed a composition deed, in which it was stipulated that the debts should be paid at 6*s.* in the pound, by promissory notes. After executing this deed, A. obtained a payment from B. in full:—Held, that B. could not recover back the difference between the full amount and 6*s.* in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof. *Ward v. Bird*, 5 C. & P. 229.

— **Under Deed subsequently declared Void—Mistake of Law.**—A debtor called a meeting of his creditors, and proposed a composition of 10*s.* in the pound, payable by two instalments, and a deed was prepared in supposed compliance with 24 & 25 Vict. c. 134, s. 192. The plaintiffs, who were creditors, declined to assent; but subsequently, on being informed by the debtor that the deed had been executed by the required number of creditors and had been registered, and the amount of the instalments having been remitted to them, they took the money and said nothing. The deed was afterwards decided to be void for want of a strict compliance with the provisions of the statute:—Held, that the plaintiffs were precluded from suing the debtor for the balance of their debt, as the mistake, if any, under which they had received the instalments was one of law and not of fact. *Kitchin v. Hawkins*, 2 L. R., C. P. 22; 12 Jur., N. S. 928; 15 L. T. 185; 15 W. R. 72.

— **Where Deed fraudulent.**—Where a debtor executed a composition deed, a creditor, who had assented to the deed and received his composition money under it, was afterwards, upon suspicious circumstances coming to his knowledge with reference to the execution of the deed, allowed to summon the debtor for examination, with the view of impeaching the validity of the deed. *Fachiri, In re*, 2 L. R., Ch. 368; 36 L. J., Bk. 10; 16 L. T. 371; 15 W. R. 472.

— **Private Arrangement between Creditor and Debtor.**—At a meeting of the creditors of a bankrupt, a statement was made on his behalf that a bank, who were secured creditors, had agreed to accept a composition of six shillings in

the pound upon the balance of their claim, after deducting the value of the securities in their hands. The statement was uncontradicted by the agent of the bank, who was present, and upon the faith of it the unsecured creditors executed a letter of licence to the debtor, whereby they allowed time for payment of their demands. It subsequently appeared that on the day previously to the meeting of the creditors, a private arrangement had been made between the bankrupt's solicitor and the bank for payment of a composition of ten shillings in the pound. The bank having received the six shillings in the pound, and bankruptcy intervening:—Held, that the bank must be considered to have assented to the arrangement for payment of the six shillings in the pound, and that they could not prove against the estate in competition with the other creditors of the bankrupt. *Hoile, In re*, 12 W. R. 1087.

#### 9. RECOVERY OF COMPOSITION.

**When Action lies against Trustee.**—A. declared that in consideration that he, at the request of B., consented and agreed to accept and receive from B. a composition of so much in the pound upon a certain sum of money owing from B. to A. in full satisfaction and discharge of the debt, B. promised to pay the composition:—Held, that this was not a good consideration to support an action against B., a mere accord not being a ground of action. *Lynn v. Bruce*, 2 H. Bl. 317.

Where A. deposited with B. 100*l.* to distribute amongst A.'s creditors, in proportion to their claims:—Held, that no one of these could maintain an action against B. before the proportions of all the claimants had been ascertained. *Robson v. Andraie*, 1 Stark. 372; 2 Chit. 263.

In an action against a trustee under a composition deed, between A. and his creditors, for the amount of a creditor's dividends (the deed reciting that the debtor was indebted to the several creditors whose debts were set opposite their names in the schedule annexed to the deed, which covenanted to pay a specific ratio of the debts), it is no defence to say that the creditor did not set the amount of his debt opposite to his name in the schedule: it is sufficient to render the trustee liable, that he had notice of the amount of the creditor's claim before action. *Daniel v. Saunders*, 2 Chit. 564.

— **Trustees are mere Stakeholders.**—When a deed of composition with creditors has been executed, under the terms of which certain persons constituted trustees under the deed are in possession of the promissory notes given to satisfy the amount agreed on as the composition, such trustees are, as between the parties to the deed, stakeholders, and are not the servants or agents either of the persons who gave the notes or of the persons who, under the provisions of the deed, would be entitled to receive them. *Latter v. White*, 5 L. R., H. L. 578; 41 L. J., Q. B. 342. Affirming 6 L. R., Q. B. 474; 40 L. J., Q. B. 162; 25 L. T. 658; 19 W. R. 1149.

If, therefore, the person who made the notes and handed them over to the trustees to deal with them under the deed, should afterwards give notice to the trustees not to hand them over to a particular creditor, the creditor cannot maintain detinue against such person, the notes not being

in his possession either really or constructively. *Id.*

W. was in difficulties. A composition with his creditors was proposed, and was agreed to by them. By the deed of composition he and his father were to give promissory notes for the composition. L., a creditor, signed the deed, but on the next day wrote (through his attorneys) to say that he had discovered the balance-sheet presented to the creditors to be incorrect, and he withdrew his assent to the deed. The deed was duly registered under the Bankruptcy Act of 1861, and the promissory notes made, but L. refused to receive them. He afterwards brought an action against W. for the original debt, to which the deed was pleaded as an answer. L. replied that it had been obtained by fraud. The cause was referred to arbitration, and after it had been referred W. withdrew from the reference, and the award was made in favour of L. Nothing was done on the award, but some time afterwards L. demanded from the trustees the notes which had been made for his share of the composition. The trustees (acting upon a notice received from the father) refused to deliver up the notes. L. thereon brought detinue against the father:—Held, that the action was not maintainable, and that whether the deed was invalid or not could not be determined, and that his proper remedy was by application to the Court of Bankruptcy, which had power to do complete justice between the parties. *Id.*

**Action by one of two Partners.**—An action lies on a deed of composition with creditors, by one of two partners, who signed the deed in the name of his firm, and set his seal thereto, for non-payment of an instalment due on a partnership debt; for the other partner, not being a party to the deed, cannot join in the action. *Metcalfe v. Rycroft*, 6 M. & S. 75.

**Power of Court of Bankruptcy.**—Where a debtor, who has executed a deed of arrangement, declines to deliver over to a creditor the composition notes to which he is entitled, the Court of Bankruptcy will grant a rule calling upon him to shew cause why an order should not be made for that purpose. *Anon.*, 13 W. R. 20.

Where a deed of composition has been duly registered, but has become unavailable by reason of the failure of the debtor to carry out the arrangement, the application for leave to issue execution against his property or person must be made to the Court of Bankruptcy. *Skilton v. Symonds*, 18 C. B., N. S. 418; 34 L. J., C. P. 151; 11 Jur., N. S. 140; 13 W. R. 409.

#### 10. DEEDS COMPOUNDING FOR PARTICULAR DEBTS ONLY.

**Without Intention of delaying other Creditors.**—If a person, having several creditors, conveys by deed the legal interest in part of his real and personal property to a trustee, in trust (after deducting the expenses respecting the trust) out of the rents and profits to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, without any intention of fraudulently delaying the creditors not named in the schedule in obtaining their demands, the deed is good in law. *Estwick v. Caillaud*, 5 T. R. 420; 2 Anst. 381.

**Debts in Discretion of Trustee.**—A deed conveyed the lease of a farm and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum to be paid to him by one of the trustees, to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustees' demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper; the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was), as a separate maintenance for her, in consequence of a separation between them on account of her husband's ill-usage:—Held, that such deed was not fraudulent or void, as against creditors, it appearing to have been made bona fide at the time, and that all the creditors of the grantor, known at the time, had, upon application to the trustees, received payment of their debts. *Wynn v. Wilmore*, 8 T. R. 521.

**Estates assigned to Trustees to keep down Interest on Debts charged thereon.**—A. and B., father and son, executed in 1818 an indenture of settlement, on the occasion of the son's intended marriage. The father and son, the lady and her father, and other persons, trustees, were parties to the indenture. Freehold estates were conveyed to the trustees for A. for life, remainder to B., and these estates were exonerated from debts due by A., which debts were made charges on certain leasehold premises expressly named. These premises were vested in trustees to keep down the interest of A.'s debts affecting any of the estates comprised in the deed, and they were empowered, with the desire and consent of A. and B., and notwithstanding any of the trusts therein, to sell the debts and incumbrances. Another deed was executed by A. and B. in 1824, which recited the former, appointed new trustees, added new debts and made provision for the payment of all. The trustees never acted in discharge of the trust, and the deeds were not communicated to the creditors; but B., who by an arrangement with his father had possession and management of the estates, paid the interest on the debts. After the deaths of A. and B., the son of the latter entered into possession of the estates. C., a bond creditor, whose name and claim were set forth in the schedule to the deed of 1818, filed a bill to have the trusts of that deed carried into execution.—Held, that this debt was within the trust contained in the indenture for the payment of the scheduled debts. *Synnot v. Simpson*, 5 H. L. Cas. 121.

**Debt in which Trustee has Interest.**—A. and B., father and son, executed deeds for the settlement of some of their family estates, and for payment of the debts of A. Certain estates were conveyed to trustees, with a power to sell, on the consent, in writing, of A. and B. or the survivor, and to apply the proceeds of the sale in payment of debts therein specified. A. was indebted to D., as trustee for an infirmity, and A. and B. had given joint and separate warrants of attorney to secure the debt. Separate judgments had been entered up against A. and against B. The amount of the sums thus due was stated in the deed. D. had some legal interest in the estates themselves. He was a party to the deed, and executed it:—Held, that this deed created

a trust in favour of the infirmary of which he was a trustee. *Montefiore v. Browne*, 7 H. L. Cas. 241.

**Power of Revocation.**—In this deed there was a power of revocation to be exercised by A. and B. A. died without exercising it:—Held, that the power of revocation was then at an end. *Id.*

**Default in Payment of Instalment.**—A debt being payable by instalments, with interest, the debtor made default in payment of one of the instalments. By a deed, reciting that the creditor had agreed to give the debtor time upon having the payment of the debt secured to him, with interest, "by the instalments and in manner hereinafter appearing," provision was made for payment of the debt, with interest, by instalments different from the former ones, with a proviso, that upon default being made in payment of any instalment, the whole unpaid portion of the debt, with interest, should become immediately payable. The debtor made default:—Held, that the proviso was not in the nature of a penalty, and that a court of equity ought not to restrain the creditor from enforcing immediate payment of the whole moneys remaining due. *Sterne v. Beck*, 1 De G., J. & S. 595.

#### 11. EFFECT OF DEEDS UPON ACTIONS AND SUITS.

**On Action commenced before 24 & 25 Vict. c. 134.**—A composition deed, by which the creditors, parties thereto, covenant not to sue the debtor for a certain period, cannot be pleaded to an action commenced before the act came into operation by a creditor who has not executed the deed. *Oppenheimer v. Griece*, 7 H. & N. 533; 31 L. J., Ex. 375; 10 W. R. 541.

**Deeds Pleadable in Bar.**—A simple covenant not to sue for a limited time is not pleadable in bar of an action, but a covenant not to sue for a limited time, and that the deed may be pleaded in bar and discharge of any action brought within that time, may be pleaded in bar of an action by a non-assenting creditor. *Walker v. Nevill*, 3 H. & C. 403; 34 L. J., Ex. 73; 11 Jur., N. S. 246; 11 L. T. 774; 13 W. R. 523.

A composition deed, professing to be made between the debtor and a surety and all the creditors (whether assenting or bound under the statute), recited, that the debtor had agreed to pay his creditors 5s. in the pound upon their debts, by two instalments of 2s. 6d. in the pound each, the first in cash, the second by the joint and several promissory notes of the debtor and the surety, at four months' date; and that the statutory majority of creditors had consented to accept such composition. It then witnessed, that in consideration of the premises, the several creditors released the debtor (in the largest possible term) from all debts, claims and demands, "save and except their rights, claims and demands under and by virtue of the deed, and of the promissory notes for the second instalment of the composition," with a proviso, saving their remedies against third persons; and the surety covenanted not to accept any security, preference or benefit, until the full amount of the composition should have been paid:—Held, that the deed amounted to an absolute release, and

might be pleaded in bar as such. *Lay v. Mottram*, 19 C. B., N. S. 479; 12 Jur., N. S. 6.

A plea of a composition deed made between a debtor and his creditors relating to his debts and liabilities and his release therefrom, is pleadable in bar to an action by a non-assenting creditor. *Whitebread v. Porter*, 5 B. & S. 123; 10 L. T. 410; 12 W. R. 742.

To a declaration for a debt, a plea alleging that a deed was made between the defendant and certain of his creditors, being "an inspectorship deed, within the true intent, meaning and provisions of the Bankruptcy Act, 1861;" that it was thereby provided that, on the happening of one of certain specified events, the defendant should be released; and that if any of the said creditors should commence any suit, the deed should operate as an order of discharge in bankruptcy, and that the conditions required by the Bankruptcy Act had been complied with, is a good plea. *Corner v. Sweet*, 1 L. R., C. P. 456; 12 Jur., N. S. 413; 14 W. R. 584.

**Deed not Executed by Creditors.**—A plea, that by a deed an insolvent and two sureties bound themselves to give, and pay at maturity, promissory notes to the amount of 3s. in the pound to all his executing and non-executing creditors, which deed was assented to by the requisite number of creditors, and in which was contained a covenant by the subscribing creditors that they would accept the notes by way of composition, and on payment would give a release; alleging a tender to the plaintiff; the deed being executed by the insolvent and by the sureties, but not appearing to have been executed by any of the creditors:—Held, that the plea was a good plea on equitable grounds. *Scott v. Berry*, 34 L. J., Ex. 193; 11 Jur., N. S. 510; 13 L. T. 40; 13 W. R. 844.

To an action of debt a composition deed was pleaded (executed after action), by which two instalments of a composition were to be paid on two future days, and which contained a release subject to be avoided by non-payment of the composition. To the plea after the first instalment was due, the plaintiff replied non-payment of the composition:—Held, that the plea was good, for that the release was an answer to the declaration at the time it was pleaded. *Newington v. Levy*, 6 L. R., C. P. 180; 40 L. J., C. P. 29; 23 L. T. 594; 19 W. R. 473. Affirming, *S. C.*, 5 L. R., C. P. 607; 39 L. J., C. P. 334; 23 L. T. 70; 18 W. R. 1198.

**No Release—Tender of Composition.**—A composition deed, binding on non-assenting creditors, may, if the composition has been tendered, be pleaded in bar to an action by a non-assenting creditor, although the deed contains no release. *Garrod v. Simpson*, 3 H. & C. 395; 34 L. J., Ex. 70; 11 Jur., N. S. 227; 11 L. T. 777; 13 W. R. 469.

**Deeds not Pleadable in Bar.**—A composition deed containing a covenant on behalf of the debtor's creditors, parties thereto, not to sue, provided their debts are paid by certain monthly instalments, as provided by the deed, but containing no clause of release, cannot be pleaded in bar to an action. *Ray v. Jones*, 19 C. B., N. S. 416; 34 L. J., C. P. 306; 11 Jur., N. S. 812; 12 L. T. 737; 13 W. R. 1018.

A deed, by which a debtor simply conveys all



his estate and effects to a trustee to be applied and administered for the benefit of his creditors as if he had been duly adjudged bankrupt, cannot be pleaded in bar to an action by a creditor. *Clarke v. Williams*, 3 H. & C. 1001—Ex. Ch.

**Judgment set aside to allow Deed to be Plead.**—A defendant, who, before action, executed a deed of arrangement, did not appear, but allowed judgment to go against him by default. Upon an application to stay proceedings upon the judgment on the ground that the deed had been executed:—Held, that it ought to have been pleaded, and that the defendant might have a rule nisi to set aside the judgment and be let in to plead the deed on payment of costs. *Couston v. Robins*, 12 W. R. 1012.

**In what Actions—Cause of Action arising out of Jurisdiction.**—An English composition and inspectorship deed, made under 24 & 25 Vict. c. 134, may be set up as an answer to an English action on a contract made and to be performed in Upper Canada; but it cannot be set up as an answer to an English action on a judgment obtained in Upper Canada in an action there on such a contract, if it could have been used as a defence in such Canadian action. *Ellis v. McHenry*, 6 L. R., C. P. 228; 40 L. J., C. P. 109; 23 L. T. 861; 19 W. R. 503.

**—For Liability in respect of Calls.**—A deed of inspectorship under the Bankruptcy Act, 1861, s. 192, by a transferee of shares, is no bar to the claim of a transferor (who did not execute the deed) in respect of calls which had been made subsequently to the date of the deed, and which he had been compelled to pay by the default of the transferee to register the transfer. *Holmes v. Symons*, 13 L. R., Eq. 66; 41 L. J., Ch. 59; 25 L. T. 628; 20 W. R. 175. An appeal against this decision was compromised; 20 W. R. 921.

**Deeds under 24 & 25 Vict. c. 134, s. 192.**—A deed under the 192nd section does not operate as a statutable release of the debtor, pleadable in bar of an action by a creditor; and the debtor can only avail himself of it by an application to the Court of Bankruptcy to stay the proceedings, or after certificate by an application to the court in which judgment has been obtained to stay execution. *Ipton Park Iron Ore Company v. Pattinson*, 2 H. & C. 828; 33 L. J., Ex. 193; 10 Jur., N. S. 427; 9 L. T. 806; 12 W. R. 344.

**Proof of Plea.**—A plea of composition with creditors, stating that defendants were indebted to the plaintiffs, and to other persons whose names were to the defendants unknown, and that the defendants agreed with the plaintiffs and their other creditors, and the plaintiffs and the other creditors mutually agreed with the defendants and each other to accept a composition, is not proved by evidence of some only of the other creditors besides the plaintiffs having agreed to accept a composition. *Brown v. Bakey*, 11 Jur. 39.

A deed which is on the face of it unreasonable or unequal as against non-assenting creditors, cannot be made good by any facts dehors

the deed. *Oldis v. Armston*, 2 L. R., Ex. 406; 36 L. J., Ex. 181; 16 L. T. 601; 15 W. R. 965.

**Action by Creditor whose Debt omitted from Schedule.**—In an action against an acceptor of an overdue bill of exchange, he pleaded, for defence on equitable grounds, a deed made between himself and the several persons whose names were thereto subscribed being his creditors, which, after reciting that he proposed to pay them a composition of 5s. in the pound, which proposal was accepted by a majority in number representing three-fourths in value of the creditors, witnessed that the debtor covenanted that he would pay to those persons the several sums placed opposite to their names in a schedule to the deed, being the amount of the composition, by two equal instalments, and would forthwith deliver to them promissory notes for the amount of those instalments; they covenanting that until he made default in the performance of his covenants they would make no claim or demand against him; that he at the time he executed the deed was ignorant that the bill sued on had been indorsed to the plaintiff, or that the plaintiff was his creditor, and therefore could not insert the same in the schedule to the deed:—Held, that the deed was not an answer to the action. *Burelot v. Mills*, 6 B. & S. 986.

**Mode of pleading Deed in Bar of Actions.**—In pleading in bar a deed of inspectorship, it is sufficient, without setting out the deed at length, to aver that it is in all respects an inspectorship deed within the true intent and meaning of the statute, and give a general description of it. *Corner v. Sweet*, 1 L. R., C. P. 456; 35 L. J., C. P. 161; 14 W. R. 584; 1 H. & R. 405.

To an action for goods sold and delivered, a plea in bar of a deed of composition executed after action, and a tender of the composition after action, is good, without shewing that the defence arose after action, and the want of a formal commencement and conclusion does not make the plea bad. *Brooks v. Jennings*, 1 L. R., C. P. 476; 12 Jur., N. S. 341; 14 L. T. 19; 14 W. R. 440; 1 H. & R. 414.

Where the release is absolute, the deed may be pleaded without averring a tender of the composition-money. *Johnson v. Barrett*, 1 L. R., Ex. 65; 35 L. J., Ex. 15; 13 L. T. 597; 14 W. R. 194; 4 H. & C. 16.

A deed made between the debtor, a surety, and the persons whose names were thereto subscribed, and all others the creditors of the debtor, after reciting that the debtor was indebted to the said several creditors in the several sums of money set opposite to their respective names in the schedule thereto, and that it had been agreed by the statutory majority of the creditors to accept a composition in full satisfaction of their debts,—witnessed that, in consideration of the promissory notes of the debtor and the surety for the payment of the composition on the respective sums of money as aforesaid, they released to the debtor all actions, suits, debts, claims, and demands, and accepted the composition in satisfaction of the debts due to them specified in the schedule:—Held, that a plea of the above deed (which was executed and registered after the date of the writ of summons), pleaded as a plea to the further main-



tenance of the action, was a good answer, not only to the debt, but to the claim for damages and costs consequent upon the detention of the debt. *Tetley v. Wanless*, 2 L. R., Ex. 21; 36 L. J., Ex. 153; 16 L. T. 60; 15 W. R. 356—Ex. Ch.

A plea to a declaration for a debt, setting up a release contained in a composition deed which it alleged to be binding upon the plaintiff under the provisions of the Bankruptcy Act, 1861, and by which certain specified creditors, not including the plaintiff, were postponed to the general body of creditors, is bad if it does not allege that the creditors so postponed executed, or at least assented to, the deed. *Cairncross v. Willis*, 38 L. J., Ex. 87; 20 L. T. 529.

**After Action.**—A deed of composition completed by execution of the requisite number of creditors after action, may be pleaded as a defence on the condition of payment of costs to the time of pleading. *Morgan v. Harding*, 11 W. R. 65.

**At Nisi Prius.**—A plea, puis darrein continuance, of a deed of arrangement allowed to be pleaded at nisi prius within eight days of the registration of the deed, although the cause had not been reached, nor in the cause list of the day. *Bond v. Weston*, 4 F. & F. 476.

Upon a plea, puis darrein continuance, of a deed of arrangement with a clause that it should operate by way of release on the prosecution of any suit or action by any of the creditors, it appearing that the deed was entered into after the cause was at issue, and registered more than eight days before the plea was tendered, but that there had been no fresh step in the cause since it was set down for trial, which was before the registration:—Held, that if there was any doubt as to whether the matter of defence arose within the last eight days, the judge, in the exercise of his discretion, would receive the plea at nisi prius; and it was accordingly so received. *Aston v. King*, 4 F. & F. 480.

**In Action by Surety against Principal Debtor.]**

—Declaration for money paid. Plea, that after the 4th October, 1861, and before the Bankruptcy Act, 1869, the defendant was indebted to divers persons, and thereupon a deed of the 29th August, 1867, relating to his debts and his release therefrom, was made between him and his creditors, being "the several persons who, at the date of the deed, would be entitled to prove, under an adjudication in bankruptcy, against him, founded upon a petition filed on the day of the date of the deed," which deed recited his inability to meet his debts and his proposal to pay a composition of 5s. in the pound, which the debtors had agreed to accept in full satisfaction and discharge of their debts, and to execute the release thereafter contained; and the defendant covenanted to pay the composition in two instalments of 2s. 6d. each at three and six months from the registration of the deed, in consequence whereof the creditors released him from all his debts. And it was provided, that any creditor holding security for his debt, or having any claim upon or against any other person as well as the defendant for such debt, might execute or assent to the deed without prejudice to such security or claim. Averment that the deed was executed after the accruing of the

claim of a certain other person whose name was to the defendant unknown, and that such claim was for money due from the defendant to such other person, who was a creditor of the defendant in respect of his claim at the time of the execution of the deed, and executed and was bound by the same; and that the plaintiff was a surety for the defendant to such other person in respect of such claim, and that the money alleged to have been paid by the plaintiff for the use of the defendant, was so paid after the execution of the deed by such other person, and was money paid by the plaintiff as such surety for the defendant to such other person for and on account of such claim, and not otherwise; and that at the time it was paid the defendant was released from such claim of such other person by the deed. Replication, that the plaintiff never executed or assented to the deed, and was no party thereto; and, that although the times for payment of the composition on the amount of the debt to which the plea was pleaded had elapsed before commencement of the action, yet the composition was never paid or tendered, or offered to be paid to the plaintiff pursuant to the deed:—Held, that the plea was good, and afforded a defence to the claim which was barred by the deed, the release contained in which was absolute, and would have been an answer to an action by the principal creditor, in whose place the surety was, by the Bankruptcy Act, 1861, s. 173, entitled to stand, and so was bound by the deed. *Hatch v. Hatch*, 28 L. T. 506.

**Issuing Execution notwithstanding Registration.]**—A person who has been arrested, notwithstanding he had a certificate of the registrar in bankruptcy of his registration of a deed of arrangement under the Bankruptcy Act, 1861, cannot maintain an action against the sheriff for detaining him in custody after the production of such certificate to the sheriff's officer. *Ames v. Waterlow*, 5 L. R., C. P. 53; 39 L. J., C. P. 41.

On the 3rd of August, A. served on B. a writ, under the Bills of Exchange Act; on the 5th, B. executed a composition deed; on the 13th the deed was registered, and a certificate thereof granted to B.; on the 15th judgment for non-appearance was signed; the sheriff took B. into custody on a ca. sa.; but on being shewn the certificate let him go:—Held, that the sheriff was liable to an action for escape at the suit of A. *Allen v. Carter*, 5 L. R., C. P. 414; 39 L. J., C. P. 212; 22 L. T. 586.

**Effect on Proceedings in Equity.]**—A deed of assignment in trust for creditors executed by the plaintiff during a suit causes an abatement, as upon bankruptcy, and the defendant should move that the suit be revived or stand dismissed, and not for dismissal for want of prosecution. *Price v. Richards*, 39 L. J., Ch. 118.

When a bill of foreclosure was filed against a lessee, who had executed a deed of assignment of all his property to trustees for the benefit of his creditors under the Bankruptcy Act, 1861, s. 192:—Held, that the trustees should have been made parties, and not the lessee. *Metropolitan Bank v. Offord*, 10 L. R., Eq. 398; 39 L. J., Ch. 820; 22 L. T. 699.

A trustee in default to the trust estate, and having executed a creditors' deed duly registered before a bill filed against him for the execution of the trusts, is entitled to his costs from the date

of the bankruptcy as between solicitor and client, from the party liable to the costs of the suit:—Held, that there is no difference in this respect between an executor and a trustee. *Bowyer v. Griffin*, 39 L. J., Ch. 159.

**Setting up Deed in Bar of Suit against Creditor.**—The defendant acted as the plaintiff's agent in certain commercial transactions previously and up to July, 1867. In that month the plaintiff fell into pecuniary difficulties, and executed a composition deed under the Bankruptcy Act, 1861, whereby he covenanted to pay a composition to his creditors, and they released him from all his liabilities. The defendant was not present at the meeting at which the composition was agreed upon, and the proper majority of creditors was obtained without reference to him; but he afterwards claimed to be a creditor in respect of the said transactions for 300l., and his name was inserted in the schedule of the deed as a creditor for that amount, and he assented to the deed, and received the composition payable thereunder. Afterwards the plaintiff filed a bill for an account charging numerous false entries in the accounts rendered by the defendant:—Held, that the composition deed was no bar to a decree for account in favour of the plaintiff. *Pike v. Dickinson*, 12 L. R., Eq. 64; 40 L. J., Ch. 450; 24 L. T. 927. Affirmed, 7 L. R., Ch. 61; 41 L. J., Ch. 171; 25 L. T. 579; 20 W. R. 81.

## 12. OPERATION OF CERTIFICATE OF REGISTRATION.

**Certificate founded on Invalid Deed is Void.**—The certificate of the registrar of the Court of Bankruptcy that a composition deed has been filed and registered, is not available to the debtor for the purposes of protecting him from arrest, unless the deed of composition is a valid one; and a certificate founded on an invalid deed may be treated as void, without taking proceedings to set it aside. *Iderton v. Jewell*, 14 C. B., N. S. 665; 32 L. J., C. P. 256. Affirmed, 16 C. B., N. S. 143—Ex. Ch.

A certificate of the registration of a deed of arrangement is no answer to an action by a non-executing creditor, if the deed contains covenants which are unreasonable or contrary to the general scope and policy of the bankrupt laws. *Leigh v. Pendlebury*, 15 C. B., N. S. 815; 33 L. J., C. P. 172; 10 Jur., N. S. 296; 10 L. T. 30; 12 W. R. 468; *S. P., Dewhurst v. Kershaw*, 10 Jur., N. S. 734.

**Certificate is only prima facie Evidence of Validity.**—The certificate of registration is only prima facie evidence of the fulfilment of the requisites of the section to which the certificate extends, and may be controverted without a separate proceeding to set it aside. *Page, Ex parte*, 1 De G., J. & S. 283.

**Execution—Omission to plead Deed.**—A debtor, who had executed and registered a deed of composition containing a release, was sued by a non-assenting creditor for a debt due before the execution of the deed. The debtor neglected to plead the deed, and the creditor obtained judgment, and issued execution:—Held, that, as the debtor might have pleaded the deed, he was estopped from setting it up afterwards to defeat

the execution. *Rossi v. Bailey*, 3 L. R., Q. B. 621; 37 L. J., Q. B. 204; 19 L. T. 130; 16 W. R. 1042.

It is no excuse for a sheriff not arresting a debtor, that the debtor produced a certificate of the registration of a composition deed, if he had had the opportunity of pleading the deed and had omitted to do so, of which the sheriff had notice; and an action will lie against the sheriff at the suit of the judgment creditor for not arresting under such circumstances. *Godwin v. Stone*, 4 L. R., Ex. 331; 38 L. J., Ex. 153; 20 L. T. 711; 17 W. R. 923.

Where a debtor, who made a composition deed, was sued by a non-assenting creditor, and suffered judgment by default, the court refused to order the sheriff to withdraw from possession of the debtor's goods under a fi. fa. issued on the judgment. *Whitmore v. Wakerley*, 3 H. & C. 538; 34 L. J., Ex. 83; 11 Jur., N. S. 182; 11 L. T. 683; 13 W. R. 350.

A defendant entered into a deed of arrangement which would have afforded a defence to the action. He had an opportunity of pleading it, but omitted to do so, and judgment was recovered against him:—Held, per Kelly, C. B., and Pigott, B., that he was still entitled to rely upon the deed as a protection against the execution on the judgment: per Bramwell and Channell, BB., that he was not. *Staffordshire Joint Stock Banking Company v. Emmott*, 2 L. R., Ex. 208; 36 L. J., Ex. 105; 16 L. T. 175; 15 W. R. 1135.

A plea of never indebted was withdrawn by consent on the understanding that judgment was not to be signed till the 8th of May. On the 7th of May the defendant registered a valid deed of composition. The plaintiff, a non-assenting creditor, signed judgment on the 8th of May, and brought an action on the judgment:—Held, that he was not entitled to enforce the judgment in this manner, because, although it might have been physically possible for the defendant to plead the deed in time, still, he had not such an opportunity of pleading it as he was bound to make available; and also, because he was prevented from pleading by the understanding on which he withdrew his plea. *Braun v. Weller*, 2 L. R., Ex. 183; 36 L. J., Ex. 100; 16 L. T. 22; 15 W. R. 519.

A plaintiff issued a writ of summons under the Bills of Exchange Act; the defendant did not appear to the writ, but before the time for appearance had expired, executed a deed of composition. The deed was assented to by the requisite number of creditors, but was not registered till after the time for appearing to the writ had expired, whereupon the plaintiff signed judgment and issued execution:—Held, that he could not proceed without leave of the Court of Bankruptcy. *Hartley v. Mare*, 19 C. B., N. S. 85; 34 L. J., C. P. 187; 11 Jur., N. S. 625; 12 L. T. 424; 13 W. R. 777.

**Practice where Validity of Deed Disputed.**—Upon a motion to set aside a fi. fa. upon the ground of a composition deed, the facts necessary to the validity of the deed being disputed, the court referred the matter to the master to report the facts, and ordered the sheriff to sell and to bring the money into court. *Maginn v. Coles*, 13 W. R. 350.

— In respect of Debts incurred after Regis-

tration.]—The certificate of the registration of a deed does not protect a debtor from arrest for a debt contracted after such registration. *Williams v. Rose*, 3 L. R., Ex. 5; 37 L. J., Ex. 12; 17 L. T. 253; 16 W. R. 316.

The protection of the certificate of registration does not extend to process in respect of debts accruing due after the date of registration, and therefore a sheriff is liable to an action for an escape, if he discharges a debtor, whom he has arrested, upon the production of the registrar's certificate, if the debt accrued due subsequently to the date of registration. *Dignam v. Bailey*, 4 L. R., Q. B. 376; 38 L. J., Q. B. 218; 17 W. R. 727—C. A. Affirming 3 L. R., Q. B. 178; 37 L. J., Q. B. 71; 17 L. T. 471; 16 W. R. 359.

—**Bill Indorsed after Registration.**—B. executed a deed of composition, containing a release by the creditors, which was registered immediately; at this time a bill drawn by C. and accepted by B. was running. The bill was indorsed to the plaintiff after it became due; the plaintiff sued B. on the bill and obtained judgment against him, and the sheriff, having arrested B. on a ca. sa., discharged him on the production of the certificate of registration of the deed. The plaintiff having brought an action against the sheriff for an escape, the sheriff pleaded the certificate as a justification, to which the plaintiff replied that the plaintiff's cause of action accrued after the registration of the deed, and the plaintiff was not a creditor bound by the deed.—Held, that the debt was barred by the deed, and the certificate therefore was a justification to the sheriff in discharging B. *Id.*

**Debtor in Execution.**—A debtor in execution, who obtains from the Court of Bankruptcy a certificate of the filing and registration of a composition deed, is entitled to be discharged out of custody. *Marks v. Hall*, 2 L. R., Q. B. 31; 36 L. J., Q. B. 40; 7 B. & S. 839.

A judgment debtor, arrested on a ca. sa. after execution by him of a valid deed of assignment, but before the expiration of the time limited for its registration, is, upon its registration, entitled to be discharged out of custody. *Bearnsman v. Langlands*, 3 H. & C. 433; 34 L. J., Ex. 3; 11 Jur., N. S. 45; 11 L. T. 348; 13 W. R. 79.

—**Where Deed invalid.**—The production of a certificate, valid on its face, of the registration of a deed of assignment by a debtor for the benefit of his creditors, justifies a sheriff in releasing the debtor whom he has arrested at the suit of a creditor, although the deed is in fact invalid as between the debtor and non-assenting creditors. *Lloyd v. Harrison*, 1 L. R., Q. B. 502; 35 L. J., Q. B. 188; 12 Jur., N. S. 701; 14 W. R. 737; 6 B. & S. 36—Ex. Ch.

—**Where Sheriff has Notice of Invalidity.**—A sheriff is bound to discharge a debtor out of custody on the production of the certificate of registration of a deed of arrangement, made subsequently to the judgment under which the debtor is arrested, notwithstanding the deed, though valid on the face of it, is in fact invalid, and the sheriff has notice of such invalidity. *Ames v. Colnaghi*, 3 L. R., C. P. 359; 37 L. J., C. P. 159; 18 L. T. 327; 16 W. R. 758.

—**No Action against Sheriff for not discharging Debtor.**—Though a debtor who produces to the sheriff a certificate of the filing and registration of a deed conveying his property to trustees for the benefit of his creditors, is entitled to his discharge, no action lies against the sheriff for not discharging him on producing such certificate. *Ames v. Waterlow*, 21 L. T. 393; 18 W. R. 67.

—**City of London Small Debts Act.**—Where a debtor who has executed a deed of arrangement with his creditors, and received his certificate of protection, is arrested and committed under a judgment summons issuing out of the City of London Sheriffs' Court, the Court of Bankruptcy will order his release, notwithstanding the provision in the City of London Small Debts Act, that no "protection order or certificate granted by any court of bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order." *Kinnaird, In re*, 7 L. T. 25.

—**Re-arrest of Debtor.**—Where a protection obtained under a deed of arrangement is impeached, and the deed is bad on the face of it, and default has been made by the debtor in carrying out its terms, a judge will give leave to re-arrest at the suit of a creditor barred by the deed. *Daniels v. Jansen*, 10 L. T. 909.

—**Jurisdiction of Court of Bankruptcy.**—A debtor having been taken under a ca. sa., notwithstanding his having produced to the officer a certificate of his having registered a deed of composition, an application was made to a judge in chambers for an order to release the debtor, which the judge refused to grant, on the ground that the deed was not a valid deed.—Held, that the Court of Bankruptcy had no power to release the debtor, and that the proper course to have taken was to have applied to the court out of which the process issued. *Smith, Ex parte*, 10 L. T. 551.

**Execution against Goods of Debtor.**—If a fi. fa. is issued at the suit of a non-assenting creditor after notice of the registration of a valid composition deed, the court will set it aside. *Stone v. Jellicoe*, 3 H. & C. 263; 34 L. J., Ex. 11.

A debtor, whose goods had been taken in execution under a fi. fa. before sale, executed a composition deed, which was duly registered.—Held, that the execution was no longer available, and the Court ordered the sheriff to withdraw from possession. *Rogers v. Roberts*, 4 H. & C. 609; 36 L. J., Ex. 40; 15 W. R. 340.

—**Garnishee.**—An order was made attaching a debt in the hands of a garnishee, and afterwards an order to pay over. Default was made, and, under an execution thereupon, the sheriff seized the goods of the garnishee, who, before sale, executed and registered a composition deed.—Held, that 24 & 25 Vict. c. 134, s. 198, applied, and that the sheriff must withdraw. *Kent v. Tomkinson*, 2 L. R., C. P. 502; 36 L. J., C. P. 224; 17 L. T. 41.

—**Proceeds of Execution.**—A plaintiff issued execution, after notice that a composition deed was about to be registered by the defendant;

the defendant's attorney gave notice of the same fact to the sheriff's officer, who withdrew on having the attorney's undertaking for the amount of the debt and costs, after refusing to withdraw on any other terms. At the time the undertaking was given the deed was, in fact, registered, and contained a release of all the creditor's claims and demands. The defendant having paid to the sheriff the amount of the undertaking under protest, and the sheriff having paid the same into court, the defendant moved to have the money paid out to him :—Held, that he was entitled to the money, inasmuch as the money represented the proceeds of the execution, and the plaintiff was not, at the time the undertaking was given, in a position in which he could have derived any benefit from the execution if it had been proceeded with. *Milner v. Rawlings*, 1 L. R., Ex. 249; 36 L. J., Ex. 250; 16 L. T. 829; 15 W. R. 1044.

— **Where Deed becomes Void.** ]—On the 20th of October, 1866, a debtor executed a deed of composition, by which, in consideration of her covenant to pay her creditors a composition of 5s. in the pound by two instalments of 2s. 6d. each, at three and six months respectively from the date of the deed, the creditors covenanted that, if the instalments were duly paid they would accept the composition in satisfaction of their respective debts, and that the deed should be an absolute release to the debtor therefrom; proviso, that unless and until the instalments of the composition, or some or one of them, should become payable, and should not be paid within three days after demand, the creditors should not sue in respect of their debts, and a further proviso, that in case the instalments, or any of them, should not be duly paid when due, the deed and the release therein contained should be at an end. The deed was executed or assented to by the required number and value of creditors, and was duly registered and gazetted, and a certificate of registration was given to the debtor. On the 28th of February, 1867 (the first instalment, payable on the 20th of January, not having been paid or tendered), the sheriff seized the debtor's goods under a f. fa. at the suit of a non-assenting creditor :—Held, that the deed being by force of the last proviso absolutely void, the certificate of registration was no bar to the execution. *Baker v. Painter*, 2 L. R., C. P. 492; 17 L. T. 53.

**Garnishee Order.** ]—Where a garnishee order to pay a judgment creditor has been made, but the judgment debtor has registered a composition deed before payment by the garnishee to the judgment creditor, the order is gone, and the subsequent payment by the garnishee is no defence to an action by the trustees under the deed. *Wood v. Dunn*, 1 L. R., Q. B. 77; 35 L. J., Q. B. 11; 12 Jur., N. S. 338; 13 L. T. 403; 14 W. R. 84.

**Summons under 8 & 9 Vict. c. 127.** ]—The registrar's certificate of the due registration of a deed operates as a protection to the debtor against process under a summons taken out pursuant to 8 & 9 Vict. c. 127, for non-payment, in obedience to an order of the court, of a debt under 20l. recovered against him in a superior court. *Gwillim v. Norris*, 11 L. T. 575.

**Attachment subject to Leave of Court of Bankruptcy.** ]—Where, upon a rule for an attachment

against a defendant for not paying money due under an order of nisi prius, it appeared that, after the money became due, he had entered into a trust deed for the benefit of his creditors, the rule for the attachment was made absolute; but it was ordered that the attachment should not issue until the plaintiff had obtained leave from the Court of Bankruptcy to make it available. *Welsh v. Butt*, 31 L. J., Q. B. 263; 10 W. R. 714.

**Discretion of Court of Bankruptcy.** ]—The Court of Bankruptcy is not bound ex debito iustitiæ, but it has a discretion to give or refuse leave to issue execution. *Daniels, Ex parte*, 10 L. T. 850.

The defendant, being sued by a creditor, before trial but not in time to plead it to the action, registered a deed under the Bankruptcy Act, 1861. The plaintiff recovered judgment; and, without obtaining leave from the Court of Bankruptcy, issued execution; but before it had been enforced the defendant applied to the court to stay proceedings. The court refused to interfere, although it appeared that the writ was about to be immediately executed. *Harding v. Inskip*, 4 L. R., Ex. 80; 38 L. J., Ex. 81; 19 L. T. 609.

**Deed Registered under s. 194 of Act of 1861.** ]—A deed of composition, registered under s. 194, although executed by more than three-fourths in number of the creditors, will not bind the remainder. *Morgan, Ex parte*, 1 De G., J. & S. 288; 32 L. J., Bk. 15; 2 Jur., N. S. 559; 7 L. T. 729; 11 W. R. 316.

**Unregistered Deed receivable in Evidence against Debtor.** ]—A deed of trust for the benefit of creditors, although unregistered, may be received in evidence as against the bankrupt. *Wensley, Ex parte*, 32 L. J., Bk. 23; 9 Jur., N. S. 315; 7 L. T. 548; 11 W. R. 241.

### 13. JURISDICTION OF THE COURT OF BANKRUPTCY.

**Under 24 & 25 Vict. c. 134, s. 197.** ]—The jurisdiction given to the Bankruptcy Court by the Bankruptcy Act, 1861, s. 197, extends for certain purposes to trust deeds registered under s. 194, as well as to those registered under s. 192, although all the powers given to the court by s. 197 with respect to deeds registered under s. 192, cannot be exercised with respect to deeds registered under s. 194. *Atkinson, Ex parte, Brooksbank, In re*, 9 L. R., Eq. 736; 39 L. J., Bk. 10; 22 L. T. 279; 18 W. R. 598.

A deed, by which a debtor residing within the jurisdiction of the Leeds District Court conveyed all his property to trustees for the benefit of his creditors, was executed and duly registered, in 1869, under the Bankruptcy Act, 1861, s. 194. By virtue of the Bankruptcy Act, 1869, s. 130, and of the orders and general rules made thereon, the jurisdiction of the Leeds District Court over trust deeds was transferred to the Bradford County Court :—Held, that (whether this was a "legal proceeding pending in bankruptcy," under s. 20 of the Bankruptcy Repeal and Insolvent Court Act, or not) the Bradford County Court had jurisdiction over the deed. *Id.*

The jurisdiction given to the Court of Bankruptcy by the Bankruptcy Act, 1861, s. 197,

applies to the case of a deed registered under s. 194, as well as to a deed registered under s. 192. *Clough, Ex parte, Ingham, In re*, 41 L. J., Bk. 45; 25 L. T. 646; 20 W. R. 105—L. J.

— **Extended by 32 & 33 Vict. c. 71.**—The Bankruptcy Court, under the Act of 1869, has over deeds of arrangement and composition registered under s. 192 of the Act of 1861, not only all the jurisdiction which the Act of 1861 gave to the court over such deeds but also all the larger and more extensive jurisdiction which s. 72 of the Act of 1869 has given to the court over bankruptcies. *Rumbold, Ex parte, Taylor, In re*, 6 L. R., Ch. 842; 40 L. J., Bk. 82; 25 L. T. 253; 19 W. R. 1102.

**Jurisdiction of Court of Chancery.**—The jurisdiction of the Court of Chancery in the administration of creditors' deeds is not excluded by the Bankruptcy Act, 1861; but the Court of Chancery will not exercise its jurisdiction except where the Court of Bankruptcy is unable to give adequate relief. *Stone v. Thomas*, 5 L. R., Ch. 219; 39 L. J., Ch. 168; 22 L. T. 359; 18 W. R. 385.

A creditor filed a bill against the trustees of a creditors' deed, alleging that one of the trustees had purchased some of the property at an under-value, and praying that the sale might be set aside, and the trusts of the deed administered by the court:—Held, that this was not a sufficient ground for the exercise of the jurisdiction of the court, and the bill was dismissed with costs. *Id.*

A debtor, by a deed registered in bankruptcy, covenanted when required to assign his estate to inspectors, to be administered as in bankruptcy. He afterwards became bankrupt. The inspectors filed a bill against the assignees in bankruptcy and a mortgagee of the debtor, claiming the balance in the hands of the mortgagee:—Held, that the Court of Chancery would not exercise its jurisdiction between the inspectors and the assignee, as both were subject to the Court of Bankruptcy. *Phillips v. Furber*, 5 L. R., Ch. 746; 22 L. T. 707; 18 W. R. 985.

— **To Appoint new Assignee.**—When proceedings in bankruptcy have been suspended by a resolution of the creditors under the Bankruptcy Act, 1861, s. 110, and an assignee has been appointed by them to wind up the estate out of court, such assignee is a trustee within the meaning of the trustee acts, notwithstanding the absence of a trust deed. Therefore, when an assignee so appointed had died before the winding-up was completed, the court appointed a successor on a petition supported by a statutory majority of the creditors entitled to the benefit of the trusts. *Raphael, In re*, 9 L. R., Eq. 233; 39 L. J., Ch. 200; 18 W. R. 247.

— **As between Trustee and Stranger to Bankruptcy.**—Although under the provisions of the acts of parliament relating to bankruptcy in cases of registered arrangement deeds the Court of Bankruptcy is armed with powers, both legal and equitable, ample enough to do complete justice, the jurisdiction of a court of equity is not thereby ousted, as between the trustee of a deed of arrangement and a third person who is a stranger to the bankruptcy. *Ellis v. Silber*,

8 L. R., Ch. 83; 42 L. J., Ch. 666; 28 L. T. 156; 21 W. R. 346.

— **As between Trustee and Sole Creditor.**—The plaintiffs brought an action against the trustee of a composition deed, registered in bankruptcy, to compel him to sue for some of their debtor's estate, outstanding in Trinidad. The plaintiffs were the only creditors interested under the deed. They relied upon this: that the deed contained clauses which, since it was executed, had been decided to be invalid. The defendant objected to the jurisdiction of the Court of Chancery:—Held, that the Court of Bankruptcy had not the exclusive jurisdiction; and a motion to stay the action, and transfer the matters to that court, was therefore refused, with costs. *Jenney v. Bell*, 2 Ch. D. 547; 45 L. J., Ch. 369; 34 L. T. 485; 24 W. R. 550.

— **Under Companies Act, 1863, s. 115.**—A contributory, on being examined under the Companies Act, 1862, s. 115, objected to answer questions aimed at impeaching a composition deed executed by him, on the ground that the Court of Bankruptcy was the proper forum in which proceedings of that nature should be taken:—Held, that he must answer the questions, one of the objects of that section being to enable a liquidator to ascertain whether he ought or ought not to take proceedings elsewhere. *London Gas Meter Company, In re, Webber, Ex parte*, 41 L. J., Ch. 145; 20 W. R. 394—L. J.

**Deed executed in District Court.**—The proper jurisdiction to deal with a trust deed executed under proceedings in a district court of bankruptcy, and afterwards duly registered in London, is the district court. *Cox, Ex parte*, 31 L. J., Bk. 49; 8 Jur., N. S. 733; 6 L. T. 672; 10 W. R. 744.

**To order Payment of Costs.**—The Court of Bankruptcy has no jurisdiction to order the trustees of a deed to pay the costs of a petitioning creditor who has obtained an adjudication subsequently to the execution of the deed, but in respect of which further proceedings have been stayed, upon the deed being duly registered. *Jones, Ex parte*, 10 Jur., N. S. 812; 10 L. T. 804; 12 W. R. 1094.

The Court of Bankruptcy has no power to order payment to the trustees of the costs and expenses incurred in reference to carrying out the trusts of a deed of assignment, which proves to be inoperative by reason of the want of the necessary assents by creditors. *Cumber, In re*. 10 L. T. 387; 12 W. R. 767.

**To direct Examination of Trustee.**—A commissioner has power, either under 24 & 25 Vict. c. 134, s. 136, or irrespectively of that section, by virtue of his authority over a trustee appointed by a trust deed, to direct the trustee to be examined as to his dealings with the debtor's estate; and although it will be a good practice not to direct such examination without some ground being shewn for it, the court will not in general entertain an appeal as to the sufficiency of such ground. *Lawrence, Ex parte*. 1 De G. J. & S. 307; 32 L. J., Bk. 61; 9 Jur., N. S. 835; 8 L. T. 407; 11 W. R. 705.

**To order Production of Securities.]**—When a composition deed, not containing any assignment of property, has been duly registered, the Court of Bankruptcy has jurisdiction, in the course of an examination of one of the creditors by another, to order the former creditor to produce a mortgage deed which he holds as security from the debtor. *Marks, In re*, 1 L. R., Ch. 429; 35 L. J., Bk. 22; 12 Jur., N. S. 737; 14 W. R. 824.

## XX. EFFECT OF BANKRUPTCY AND LIQUIDATION.

### 1. ON EXECUTIONS.

#### a. Under Statutes prior to the Bankruptcy Act, 1869.

##### i. Executions founded on Warrants of Attorney or Cognovits.

**Under 12 & 13 Vict. c. 106.]**—A trader is not to be deemed unable to meet his engagements within the 12 & 13 Vict. c. 106, s. 135, if his assets exceed the amount of his liabilities, even although it does not appear that he could have immediately realised the amount. *Loader v. Hiscock*, 1 F. & F. 132.

A warrant of attorney given to a retiring partner, contemporaneously with the deed of dissolution, to secure him payment of the capital he had brought into the business, is not given for an antecedent debt or demand within 12 & 13 Vict. c. 106, s. 135. *Ib.*

A judgment and execution on a cognovit, not filed according to 3 Geo. 4, c. 39, are not absolutely void, but only inoperative against the assignees of a bankrupt. *Green v. Gray*, 1 D. P. C. 350.

When judgment was signed, within twenty-one days, upon a warrant of attorney given by a bankrupt, which had been filed within twenty-one days after its execution, but without any affidavit ever being filed, attesting that the warrant was filed within twenty-one days after the execution of it—Held, that the judgment and execution issued thereon were void as against the assignees. *Acraman v. Herniman*, 16 Q. B. 998; 20 L. J., Q. B. 355; 15 Jur. 1008.

Where, upon taking a guarantee for repayment of advances to one of their customers, certain bankers also took from their principal debtor a warrant of attorney to cover the debt, and at the same time agreed with the guarantor that they would at any time, at his request, enter up judgment and levy execution on the warrant of attorney against the principal debtor; but by their neglect to file the warrant of attorney, or a true copy thereof, the warrant of attorney became void:—Held, that this neglect on the part of the bankers operated as a discharge to the surety. *Watson v. Aloock*, 4 De G., Mac. & G. 247; 22 L. J., Ch. 858; 17 Jur. 568. See *Parker v. Watson*, 8 Ex. 404; 22 L. J., Ex. 167.

D., being possessed of 299*l.*, lent it to W., whom she was about to marry. He, as a security for the loan, gave to her and S. a warrant of attorney, in 1837, to confess judgment for 600*l.* By the defeasance, which stated that the loan was made in contemplation of marriage, W. was to hold the money as long as D. and S. should please, paying interest to S. for her, and, on her request, S. might on a week's notice require payment of the principal, judgment was to be entered up.

tered up forthwith, and execution was to issue in default of payment after notice. The marriage took place, judgment was entered up, and in 1845 S., at the wife's request, gave a week's notice demanding payment, and as it was not paid issued execution, and levied on W.'s goods. W. in a few days afterwards became bankrupt, and his assignee applied to set aside the judgment and execution, on the grounds, first, that the execution was irregular, the judgment not having been revived by scire facias, and being more than a year old; and secondly, that the marriage between D. and W. had discharged the judgment. The court refused the application. *Dolling v. White*, 1 B. C. C. 170; 22 L. J., Q. B., 327; 17 Jur. 505.

A judgment on a warrant of attorney, duly entered up more than a year before the bankruptcy of the debtor, and registered before such bankruptcy, constitutes a lien, under 1 & 2 Vict. c. 110, s. 13, upon the real estate of the bankrupt debtor within the meaning of the exception in the 12 & 13 Vict. c. 106, s. 184. *Boyle, Ex parte*, 22 L. J., Bk. 78; 17 Jur. 979.

**Under previous Statutes.]**—A warrant of attorney which was not filed within the twenty-one days prescribed by 3 Geo. 4, c. 39, was void against the assignees in bankruptcy, although judgment was signed and execution issued on it before the commission of the act of bankruptcy. *Bittleston v. Cooper*, 14 M. & W. 399.

Or although the petitioning creditor's debt upon which the fiat was founded did not exist at the time of the execution of the warrant of attorney, or within the twenty-one days. *Everett v. Wells*, 2 Scott, N. R. 525; 9 D. P. C. 424; 2 M. & G. 269.

Where a party taking a cognovit neglects to file it within twenty-one days, it cannot in any case be made available in the event of the subsequent bankruptcy of the party giving it; and even when the judgment has been entered up, execution issued, and seizure and sale effected long before the act of bankruptcy of such party, and no fraud is suggested. *Biffin v. York*, 5 Scott, N. R.; 5 M. & G. 428; 12 L. J., C. P. 162. 7 Jur. 259.

Trover would lie against a sheriff, who, having seized goods after an act of bankruptcy under a fi. fa. issued on a judgment founded on a warrant of attorney, sold the goods after the fiat. *Heston v. Gibbs*, 12 M. & W. 111; 1 D. & L. 420; 13 L. J., Ex. 53.

The 1 Will. 4, c. 7, s. 7, exempting judgments on cognovit, and by default, confession, or nil dicit, in any action commenced adversely and without collusion, from the operation of s. 108 of the 6 Geo. 4, c. 16, did not extend to a judgment on a warrant of attorney, though given without collusion or fraudulent preference; and a sheriff having seized and sold the goods on an execution issued upon such judgment, and paying over the proceeds after notice of an act of bankruptcy committed by the defendant, was answerable to the assignees for money had and received. *Crossfield v. Stanley*, 4 B. & Ad. 87; 1 N. & M. 668.

Judgment was entered up on a warrant of attorney given by two joint traders: and a fi. fa. issued, returnable on the 2nd May. On the 1st of that month, the sheriff's officer received from the defendants the money directed to be levied. On the 2nd of May one of them committed an

act of bankruptcy, and the other on the 5th. On the 11th, a commission of bankruptcy issued; and on the 19th the sheriff paid over the money to the execution creditor. In an action by the assignees—Held, that the creditor was entitled to retain it, not being a creditor having a security at the time of the bankruptcy. *Morland v. Pellatt*, 8 B. & C. 722; 2 M. & R. 411.

A plaintiff in execution, upon a judgment by confession, ceased to be a creditor having security for his debt, within the 6 Geo. 4, c. 16, s. 108, when the goods seized under that execution were sold, even though an act of bankruptcy was committed before the return of the writ. *Higgins v. McAdam*, 3 Y. & J. 1.

A warrant of attorney was given to secure a debt in 1819, judgment was entered up, a fi. fa. issued, and goods seized, which were assigned over to the plaintiff in 1825, about a fortnight previously to bankruptcy.—Held, that the assignees were not authorized by the 6 Geo. 4, c. 16, s. 108, in taking possession of the goods seized in execution. *Wymer v. Komble*, 6 B. & C. 479; 9 D. & R. 511.

A creditor on a judgment founded upon a warrant of attorney issued execution thereon, and seized and sold the goods of the debtor under a fi. fa., without notice of any act of bankruptcy committed. On the day after the sale, a fiat issued against the debtor.—Held, that the assignees were not entitled to recover from the creditor the proceeds of the sale, inasmuch as at the time of the fiat he was not a creditor of the bankrupt, within 6 Geo. 4, c. 16, s. 108. *Ramsey v. Eaton*, 10 M. & W. 22.

An execution on a judgment founded on a warrant of attorney, to be good, under 6 Geo. 4, c. 16, s. 108, against a fiat, must be so executed that the execution creditor has ceased to be a creditor of the bankrupt holding a security for his debt: the sale under the execution must, therefore, be complete before fiat. *Ward v. Dalton*, 7 C. B. 643; 18 L. J., C. P. 236; 13 Jur. 734.

Assignees of a bankrupt were entitled to recover goods bona fide seized by an execution creditor under a fi. fa. on a judgment upon a warrant of attorney after a secret act of bankruptcy, but not sold until after the date and issuing of the fiat, and notice thereof; and the 2 & 3 Vict. c. 29, did not protect such an execution. *Skey v. Carter*, 11 M. & W. 571; 2 D. N. S. 831; 5 Scott, N. R. 877, n.; 12 L. J. Ex. 511; 7 Jur. 427—Ex. Ch.; *S. P.*, *Whitmore v. Robinson* or *Robertson*, 1 D. N. S. 135; 8 M. & W. 463; 6 Jur. 1088; *Lackington v. McLachlan*, 5 Scott, N. R. 874.

If a sheriff seized goods under a fi. fa. upon a judgment founded upon a warrant of attorney, such writ became void by the issuing of a fiat against the debtor before the sale. *Graham v. Lynes*, 7 Q. B. 491; 14 L. J., Q. B. 290; 9 Jur. 1104; *Goldschmidt v. Hamlet*, 6 M. & G. 187; 6 Scott, N. R. 962; 1 D. & L. 801; *Congreve v. Everts*, 10 Ex. 298.

An execution founded on a warrant of attorney, and complete by sale prior to the fiat, was protected by 2 and 3 Vict. c. 29, notwithstanding the creditor before the sale had notice of an act of bankruptcy. *Whitmore v. Greene*, 2 D. & L. 174; 14 M. & W. 104; 13 L. J., Ex. 811; 8 Jur. 697.

If an execution creditor would allege, against

the claim of assignees, that his judgment was signed under a warrant of attorney in an action commenced adversely, and was, therefore, protected by 1 Will. 4, c. 7, s. 7, the onus of proving the action so commenced was on such creditor. *Linnit v. Chaffers*, 4 Q. B. 762; D. & M. 14; 12 L. J., Q. B. 867.

## ii. Executions founded on Judges' Orders.

Under 12 & 13 Vict. c. 106, s. 137.]—This section does not avoid a judge's order not filed pursuant to its direction, as against the trader himself, but only as against his assignees, if he afterwards should become bankrupt. *Bryan v. Child*, 5 Ex. 368; 1 L., M. & P. 429; 19 L. J., Ex. 264; 14 Jur. 510.

A. having commenced an action for a debt against B., a trader, B. proposed that a judge's order should be made for a stay of proceedings upon payment of debt and costs, and sent to A. a summons for that purpose, upon which a consent was indorsed by A. A judge's order was thereupon made at the instance of B., directing proceedings to be stayed on payment of debt and costs, in default of payment, judgment to be signed and execution to issue. B. served a copy of this order on A. Neither the original order, nor any copy of it, was filed with the clerk of the dockets and judgments in the Queen's Bench, as directed by 12 & 13 Vict. c. 106, s. 137. Judgment was signed, and execution taken out, under the order; and the sheriff paid to A., from the proceeds of the sale of goods of B., the debt and costs for which execution had issued. After the execution and payment B. became bankrupt.—Held, that under 12 and 13 Vict. c. 106, s. 137, the order, judgment and execution were void as against B.'s assignees, the order not having been filed; and that the assignees might recover from A. the amount paid him under the execution, as money received to their use as assignees. *Farrow v. Mayes*, 18 Q. B. 516; 17 Jur. 132.

A., a trader, gave B. a judge's order for payment of a debt and costs to be taxed. The costs were duly taxed, and the debt and costs paid; and afterwards, and within twenty-one days from the date of the order, B. caused it to be filed.—Held, that he had a right to do so. *Dimmack v. Bowley*, 2 C. B., N. S. 542; 26 L. J., C. P. 231; 3 Jur., N. S. 1059.

Under previous Statutes.]—An execution issued upon a judge's order was an execution obtained by confession within 6 Geo. 4, c. 16, s. 108. *Andrews v. Deeks* or *Diggs*, 4 Ex. 827; 20 L. J., Ex. 127.

A defendant sued adversely consented to a judge's order, to pay debt and costs forthwith, upon which judgment was entered up, and a fi. fa. issued on the 9th February, under which the sheriff seized the goods, at two o'clock of the same day. At three o'clock of the same day, a declaration of the defendant's insolvency was filed, pursuant to 6 Geo. 4, c. 16, s. 6. A fiat issued on the 10th February, and notice was given on that day to the sheriff. The defendant was adjudged a bankrupt, and assignees were appointed on the 25th February.—Held, that the judgment was a judgment by nil dicit, and the execution a valid execution protected by 1 Will. 4, c. 7, s. 7. *Bell v. Bidgood*, 1 C. B. 763; 7 D. & L. 260; 19 L. J., C. P. 16.



seizure and execution. —The words "bona fide executed and levied," in 2 & 3 Vict. c. 29, meant bona fides on the part of the execution creditor and sheriff. *Belcher v. Magway*, 12 M. & W. 108; 1 D. & L. 441; 13 L. J., Ex. 49; 7 Jur. 1100.

**Seizure and Sale.** —A sheriff being in possession of the goods of T. under a f. fa. on the evening of Saturday, the 20th December, executed a bill of sale of the goods seized to L., the execution creditor, containing a clause of indemnity by L. to the sheriff. T. had previously committed an act of bankruptcy, upon which he was afterwards made a bankrupt. Notice of this act of bankruptcy was sent to L.'s residence, but in consequence of his absence from home was not received by him until Saturday. L. did not execute the bill of sale until Monday, the 22nd, when the goods were delivered to him. —Held, that the property passed upon the execution of the bill of sale by the sheriff, and that the execution was therefore executed and levied by seizure and sale within 12 & 13 Vict. c. 106, s. 133. *Christie v. Winstington*, 6 Ex. 287; 22 L. J., Ex. 212.

A seizure of a trader's goods under an execution commenced adversely, gives the creditor no priority in case such trader is made bankrupt upon a petition for adjudication filed before the sale of the goods, whether the act of bankruptcy is before or after the seizure. *Hutton v. Cooper*, 2 L. M. & P. 104; 6 Ex. 159, 20 L. J., Ex. 153.

Goods seized by a sheriff under a f. fa. were valued and delivered to the execution creditor, upon a bona fide purchase by him; but no bill of sale was executed:—Held, that there was a valid sale of the goods. *Herniman v. Beecher*, 11 Ex. 760.

An execution is bona fide completed by sale if there is a bill of sale to the execution creditor for the full value, and the amount is actually paid over. *Lander v. Husock*, 1 F. & F. 132.

Where a debtor commits an act of bankruptcy after his goods are seized by a sheriff under a f. fa., the execution is not valid as against the assignees, unless it has been perfected by sale of the goods before the filing of the petition for adjudication of bankruptcy. *Young v. Reebuck*, 2 H. & C. 297, 32 L. J., Ex. 260; 8 L. T. 453.

Where, after the seizure of goods by the sheriff, the sale has been delayed by an interpleader order, and the debtor is adjudicated bankrupt upon his own petition in the interval between the seizure and the sale, the assignee of the bankrupt's estate is entitled as against the execution creditor to the proceeds of the sale, on the ground that the seizure has not been perfected by sale before adjudication. *O'Brien v. Bradie*, 1 L. R., Ex. 302; 35 L. J., Ex. 188, 12 Jur., N. S. 527; 14 L. T. 559, 14 W. R. 840.

An order for the protection of the property of a trader, under 12 & 13 Vict. c. 106, s. 211, did not operate to disentitle a judgment creditor to the benefit of a f. fa. levied by seizure of the goods of the trader before the presentation of the petition. *Bottomley v. Heywood*, 7 H. & N. 663; 31 L. J., Ex. 500; 8 Jur., N. S. 1156; 7 L. T. 44; 10 W. R. 780.

**Notice of Act of Bankruptcy.** —An execution

seizure, but before sale, committed an act of bankruptcy, of which the creditor had notice. —Held, that the words notice of any prior act of bankruptcy, in 12 & 13 Vict. c. 106, s. 133, have reference only to acts of bankruptcy committed prior to the seizure, and not to acts of bankruptcy subsequent thereto; and that, consequently, the creditor was entitled to the benefit of his execution. *Edwards v. Sherebrook*, 3 B. & S. 280; 32 L. J., Q. B. 46; 9 Jur., N. S. 527; 7 L. T. 275; 11 W. R. 83. Affirmed, 9 Jur., N. S. 201—Ex. Ch.

The sheriff having seized, notice was given of a prior act of bankruptcy by the debtor, and a petition was filed, under which he was adjudicated bankrupt; the goods remained unsold, and the messenger took possession of them:—Held, that the sheriff was not entitled to a rule calling upon the assignees to pay him the expenses of preparing for a sale of the goods. *Shorie v. Blaine*, 14 C. B., N. S. 356.

**Before the 12 & 13 Vict. c. 106, s. 133.** —On the 22nd November, 1842, a f. fa. issued upon a judgment obtained against A., the partner of B., and on the same day was lodged with the sheriff. On the following day the officer entered under a warrant granted thereon, and seized the whole of the partnership effects. On the 2nd December another f. fa. issued upon a judgment against A. and B., directed to the same sheriff, who thereupon granted a warrant to different officers: no actual seizure was made under this second writ. On the 7th December each of the partners committed an act of bankruptcy; on the 9th a fiat issued against them, under which they were duly declared bankrupts. The sheriff afterwards sold the whole of the partnership effects, in satisfaction of the two writs:—Held, that the sheriff was not justified in selling any part of the goods to satisfy the second writ, such writ not having been served or levied by seizure upon the property of the bankrupts before the issuing of the fiat, within 6 Geo. 4. c. 16, s. 108. *Johnson v. Evans*, 7 M. & G. 240; 7 Scott, N. R. 1036, 1 D. & L. 928; 13 L. J., C. P. 117.

A trader on the 15th of August, 1842, committed an act of bankruptcy, by assigning all his property for the benefit of creditors to trustees, of whom the plaintiff was one; and on the same day, but before such assignment, a seizure of a portion of the trader's goods was made by the sheriff, under an execution at the suit of a bona fide hostile creditor. On the 17th of August, the sheriff assigned to his creditor the goods so seized, in satisfaction of his execution. The plaintiff who was also a creditor of the bankrupt, paid off the judgment creditor, and took an assignment of these goods on the 12th of October. A fiat was issued against the trader on the 25th of January, 1843, at which time it was found by the jury, that the goods remained in the possession, order and disposition of the bankrupt:—Held, that, as the seizure was made under the execution before the act of bankruptcy, and the title of the judgment creditor would, therefore, have been good as against the assignees, even supposing he had notice of such act of bankruptcy, the plaintiff who took the assignment from him, with notice of the act of bankruptcy, had also a title as against them. *Forrest v.*



The court  
issued upon  
confession,  
seizure upon  
his bankruptcy  
rendering  
merely an ena-  
ction should  
ditors. *Te*  
R. 159.

iv

Before the  
took goods  
act of ban-  
issued, and  
trover lay  
Bl. 65 ; 1 B.

If a creditor  
in levying  
avoided by  
might be re-  
nees, though  
their value.

*son*, 1 B. &

A sheriff  
fi. fa., and  
ment credit  
secret act  
debtor, but  
the seizure  
conversion,  
trover at the  
chosen. *B.*

Bing. 471 ;  
S. C. 2 Tyr.

A sheriff  
mitted by a  
sheriff of su-  
the issuing  
dant, seized  
under a fi. fa.  
nees. *Garl*  
Bing. N. C.

An action  
the assignee  
who had le-  
to the act of  
2 W. Bl. 82

Where a  
dict against  
fa., under w-  
the trader, &  
were sold, &  
which a con-  
clared a be-  
notice, but  
over the pro-  
Held, that  
the money,  
the assignee  
received. *J*  
C. 160.

An execut-  
his goods we-  
had commit-  
signees bro-  
assessing the  
of the sale  
*Clarke v. A*  
233.

ment.]—After a writ of fi. fa. had been issued against a non-trader and lodged with the sheriff, but before any levy had been made, an arrangement (which the court held to be fraudulent) was, with the knowledge of the under-sheriff, made between the debtor and H., an auctioneer, that H. should, after a levy had been made, purchase goods of the debtor sufficient to satisfy the amount to be levied, and that he and the debtor should at once select the goods which H. was to purchase. H. knew that the debtor was about to file a liquidation petition. On the 19th of March the goods were selected, and were pointed out to B., a clerk of the under-sheriff, who took a list of them, which he handed to the under-sheriff. On the 20th of March B. seized the goods and put a man in possession. Shortly afterwards the debtor filed a liquidation petition, but, before notice of the petition had been served on the under-sheriff, he had sent to H., telling him that the seizure had been made, and that the selected goods were his property, and asking him to send a cheque for the amount of the levy. Later in the same day the under-sheriff gave up possession of the goods to a receiver who had been appointed under the petition, under the mistaken impression that the debtor was a trader. The next day H. sent a cheque for the amount of the levy to the under-sheriff, and out of the proceeds the execution debt was paid. A trustee having been appointed under the petition, H. applied to the court for an order that the trustee should deliver up the selected goods to him, or pay him the amount which they had produced. The trustee had sold them for double what H. had paid:—Held, that the goods had never become the property of H., and that, although, by virtue of the seizure before the filing of the petition, the execution creditor had acquired a security for his debt on the debtor's property, yet H., who had chosen to enter into a fraudulent arrangement with the debtor with knowledge that he was about to commit an act of bankruptcy, had no equity to be allowed to stand in the place of the execution creditor, notwithstanding the fact that, by paying the execution debt, he had relieved the debtor's estate from the necessity of paying it. *Hall, Ex parte, Townsend, In re*, 14 Ch. D. 132; 42 L. T. 162; 28 W. R. 556—C. A.

**Seizure after Act of Bankruptcy.]**—Filing a petition for liquidation by arrangement is an act of bankruptcy available for adjudication; and the title of the trustee relates back in the same manner as the title of a trustee under a bankruptcy. And, therefore, where a petition for liquidation by arrangement had been filed by a debtor before seizure of his goods under an execution, and notice of the filing was given to the solicitors of the execution creditor before sale, and the goods were afterwards sold by the sheriff to the solicitors, who were restrained by injunction from removing them:—Held, that the goods must be delivered up to the trustee who had been appointed. *Dwigan, Ex parte, Bissell, In re*, 11 L. R., Eq. 604; 40 L. J., Bk. 33; 24 L. T. 237; 19 W. R. 711. Affirmed, 6 L. R., Ch. 605; 40 L. J., Bk. 68; 25 L. T. 286; 19 W. R. 1127.

A warrant of fi. fa., on a county court judgment, was delivered to the bailiff of a county court to be executed. Later on the same day the debtor filed a petition for liquidation, and a

receiver was appointed. The bailiff, on coming to the debtor's house to execute the warrant, found the receiver in possession:—Held, that the trustee under the liquidation was entitled to the goods as against the execution creditor; for that under the Bankruptcy Act, 1869, s. 12, goods are not, as against a trustee in bankruptcy, bound by a fi. fa. from the delivery of the writ to the sheriff, but a seizure of them before the act of bankruptcy is necessary. *Williams, Ex parte, Davies, In re*, 7 L. R., Ch. 314; 41 L. J., Bk. 38; 26 L. T. 303; 20 W. R. 430.

## ii. *Fieri Facias* against Goods of Traders for Sums exceeding 50l.

### a. Who is a Trader.

In order that the Bankruptcy Act, 1869, s. 87, may be applicable, it is not necessary that the debtor should have been adjudicated bankrupt as a trader, but only that he should be in fact a trader. *Revell v. Blake*, 8 L. R., C. P. 533; 42 L. J., C. P. 165; 29 L. T. 67; 22 W. R. 96—Ex. Ch.

After the sheriff, under a fi. fa., had seized the goods of a debtor, they were claimed by M. under a bill of sale. On the application of the sheriff the court made an interpleader order. The debtor then filed a petition for liquidation by arrangement, describing himself as a cashier, and a trustee was subsequently appointed. Afterwards M. abandoned his claim, and the sheriff sold the goods, and the judgment creditor claimed the proceeds of the sale, but the trustee having proved that the debtor was a share-broker, and therefore a trader, the court ordered the balance of the proceeds of the sale to be paid to him:—Held, that it was competent for the trustee to prove the debtor a trader; and consequently that, under the Bankruptcy Act, 1869, s. 87, the trustee, and not the execution creditor, was the person entitled to receive the balance of the moneys arising from the sale of the debtor's goods. *Ross, Ex parte, Hare, In re*, 28 L. T. 450; 21 W. R. 560.

**Dissolution of Partnership—Appointment of Receiver.]**—E. and F. being in partnership as wine merchants, F. brought an action in the Chancery Division for a dissolution of the partnership, and an order was made by the court for a dissolution and the appointment of a receiver, under which a receiver took possession of the partnership effects and carried on the business, F. ceasing to take any part in the business, and having no other occupation than that of book-keeper to a trading company. An action having been commenced against E. and F. upon bills accepted by the firm before the receiver took possession, judgment was signed against F. and his separate property taken in execution for a sum exceeding 50l.:—Held, that F. was not at the time of the execution a "trader" within the meaning of s. 87 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71. *Dave v. Vergara*, 11 Q. B. D. 241; 49 L. T. 41; 47 J. P. 583.

### (B) What is an Execution for a Sum exceeding 50l.

**Expenses of Execution.]**—Judgment having been entered up against a trader for 48l. 19s., the sheriff levied and sold goods of the debtor to

*Fearne*, 6 Q. B. 20; 13 L. J., Q. B. 30; 8 Jur. 645.

The court would not set aside an execution issued upon a judgment obtained by default, confession, or nil dicit, and served and levied by seizure upon the property of a bankrupt before his bankruptcy: the 6 Geo. 4, c. 16, s. 108, not rendering the execution in such case void, but merely enacting that the plaintiff in such execution should share rateably with the other creditors. *Taylor v. Taylor*, 5 B. & C. 392; 8 D. & R. 159.

#### iv. Proceedings by Assignees.

**Before the 13 & 13 Vict. c. 106.**—If a sheriff took goods of a bankrupt in execution, after the act of bankruptcy and before the commission issued, and sold them after the commission, trover lay against him. *Cooper v. Chitty*, 1 W. Bl. 65; 1 Burr. 20.

If a creditor accompanied the sheriff's officer in levying an execution, which was afterwards avoided by a commission of bankruptcy, trover might be maintained against him by the assignees, though he had never received the goods or their value from the sheriff. *Menham v. Edmondson*, 1 B. & P. 369.

A sheriff seized the goods of a debtor under a fi. fa., and sold and delivered them to the judgment creditor, in satisfaction of the debt, after a secret act of bankruptcy committed by the debtor, but before the commission:—Held, that the seizure and sale of the goods were a wrongful conversion, for which the sheriff was liable in trover at the suit of the assignees subsequently chosen. *Balme v. Hutton*, 3 M. & Scott, 1; 9 Bing. 471; 1 C. & M. 262; 2 Tyr. 620; reversing *S. C.* 2 Tyr. 17; 2 C. & J. 19; 2 Y. & J. 101.

A sheriff who after an act of bankruptcy committed by a defendant, but without notice to the sheriff of such an act of bankruptcy, and before the issuing of a commission against the defendant, seized and sold the goods of the defendant under a fi. fa., was liable in trover to the assignees. *Garland v. Carlisle*, 3 M. & W. 152; 4 Bing. N. C. 7; 5 Scott, 587; 9 Bligh, N. S. 421.

An action for money had and received lay by the assignees of a bankrupt against a creditor who had levied his debt by fi. fa., subsequently to the act of bankruptcy. *Hitchin v. Campbell*, 2 W. Bl. 827; 3 Wils. 304; Lofft, 208.

Where a creditor obtained judgment by nil dicit against a trader, and thereupon issued a fi. fa., under which the sheriff seized the goods of the trader, who afterwards, and before the goods were sold, committed an act of bankruptcy, upon which a commission issued, and he was duly declared a bankrupt, of which the sheriff had notice, but nevertheless sold the goods, and paid over the proceeds to the execution creditor:—Held, that he was not justified in paying over the money, and was liable to be sued for it by the assignees, in an action for money had and received. *Notley v. Buck*, 2 M. & R. 68; 6 B. & C. 160.

An execution having issued against a trader, his goods were seized and sold under it, after he had committed an act of bankruptcy. The assignees brought trover:—Held, that the jury in assessing the damages might deduct the expenses of the sale from the proceeds of the goods. *Clarke v. Nicholson*, 1 C., M. & R. 724; 5 Tyr. 233.

On the 4th March the sheriff entered upon the premises of B., under a fi. fa. in his hands at the suit of the defendant, an execution creditor. When the sheriff entered, all the goods of B. were in possession of an officer of the Mayor's Court, London, who had taken them in execution at the suit of L.; and the goods were also under a distress put in by the landlord for rent. On the 9th March a fiat issued against B. On the 6th April the landlord sold all the goods, paid himself and L., and paid the surplus into court, to abide the event of an issue directed to be tried between the assignees of B. and the defendant:—Held, that the assignees could not impeach the title of the defendant by setting up the claims of the landlord, or of L. *Belche v. Patten*, 6 C. B. 608; 6 D. & L. 370; 18 L. J., C. P. 69; 12 Jur. 1028.

#### b. Under Bankruptcy Act, 1869.

##### i. Fieri Facias against Goods of Non-Traders or of Traders for Sums not exceeding 50l.

**Seizure before Act of Bankruptcy.**—An execution creditor for a sum less than 50l., who has seized the goods of a bankrupt before the committing of an act of bankruptcy, is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale. *Slater v. Pinder*, 7 L. R., Ex. 95; 41 L. J., Ex. 66; 26 L. T. 492; 20 W. R. 441—Ex. Ch. Affirming 6 L. R., Ex. 228; 40 L. J., Ex. 146; 24 L. T. 631; 19 W. R. 778.

An execution creditor who has seized the goods of his debtor before the latter has committed an act of bankruptcy is entitled to the proceeds of them as against the trustee. *Bailey, Ex parte, Jecks, In re*, 13 L. R., Eq. 314; 41 L. J., Bk. 1; 25 L. T. 918; 20 W. R. 76.

Therefore where goods of a non-trading debtor were seized on the 18th of February, and the debtor filed a petition for liquidation on the 22nd of February:—Held, that the execution creditor was entitled to the proceeds of the execution. *Ib.*

After the sheriff had seized the goods of a debtor, the debtor presented to the county court a petition for liquidation by arrangement, thereby committing an act of bankruptcy, and on the same day obtained an injunction restraining the sheriff from proceeding to a sale. The sheriff, however, sold the goods, and paid the balance of the proceeds of the sale into the county court:—Held, that the execution creditor, and not the trustee, was entitled to the money in court. *Rocke, Ex parte, Hall, In re*, 6 L. R., Ch. 795; 40 L. J., Bk. 70; 25 L. T. 287; 19 W. R. 1129.

After execution levied on the goods of a debtor, a petition for liquidation was filed by the debtor, and notice served on the bailiff. On the day appointed for the sale an order of the court was obtained for the appointment of a receiver, and an injunction was granted to restrain further proceedings under the execution. Subsequently, a trustee was appointed:—Held, that the goods seized were the property of the trustee, and that the execution creditors were not entitled to be paid their debt out of the proceeds of the sale. *Veness, Ex parte, Gwynn, In re*, 10 L. R., Eq. 419; 39 L. J., Bk. 23; 25 L. T. 311; 18 W. R. 979. *But see preceding cases.*

— Levy avoided by Fraudulent Arrange-

by abandoning so much of his judgment debt as might be necessary to keep the total amount for which the goods were sold under 50*l.*, avoid the operation of s. 87 of the Bankruptcy Act, 1869, and that, therefore, the execution creditor and not the trustee in liquidation was entitled to the proceeds of the execution. *Turner v. Bridgett*, 8 Q. B. D. 392; 51 L. J., Q. B. 374; 30 W. R. 586; 46 J. P. 343.

#### *γ. Who Entitled to Proceeds.*

**When no prior Act of Bankruptcy, and no notice within the 14 days.**—An execution levied by seizure and sale of a trader's goods for a debt exceeding 50*l.*, although an act of bankruptcy, is not for that reason necessarily a void proceeding; and if the execution creditor had no notice of a prior act of bankruptcy, and no notice of a petition for adjudication is given to the sheriff under the Bankruptcy Act, 1869, s. 87, within fourteen days after the sale, the execution creditor is entitled to the proceeds of the sale notwithstanding a supervening bankruptcy. *Villars, Ex parte, Rogers, In re*, 9 L. R., Ch. 432; 43 L. J., Bk. 76; 30 L. T. 348; 22 W. R. 603. Reversing 30 L. T. 104; 22 W. R. 397.

The sheriff may make a valid sale by private contract of goods seized under an execution, to the execution creditor. *Ib.*

If the sheriff sells goods seized under the same writ on different days, all the sales will be considered as one transaction. *Ib.*

An execution in respect of a judgment for a sum exceeding 50*l.* levied by seizure and sale of the goods of a trader debtor cannot be protected by s. 95, sub-s. 3, since such an execution is itself an act of bankruptcy by s. 6, sub-s. 5; and the execution creditor, therefore, has notice of an act of bankruptcy within s. 95, sub-s. 3. *Keys, Ex parte, Skinner, In re*, 10 L. R., Eq. 432; 39 L. J., Bk. 28; 18 W. R. 918. *But see preceding case.*

A sheriff seized a trader's goods in an execution in respect of a judgment for a sum exceeding 50*l.*, sold them, and retained the proceeds. Within fourteen days after, the debtor filed a petition for liquidation, and notice thereof was served on the sheriff. A trustee was not appointed within fourteen days:—Held, that the execution was not protected by s. 95, sub-s. 3; that the petition for liquidation had the same effect as a petition in bankruptcy, so far as to bring the case within s. 87; and that the sheriff must retain the proceeds till a trustee in liquidation should be appointed, and pay them, under that section, to the trustee when appointed. *Ib.*

**Petition before Sale.**—The sheriff seized in execution, under a judgment for more than 50*l.*, goods of a trader. Before sale, and whilst the sheriff was in possession, the debtor presented a petition for liquidation by arrangement, and the trustee appointed under the liquidation obtained an order restraining further proceedings in the execution:—Held, that the trustee was entitled to the goods as part of the debtor's estate, and that the sheriff must give up possession to him. *Rayner, Ex parte, Johnson, In re*, 7 L. R., Ch. 325; 41 L. J., Bk. 26; 26 L. T. 306; 20 W. R. 456. Affirming 26 L. T. 205; 20 W. R. 397.

In the Bankruptcy Act, 1869, s. 95, sub-s. 3, "act of bankruptcy" means an act of bankruptcy which has been committed at the time of seizure.

*Tothamster, Ex parte, Norton, In re*, 10 L. R., Eq. 425; 39 L. J., Bk. 17; 18 W. R. 890.

Therefore, when a petition for liquidation is presented after the goods of the debtor, a non-trader, are seized in execution, and the sale takes place before the appointment of a trustee, and no act of bankruptcy has been committed before the seizure, the execution creditor is entitled to the proceeds. *Ib.*

**Sale suspended by Interpleader.**—Where an execution for a sum exceeding 50*l.* is levied by seizure of the goods of a trader, but the sale is suspended by an interpleader order, and before sale a liquidation petition is filed by the execution debtor, the case comes within the 87th section of the Bankruptcy Act, 1869, and the execution creditor is deprived of the benefit of his execution. *Halling, Ex parte, Haydon, In re*, 7 Ch. D. 167; 47 L. J., Bk. 25; 37 L. T. 809; 26 W. R. 182—C. A.

A judgment creditor issued execution on the goods of a trader for a debt above 50*l.* A prior claim was put in by a bill of sale holder, and on an interpleader summons taken out by the sheriff, the judge made an order, after payment of costs, to pay the amount of the debt of the bill of sale holder into court, and to pay the balance to the execution creditor. Before sale the debtor filed his petition for liquidation. The execution creditor claimed the goods, as against the trustee, under the judge's order:—Held, that the trustee was entitled to the goods, subject to the claim of the holder of the bill of sale. *Ib.*

**Sale delayed by Injunction.**—When the goods of a trader have been seized under an execution, and the sheriff is prevented from selling by an injunction granted in liquidation proceedings which afterwards prove abortive, and the debtor is afterwards adjudicated a bankrupt upon a petition presented within fourteen days after the failure of the liquidation proceedings, the creditor has no right to enforce his execution. *Harper, Ex parte, Bremner, In re*, 10 L. R., Ch. 376; 44 L. J., Bk. 57; 32 L. T. 317; 23 W. R. 433.

**Sale by Bailiff before Time fixed by Statute.**—An execution levied by seizure upon the goods of a trader under a county court judgment, and sold by the high bailiff by consent of both parties after the commission of an act of bankruptcy of which the execution creditor had notice, and upon which the adjudication subsequently proceeded, but before the expiration of the five days required by the County Courts Act, 1846, s. 106, is not a protected transaction within the Bankruptcy Act, 1869, s. 95. *Bulmer, Ex parte, Hughes, In re*, 40 L. T. 40.

**Sale on two different Days.**—Sect. 87 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), enacts that, where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*, and sold, the sheriff shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader (followed by an adjudication), shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to

the trustee. On the 29th of December, 1882, an execution was issued at the suit of the plaintiff against the defendants, traders, upon a judgment for 87*l.* 19*s.* 4*d.* debt and costs, and lodged with the sheriff, who on the same day seized certain goods of the defendants and sold them on the 10th of January, 1883, realizing by that sale 41*l.* 12*s.* 7*d.* On the 12th of January other goods of the defendants which were upon other premises occupied by them were sold under the *fi. fa.*, and realized 74*l.* 10*s.* 10*d.* On the 24th of January, 1883, a petition in bankruptcy was presented against the defendants, under which they were adjudicated bankrupts on the 19th of February. The sheriff had notice of the petition on the 25th of January:—Held, that the trustee was entitled to the whole proceeds, as the "sale" contemplated by s. 87 of the Bankruptcy Act, 1869, was not completed until the 12th of January, within fourteen days from the receipt by the sheriff of notice of the filing of the petition. *Jones v. Parcell*, 11 Q. B. D. 430; 52 L. J., Q. B. 672; 49 L. T. 197; 47 J. P. 614.

**When Proceedings on Petition fail.**—Execution for a debt above 50*l.* was levied on the goods of a trader on the 17th of November. On the 18th of November the debtor filed a liquidation petition. On the 22nd of November the sheriff sold, and on the same day notice of the petition was served on him. Upon the 16th of December the creditors met, and separated without passing any resolutions. On the 17th of December the sheriff paid the proceeds of the sale to the execution creditor. On the 19th of December a petition was presented against the debtor, stating the filing of the liquidation petition and the proceedings thereunder, and on the 10th of January an adjudication was made:—Held, that the proceedings under the liquidation petition came to an end on the 16th of December, and that, consequently, the execution creditor was entitled to the proceeds of the sale. *James, Ex parte, Condon, In re*, 9 L. R., Ch. 609; 43 L. J., Bk. 107; 30 L. T. 773; 22 W. R. 937.

On the 23rd of February the execution creditor, upon the authority of a decision of the Court of Appeal, which was afterwards reversed, paid the proceeds of the sale to the trustee under the bankruptcy. —Held, that though this was a voluntary payment made under a mistake of law, yet the trustee, being an officer of the court, was bound to repay the money to the person properly entitled to it. *Id.*

**Prior Execution at Suit of same Party constituting Act of Bankruptcy—Notice.**—A creditor issued execution against a trader for a debt above 50*l.* After the goods seized by the sheriff had been sold, the same creditor issued another execution against the debtor for another debt above 50*l.* The goods seized under the second execution were sold, and the money produced by the sale was paid over to the creditor, the sheriff having had no notice within fourteen days from the sale of any bankruptcy petition against the debtor. Afterwards the debtor was adjudicated a bankrupt upon the act of bankruptcy committed by the seizure and sale under the first execution. The money produced by the first sale was not paid to the creditor till after the sale under the second execution:—Held, that, though it was not proved that the creditor had, when the sale took place under the second execu-

tion, any actual knowledge that the sale had been made under the first, he must be deemed to have had notice of the proceedings under his own execution, and must therefore refund the money produced by the second execution. *Davies, Ex parte, Husband, In re*, 19 L. R., Eq. 438; 44 L. J., Bk. 62; 32 L. T. 103; 23 W. R. 384.

**Two Executions, one under and one over 50*l.***—On the 25th of November a sheriff seized the goods of a trader under a writ of execution for 191*l.*, and on the 16th of December another seizure was made for a debt of 32*l.* On the 30th of December the debtor filed a liquidation petition. At this time the sheriff was in possession, but no sale had been made. On the 22nd of January a trustee was appointed:—Held, that the creditor for the 32*l.* was entitled to proceed to a sale under his execution. *Loxering, Ex parte, Peacock, In re*, 17 L. R., Eq. 452; 43 L. J., Bk. 58; 29 L. T. 897; 22 W. R. 365.

**Payment by Debtor to avoid Seizure or Sale.**—The sheriff having seized the goods of a trader under an execution for more than 50*l.*, the debtor, before sale, paid him, on the 18th of November and the 21st of November, two sums of 100*l.* and 32*l.* respectively, on account of the debt. The judgment creditors knew of and assented to the payments. The debtor, on the 24th of November, filed a petition for liquidation, and a restraining order was served on the sheriff, who continued to hold the sums so paid on account. Subsequently, on the 20th of December, trustees were appointed, who claimed the 132*l.*:—Held, that the judgment creditors, having assented to the payments, were entitled to the money as against the trustees. *Stock v. Holland* 9 L. R., Ex. 147; 43 L. J., Ex. 112; 31 L. T. 121; 22 W. R. 661.

The sheriff having received a writ of execution against a trader for a debt exceeding 50*l.*, the debtor, on the 24th of July, before any levy had been made, paid to the sheriff's officer, a large part of the debt in a bill, a cheque drawn by another person, and bank notes. On the 25th of July the sheriff's officer asked the creditors whether they would accept in part payment what the debtor had given him, and shewed them the bill. They expressed their assent. On the 26th of July (Saturday) the debtor filed a liquidation petition, and a receiver was appointed. On the 28th of July the sheriff's officer, having received the remainder of the debt from another person liable for it, paid the whole to the creditors:—Held, that the transaction was a payment under pressure; and that the creditors were not bound to hand over to the trustee the bill of exchange, the cheque, or the bank notes. *Brook, Ex parte, Hassall, In re*, 9 L. R., Ch. 301; 43 L. J., Bk. 49; 30 L. T. 103; 22 W. R. 395. Reversing 43 L. J., Bk. 35; 29 L. T. 653; 22 W. R. 205.

### 8. Right of Sheriff to Expenses.

A sheriff's officer seized the goods of a trader debtor under a *fi. fa.* for more than 50*l.*, and advertised them for sale. Before the sale could take place the debtor filed a petition for liquidation, and the trustee obtained an injunction restraining the sale, and possession was then given up. Upon the application of the sheriff for his

did not affect the right of the sheriff to be paid by the trustee the necessary expenses of possession and of preparing for sale. *Craycraft, In re, Browning, Ex parte*, 8 Ch. D. 896; 47 L. J., Bk. 96; 38 L. T. 864; 26 W. R. 559.

A sheriff seized goods under a *fi. fa.* delivered to him indorsed to levy a sum for the debt and interest, besides fees, poundage and other incidental expenses. Before sale he had notice of a composition in bankruptcy proceedings, accepted by the execution creditor from the debtor. Thereupon he was requested to withdraw by the execution debtor, but refused, except upon payment of his fees and possession money. The execution creditor took no further steps in the matter, neither directing him to sell nor countermanding the execution of the writ. The sheriff sold goods to levy the sum required to meet his fees, possession money and expenses of levy. The execution debtor brought trover and trespass against him:—Held, that the debt being barred by the acceptance of the composition, the execution creditor had lost his right to levy in respect of the debt, and that the right of the sheriff to levy for his fees, possession money and expenses fell with the right to levy the debt, and therefore that the action was maintainable. *Sherry v. Abdy*, 1 Ex. D. 299; 45 L. J., Ex. 808; 34 L. T. 101.

### c. Liability of Sheriff.

In order to make a sheriff liable for paying over the proceeds of an execution before the expiration of the fourteen days during which the Bankruptcy Act, 1869, s. 87, requires him to hold the same in the case of a trader debtor, the notice served on him under that section must clearly establish the identity between the debtor to whose bankruptcy the notice refers and the person whose goods the sheriff has sold. *Spencer, Ex parte, Smith, In re*, 10 L. R., Ch. 168; 44 L. J., Bk. 24; 31 L. T. 494; 29 W. R. 204. Affirming 44 L. J., Bk. 7; 23 W. R. 55.

On the fourteenth day after the sheriff had sold under an execution the goods of one W. Smith, a judgment debtor, the debtor's solicitor served upon the sheriff a notice intitled in an action other than that under the judgment in which the sheriff had sold the goods, stating that "the said W. Smith, one of the above-named defendants," had that day filed a petition for liquidation by arrangement:—Held, that the notice was not sufficient to make the sheriff liable for the proceeds of sale which he had paid over to the execution creditor, as it did not shew on its face that the debtor who had filed the liquidation petition was the person whose goods the sheriff had sold. *Id.*

When the sheriff has sold under an execution the goods of a person who is not evidently a trader, and notice of the filing of a liquidation petition is given to the sheriff under the Bankruptcy Act, 1869, s. 87, it should give such information to the sheriff, that he may identify the debtor with the person whose goods have been sold, and may infer that he is a trader. *Id.*

### iii. When Composition resolved on.

An execution issued after petition, but before resolution for a composition, is not affected by

116; 23 W. R. 886. Affirming 33 L. T. 61.

A creditor sued out a *fi. fa.* and delivered it to the sheriff. Earlier in the same day the debtor filed a petition for liquidation or composition, and he afterwards obtained an injunction restraining the proceedings in the execution. At the first meeting of creditors a resolution was passed to accept a composition:—Held, that the creditor was entitled to proceed with his execution. *Id.*

Where a sheriff, who has seized goods of a trader under a *fi. fa.* for an amount exceeding 50*l.*, receives notice within fourteen days of a bankruptcy petition having been presented against the trader, and subsequently a resolution for composition is duly passed and registered, the sheriff ought to pay the proceeds of the execution to the execution creditor. *Lender v. Knight*, 26 W. R. 897—C. A. Affirming 26 W. R. 818.

But where an injunction had been granted, prior to the composition proceedings being resolved on, restraining the sheriff from further proceedings till further order, and it was stated at the bar on his behalf, but was not apparent on the pleadings, that before the execution creditor could have got the injunction dissolved after the registration of the composition for resolution, an order was made by the Court of Bankruptcy summoning a fresh meeting, under which order the resolution for composition was subsequently vacated and a liquidation by arrangement resolved upon; the court gave the sheriff leave to amend, to state these facts, and to raise the point as to whether the plaintiff could have obtained the dissolution of the injunction during the pending proceedings in the Bankruptcy Court. *Id.*

It is not competent for a debtor by presenting a petition and effecting a composition with his creditors, without the appointment of a trustee, or any change of property, to deprive a creditor of the advantage of a lawful seizure of goods made before the presentation of the petition, and without notice of any act of bankruptcy. *Birmingham Gaslight and Coke Company, Ex parte, Adams, In re*, 11 L. R., Eq. 204; 40 L. J., Bk. 1; 24 L. T. 42; 19 W. R. 123.

A. being indebted to a gas company, the company, under the powers given them by their act, obtained on the 29th of July, 1870, a warrant for the seizure of his goods, which warrant was immediately executed. Later in the day he filed a petition for liquidation by arrangement, and applied to the registrar of the local county court for an order restraining the sale of goods, which order was granted. Meetings of creditors were afterwards duly held, and the creditors resolved to accept a composition of 5*s.* in the pound; no trustee being appointed. The debtor afterwards applied for and obtained from the registrar an order on the gas company to re-deliver to the applicant the goods seized:—Held, that the order was wrong, and must be discharged. *Id.*

On filing a liquidation petition an injunction was at once granted, *ex parte*, restraining a creditor from proceeding further in an action in which he had recovered judgment against the debtor. The next day the creditor delivered a *fi. fa.* to the sheriff. He did not deny that, before he did so, he knew of the restraining order. The creditors resolved upon a compo-

tion:—Held, that the judgment creditor was not entitled, after the registration of the resolution, to enforce his execution against the debtor. *Lewis, In re, Maunthner, Ex parte*, 3 Ch. D. 113; 45 L. J., Bk. 125.

A majority of the creditors of a bankrupt resolved that his bankruptcy should be annulled and a composition, to be secured by an assignment of his personal property to the trustee under the bankruptcy, accepted. This scheme was approved by the court, and an order annulling the bankruptcy was made. Thereupon a dissentient creditor who had issued execution before an act of bankruptcy had been committed, but who, if the bankruptcy had continued, would have lost the benefit of his execution, instructed the sheriff to sell. On the application of the trustee, the court granted an injunction restraining him from taking proceedings under his execution. *Hillyard, Ex parte, Chidley, In re*, 1 Ch. D. 177; 45 L. J., Bk. 49; 33 L. T. 553; 24 W. R. 182—C. A.

A non-assenting creditor of a compounding debtor, under s. 126 of the Bankruptcy Act, 1869, against whom no equity can be raised by reason of his personal conduct, can acquire a valid security for his debt by levying an execution on the debtor's goods at any time before the registration of the extraordinary resolution accepting the composition. *McLaren, Ex parte, McColla, In re*, 16 Ch. D. 534; 50 L. J., Ch. 203; 44 L. T. 36; 29 W. R. 389—C. A.

**Presence of Creditor at Meeting when raising no Equity against him.**—The mere fact that a judgment creditor, who is entered in the debtor's statement of affairs as having no security for his debt, is present in silence at the first meeting of the creditors, not proving his debt or taking any other part in the proceedings, will not raise an equity against him so as to prevent his levying an execution on his judgment, and thus acquiring a valid security for his debt before the registration of an extraordinary resolution accepting a composition. *Id.*

#### iv. *Elegit*.

**Elegit.**—Under a writ of *elegit* the sheriff is entitled to seize the debtor's goods at once, before the holding of the inquisition, and from the time of the seizure the creditor becomes a secured creditor within the meaning of s. 16 (sub-s. 5) of the Bankruptcy Act, 1869. S. 87 has no application to a seizure of goods under an *elegit*. *Abbott, Ex parte, Gourlay, In re*, 15 Ch. D. 447; 50 L. J., Ch. 80; 43 L. T. 417; 29 W. R. 143—C. A. Affirming *S. C.*, sub nom. *Gourlay, In re, Ormandy, Ex parte*, 49 L. J., Bk. 23; 42 L. T. 155.

—**Executed by Seizure but not by Sale after but without Notice of Act of Bankruptcy—Relation back.**—After an act of bankruptcy had been committed, a judgment creditor for a sum exceeding 50*l.*, without notice of the act of bankruptcy, issued an *elegit* against the goods of the bankrupt (there being no land); but before inquisition proceedings preparatory to sale had been commenced, a bankruptcy petition founded on the act of bankruptcy was presented, and the sheriff was restrained:—Held, that the transaction was not protected by sub-s. 3 of s. 95. *Salger,*

*Ex parte, Chinn, In re*, 17 Ch. D. 839; 50 L. J., Ch. 687; 44 L. T. 652; 29 W. R. 808.

—**Delivery by Sheriff to Creditor.**—A creditor to whom goods of the bankrupt have been delivered by the sheriff, under a writ of *elegit* issued after the act of bankruptcy (of which the creditor had no notice) on which the adjudication is founded, is protected under sub-s. 3 of s. 95 of the Bankruptcy Act, 1869, against the title by relation back of the trustee in bankruptcy. The fact that, after seizure, but before sale, of the goods, the creditor had notice of another act of bankruptcy committed by the bankrupt after seizure but before sale, will not prejudice the title of the creditor. *Vale, Ex parte, Bannister, In re*, 18 Ch. D. 137; 50 L. J., Ch. 787; 45 L. T. 200; 29 W. R. 855—C. A.

#### v. *Equitable Execution*.

**Equitable Execution—Receiver.**—A judgment creditor became the transferee of a legal mortgage of leaseholds belonging to the judgment debtor. He then commenced an action in the Chancery Division, claiming an account and payment of what was due to him on both mortgage and judgment; or a sale of the property and payment out of the proceeds; and the appointment of a receiver. On the same day he obtained *ex parte* an order extending over eight days, appointing an interim receiver of the rents, without security. On the eighth day he obtained, on notice, an order absolute for the appointment of the same person to be receiver of the rents, upon his giving security. On the same day the debtor filed a liquidation petition, and a receiver of his property was appointed by the Court of Bankruptcy. It did not appear which receiver was appointed first. The receiver in the action never gave security. The creditor had not sued out an *elegit*:—Held (affirming the decision of Bacon, C. J.), that the appointment of the receiver in the action was such a delivery in execution by lawful authority of the mortgaged lands, within the meaning of s. 1 of the act 27 & 28 Vict. c. 112, as to render the judgment creditor a secured creditor, within the meaning of s. 16, sub-s. 5, of the Bankruptcy Act, 1869, and that he was entitled to hold the lands as a security for his judgment debt as well as for his mortgage debt. *Evans, Ex parte, Watkins, In re*, 13 Ch. D. 262; 49 L. J., Bk. 7; 41 L. T. 565; 28 W. R. 127—C. A.

**Equitable Execution—Receiver appointed without Notice of Act of Bankruptcy—Receiver previously appointed by Court of Bankruptcy.**

—S. recovered judgment for a debt against C. and issued an *elegit*. The sheriff returned that the debtor had no lands which he could seize. C. had leasehold property which was subject to mortgages. S. thereupon obtained the appointment of a receiver of the rents of the leasehold property without prejudice to the rights of the prior incumbrancers. On the same day a petition for adjudication in bankruptcy was filed against C., and a receiver was appointed in bankruptcy a few minutes before the appointment of the receiver in the action. C. afterwards filed a petition for liquidation, the same receiver was appointed in the liquidation as had been appointed in the bankruptcy, and resolutions were passed for liquidation of his affairs by

arrangement. S. had not, until some days after the appointment of his receiver, any notice that C. had committed an act of bankruptcy, or that any proceedings in bankruptcy were pending against him :—Held, that as, at the time when S. obtained equitable execution by the appointment of a receiver, the property was legally though not actually in the possession of the receiver appointed by the Court of Bankruptcy, the equitable execution was ineffectual, and was not protected by s. 95, sub-s. 2, of the Bankruptcy Act, 1869. *Salt v. Cooper*, 16 Ch. D. 544; 50 L. J., Ch. 529; 43 L. T. 682; 29 W. R. 553—C. A.

#### vi. Sequestration.

**Chose in Action.**—The mere issuing of a writ of sequestration against a defendant and the service of it on a debtor to him, or a trustee of a fund for him, without anything further being done to render the sequestration effectual against the debt or fund, is not enough to make the plaintiff a secured creditor of the defendant within the meaning of the Bankruptcy Act, 1869. *Nelson, Ex parte, Hoare, In re*, 14 Ch. D. 41; 49 L. J., Bk. 44; 42 L. T. 389; 28 W. R. 564—C. A.

#### 2. ON CROWN PROCESS.

An adjudication in bankruptcy and appointment of an official assignee took place on the same day on which an extent issued against the bankrupt for a crown debt, but at an earlier period of the day :—Held, that the extent operated from the first moment of the day, and the title of the crown prevailed. *Edwards v. Reg. (in error)*, 9 Ex. 628; 2 C. L. R. 590; 23 L. J., Ex. 42; 18 Jur. 384—Ex. Ch.

A penalty for not paying the excise duties, incurred before an act of bankruptcy, but not substantiated by conviction till after, continues a lien upon the estate in the hands of the assignees, and may be distrained for. *Stacey v. Hulse*, 2 Dougl. 411; *S. P.*, *Rea v. Fowler*, 2 Dougl. 416, n.

If a soap-maker, having incurred a forfeiture for concealing soap, contrary to 1 Geo. 1, c. 2, s. 36, became bankrupt, and a provisional assignment of his estate was made, after which the soap was condemned, and the bankrupt convicted, and thereupon a warrant issued to levy the penalty on his goods generally, such a warrant was bad, and could not justify a seizure of the soap in the hands of the assignees. *Austin v. Whitehead*, 6 T. R. 436.

Personal estate was seized under the crown's extent, which was afterwards set aside for irregularity, and the effects ordered to be delivered up to the assignees of the debtor, duly appointed under a commission of bankruptcy sued out after the teste of the extent; a second extent, tested the day the first was set aside, and subsequently to the assignment, was issued, and delivered to the sheriff, before the execution of the order for delivery of the goods to the assignees, the sheriff still holding them in his custody :—Held, that the property in the effects had been changed and transferred by the assignment; that the crown had no lien thereon, and consequently that the assignees were entitled to reduce them into possession. *Rea v. Marsh, McChel. & Y.* 250.

Although a warrant of the commissioners of the land-tax is not equal to an extent, so as to

bind the goods of a bankrupt from the date, yet if a collector becomes bankrupt, and his goods are afterwards seized under a warrant from the commissioners before the actual execution of the assignment, the king's debt must be satisfied. *Rea v. Jones*, 8 Price, 108.

A. & B., bankers in London, had in their hands, at the time of their bankruptcy, cash and short bills belonging to C. & D., bankers in the country. The cash was the excise duties remitted by the country bankers to and received by the London bankers, and against which the former had given to the commissioners the latter's acceptances. In respect of the duties an extent had issued :—Held, that the crown had a right to elect against what securities it would go; and, on the consent of the Attorney-General, the short bills were ordered to be delivered up. *Routon, Ex parte*, 1 Rose, 15.

#### 3. ON ACTIONS.

**Abatement or Continuance of Actions on Bankruptcy of Parties.**—In an action issue was joined, and notice of trial was given by the sole plaintiff. He then filed a liquidation petition, and a trustee of his property was appointed. When the action came on for trial no one appeared either for the plaintiff or for the trustee, and there was no evidence that any notice of the action had been served on the trustee :—Held, that Ord. L., r. 1, applies only when the cause of action survives or continues in some person who is before the court; that the action had abated, and that the only order the court could make was to strike it out of the list. *Eldridge v. Burgess*, 7 Ch. D. 411; 47 L. J., Ch. 342; 38 L. T. 232; 26 W. R. 435.

When two of five defendants, jointly and severally liable to the plaintiff, had become bankrupt :—Held, that the action might proceed against the other three defendants without bringing the trustees in bankruptcy of the two bankrupt defendants before the court, or giving them notice of the proceedings. *Lloyd v. Dimmack*, 7 Ch. D. 398; 47 L. J., Ch. 398; 38 L. T. 173; 26 W. R. 458.

When a defendant is adjudicated bankrupt after action brought, upon an act of bankruptcy, which occurred before action brought, the plaintiff may confess that the property claimed was in the order and disposition of the defendant at the date of the act of bankruptcy, and sign judgment under Ord. XX. r. 3, for his costs. *Champion v. Formby*, 7 Ch. D. 873; 47 L. J., Ch. 395; 26 W. R. 391.

See further, title PRACTICE (Proceedings on Change of Parties).

**Action against Bankrupt.**—The Bankruptcy Act, 1869, s. 12, which limits the remedy against the property or person of an adjudicated bankrupt, in respect of a provable debt, to the manner directed by the act, does not prevent an action being brought for such debt. *Marshall v. King*, 31 L. T. 511; 23 W. R. 92.

The plaintiff contracted to repair a boiler belonging to the defendant. During the performance of the contract the defendant was adjudicated bankrupt. The plaintiff, without knowledge of the adjudication, obtained a bill of exchange as security for the amount due for his labour. The defendant did not obtain his dis-



the adjudication in bankruptcy:—Held, that without an order of discharge, the bankruptcy was no answer to the action, and also that there was good consideration for the account stated. *Id.*

**On Rights of Action vested in Bankrupt.]—**In an action against attorneys for breach of duty in failing to procure the best price for the equity of redemption of premises of the plaintiff, which had been entrusted to them for sale, the declaration alleged as special damage that they "well knew that if the plaintiff did not obtain a reasonable price, his bankruptcy would be the necessary and inevitable consequence," and further, that in consequence of the breach of duty alleged, he was adjudicated bankrupt. They pleaded his bankruptcy:—Held (by a majority of the court), that the plea was good, that the cause of action passed to the assignees, and that the knowledge that bankruptcy would follow from the breach of duty made no difference. *Morgan v. Steele*, 7 L. R., Q. B. 611; 41 L. J., Q. B. 260; 26 L. T. 206.

#### 4. ON CONTRACTS.

A contract for the construction of a chattel under which the purchase-money is to be paid by instalments during the progress of the work is not necessarily dissolved by the insolvency of the purchaser before its completion, but the insolvent purchaser has the right to have the chattel completed for the benefit of his estate, or he may, by giving notice to the vendor, abandon the contract, the vendor proving against his estate, for damages; and this is so, whether under the terms of the contract the property in the unfinished chattel has passed to the purchaser subject to the vendor's lien for unpaid instalments, or whether it remains in the vendor, subject to a charge in favour of the purchaser for the instalments he has paid. *Lambton, Ex parte, Lindsay, In re*, 10 L. R., Ch. 405; 44 L. J., Bk. 81; 32 L. T. 380; 23 W. R. 662.

When an insolvent purchaser abandons such a contract, having previously given acceptances for the instalments due, the holder of these acceptances, in the event of the subsequent insolvency of the vendor, will have no right, under the rule in *Waring, Ex parte* (19 Ves. 345), to have the chattel sold, and the proceeds applied in discharge of the acceptances. *Id.*

**On Contracts of Agency.]—**The bankruptcy of an agent is not per se a defence to an action for wrongful dismissal, even though the agent is to receive moneys on account of his principal. The fitness of the agent to perform his duties is a question for a jury. *McCall v. Australian Meat Co.*, 16 W. R. 188.

**On Contract for Sale of Goods.]—**An iron company in October, 1874, contracted to supply a steel company with iron at a certain price, to be delivered in monthly instalments, and to be paid for, as to some, by bills at four months, and as to the rest, by cash at a certain length of credit. The instalments were delivered till the month of February, 1875, inclusive, in which month the purchasing company called a meeting of their principal creditors, and stated that they were

of credit in their existing contracts, which however was refused them. The selling company then refused to deliver any more iron except upon immediate cash payments, and in consequence of that refusal the purchasing company gave notice to rescind the contract. The purchasing company continued to carry on the business after the meeting, and endeavoured to raise fresh capital by issuing preference shares, but in June, 1875, they passed a resolution for winding-up. The selling company claimed to prove for damages for breach of the contract against the estate of the purchasing company:—Held, that there was no such declaration of insolvency at the meeting in February as to justify the selling company in refusing to deliver iron except for cash payments; and consequently that the purchasing company had a right to rescind the contract; and the claim for damages was dismissed. *Phoenix Reformer Steel Company, In re, Carruthers Hematite Iron Company, Ex parte*, 4 Ch. D. 108; 46 L. J., Ch. 115; 25 L. T. 776; 25 W. R. 187—C. A.

In order to justify the vendors in such a case in exercising their right of refusal to deliver, there must be such proof or admission of the insolvency of the purchasers at the time as amounts to a declaration of intention not to pay for the goods. *Id.*

The defendants had, on the 5th of February, sold to the plaintiffs 200 tons of iron, to be delivered twenty-five tons monthly at 5*l.* per ton, net cash, or by a four months' bill with 2*s.* 6*d.* per ton added. By the usage of trade no delivery was due under this contract till the 1st of April. On the 12th of March the plaintiffs found themselves to be insolvent, and they gave notice of the fact to the defendants. On the 16th of March they filed a petition in the Bankruptcy Court for liquidation by arrangement or composition. The usual course of business under previous contracts between the parties of a similar description was for the defendants to deliver upon such contracts without further demand of delivery. No delivery, however, was made by the defendants or claimed by the plaintiffs in April. On the 5th of April, at the first meeting of the creditors, a resolution was passed to accept a composition of five shillings in the pound. Though the existence of the contract was mentioned at the meeting, no mention was made of it in the written statement of the plaintiffs' affairs. No step was taken in relation to the contract by either party until the 13th of May, when the market for iron having risen, the plaintiffs claimed the delivery of iron in fulfilment of the contract, offering and being ready to pay cash for it. The defendants replied, stating that the plaintiffs having failed to perform their part of the contract there was an end of it. The plaintiffs thereupon brought an action against the defendants for non-delivery of the iron:—Held, that the effect of the facts was that there had been a rescission of the contract before the 13th of May, the conduct of the plaintiffs having been such as to justify the defendants in the belief that the plaintiffs intended to abandon the contract upon their insolvency, and there being evidence that the defendants in such belief had likewise abandoned it. *Morgan v. Bain*, 10 L. R., C. P. 18; 44 L. J., C. P. 47; 31 L. T. 616; 23 W. R. 229.

A manufacturer sold 330 tons of bleaching-powder to be delivered thirty tons per month, payment to be made in cash fourteen days after each delivery. The whole amount was delivered except one instalment of thirty tons due in December, 1871; but the November instalment was not paid for. On the 20th of December the buyer called a meeting of his creditors and declared himself insolvent. On the 23rd of December, the seller wrote a letter refusing to deliver any more bleaching-powder under the contract. In February following, the buyer was adjudicated bankrupt, and the trustee applied to the court for an order upon the seller to pay 150*l.* damages for non-delivery of the December instalment of goods:—Held, that although neither the non-payment of the November instalment nor the bankruptcy of the buyer would entitle the seller to rescind the contract, yet he had a right, after the declaration of insolvency, to refuse to deliver any more goods till the price of both the November and December instalments had been tendered to him. *Chalmers, Ex parte, Edwards, In re*, 8 L. R., Ch. 289; 42 L. J., Ch. 37; 28 L. T. 325; 21 W. R. 349.

Held, also, that the seller's letter of the 23rd of December did not excuse the trustee of the buyer's estate from tendering the price of the two instalments before claiming damages for the non-delivery of the December instalment. *Id.*

#### 5. ON AUTHORITY OF AGENT.

**Authority not revoked till Notice of Act of Bankruptcy.]**—Where authority had been given previous to an act of bankruptcy by the bankrupts to the defendant in the course of mutual dealings to receive the purchase-money of their estate, and to place it to their account, and such authority had been acted upon before notice of an act of bankruptcy:—Held, that such authority was not revoked by the act of bankruptcy; that the payment thereof to the defendant was a rightful payment; that being so received it became a debt and an item in the account between him and the bankrupts before notice of any act of bankruptcy, and that the defendant was entitled to set off against it, in an action brought by the trustee in bankruptcy, the debt due from the bankrupts to him. *Elliott v. Turquand*, 7 App. Cas. 79; 51 L. J., P. C. 1; 45 L. T. 771; 30 W. R. 477—P. C.

**Power of Attorney.]**—Bankruptcy determines a power of attorney. *Markwick v. Hardingham*, 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361—C. A.

As a general rule, the power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of it as against the trustee under his subsequent bankruptcy. *Snowball, Ex parte, Douglas, In re*, 7 L. R., Ch. 534; 41 L. J., Bk. 49; 26 L. T. 894; 20 W. R. 786.

But if, after the act of bankruptcy, but before an adjudication, property of the bankrupt is conveyed under the power to a bona fide purchaser without notice of the act of bankruptcy, he may hold the property as against the trustee under the bankruptcy. *Id.*

#### 6. ON BEQUESTS BY WILL.

After G. had been adjudged a bankrupt by a Scotch sequestration, and before he obtained his

discharge, his wife, who had taken part in procuring the sequestration, made her will and thereby gave an annuity to him for life, and declared, that if he should become bankrupt, or should assign, the annuity should cease; and she also empowered the trustees of her will in their discretion at any time to refuse or discontinue payment of the annuity to her husband. After the death of the testatrix, and before the first payment of the annuity became due, G. obtained a discharge which did not divest the property from the trustee in the sequestration:—Held, that the annuity was forfeited. *Trappes v. Meredith*, 7 L. R., Ch. 248; 41 L. J., Ch. 237; 26 L. T. 5; 20 W. R. 130.

Under a clause of forfeiture of a life interest on a future bankruptcy, a forfeiture will be caused by a past bankruptcy which remains unannulled at the time at which the first payment under the gift for life becomes due, although the bankruptcy is afterwards annulled, before any claim is made by the persons entitled under the gift over. The retention of the money by the trustees is equivalent to payment to another person. *Parnham, In re*, 13 L. R., Eq. 413; 41 L. J., Ch. 292; 20 W. R. 396.

Under a bequest of an annuity with a proviso that it should cease if the annuitant assign, incur, or part with the same, and upon a liquidation by arrangement under the Bankruptcy Act of 1869, of the affairs of the annuitant:—Held, that a forfeiture had taken place. *Amherst, In re*, 13 L. R., Eq. 464; 41 L. J., Ch. 222; 25 L. T. 870; 20 W. R. 290.

A testator bequeathed stock to trustees, upon trust, after the death of a tenant for life, to divide the income equally among the sons of his sister, with a declaration that in the event of any one of such sons assigning or otherwise disposing of the life interest thereinbefore given, or if by act or operation of law he should be personally deprived of the benefit of the bequest, his life interest should immediately cease and determine; and on such event occurring, the income should be paid to the person or persons entitled to the same under the bequest thereafter contained. After the death of testator a son of the sister was adjudicated bankrupt; but he obtained an annulment of the bankruptcy before the death of the tenant for life:—Held, that there was no forfeiture of his life interest. *Parnham, In re*, 46 L. J., Ch. 80.

A father devised his real estates to trustees charged with the payment of an annuity of 150*l.* to each of his younger sons, and he declared that if any son entitled to such annuity should at any time do or permit any act, deed, matter, or thing whatsoever whereby the same should be aliened, charged, or incumbered in any manner whatsoever, the annuity should thereupon absolutely cease. One of the younger sons failed to comply with a debtor's summons, and was adjudicated a bankrupt on the petition of the creditor who had issued the summons:—Held, that the annuity had ceased under the clause in the will, and did not go to the trustee in the bankruptcy. *Eyton, Ex parte, Throckmorton, In re*, 7 Ch. D. 145; 47 L. J., Bk. 62; 37 L. T. 447; 26 W. R. 181—C. A.

A testator gave the income of property to one of his trustees for life, or till bankruptcy, or till he should do or suffer anything to deprive himself of the enjoyment of the income. He was adjudicated bankrupt, the bankruptcy was an-

meantime:—Held, that he had not forfeited his life interest. *Robins v. Ross*, 48 L. J., Ch. 884; 80 L. T. 152.

A mother by her will, dated February 18, 1874, gave the residue of her property upon trust to pay the income in equal fourth shares to her sons and grand-daughters, but provided that if any of them "should become insolvent or be declared bankrupt, or should assign, charge, or incumber his or her share or do or suffer anything, whereby the same or any part thereof would, through his or her act or default, or by process or operation of law or otherwise, if belonging absolutely to him or her, become vested in or payable to some other person or persons," there should be a forfeiture of his or her interest in favour of the others of them. W., one of the sons, had been made a bankrupt within the knowledge of the testatrix in December, 1872, and was still so at the time of her death in February, 1875. In July, 1875, the statutory majority of W.'s creditors agreed to accept a composition, but owing to circumstances beyond W.'s control, the order for annulment of his bankruptcy was delayed, and was not drawn up until October, 1878:—Held, that no forfeiture of his interest under the will had arisen. *Anson v. Waddell*, 10 Ch. D. 157; 48 L. J., Ch. 111; 40 L. T. 81; 27 W. R. 186.

## 7. CREDITOR'S REMEDY AFTER CLOSE OF BANKRUPTCY.

A creditor's remedy against the estate of a bankrupt three years after the close of the bankruptcy, where the bankrupt has not obtained his discharge, cannot be enforced against the representatives of the estate of a deceased bankrupt. *Simmons, In re, Kelly, Ex parte*, 7 Ch. D. 161; 47 L. J., Bk. 80; 37 L. T. 684; 26 W. R. 120—C. A.

The proper remedy is by an action for administration. *Id.*

In 1854 a person entitled to a contingent interest in a fund took the benefit of the Insolvent Act, but omitted this interest from his schedule. In 1876 the contingent interest vested in possession, and later in the year he was found lunatic. The court made an order giving the holder of the fund liberty to pay into court to the credit of the lunacy, and directing it to be invested, and the income paid to the committee, and refused to hear the provisional assignee of the insolvent's estate in opposition to the application for such order. On a subsequent petition presented in the lunacy by the provisional assignee:—Held, that the close of the insolvency did not prevent the distribution of the fund amongst the insolvent's creditors, and that the fund must be paid to the provisional assignee. *Hinds, In re*, 7 Ch. D. 26; 37 L. T. 768; 26 W. R. 193—C. A.

## XXI. THE BANKRUPT OR LIQUIDATING DEBTOR.

### 1. SURRENDER.

**Bankrupt allowed to Surrender after Lapse of Statutory Period.]**—Where it is consistent with public justice and for the interests of the cre-

ditor, and the bankrupt is not an object. *Shelton, Ex parte*, 3 De G. & J. 47.

**—Where Bankrupt Abroad at Date of Fiat.]**—Where a bankrupt is abroad when the fiat issues and is not informed of its existence till after the time for surrendering has passed, the court, upon petition, will permit him to surrender, and will allow him his costs out of the estate. *Harrison, Ex parte*, 12 L. J., Bk. 27; 6 Jur. 1088.

**—Non-attendance at Adjourned Last Examination.]**—A bankrupt, who was abroad when the commission was issued, after the lapse of many years returned to England, and obtained an order for leave to surrender, and pass his last examination. He accordingly went down from London to Liverpool to attend the commissioners for this purpose, but no one expressed any wish or intention to examine him; and the commissioners, after taking his surrender, adjourned the last examination for three months, but not at the request of the bankrupt:—Held, that his non-attendance at the adjourned meeting did not deprive him of his right to an order on the assignees, under 6 Geo. 4, c. 16, s. 132, to declare how they had disposed of his real and personal estate. *Tarleton, Ex parte*, 2 Mont. D. & D. 189.

**—Application by Assignees to Discharge Order for Surrender.]**—A fiat was issued in January, and in November the bankrupt petitioned for leave to surrender, stating that he left England thirteen months before on account of family disagreements, and in the belief that he left enough to pay his creditors, and that he had lately returned to this country. On that petition the assignees appeared, and did not oppose it; and the order was made, and costs were directed to be paid out of the estate. After this the bankrupt stated to the commissioner that he left England from pecuniary embarrassments, and took away goods with him. The assignees petitioned that the former order might be discharged; but the petition was dismissed, with costs. *Pennell, Ex parte*, 3 De G. & S. 555; 18 L. J., Bk. 7; 13 Jur. 165.

**—Bankrupt's Costs not Allowed.]**—Where a bankrupt left England on account of his embarrassments, and consequently did not hear of the fiat till after the time for surrendering had expired, he was not allowed his costs on petitioning for leave to surrender. *Perry, Ex parte*. De Gex, 377; 11 Jur. 48.

**—Court will not interfere with Commissioner's Discretion.]**—The court refused to interfere with the discretion of the commissioner as to not allowing liberty to a bankrupt to surrender. *Gordon, Ex parte*, 19 L. J., Bk. 12.

**—Scotchman allowed to Surrender after Petitioning for Sequestration in Scotland.]**—A petition by a domiciled Scotchman, made a bankrupt in England, for leave to surrender, will not be refused on the ground that he opposed the petition for adjudication, and that by obtaining a Scotch sequestration on his own petition (which was afterwards recalled in Scotland) he had incurred great expense and occasioned a long delay, it not appearing that his opposition was unwar-

Indictment for not Surrendering.]—See OFFENCES BY BANKRUPTS, post.

## 2. EXAMINATION.

**Not upon Oath.]**—By 8 & 9 Vict. c. 48 (which substituted a declaration for an oath), it was not only unnecessary, but illegal, to examine a bankrupt upon oath. *Remaden, In re*, 1 B. C. Rep. 133; 3 D. & L. 748; 16 L. J., Q. B. 294; 10 Jur. 879.

**Adjournment of Last Examination sine die.]**—A commissioner has no power, under 13 & 14 Vict. c. 106, s. 162, to adjourn the last examination of a bankrupt sine die, unless for such an offence as under 24 & 25 Vict. c. 134, s. 159, would disentitle him to his order of discharge. *Grumitt, Ex parte*, 33 L. J., Bk. 42; 10 Jur., N. S. 738; 10 L. T. 680; 13 W. R. 1018.

A commissioner having adjourned the last examination of a bankrupt sine die, on the ground of the unsatisfactory condition of the accounts, the assignees were ordered to furnish definite objections, and this was done; but on the matter coming on again, it was found that there was no statement of the particulars in which, or of the reasons why the accounts were deemed unsatisfactory; and the matter was ordered to stand over, with leave to make any further application to the commissioner. *Quinn, Ex parte*, 10 L. T. 704.

A bankrupt on his last examination stated that he had not the means of verifying the first item in his cash account, dated about a year before the bankruptcy, by any earlier cash account, although he could verify it by other means, and stated that he had not the means of furnishing any better accounts. The registrar acting for the commissioner adjourned the bankrupt's examination sine die, with liberty to apply to the court again:—Ordered, on appeal, that the bankrupt should be at liberty to go before the commissioner, and give such further explanation of his accounts as he was able. *Riley, Ex parte*, 3 De G. & J. 469.

Where bankrupts had failed to account for the loss of 9,000*l.* to their estate, and in their examination had stated that they did not know what had become of the amount.—Held, that their last examination had been properly adjourned sine die. *Brook, Ex parte*, 8 L. T. 875.

Held, also, that it was the duty of the creditors' assignees, and not of individual creditors, to appear, and oppose the passing the last examination; the costs of the appearance of the assignees were therefore refused. *Id.*

When a bankrupt has filed accounts shewing a large deficiency, of which he is unable to give any satisfactory explanation, the court will adjourn his last examination sine die, although he states his inability to give any further information. *Milne, Ex parte, Denton, In re*, 28 L. T. 175; 31 W. R. 435.

**Notice of Adjournment.]**—A registrar, as deputy for a commissioner, adjourned a meeting for the last examination of a bankrupt; and the notice of adjournment recited that the meeting was before Mr. Commissioner Fonblanque. Notice of such adjournment was indorsed on the order of protection, and the paper was given

to the bankrupt being the only person present, and that a mere memorandum indorsed on the order of protection was not such a notice as is required to be served upon the bankrupt, under 24 & 25 Vict. c. 134, s. 221, informing him of the day allowed him for finishing his examination, the non-compliance with which (notice being duly given) is made a misdemeanor by that section. *Reg. v. Bushnell*, 9 Cox, C. C. 383.

Where the public examination of a bankrupt has been adjourned to a day fixed, with liberty to apply for an earlier day upon payment of a sum named, and the bankrupt applies for and has an earlier day appointed upon which to pass his public examination, the notices required by the 111th rule must be given to each creditor. *Henry, Ex parte, Woodhouse, In re*, 48 L. T. 912.

**Liquidating Debtor.]**—If a trustee in a liquidation by arrangement is dissatisfied with the information given to him by the debtor as to his debts and assets, he is entitled to summon the debtor for examination before the court, and is not bound, before he can proceed with the examination, to show that the debtor has made default in giving him the information which he is entitled to require. *Clegg, Ex parte, Bennett, In re*, 5 Ch. D. 145; 46 L. J., Bk. 1; 36 L. T. 429; 25 W. R. 504—C. A. Reversing 3 Ch. D. 315; 45 L. J., Bk. 126; 34 L. T. 949; 24 W. R. 504.

SECT. 96 of the Bankruptcy Act, 1869, applies to liquidation by arrangement as well as to bankruptcy. *Id.*

**Order not made Ex Parte.]**—An application by a trustee under a liquidation for a summons for the examination of the debtor should not be made ex parte, but upon notice to the debtor, who is entitled to be heard thereon. The onus of proving that the debtor has refused to give information is on the trustee. *Bennett, In re, Clegg, Ex parte*, 3 Ch. D. 315; 45 L. J., Bk. 126; 34 L. T. 949; 25 W. R. 258.

**Written Requisitions—Power of Registrar to Order.]**—A trustee examined the bankrupt at his public examination concerning alleged fraudulent transactions, on which he had previously examined him in private, but failed to obtain satisfactory explanation. The registrar, sitting as chief judge, against the wish of the trustee, stopped the public examination, considering that it was a waste of public time, and adjourned it to a future day, ordering the trustee in the meantime to deliver written requisitions to the bankrupt as to the points on which he required information:—Held, that even if the registrar had power to order the trustee to deliver such written requisitions, which he had not, he had not exercised a sound discretion in stopping the examination; and order discharged accordingly. *Crump, Ex parte, Hendrey, In re*, 1 Ch. D. 530; 45 L. J., Bk. 98; 34 L. T. 12; 24 W. R. 557—C. A.

**Trustee must Examine Accounts before Public Examination.]**—It is the duty of a trustee, prior to the public examination of the bankrupt, to examine into the accounts, and require the production of his books and all such information

**Passing Public Examination — Conditional Order.]**—The Court of Bankruptcy has no power to make an order that a bankrupt do pass his public examination conditionally on his doing certain acts. The examination ought to be adjourned till he has done all that is required by the act and the rules, and till he is able to swear his affidavit in the form No. 45 appended to the rules, and then an absolute order for his passing should be made. *Smith, Ex parte, Angerstein, In re*, 7 L. R. Ch. 662; 41 L. J., Bk. 44; 27 L. T. 330; 20 W. R. 851.

**Signing Examination.]**—The court has no jurisdiction to make an order on a bankrupt, after his petition has been dismissed, to sign an examination taken pending the proceedings in bankruptcy. *Spiller, In re*, 18 W. R. 295.

**Furnishing Cash Account of Business.]**—When a trader four years previously to his bankruptcy had been engaged in a partnership business, and two important items in his accounts were connected with the transactions of that partnership business, the trustee was held to be entitled to demand a cash account of that business, notwithstanding the lapse of time. *Crawford, Ex parte, Crawford, In re*, 28 L. T. 244; 21 W. R. 509.

Sect. 19 of the Bankruptcy Act, 1869, gives the court power to order a bankrupt to file a cash account of his receipts and payments for a specified period before his bankruptcy, and, if the circumstances which appear on the file of proceedings shew that such an order ought to be made, the court can make it without any further evidence. The court, however, has a discretion in the matter, and such an order ought not to be made as a matter of course, but only under special circumstances. *Moir, Ex parte, Moir, In re*, 21 Ch. D. 61; 51 L. J., Ch. 931; 47 L. T. 267; 30 W. R. 738—C. A.

A bankrupt who had been engaged in an extensive business as a promoter of public companies, had kept no accounts, and could produce no record whatever of his transactions, except his banker's pass-book, and some counterfoils of recent cheques.—Held, that this was a sufficient reason for ordering him to file a cash account of his receipts and payments for two years before his bankruptcy. *Id.*

**Admissibility in Evidence.]**—To render an examination of a bankrupt under 12 & 13 Vict. c. 106, s. 117, admissible as a deposition under the seal of the court, pursuant to 24 & 25 Vict. c. 134, s. 208, it must appear that his answers after they were reduced into writing were signed and subscribed by the bankrupt. *Reg. v. Aken*, 20 L. T. 498; 17 W. R. 683.

*See further, LIQUIDATION, COMPOSITION, and COMPOSITION DEEDS, ante.*

### 3. COMMITTAL FOR NOT ANSWERING QUESTIONS.

**Examination must be Fair and Relevant.]**—

hearings of estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money or debts." *Leggs, Ex parte*, 1 B. C. C. 163; 23 L. J., Q. B. 345; 17 Jur. 415.

Where a bankrupt, on a second or subsequent examination, states that he wishes to explain some of his former statements, but that he does not sufficiently recollect them, his memory should be refreshed by their being repeated to him. *Id.*

**Bankrupt's Answers must be Reasonably Probable.]**—The court will not discharge from custody a bankrupt committed for not answering questions when the court is of opinion that the story contained in his answers is not such as to satisfy a reasonable person of its truth. *Lord, Ex parte*, 16 M. & W. 462; 16 L. J., Ex. 118; 11 Jur. 186.

A warrant of commitment set out the whole of the bankrupt's examination respecting a sum of money which was not forthcoming, and which he alleged to have been stolen from him by housebreakers; it then proceeded, "which answers are not, nor are any of them, satisfactory to me the commissioner."—Held, sufficient, although some of the answers might, on the face of them, be satisfactory, for that the bankrupt was committed on account of answers, which, taken as a whole, were unsatisfactory. *Id.*

**Power of Court to interfere with Discretion of Commissioner.]**—If the court can see clearly that the commissioner was wrong in holding that the answers were not satisfactory, they will order the bankrupt to be discharged; but they are always slow in such a case to interfere with the discretion of the commissioner, and will not do so unless they are satisfied that he was wrong. *Ward, In re*, 3 D. & L. 766; 10 Jur. 433; 15 L. J., Q. B. 233.

If the examination, when viewed as a whole, is entirely unsatisfactory, the commissioner will be justified in finding that the answers are not, nor are any of them, satisfactory, although the answers to certain introductory questions may be such as would be perfectly satisfactory when viewed by themselves. *Id.*

**Incredible Account.]**—If, upon the examination of a bankrupt touching the disposition of his property, he swears to an account of the same, which appears to be incredible, the commissioners may commit him. *Norden, Ex parte*, 6 T. R. 118.

**Here Misbehaviour no Ground for Committal.]**—The commissioners cannot commit a bankrupt for misbehaviour only, or any act or omission not comprised in the statute giving them authority. *Miller v. Scars*, 2 W. Bl. 1141.

**Unsatisfactory Answers.]**—A general answer by a bankrupt under examination, that he has lost 1,886*l.* by selling goods under prime cost, is not satisfactory, especially if falsified by subsequent confessions of the disposal of different sums for other purposes. *Langhorn's case*, 2

ing kept any books, does your memory serve you as to how the 100l." (the proceeds of a cheque drawn by the bankrupt, payable to B.) "was appropriated?" replied, "Not now:"—Held, that the commissioner was justified in committing the bankrupt to prison for not fully answering to his satisfaction. *Bradbury, Ex parte*, 14 C. B. 15; 2 C. L. R. 585; 23 L. J., C. P. 25; 18 Jur. 189.

**Satisfactory Answers.]**—A bankrupt, to a question whether he had not within six months previously to the commission executed two conveyances of his estate and effects, or part thereof, to his son, answered, "Not to my knowledge." This answer held to be satisfactory, no further questions having been put. *Norris's case*, 2 J. & W. 437.

There being reason to apprehend that a bankrupt after the adjudication was about to abscond to America, the commissioners issued a summons against him, and on that summons without any warrant the messenger arrested him, and brought him before the commissioners, when they proceeded to examine him, and put to him this question:—"You having five months ago taken away 1,500l. and now accounting only for 600l. of it, what account do you now give of the rest?" To which the bankrupt having answered, "I can give no account;" the commissioners committed him for answering unsatisfactorily. The court, on the petition of the bankrupt, ordered his immediate discharge. *James, Ex parte*, 3 Deac. 518; 3 Jur. 538.

**What admitted by Answer.]**—A bankrupt answering a question which embodies a statement of the acts or sayings of himself, or of a third person, without denying or qualifying, is understood to admit the statement. *Crowley's case*, 2 Swans, 75; Buck, 264.

#### 4. PRIVILEGE AND PROTECTION.

**Extent of Privilege—Contempt of Court.]**—The privilege of a bankrupt from arrest during his examination extends to an attachment issued for a contempt in not paying money into court. *Bury, Ex parte*, 3 Mont., D. & D. 309; 7 Jur. 406.

Or not paying money under an award made a rule of court. *Parker, Ex parte*, 3 Ves. 554.

**Debts contracted since Bankruptcy.]**—The protection from arrest granted to a bankrupt during the suspension of his certificate does not protect him from arrest in respect of debts contracted since his bankruptcy. *Grace v. Bishop*, 11 Ex. 424; 25 L. J., Ex. 58.

An order for protection does not protect a bankrupt from arrest at the suit of a subsequent creditor, even though he has not passed his final examination. *Phillips v. Poland*, 1 L. R., C. P. 204; 35 L. J., C. P. 128; 12 Jur., N. S. 260; *S. C.*, 1 L. R., Ch. 356; 35 L. J., Bk. 19; 12 Jur., N. S. 425; 14 L. T. 502.

**Plaintiff suing out Execution without Notice of Protection Order.]**—Trespass was not maintainable against a plaintiff in an action, or his attorney, for suing out an execution, and causing the defendant to be arrested under it, the defendant having at the time an order for protection from arrest under 5 & 6 Vict. c. 116, s. 4, of which

VOL. I.

the plaintiff had no notice. *Yearsley v. Heane*, 14 M. & W. 322; 3 D. & L. 265.

**Non-payment of Rates—Imprisonment in Default of Payment.]**—An action was brought against overseers of the poor for maliciously, and without reasonable or probable cause, obtaining a warrant for arresting A. for poor-rates, they knowing that he was privileged from arrest pending his examination. There was a count for false imprisonment. A. owed for two poor-rates before his bankruptcy, and for one allowed and published after it. He obtained protection from arrest under the Bankruptcy Act. The rates were then demanded of him, and not paid. The overseers applied to a justice. A summons was issued, calling on him to appear before the justices to shew cause why he had not paid the rates. He indorsed on the summons that his goods were under the protection of the Court of Bankruptcy; but did not appear to shew cause. The justices issued a distress warrant against A. His goods having been seized under the bankruptcy, a return of nulla bona was made to the warrant. On that return the justices issued a warrant for A.'s imprisonment, in default of payment, and he was arrested and imprisoned under it by direction of the overseers, who knew all the facts:—Held, that there was no evidence of malice, or of want of reasonable or probable cause for obtaining the warrant; and that there was no ground for maintaining an action against the overseers on either count. *Phillips v. Naylor*, 4 H. & N. 565; 25 L. J., Ex. 225; 5 Jur., N. S. 966; 33 L. T. 167; 7 W. R. 504—Ex. Ch.

**May be taken by his Bail.]**—A bankrupt may be taken by his bail for the purpose of rendering him, notwithstanding his privilege from arrest; and if they neglect to take him they may be fixed. *Payne v. Spencer*, 6 M. & S. 237.

**After Order of Discharge.]**—On the 20th of November the defendant was adjudicated bankrupt, on the petition of a creditor, in Dublin. On the 12th of January he obtained a first-class certificate, and also an order of protection from arrest. The certificate was retained in the court, to allow of any creditors, within a month, appealing against its being granted. The plaintiff, on the 2nd of October, commenced an action against the defendant, upon a promissory note given in respect of a debt owing from the defendant, and which he had entered in his schedule. The defendant pleaded to the action, but did not appear at the trial, on the 10th of December, when a verdict passed for the plaintiff. The costs were taxed on the 8th of January, and the defendant was arrested on the 13th, when he produced his order of protection:—Held, that, having obtained his certificate, he was privileged from arrest in respect of the costs as well as of the debt, and that the arrest was unlawful. *Simpson v. Maravita*, 4 L. R., Q. B. 257; 38 L. J., Q. B. 76; 20 L. T. 275; 17 W. R. 589.

**Crown Process.]**—A bankrupt attending commissioners, in obedience to their summons, was arrested under an extent at the suit of the crown:—Held, that although the crown is not within the bankruptcy statutes, the bankrupt was entitled to his discharge; on the principle of the common law protecting witnesses attending

Z Z

for ex  
purpos  
Vea. 10  
391 ; 1

**Over**  
overse  
debt  
hands  
Where  
rupt,  
was fo  
that h  
to gra  
Will.  
*James*  
73 ; 1

**Wh**  
protec  
ment  
there  
of di  
Bank  
862.

[**B.**  
s. 267  
execu  
13 V  
discha  
until  
date  
*Crole*

A b  
tion v  
and a  
29th  
stanc  
and a  
under  
Decer  
anoth  
sa. wa  
of an  
On th  
obtai  
Queer  
tor, a  
held,  
arrest  
secon  
he de  
illega  
L. J.,  
W. F  
held,  
court  
9 W.  
these  
from  
the o  
were  
to hi  
Ch. 4  
321.

Th  
obtai  
Vict.  
ing 1  
c. 13  
pove  
both  
confe



**Debt Provable—Discharge of Debtor.]**—Where a debt is due before the bankruptcy, and consequently provable under the commission, the court will in general discharge the bankrupt out of custody. *Holding v. Impey*, 7 Moore, 614; 1 Bing. 189; *S. P.*, *Robinson v. Vale*, 4 D. & R. 340; 2 B. & C. 769.

**— Exceptions—Fraud.]**—Unless it appears that the certificate was obtained by fraud. *Vincent v. Brady*, 2 H. Bl. 1.

Or the commission appears to be grossly fraudulent. *Sowley v. Jones*, 2 W. Bl. 725.

**— Certificate disputed.]**—Or that it is seriously meant to be disputed. *Stacey v. Frederici*, 2 B. & P. 390.

**Costs as Co-Respondent.]**—A bankrupt having his order of discharge drawn up and delivered out to him is entitled to his release from custody under an attachment for costs of a suit in the Divorce Court, in which he was co-respondent. *Green, In re*, 6 L. T. 109.

**Alimony.]**—An attachment issued out of the Divorce Court for non-payment of alimony, is no bar to the bankrupt's release. *Rawlins, In re*, 12 L. T. 57.

**Shareholders in Insolvent Company.]**—A shareholder of an insolvent banking company, against whom the court had, under 7 & 8 Vict. c. 113, s. 13, granted leave to a judgment creditor of the company to issue execution, but who afterwards became himself bankrupt, was entitled, upon obtaining his certificate, to be discharged out of custody under such execution. *Thompson v. Harding*, 3 C. B., N. S. 254; 27 L. J., C. P. 38; 4 Jur., N. S. 94.

The court in which the order for execution was obtained is the proper court to apply to for the discharge, which it has the power to grant under the general jurisdiction it possesses over its own process. *Id.*

**Cases in Nature of Criminal Offence.]**—A commitment under 4 & 5 Will. 4, c. 76, ss. 78, 99, for recovery of the penalty imposed by 43 Eliz. c. 2, s. 7, for disobeying an order of justices to maintain a relative, was in the nature of criminal process, and therefore a bankrupt in custody under it was not entitled to protection under 12 & 13 Vict. c. 106, s. 112. *Bancroft v. Mitchell*, 2 L. R., Q. B. 549; 36 L. J., Q. B. 257; 16 L. T. 558; 15 W. R. 1132; 8 B. & S. 558.

A debtor was convicted under 25 & 26 Vict. c. 68, s. 6, for violations of copyright in engravings, and sentenced to pay a fine, and in default was imprisoned. After the conviction he executed a deed of composition with his creditors, which was duly registered. He then applied for discharge from prison:—Held, that the process under which he was arrested was of a criminal nature, and not for a debt, and that he was not entitled to his discharge. *Graves, Ex parte*, 3 L. R., Ch. 642; 19 L. T. 241; 16 W. R. 993.

**Outlawry.]**—A creditor obtained judgment against S. on a bill of exchange, and not having been able to arrest him, proceeded to outlawry,

bankrupt:—Held, that he was not "in prison or in custody for debt" within 12 & 13 Vict. c. 106, s. 112, and that the court had no jurisdiction to order his release. *Stoffel, Ex parte*, 3 L. R., Ch. 240; 37 L. J., Bk. 4; 16 W. R. 237.

**Bond under 1 & 2 Vict. c. 110, s. 8.]**—A debtor who had executed a bond under 1 & 2 Vict. c. 110, s. 1, and against whom a verdict was returned in the action, who afterwards was declared bankrupt, and surrendered to the fiat, and then immediately rendered in discharge of his sureties in the bond, was not, under such arrest or imprisonment, within 5 & 6 Vict. c. 122, s. 23, so as to entitle him to his discharge from custody. *Oldaker, Ex parte*, 1 De Gex, 591; 17 L. J., Bk. 8; 12 Jur. 108.

**Solicitor—Money due as Solicitor.]**—A solicitor who had made default in payment of a sum of money due from him as solicitor was adjudicated bankrupt, and after his adjudication was arrested under a writ of attachment issuing out of the Court of Exchequer. He applied to the Court of Bankruptcy to order his discharge. The Lords Justices, in the exercise of their discretion under the Bankruptcy Act, 1869, s. 13, declined to interfere with the writ of attachment issued by the Court of Exchequer, and refused the application. *Deere, In re*, 10 L. R., Ch. 658; 44 L. J., Bk. 120; 33 L. T. 115; 23 W. R. 866.

**Trustees.]**—A debtor, who had been committed to prison under an attachment, as a person in a fiduciary character making default in payment of a sum of money which he had been ordered by the court to pay, filed a declaration of insolvency, and, on a petition alleging such declaration as an act of bankruptcy, was adjudicated a bankrupt. Subsequently he applied to the court for his discharge from custody. The court refused to grant such discharge, but gave leave to the bankrupt, if he should be so advised, to renew his application when he had passed his final examination. *Lewes (Earl) v. Barnett*, 47 L. J., Ch. 144; 26 W. R. 101—C. A.

**Power of Court of Bankruptcy to order Discharge.]**—The Court of Bankruptcy has power to order the release from custody of a bankrupt who, having surrendered, and having obtained protection, is arrested. *Browne, In re*, 12 L. T. 641; 13 W. R. 926.

**Suspension of Order of Discharge—Power of Court.]**—A bankrupt passed his final examination, and obtained his order of discharge, suspended for twelve months, with protection for three months renewable from time to time on giving notice to the assignees and the opposing creditors. After the expiration of the three months the bankrupt was taken into custody under an execution, and he then applied, upon notice, for a renewal of his protection and a release from custody. He obtained a renewal of the protection, but upon the application for a release from custody:—Held, that the court had no power under the first part of s. 112 of the 12 & 13 Vict. c. 106, to grant the application, and that whether it had or had not a discretionary power under the latter part of the same section, it was not a case for the exercise of that discretion. *Kimberley, Ex parte*, 34 L. J.,



Bk. 28; 11 Jur., N. S. 571; 12 L. T. 291; 13 W. R. 641.

The Court of Bankruptcy has no inherent authority, independently of the 12 & 13 Vict. c. 106, s. 112, to order the release of a bankrupt whose order of discharge has been suspended with protection, and who (having neglected to obtain a renewal in time) is arrested on a ca. sa. after the expiration of his term of protection, and before the commencement of a second term. *Ib.*

**Ca. sa. during Suspension not Enforceable after Certificate.**—A ca. sa. against a bankrupt during the suspension of his certificate could not be enforced after such certificate had come into operation. *Eccard, In re*, 6 Ex. 111; 2 L. M. & P. 80; 15 Jur. 156.

**6 Geo. 4, c. 16, s. 126—Power to stay Action.**—Under 6 Geo. 4, c. 16, s. 126, which authorized the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, the court had incidentally the power of staying, before judgment, proceedings against such a bankrupt for such a debt. *Sadler v. Cleaver*, 7 Bing. 769; 5 M. & P. 706.

**Sheriff justified in releasing Bankrupt though Bankruptcy invalid.**—A sheriff was justified in immediately discharging a person arrested for debt, or on an escape warrant, on the production by him of a summons, signed as required by 5 & 6 Vict. c. 122, s. 23, to the officer who arrested him, and on giving him a copy thereof. In such case, the validity of the bankruptcy was immaterial; it was sufficient if the party was a bankrupt de facto, although not de jure. *Norton v. Walker*, 3 Ex. 480; 6 D. & L. 204; 18 L. J., Ex. 234.

**Gaoler not Liable for Detention of Bankrupt.**—The 12 & 13 Vict. c. 106, s. 113, which made "any officer" who shall detain a bankrupt in custody after he shall have produced his protection liable to penalties, did not apply to the gaoler or governor of a prison where the bankrupt was taken after his arrest, but only to the officer actually arresting the bankrupt. *Myers v. Veitch*, 4 L. R., Q. B. 649; 38 L. J., Q. B. 316; 20 L. T. 847; 17 W. R. 918.

**Right of Bankrupt to Appeal against Refusal of Discharge.**—A bankrupt who had unsuccessfully applied to be discharged from imprisonment renewed his application after his last examination:—Held, that it was to be regarded as an original application, and that its refusal gave a new right of appeal. *Jones, Ex parte*, 3 De G. & S. 671.

## 6. ALLOWANCE TO BANKRUPT.

The power given by 12 & 13 Vict. c. 106, s. 194, to a commissioner, of making an allowance to a bankrupt, is not taken away by 24 & 25 Vict. c. 134, s. 109, except where the creditors come to an actual resolution under the latter section. *Ellerton, Ex parte*, 33 L. J., Bk. 32; 10 Jur., N. S. 502; 10 L. T. 317, 722.

The words "up to the time of passing his last examination," contained in 24 & 25 Vict. c. 134, s. 109, mean up to the time appointed, under s. 140, for a bankrupt to pass his last examination; and therefore, where a bankrupt had failed

to pass his last examination at the first meeting, the allowance made to him by the creditors ceased. *Osborne, Ex parte*, 34 L. J., Bk. 15; 10 Jur., N. S. 1137; 11 L. T. 356; 13 W. R. 146.

If the creditors present at the first dividend meeting do not determine whether any and what allowance shall be made to a bankrupt out of his estate, pursuant to 24 & 25 Vict. c. 134, s. 174, the court has no power under 12 & 13 Vict. c. 106, s. 195, to order the statutory allowance therein stated to be paid to the bankrupt. *Lovell, Ex parte*, 1 L. R., Ch. 134; 35 L. J., Bk. 14; 13 L. T. 451; 14 W. R. 186.

**Where Joint and Separate Estates.**—Under a joint and separate fiat, a bankrupt's allowance is to be calculated on the amount of his separate estate, together with his share of the joint estate, not on the gross amount of the joint estate. *Lomas, Ex parte*, 1 Mont. & Ayr. 525; 4 Deac. & Chit. 240.

A partner is entitled to an allowance, although his separate estate does not contribute to the joint estate, so as to form the statutable amount for allowance. *Morris, Ex parte*, 1 Mont. 505; 1 Deac. & Chit. 526; *S. P., Gibbs, Ex parte*, 1 Mont. 105.

A., B., and C. were bankrupts; their joint estate paid 9s. in the pound; the separate assets of A. and B. contributed sufficient to make a dividend of 15s. in the pound; but C.'s separate estate contributed nothing:—Held, nevertheless, that he was entitled to an allowance. *Ib.*

Where A., being one of three partners, had paid 20s. in the pound on his separate estate, and 12s. 6d. in the pound had been paid on the joint estate; but on the separate estates of the other two partners a sufficient dividend had not been paid:—Held, that under 6 Geo. 4, c. 16, s. 129, A. was entitled to an allowance for his sole use, of five per cent., not exceeding 400l. *Minchin, Ex parte*, 1 Mont. & Mac. 135.

**Debtor executing Composition Deed.**—*See XIX. COMPOSITION DEEDS.*

## 7. RIGHTS OF BANKRUPT.

### a. Submitting to Arbitration.

A submission to arbitration by a bankrupt, though of matters which have passed to his assignees, is not void, and payment of costs pursuant to the award may be enforced against him. *Milnes, In re*, 15 C. B. 451; 2 C. L. R. 232; 24 L. J., C. P. 29; 18 Jur. 1108.

### b. Suing as Trustee.

Action to recover an average loss on a policy of insurance on goods from the Havannah to a market in Europe, at 60s. per cent. premium, to return 23s. 9d. per cent. if the risk ended in the United Kingdom, and less if at other places in the north of Europe. Plea, the bankruptcy of the plaintiff before action. Replication, that on his bankruptcy he sold the goods and transferred the policy and his right and interest to recover for the loss of the goods to F., and delivered the policy to him. Rejoinder, that the cargo was delivered, and the risk thereon ended, before the bankruptcy, and that the right to have a return of premium was not transferred from the plaintiff before his bankruptcy:—Held, that the two

same instrument, the bankrupt was entitled to sue for average loss as trustee for his vendee, that being a cause of action in which he had no beneficial interest at the time of his bankruptcy. *Boddington v. Castelli* (in error), 1 El. & Bl. 879; 1 C. L. R. 281; 23 L. J., Q. B. 31; 15 Jur. 781—Ex. Ch. Affirming, 8 C. 1 El. & Bl. 66; 22 L. J., Q. B. 5; 17 Jur. 457.

In an action for rent upon an indenture of lease, the defendant pleaded the bankruptcy of the plaintiff, who replied that he let the premises to the defendant as trustee for J. S., and that he had no beneficial interest therein, and was suing as such trustee.—Held, that his being trustee was not material, as he had shewn by parol that he had no beneficial interest in the premises. *Houghton v. Kærig*, 18 C. B. 235.

So, he may sue as a trustee for his assignees, and the defendant cannot object, unless they interpose. *Cumming v. Roebuck*, Holt, 172.

Though he is also a cestui que trust under the same instrument. *Webster v. Scales*, 4 Dougl.

#### c. Suing in respect of Contracts.

**Contracts made after Fiat.]**—A bankrupt has a good title to all property acquired, and a right to sue on all contracts made with him between the fiat and the allowance of his certificate; and also after the allowance of his certificate under a second fiat against him, under which his estate has not paid 15s. in the pound, unless his assignees interfere and claim the property, or the benefit of such contracts. *Herbert v. Sayer*, 2 D. & L. 49; 5 Q. B. 965; 13 L. J., Q. B. 209; 8 Jur. 812.

#### —Where in Course of Bankrupt's Trade.]

Action for work and labour as a surgeon and apothecary, and for medicines. Plea, his bankruptcy, and that the debt was claimed by the assignees. Replication, that the labour was personal labour bestowed after the bankruptcy, and done for the necessary present maintenance of the plaintiff and his family; and the medicines were purchased out of the earnings of his personal labour done after his bankruptcy; and that the medicines were increased in value by the plaintiff's personal labour, and were found and administered for the necessary present maintenance of himself and his family. Rejoinder, that the labour was not personal, nor the medicines purchased out of the earnings of personal labour, nor the medicines found or administered for the necessary present maintenance of the plaintiff and his family. The plaintiff was a general medical practitioner; he had filed a declaration of insolvency, and was an uncertificated bankrupt. By an arrangement with a friend, who had purchased his stock of medicines, he continued in possession of them on credit, carried on his business as before, and was supplied with fresh medicines on credit from wholesale houses. The plaintiff attended the defendant, giving the benefit of his skill, and furnishing the medicines which he thought necessary.—Held, that the plaintiff was carrying on his business as a medical practitioner, and therefore the replication was not proved. *Elliott v. Clayton*, 16 Q. B. 581; 20 L. J., Q. B. 217; 15 Jur. 293.

**Goods Sold.]**—The price of goods sold by an

After the bankruptcy of A., and before his certificate, B., one of his creditors, purchased goods from him. In an action by A., after he had obtained his certificate, for the price of the goods, the old debt could not be set off, being barred by the certificate. *Id.*

**Money Lent.]**—An uncertificated bankrupt may maintain an action for money lent. *Evans v. Brown*, 1 Esp. 170.

Unless his assignees interfere to prevent him. *Chippendale v. Tomlinson*, 7 East, 57, n.; 4 Dougl. 318.

**Work and Materials.]**—And for work and labour for his personal services, and for materials found, as well as for the mere work and labour. *Silk v. Osborn*, 1 Esp. 140.

An undischarged bankrupt may maintain an action, in respect of a debt due to him for work and labour done after his bankruptcy, if the trustee does not interfere. *Herbert v. Sayer* (5 Q. B. 965) followed. *Jameson v. Brick and Stone Company, Limited*, 4 Q. B. D. 208; 48 L. J., Q. B. 249; 39 L. T. 594; 27 W. R. 221—C. A.

#### Where Assignees claim Benefit of Contract.]

—It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay them the money claimed and debts. *Kitchen v. Bartsch*, 7 East, 53; 3 Smith, 58.

#### Earnings of Personal Labour by undischarged Bankrupt—Adding Trustee as Plaintiff.]

—The plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge.—Held, that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-plaintiff in the action, and give him the conduct of the action. *Emden v. Carter*, 17 Ch. D. 768; 51 L. J., Ch. 41; 44 L. T. 536—C. A. Affirming 8 C. 17 Ch. D. 169; 50 L. J., Ch. 492; 44 L. T. 344; 29 W. R. 600.

#### Carrying on Business for Benefit of Estate—

**Right to Remuneration.]**—If the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time, this is evidence of such a contract between him and his assignees as will enable him to recover from them a reasonable compensation for his work and labour. *Coles v. Barrow*, 4 Taunt. 754; 2 Rose, 277.

#### Staying Proceedings under 6 Geo. 4, c. 16, s. 136.]

—If the drawer of a bill of exchange which had been duly accepted, indorsed it to another for the purpose of enabling him to raise money upon it, which the latter did by indorsing it over; and before the bill became due, the first indorsee was declared bankrupt and obtained his

certificate, and an action was commenced against him by the drawer, the court would stay the proceedings under 6 Geo. 4, c. 16, s. 126. *Heigh v. Jackson*, 1 H. & H. 167; 2 Jur. 777.

#### d. Suing in respect of Torts.

##### Arising out of Contract—Wrongful Dismissal.]

—A. entered into an agreement with B. & C. to serve them for seven years, at the rate of three guineas weekly, the party making default to pay to the other 5,000*l.* by way or in nature of specific damages. A. was dismissed; he became bankrupt, and after the bankruptcy brought an action on the agreement, to which B. and C. pleaded his bankruptcy:—Held, that this plea was an answer, for that the right of action in respect of this breach of the agreement passed to his assignees. *Beckham v. Drake (in error)*, 2 H. L. Cas. 579; 13 Jur. 921. Affirming *S. C.*, in Ex. Ch., 11 M. & W. 315; 12 L. J., Ex. 486; 7 Jur. 204.

**Trespass to Land—Personal Injury.**—Action for breaking and entering the dwelling-house and garden of the plaintiff, and creating a noise and disturbance therein, and damaging the doors of the house, and the trees of the garden, and seizing his goods, and exposing them to sale on the premises, without his leave; whereby he and his family were disturbed and annoyed in the possession of the dwelling-house and garden, and the plaintiff was prevented from carrying on his business. Plea, in bar of the further maintenance of the action, that the plaintiff became bankrupt after the action, and that an assignee had been appointed, who accepted the appointment; whereby the causes of action became vested in the assignee:—Held, that the plea was bad; and that, the primary personal injury to the bankrupt being the principal and essential cause of action, it still remained in the bankrupt, and did not pass to his assignee. *Rogers v. Spence (in error)*, 13 M. & W. 571; 12 C. & F. 700; 15 L. J., Ex. 49; *S. C.*, 2 D., N. S. 999; 11 M. & W. 191; 12 L. J., Ex. 252.

—**Seizing Goods.**—An uncertificated bankrupt cannot maintain an action of trespass against subsequent creditors for breaking open his house, and seizing his after-acquired property, although the assignees do not ratify the seizure, and although they were unknown to the defendants until after the commencement of the action. *Hull v. Pickersgill*, 3 Moore, 612; 1 B. & B. 282. See *Forster v. Bates*, 12 M. & W. 226.

#### e. Future Property.

**Title good against all except Assignees.**—Property acquired by an uncertificated bankrupt after an act of bankruptcy committed by him, does not vest absolutely in his assignees, although they have a right to claim it; for if they remain passive, and do not make any claim, the bankrupt has a right to such property as against all other persons. *Drayton v. Dale*, 3 D. & R. 534; 2 B. & C. 293.

—**May maintain Trover.**—An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and may maintain trover for them against a stranger. *Webb v. Fox*, 7 T. R. 391;

*S. P.*, *Chambers v. Bernasconi*, 6 Bing. 501; 4 M. & P. 278.

If an order for the delivery of goods in the hands of a third person is given to an uncertificated bankrupt, in payment of a debt accrued subsequently to his bankruptcy, he may maintain trover for them. *Fowler v. Down*, 1 B. & P. 44.

**Certificated Bankrupt—Collusion.**—The after-acquired goods of a certificated bankrupt having been taken in execution for a debt which might have been proved under the commission, the court set aside the *fi. fa.*, and refused to put him to an *audita querela*, though it was stated that the bankruptcy was collusive, and that, in an action by the assignees, a jury had found against them as to the fact of trading. *Barrow v. Poile*, 1 B. & Ad. 629.

**Assignees allowing Bankrupt to retain Possession.**—Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had allowed the bankrupt to remain in possession of his furniture, but which, notwithstanding, they afterwards seized:—Held, that they were warranted in so doing, on the ground that an uncertificated bankrupt cannot acquire property for himself, nor is he entitled to retain any property against his assignees. *Nias v. Adamson*, 3 B. & A. 225.

**Under 32 & 33 Vict. c. 71.**—After the close of a bankruptcy, property falling in to the bankrupt belongs to him, and not to the trustee, although the bankrupt has not obtained an order of discharge. *Petit, In re*, 1 Ch. D. 478; 45 L. J., Bk. 63; 34 L. T. 51; 24 W. R. 359.

When the creditors of a liquidating debtor have passed a resolution granting him his discharge, his after-acquired property does not vest in the trustee for the benefit of the creditors, but belongs to the debtor; although no resolution fixing the close of the liquidation has been passed. *Bennett's Trusts, In re*, 10 L. R., Ch. 490; 32 L. T. 652; 23 W. R. 822—*C. A.* Reversing *S. C.*, 19 L. R., Eq. 245; 44 L. R., Ch. 244; 31 L. T. 720; 23 W. R. 229.

When the creditors of a liquidating debtor have passed a resolution granting him his discharge, his after-acquired property does not vest in the trustee, but belongs to the debtor, although no resolution closing the liquidation has been passed. *Ebbs v. Boulnois*, 10 L. R., Ch. 479; 44 L. J., Ch. 691; 32 L. T. 650; 33 ib. 342; 23 W. R. 820.

An undischarged bankrupt died intestate within three years after the close of his bankruptcy, having in the interval acquired fresh property and contracted fresh debts. Only a small dividend had been paid in the bankruptcy and the bankrupt had not, after the close of the bankruptcy, made any further payments to the creditors who had proved. An action was brought by one of the new creditors to administer the bankrupt's estate. The estate was sufficient to pay the costs of the action, to pay the new creditors in full, and to leave a surplus. This surplus was claimed by the old creditors:—Held, that the administratrix was entitled to the surplus, and that the old creditors had no right to it. *Smith, In re, Green v. Smith (No. 2)*, 24 Ch. D. 672; 52 L. J., Ch. 921; 49 L. T. 297.

property acquired by him after the close of the bankruptcy, except such rights as are given to them by s. 54, and those rights cannot be enforced after the death of the bankrupt. Sect. 12 applies to property acquired by an undischarged bankrupt after the close of the bankruptcy as well as to property divisible among the creditors in the bankruptcy. *Id.*

After the close, on the 1st of December, 1874, of a bankruptcy, the debtor who had been made bankrupt became entitled, under the will of a testatrix who died in 1875, and under a decree dated the 8th of January, 1878, in a suit for the administration of her estate, the property amounting to about 20,000*l.* During the three years which elapsed after the close of the bankruptcy, the debtor did not pay 10*s.* in the pound, and he had not obtained an order of discharge. On the 26th of February, 1878, a creditor, whose name and debt appeared in the bankrupt's statement of affairs, but who had not proved before the close of the bankruptcy, sent in a proof of his debt to the registrar, who had become the trustee:—Held, that the proof was good, and that the creditor, notwithstanding that his debt was not proved before the close of the bankruptcy, was entitled to apply for leave to enforce payment of his debt as a judgment debt against the property of the debtor, under sub-a. 2 of s. 54 of the Bankruptcy Act, 1869. *Lancaster Banking Corporation, Ex parte, Westby, In re*, 10 Ch. D. 776; 48 L. J., Bk. 89; 39 L. T. 673; 27 W. R. 292.

Upon the granting of an application for the sanction of the court, as required by sub-a. 2 of s. 54 of the Bankruptcy Act, 1869, a notice must be inserted in the Gazette, as prescribed by Form 70 in the Schedule to the Bankruptcy Rules, 1870. *Id.*

**Allowance out of Property to Bankrupt—Bill of Sale.]**—*B.*, an undischarged bankrupt, to whom his creditors had given, by a resolution duly passed, a certain quantity of his furniture, assigned that furniture by bill of sale to the plaintiff, and afterwards sent it to the defendant, an auctioneer, who sold it and paid the money received to the bankrupt. In an action for conversion—Held, that the plaintiff was entitled to the furniture, for that the bankrupt could, under the resolution of his creditors, dispose of it to the plaintiff, and that there was no *jus tertii* which the defendant could set up. *Brown v. Hickinbotham*, 50 L. J., Q. B. 426.

**Furniture left in Bankrupt's Possession—Bill of Sale.]**—A trustee under a liquidation, who, with the authority of the creditors, permits the debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that the debtor was holding himself out as the real owner and dealing with it as such, forfeit his right to it so long as there has been no closing of the liquidation or order of discharge; and his right to it and to any after-acquired property cannot be defeated by a bill of sale given by the debtor subsequently to the liquidation. *Maggie v. Imperial Discount Company*, 3 Ch. D. 711; 47 L. J., Q. B. 119; 38 L. T. 309; 26 W. R. 343—C. A.

— Money paid by Undischarged Bankrupt

cannot be followed by the trustee, though the person to whom the money was paid has notice of the bankruptcy. *Dewhurst, Ex parte, Van-Iske, In re*, 7 L. R., Ch. 185; 41 L. J., Bk. 18; 25 L. T. 731; 20 W. R. 172.

A bankrupt, who had not obtained his order of discharge, took a furnished house at 5*l.* per week from a person who had notice of the bankruptcy, on the terms of paying six months' rent in advance if required. Having obtained 200*l.* as compensation for being turned out of an appointment which he had taken since the bankruptcy, he paid to the landlord out of this sum 130*l.* as the six months' rent, the landlord having required payment:—Held, that though the trustee in bankruptcy could have intercepted the 200*l.* and required it to be paid to him, he could not follow any part of it into the hands of the landlord. *Id.*

A bankrupt, who had never obtained his order of discharge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded by the decree of a competent court 104*l.* as six months' salary in lieu of proper notice of dismissal:—Held, that the trustee could claim this money before it was paid to him, as against any creditors, subsequently to and without notice of the bankruptcy, for that, first, the trustee had been guilty of no breach of duty towards such creditors, so as to estop him from setting up his claim; and, secondly, that the money was not the proceeds of the bankrupt's personal labour subsequent to his bankruptcy, but a compensation for the breach of a contract, which became part of his estate in bankruptcy. *Wedding v. Oliphant*, 1 Q. B. D. 145; 45 L. J. Q. B. 173; 33 L. T. 837; 24 W. R. 246.

**Damages recovered in Action of Tort.]**—Under the Bankruptcy Act, 1869, as before it, damages in an action for a personal tort recovered by an undischarged bankrupt do not pass to his trustee. *Vine, Ex parte, Wilson, In re*, 8 Ch. D. 364; 47 L. J., Bk. 116; 38 L. T. 730; 26 W. R. 582. Affirming 38 L. T. 327; 26 W. R. 482—C. A.

Though if the bankrupt had accumulated the money and invested it in property, the trustee might be entitled to the property, yet he cannot intercept the damages or prevent the bankrupt from expending them in the maintenance of himself and his family. *Id.*

**Property acquired by Fraud.]**—A liquidating debtor who had not obtained his order of discharge engaged in trade. He ordered some goods from a wholesale house, who sent the goods to him in the belief that the order had come from a firm with whom they were acquainted, and whose name resembled that under which the debtor traded. The trustee claimed the goods:—Held, that the debtor had acquired no property in the goods, and that the trustee was bound to return them to the persons who had sent them. *Reed, In re, Barnett, Ex parte*, 3 Ch. D. 123; 45 L. J., Bk. 120; 34 L. T. 684; 24 W. R. 904.

**After Suspension of Bankruptcy Proceedings no Discharge.]**—A resolution of the creditors of a bankrupt, under the Bankruptcy Act, 1861, a

110, suspending proceedings in the bankruptcy, does not without the order of the court operate as a discharge of the bankrupt, and in the absence of such order any after-acquired property still vests in the assignee. *Carter, In re, Carter, Ex parte*, 2 Ch. D. 806; 45 L. J., Bk. 145; 35 L. T. 388—C. A.

### Second Liquidation—Sale of Estate to Debtor by Trustee of First—Right of Trustee of Second.]

—An undischarged debtor went into business again, and afterwards filed a second liquidation petition. His creditors, old and new, empowered the trustee to sell the debtor's estate to him for 475*l.*, upon payment of which sum he was to be entitled to his discharge. The money was paid, and was then claimed by the trustee under the first liquidation. The court decided in favour of that claim. The second trustee thereupon claimed the debtor's stock-in-trade and effects:—Held, that the debtor, having paid the 475*l.*, was free from the claims of all his creditors, and was entitled to retain whatever property he had acquired. *Caughey, Ex parte*, 4 Ch. D. 533; 46 L. J., Bk. 18; 36 L. T. 39; 25 W. R. 308.

### f. Surplus.

**Right to Account.**—A certificated bankrupt, who shews the probability of a surplus, is entitled to an account against his assignees. *Malachy, Ex parte*, 1 Mont., D. & D. 353; 4 Jur. 1092.

**Right to Surplus cannot be attached under Garnishee Order.**—The surplus money due to a bankrupt out of his estate after payment of 20*s.* in the pound to the creditors under the bankruptcy, is not a debt due to the bankrupt from the official assignee (though the bankrupt's estate remains vested in him) which can be attached under the garnishee clauses of the Common Law Procedure Act, 1854, by a judgment creditor of the bankrupt. *Hunter v. Greensill*, 8 L. R., C. P. 24; 42 L. J., C. P. 55; 27 L. T. 827; 21 W. R. 263.

**Right of Mortgagee of Surplus.**—A trustee in bankruptcy is not a trustee of the surplus of the estate for the bankrupt. The bankrupt, while undischarged, has no interest in the surplus beyond a mere hope or expectation, and he cannot, by assigning the surplus by way of security, give to his assignee any right to interfere in the administration of the estate, as, for instance, by examining an alleged creditor with respect to his claim. *Sheffield, Ex parte, Austin, In re*, 10 Ch. D. 434; 40 L. T. 16; 27 W. R. 622—C. A.

### g. Setting aside Irregular Proceedings.

The interest which a bankrupt has in increasing the divisible fund under the fiat is sufficient to enable him to set aside an execution levied on his goods against good faith. *Pinches v. Harvey*, 1 G. & D. 236; 1 Q. B. 868; 6 Jur. 389.

A defendant who has become bankrupt and obtained his certificate after trial and verdict against him, has a right to set it aside for a want of a sufficient notice of trial, although his estate is insolvent, and his assignees are no parties to

the application. *Shepherd v. Thompson*, 9 M. & W. 110; 1 D., N. S. 345.

Where an audit<sup>a</sup> querel<sup>a</sup> had been irregularly issued, and the plaintiff in the action subsequently became bankrupt, he was permitted to move to set aside the writ and proceedings, without shewing any assent on the part of the official assignee. *Dearie v. Ker*, 4 Ex. 82; 7 D. & L. 231; 18 L. J., Ex. 448.

### Trustee compromising Claims on Property of Bankrupt.]

—A mortgagee of property of a bankrupt, who had foreclosed before the bankruptcy, sent in a claim three years after the commencement of the bankruptcy to prove for 21,000*l.* as the balance of his debt after giving credit for the value of his security, treating the foreclosure as re-opened. The trustee, believing that the claimant's right to re-open the foreclosure could only be decided by a very expensive litigation, effected a compromise with him with the assent of the creditors, by the terms of which compromise his claim was to be admitted for 20,000*l.*, all the other creditors were first to receive 18*s.* in the pound, then the claimant was to receive 18*s.* in the pound, and afterwards he and the other creditors were to share *pari passu* in the remaining assets. But for this claim the estate would have been sufficient to pay all the other creditors in full and to leave a large surplus for the bankrupt. The bankrupt disputed the validity of the claim altogether, and applied to the Court of Bankruptcy for an order for the examination of the claimant in respect of his claim:—Held, that the bankrupt was entitled to the order asked for, as the compromise was one which was only detrimental to the bankrupt, and was not such a one as the trustee could effect under the Bankruptcy Act, 1869, s. 27, sub-s. 3. *Austin, Ex parte*, 4 Ch. D. 13; 46 L. J., Bk. 1; 35 L. T. 529; 25 W. R. 51—C. A.

### h. Appealing against Injunction.

A defendant, who had become bankrupt since the trial of the action, appealed against an injunction restraining him from selling certain articles with labels or wrappers in imitation of those used by the plaintiff, and from using a certain name, either alone or in combination with his own or any other name, in the manufacture of these articles in such manner as to lead to the belief that the articles made by the defendant had been manufactured by the plaintiff. The trustee in the bankruptcy did not join in the appeal:—Held, that, notwithstanding the bankruptcy, the defendant was entitled to appeal from the injunction, inasmuch as it imposed a personal liability upon him. *Dence v. Mason*, 41 L. T. 573—C. A.

### i. Taking Part in Winding-up Proceedings.

#### Application for Proceedings to be taken against Director—Locus standi of Contributory who is an Undischarged Bankrupt.]

—An undischarged bankrupt, although on the list of contributories, is a mere stranger to the winding-up proceedings, and has no locus standi to apply therein that proceedings may be ordered to be taken against a director for money alleged to be improperly received by him. *Cape Breton Company, In re*, 45 L. T. 395—C. A.

## j. Costs.

**Immunity from Payment of Costs.]**—No personal order can be made against a bankrupt for payment of costs of an unsuccessful appeal. *Jacobs, Ex parte, Jacobs, In re*, 44 L. J., Bk. 34.

**Trustee—Breach of Trust.]**—A defaulting trustee is entitled to his costs of a suit for the execution of the trusts incurred after his bankruptcy. *Boucyer v. Griffin*, 9 L. R., Eq. 340; 39 L. J., Ch. 159.

Where the trustee of a settlement became bankrupt shortly after the commencement of an action for the execution of the trusts, and an order was made for payment by him into court of a sum of money certified to be due from him to the estate, he was held entitled to his costs of the action, though he was not to receive them until he had made good his default. *Lewis v. Trask*, 21 Ch. D. 862.

In an administration action one defendant was an executor. He was a defaulting trustee under a settlement. After the action was commenced he was adjudicated bankrupt, and a trustee in bankruptcy was appointed and made a defendant:—Held, that the defaulting trustee was entitled to be paid his costs incurred after his bankruptcy. *Clare v. Clare, Clare, In re*, 21 Ch. D. 865; 51 L. J., Ch. 553; 46 L. T. 851; 30 W. R. 789.

Where, after the commencement of an administration action against a defaulting executor or trustee, he becomes bankrupt, and, under s. 49 of the Bankruptcy Act, 1869, his debt remains undischarged by the bankruptcy, he is not entitled to be paid any of his costs of the action, whether incurred before or after the bankruptcy, until he has made good his default. But where the debt of the defaulting executor or trustee has been discharged by his bankruptcy—as where the bankruptcy has taken place prior to the Bankruptcy Act, 1869; or where, after the bankruptcy, his debt remaining undischarged, he renders services in the action in his character of executor or trustee, he is entitled to be paid his costs incurred subsequently to his bankruptcy, though his prior costs must be set off against his debt. *Lewis v. Trask* (21 Ch. D. 862) followed. *Clare v. Clare* (21 Ch. D. 865) not followed. *Basham, In re, Hannay v. Basham*, 23 Ch. D. 195; 52 L. J., Ch. 408; 48 L. T. 476; 31 W. R. 743.

Two executors, defendants in an administration action, were represented by the same solicitor, to whom they had given a joint retainer, and one of them was a debtor to the estate and became bankrupt after the passing of the Bankruptcy Act, 1869:—Held, that the solvent executor was entitled to be paid his separate costs out of the estate, and that the separate costs of the insolvent executor must be set off against the debt due from him to the estate; but that whether the whole or what part of the common costs of both executors was to be paid out of the estate was a question for the taxing master to determine according to the settled practice of the taxing-office. *McEwan v. Crombie, Porter v. Grant*, 49 L. T. 499; 32 W. R. 115.

By the chief clerk's certificate, a sum was found due from the estate to the two executors jointly:—Held, that an inquiry must be directed to ascertain whether that sum was, as between

the executors, payable wholly to one, or how much was payable to one, and how much to the other; and that the part (if any) found due to the insolvent executor must be set off against the debt due from him to the estate. *Id.*

## k. To Demand Delivery of Bill of Costs.

**Rights.]**—A bankrupt is not during the bankruptcy a party interested in the estate in the hands of the trustee in bankruptcy so as to entitle him after his discharge, and although his creditors have been paid in full, to demand delivery and taxation of a bill of costs paid by the trustee out of the estate, under 6 & 7 Vict. c. 73 (The Solicitors Act, 1843), ss. 39, 40. *Leadbitter and Harvey, In re*, 39 L. T. 12. Affirmed, 10 Ch. D. 338; 48 L. J., Ch. 242; 39 L. T. 286; 27 W. R. 267—C. A.

## 8. TRADING BY BANKRUPT.

**Gives Title good against all except Assignees.]**

—If an uncertificated bankrupt carries on trade, and sells a vessel of which he is the ostensible owner, to A., A. has a good title against all persons but the assignees. *Laroche v. Wakeman, Peake*, 140.

**Knowledge of Assignees.]**—A., an uncertificated bankrupt, having been employed as manager of an hotel, agreed to purchase the stock and goodwill from B., who knew of the bankruptcy, and who agreed to lend A. money to purchase the stock and other trade effects, but on the understanding that the effects were to be assigned to B. as security for the debt. Accordingly B. lent to A. the money, taking A.'s bond for the amount, and the same day A. purchased the effects, and assigned the same as a security to B. The official assignee knew that A. was carrying on business on his own account, but did not know of the transaction:—Held, that the loan, purchase and mortgage were one transaction, and nothing passed to the official assignee except what was subject to A.'s lien. *Kerakoose v. Brooks*, 3 L. T. 712—P. C.

**Carrying on former Business.—Right to Proceeds.]**—A furniture broker, being an uncertificated bankrupt, was employed to remove goods, in the course of which business he employed several men and vans, supplied packing-cases, repaired furniture, and provided materials for this purpose, and other articles to a trifling amount:—Held, that the debt which thereby accrued was not in respect of personal labour, but was claimable by the assignees. *Crofton v. Poole*, 1 B. & A. 568.

**Rights of Creditors without Notice.]**—If a trustee allows a bankrupt to trade for the benefit of the creditors, the rights of an execution creditor in respect of a debt contracted after and without notice of the bankruptcy will be preferred to the rights of the trustee. *Engleback v. Nixon*, 10 L. R., C. P. 645; 44 L. J., C. P. 396; 33 L. T. 831.

Although such rights are purely equitable, a court of law will recognise them upon an interpleader issue. *Id.*

An advertising agent became bankrupt in 1870, and not having yet obtained his discharge, was allowed to carry on his trade for the benefit of his creditors, and in the course of such trade

contracted a debt, in respect of which the defendant, who had no notice of the bankruptcy when he gave credit, obtained judgment, and issued execution against him, in pursuance of which the sheriff levied upon his furniture. Possession of the house in which the furniture was had been yielded up to an agent of the trustee of the bankrupt a few days before the sheriff entered, but the bankrupt, who had bought the furniture with the proceeds of the permitted trading, had not disclosed his ownership of it to the trustee until about a fortnight before that time:—Held, on an interpleader issue that the rights of the execution creditor ought to be preferred to the right of the trustee. *Ib.*

**Without Knowledge of Trustee.]**—In liquidation proceedings there is no such duty of looking after an undischarged debtor imposed upon the creditors or upon the trustee as will make them guilty of laches if the debtor trades again without interference on their part, unless they are aware of what he is doing; and, in the absence of positive evidence that they had such knowledge, they will be held entitled to the property acquired by the debtor in the course of his subsequent trading in priority to new creditors who have come in and proved under a second liquidation petition. *Ford, Ex parte, Caughey, In re*, 1 Ch. D. 521; 45 L. J., Bk. 96; 34 L. T. 634; 24 W. R. 590—C. A. Affirming 45 L. J., Bk. 19; 33 L. T. 482.

An undischarged liquidating debtor, being a master painter, took a job in the way of his trade, upon which, besides his own labour, he employed three workmen, and supplied the necessary materials. He received for the job 49l., of which he stated in evidence that the cost of the materials was 10l., and of the hired labour 15l.:—Held, that the debtor was carrying on his business, and that the entire proceeds belonged to his trustee. *Dowling, In re, Banks, Ex parte*, 4 Ch. D. 689; 46 L. J., Bk. 74; 36 L. T. 117; 25 W. R. 515.

**Secured Creditor giving further Credit on Representation by Trustee—Right to apply Proceeds of Security.]**—An undischarged debtor, with the knowledge and assent of his creditors, and of the trustee under the liquidation, continued trading, and dealt with his property as his own. A fully-secured creditor, who had not proved under the liquidation, relying on the statement of the trustee that the debtor was a free man, continued to deal with and give him credit. The security was subsequently realized, and a surplus remained in the hands of the creditor, which the trustee under the liquidation claimed:—Held, that such creditor was entitled, as against the trustee, to deduct from such surplus the debts due to him from the debtor in respect of the subsequent trading. *Dysart, In re, Bolland, Ex parte*, 9 Ch. D. 312; 47 L. J., Bk. 74; 38 L. T. 693; 26 W. R. 807—C. A.

**Goods supplied on Bankrupt's Guarantee, but in Name of Son—Right of Assignees.]**—An uncertificated bankrupt hired a shop; goods were supplied in the name of his son, but principally upon the father's guarantee:—Held, that his assignees were liable to an action of trespass at the suit of the son, for seizing them as the goods of the bankrupt. *Davis v. Living, Holt*, 275.

## 9. REMOVAL OF BANKRUPT TRUSTEE.

A trustee who becomes bankrupt ought to be removed from his trusteeship whenever the nature of the trust is such that he has to receive or deal with trust funds so that he can misappropriate them. *Barker, In re*, 1 Ch. D. 43; 45 L. J., Ch. 52; 24 W. R. 264.

The court having power under the Bankruptcy Act, 1869, s. 117, by reference to the Trustee Act, 1850, s. 32, to appoint a new trustee in substitution for a bankrupt, is the Court of Chancery. *Coombes v. Brookes*, 12 L. R., Eq. 61; 41 L. J., Ch. 114; 25 L. T. 198; 19 W. R. 1002.

## 10. BANKRUPT HOLDING POWER OF ATTORNEY.

Bankruptcy determines a power of attorney. *Markwick v. Hardingham*, 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361—C. A.

## 11. ACTIONS AGAINST BANKRUPT.

**Debt incurred by Means of Fraud—Pending Liquidation Proceedings.]**—In 1868 G. fraudulently obtained money from R. for investment, and appropriated it to his own use. In 1870 he gave R. promissory notes for the amount, upon which he paid interest from 1870 till 1879. In 1879 he filed a liquidation petition, and a trustee was appointed. Pending the liquidation proceedings, R. brought an action to recover the money:—Held, that the acceptance of the promissory notes and the interest had not changed the original character of the debt or substituted for it a simple contract debt. *Ross v. Gutteridge*, 52 L. J., Ch. 280; 48 L. T. 117.

A creditor is entitled to take proceedings and recover judgment against a liquidating debtor for a debt incurred by means of fraud while the liquidation proceedings are pending, although the judgment cannot be enforced until the debtor obtains his discharge. *Ib.*

## 12. PROCEEDINGS AGAINST ESTATE OF DECEASED BANKRUPT.

Sect. 54 of the Bankruptcy Act, 1869, does not enable the court to sanction proceedings under it against the estate of a deceased undischarged bankrupt. *Kelly, Ex parte, Simmons, In re*, 7 Ch. D. 161; 47 L. J., Bk. 30; 37 L. T. 584; 26 W. R. 120—C. A.

In 1873 a bankruptcy, under which no assets had been realized, was closed, but the bankrupt did not obtain an order of discharge. In April, 1877, the bankrupt died, leaving assets of which he had disposed by will. The petitioning creditor, then, with notice to the executors of the will, applied to the Bankruptcy Court for leave to enforce his debt against the estate of the bankrupt as a judgment debt, or for liberty to institute proceedings in the Chancery Division for the administration of the bankrupt's estate:—Held, that s. 54 did not enable the court to sanction proceedings against the estate of a deceased bankrupt, and that, as the creditor could commence proceedings for administration without the leave of the court, such leave was unnecessary. *Ib.*



### 13. PROCEDURE IN ACTIONS TO WHICH BANKRUPT IS PARTY.

**Bankruptcy of Sole Plaintiff—One Defendant appointed Trustee.]**—When a sole plaintiff has become bankrupt, and a defendant is appointed his trustee, that defendant may obtain an order dismissing the bill with costs against him, he undertaking not to take any proceedings for enforcing the order, except by proving for the amount of his costs in the bankruptcy. *Abbottson v. Gregg*, 23 L. T. 796; 19 W. R. 340.

**Bankruptcy of Defendant after Notice of Trial.]**—A defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against his trustee, and served on him. The trustee did not enter an appearance. Notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial:—Held, that it was not necessary for the plaintiff to file the pleadings or a notice of motion for judgment as against the trustee under r. 6 of Ord. XIX. of the Rules of S. C. *Chorlton v. Dickie*, 13 Ch. D. 160; 49 L. J., Ch. 40; 41 L. T. 467; 28 W. R. 228.

**Two Trustees—Continuing Action by One.]**—When a sole plaintiff becomes bankrupt he cannot continue the action. If there are two trustees in bankruptcy, and one refuses to go on, the other may have an order as of course to continue the action and make his co-trustee a defendant. *Jackson v. North Eastern Railway Company*, 5 Ch. D. 844; 46 L. J., Ch. 723; 36 L. T. 779; 25 W. R. 518—C. A.

**Reviving Suits by Assignee—Liability for Costs already Incurred.]**—A plaintiff became bankrupt, leaving costs in the suit, which he had been ordered to pay prior to the bankruptcy, unpaid; his assignee revived the suit. The court, upon motion by defendants, stayed all further proceedings in the suit until payment of the costs by the assignee. *Cook v. Hathway*, 39 L. J., Ch. 99.

**Filing Bills in Equity.]**—An uncertificated bankrupt is incapable of suing in the Court of Chancery, though the bill charges fraud against all the defendants, including amongst them the creditors' assignee. Observations on demurring to a bill by an uncertificated bankrupt, charging personal fraud. Bill dismissed, but, inasmuch as the charges of fraud (which had been answered) were held to have been sustained, without costs. *Motion v. Mojen*, 14 L. R., Eq. 202; 41 L. J., Ch. 596; 20 W. R. 861.

A bankrupt cannot file a bill without previously applying to the Court of Bankruptcy on the subject. *Payne v. Dicker*, 6 L. R., Ch. 578; 24 L. T. 898; 19 W. R. 987. Varying 24 L. T. 492.

When a demurrer to a bill by a bankrupt was allowed, but without costs and with liberty to amend:—Held, that, under the circumstances, costs ought to have been given, and liberty to amend refused. *Ib.*

**Conduct of Proceedings—Receiver—Bankrupt Administrator.]**—An action was commenced in the court of one of the vice-chancellors for the administration of the estate of a testator, against the administrator with the will annexed. The

administrator, being interested in that capacity in the estate of another testator, commenced an action for the administration of his estate in the court of a different vice-chancellor, and then became bankrupt. The plaintiff in the first suit moved in that suit that a receiver of the estate might be appointed, and that the plaintiff might be permitted to prosecute the second action in the name of the administrator:—Held, that the plaintiff was entitled to the order asked for, and that it was properly made in the court to which the first action was attached. In such a case it is not the modern practice to permit the receiver to carry on an action in the name of a bankrupt executor or administrator. *Hopkins, In re, Dowd v. Hawtin*, 19 Ch. D. 61; 30 W. R. 601—C. A.

**Party to Suits.]**—A bankrupt is not a proper party to a suit instituted by the trustee under his bankruptcy to set aside a conveyance executed by the bankrupt with intent to delay or defeat his creditors. *Weise v. Wardle*, 19 L. R., Eq. 171; 23 W. R. 208.

**Plea of Bankruptcy.]**—A plea in the general form, according to the Bankruptcy Act, 1861, s. 161, that the defendant became bankrupt according to the statute in force concerning bankrupts, and that the cause of action accrued before the defendant so became bankrupt, is not proved by shewing that he was adjudicated bankrupt before and received his order of discharge after action brought. *Jones v. Hill*, 5 L. R., Q. B. 230; 39 L. J., Q. B. 74; 21 L. T. 784; 18 W. R. 453.

### 14. LIABILITY ON NEW PROMISE TO PAY DEBTS.

See XIV. ORDER OF DISCHARGE AND ITS  
EFFECT.

## XXII. OFFENCES BY BANKRUPT.

### 1. NOT SURRENDERING.

**Partners—No actual Knowledge of Summons to Surrender.]**—G., one of two partners who had been jointly adjudged bankrupts, was indicted, under 12 & 13 Vict. c. 106, s. 251, for not surrendering. There was no evidence that G. had actual knowledge of the adjudication and summons to surrender:—Held, that assuming the notice to surrender had been duly served, if he did not surrender pursuant to it, he was guilty of the offence of not surrendering; and even if the words with intent to defraud his creditors, in s. 251, override the whole section, that the absconding with the intent proved was sufficient. *Reg. v. Gordon*, Dears. C. C. 586; 25 L. J., M. C. 19; 2 Jur., N. S. 67.

**Separate Notices.]**—It appeared that only one duplicate adjudication, and only one duplicate notice to surrender, were served:—Held, that a separate notice to surrender ought to have been left for each of the bankrupts at their last known place of business. *Ib.*

**Days named for Surrender.]**—The summons or notice required the bankrupts to surrender on the 7th July and the 19th August, the last-named day being the day limited for their surrender:—Held, that service of the notice on the 27th July was sufficient. *Ib.*



**Intent presumed.]**—On an indictment against a bankrupt, under 12 & 13 Vict. c. 106, s. 251, for not surrendering, he having left the country before adjudication, it is not necessary to prove that he intended to defraud his creditors if he went away wilfully and to evade the jurisdiction in bankruptcy, and would deprive his creditors of their remedy. *Reg. v. Hughes*, 1 F. & F. 726.

**But must be alleged in Indictment.]**—An indictment against a bankrupt on 6 Geo. 4, c. 16, s. 112, for not surrendering on the 42nd day, was bad, if it did not allege, that he had an intent to defraud his creditors. *Reg. v. Hill*, 1 C. & K. 168.

**Summons to Surrender at "District Court of Bankruptcy."]**—A fiat issued against J. D., directed to a district court of bankruptcy, where there were two commissioners, Mr. J. and Mr. S., to whom the fiats were allotted in rotation. This fiat was allotted to Mr. J. The court was all in one building, and the name of the commissioner to whom each fiat was allotted was posted up at the court. The summons granted by Mr. J. for the surrender of J. D. called on him to surrender "at the district court of bankruptcy." It was proved that he did not surrender to Mr. J., either at the district court or anywhere else:—Held, sufficient proof of non-surrender to Mr. J., either at the district court or anywhere else. *Reg. v. Dealtry*, 2 C. & K. 521; 1 Den. C. C. 287.

Held, also, that the summons was good, although it did not expressly inform the bankrupt that the fiat had been referred to the district court of bankruptcy, and did not contain an allegation that he had been adjudged a bankrupt at that court. *Id.*

## 2. FRAUDULENTLY OBTAINING GOODS ON CREDIT.

**All preliminary Matters must be Proved.]**—Upon an indictment under 12 & 13 Vict. c. 106, s. 253, it is not enough to prove the petition to, and adjudication of, the Court of Bankruptcy, but the preliminary matters, viz., the petitioning creditor's debt, the trading, and act of bankruptcy must also be proved. *Reg. v. Lands, Dears.* C. C. 567; 25 L. J., M. C. 14; 1 Jur., N. S. 1176.

**Petition Filed under 12 & 13 Vict. c. 106, s. 211.]**—An indictment for obtaining goods on credit within three months next preceding the date of the fiat and the filing of a petition for adjudication under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, could not be sustained upon evidence that the petition filed was one for private arrangement under 12 & 13 Vict. c. 106, s. 211, although the party was afterwards adjudicated a bankrupt, and the proceedings adjourned into open court. The misdemeanor contemplated by 12 & 13 Vict. c. 106, s. 253, arose upon the filing of a petition under s. 89. *Reg. v. Powell*, 6 Cox, C. C. 134.

**Goods on Approval.]**—Where a person obtained goods on approval, and pawned them, and afterwards obtained credit for them:—Held, that 24 & 25 Vict. c. 134, s. 221, did not apply. *Reg. v. Lyons*, 9 Cox, C. C. 299.

**Under 32 & 33 Vict. c. 62.]**—An indictment under the Debtors Act (32 & 33 Vict. c. 62), s. 11, sub-s. 13, which merely charges that a bankruptcy petition was presented against the defendant to the county court, upon which he was adjudged bankrupt, and that he, within four months before the presentation of the petition, did by certain false representations obtain from B. on credit certain property, and has not paid for the same, is sufficient in arrest of judgment. *Reg. v. Watkinson*, 26 L. T. 853.

**No Evidence of false Representations.]**—A trader, being in insolvent circumstances, purchased goods on credit, and shipped them to Australia, and obtained advances by pledging the bills of lading. Within four months afterwards he became bankrupt. In his examination he stated that he could give no account of what had become of the purchase-money:—Held, that in the absence of any evidence of his having obtained the goods on false representations, his conduct did not constitute an offence under the 14th or 15th sub-sections of s. 11 of the Debtors Act, 1869; and an application by the trustee for an order to prosecute him was refused. *Brett, Ex parte, Hodgson, In re*, 1 Ch. D. 151; 13 Cox, C. C. 128; 45 L. J., Bk. 17; 33 L. T. 711; 24 W. R. 101.

Held, also, that he had not committed an offence under the 13th sub-section of the same section. *Id.*

**Representation must be False to Knowledge of Debtor.]**—To make the false representation fraudulent under 32 & 33 Vict. c. 62, s. 11, sub-s. 13 and 14, it must be made knowingly by the debtor. *Reg. v. Cherry*, 12 Cox, C. C. 32.

Where a debtor pretends to be dealing in the ordinary way of business, but is not in reality doing so, the onus is on him to satisfy the jury that he was acting honestly, and had no intention to defraud. *Id.*

## 3. CONCEALING, DISPOSING OF, OR PAWNING PROPERTY.

**Concealing—Offence when Complete.]**—The offence by a bankrupt in not discovering his property on examination is not complete until the examination is ended. *Nash v. Reg. (in error)*, 4 B. & S. 935; 33 L. J., M. C. 94; 10 Jur., N. S. 819; 9 L. T. 716; 9 Cox, C. C. 424.

**Indictment—Declaration of Insolvency wrongly alleged.]**—In an indictment against a bankrupt for feloniously removing, concealing, and embezzling part of his personal estate, it was alleged that he committed an act of bankruptcy by being unable to meet his engagements, and by filing his petition to the Court of Bankruptcy:—Held, that as it was not alleged that he had filed a declaration that he was unable to meet his engagements, as required by 12 & 13 Vict. c. 106, s. 70, there was no sufficient allegation of an act of bankruptcy, and the indictment could not be supported. *Reg. v. Massey*, 1 L. & C. C. 206; 9 Cox, C. C. 234; 32 L. J., M. C. 21; 8 Jur., N. S. 1183; 7 L. T. 391; 11 W. R. 42.

**Jury to judge of Intent.]**—On an indictment against a bankrupt for fraudulently concealing and disposing of goods, and fraudulently omitting transactions and inserting fictitious

transactions in his schedule, the jury is to judge as to the intent, in such instances, from the general character of the transactions, as disclosed in the whole of the evidence, and to consider whether it indicates a scheme and design on the part of the debtor to obtain the benefit of the bankruptcy law, and relieve himself from his liabilities without making an honest disclosure and surrender of his property for the benefit of his creditors. *Reg. v. Manser*, 4 F. & F. 45.

**Goods obtained in Paris and pawned in London—Question for Jury.]**—A bankrupt was indicted for conspiring with B., and also with pawning and disposing of goods with intent to cheat and defraud his creditors; B. had a place of business in Paris, and goods were obtained there on credit and disposed of in London by pawning:—Held, that the questions for the jury were, whether the premises in Paris were really used as an independent place of business for buying and selling, or only as ancillary to the place of business in London, and merely for the purpose of getting hold of goods to be disposed of in London, and whether B. and the bankrupt acted together for the purpose of obtaining and disposing of such goods, with intent to cheat and defraud the creditors; and the jury finding on these questions against the bankrupt, he was guilty of pawning and disposing of goods; but not for conspiracy to obtain the goods. *Reg. v. Raudnitz*, 4 F. & F. 165.

**Partners—Act of Bankruptcy—What Necessary to Prove.]**—A bankrupt was indicted for obtaining goods within three months of filing his petition for adjudication under the false colour and pretence of carrying on business in the ordinary course of trade, and for pawning and disposing of such goods with intent to defraud. The facts were that he carried on business at Bread-street, in the city of London, in partnership with B., and the firm had a house in Paris, where B. principally was. B. was in the habit of buying large quantities of goods in Paris and transmitting them to London, where they were received in Bread-street, and immediately afterwards pawned or disposed of considerably below the wholesale invoice price. Amongst other creditors was D., who was a Frenchman, domiciled in Paris, and who afterwards, upon a declaration of insolvency filed by the bankrupt, became the petitioning creditor. Upon his petition, he and B. were jointly adjudicated bankrupts:—Held, that as the adjudication was not upon the bankrupt's own petition, it was necessary to prove the trading, petitioning creditor's debt, and act of bankruptcy. *Id.*

Held, also, that as the adjudication was joint, it was necessary to prove a joint trading, a joint petitioning creditor's debt, and an act of bankruptcy against each. *Id.*

The act of bankruptcy suggested against B. was that, having come over to this country two days before the adjudication, and having taken away the books, he had absconded, with intent to defeat his creditors:—Held (after objection that B. had not his place of business here, but in Paris), that it was a question for the jury whether he had left London *bonâ fide*, or for the purpose of defeating his creditors. *Id.*

**Goods obtained out of Jurisdiction.]**—Held, also, that as the goods had all been obtained in

Paris, they were obtained out of the jurisdiction, and the bankrupt, although acting in concert with B. in Paris, was not answerable in this country. *Id.*

**Bill of Sale—Evidence of Bankruptcy—Disposition of Property.]**—A grocer obtained goods of his trade upon credit. Soon after receiving them and before they were paid for, he executed a bill of sale in favour of his sister, who lived with him. This bill of sale, which was given in consideration of a debt owing from him to his sister, passed away all his stock-in-trade and effects whatsoever, including the unpaid-for goods. Having been made bankrupt, he was indicted for misdemeanor under the Debtors Act, 1869, s. 11:—Held, that the production of the adjudication under the seal of the court was sufficient evidence of the bankruptcy; that disposing of the goods by a bill of sale was not disposing of them in the "ordinary way of trade;" and therefore that as property which the bankrupt had obtained on credit, and had not paid for, had passed by the bill of sale, he came within the section, unless he had no intent to defraud; but that assigning the whole of his property to one creditor, reserving nothing for the others, shewed an intent to defraud. *Reg. v. Thomas*, 22 L. T. 138.

**Disposing of Stock assigned in Trust.]**—In December, 1872, a debtor made a deed of assignment of farming stock, &c. to trustees upon certain trusts, and the debtor continued to carry on the farm as the bailiff of the trustees in pursuance of the trusts of the deed. On the 14th and 16th of October, 1873, he removed certain stock and sold it, and handed the proceeds to third parties in fraud of the trustees and the objects of the deed. On the 17th of October he petitioned the county court in bankruptcy for liquidation of his affairs by arrangement, and on the 7th of January, 1871, was indicted and found guilty of having within four months before the commencement of the liquidation fraudulently removed a part of his property of the value of 10*l.* and upwards, contrary to the Debtors Act, 1869, s. 11, sub-s. 5:—Held, that at the time of the removal the farming stock, &c. was not his property, and therefore the conviction must be quashed. *Reg. v. Creese*, 2 L. R., C. C. 105; 43 L. J., M. C. 51; 29 L. T. 897; 22 W. R. 375; 12 Cox, C. C. 539.

**Indictment under 6 Geo. 4, c. 16.]**—An indictment, after stating that a commission of bankruptcy issued against A., by virtue of which the commissioners adjudged him to be a bankrupt, charged, that he and other defendants conspired to conceal a part of his personal estate:—Held, that ever since the 6 Geo. 4, c. 16, s. 112, such an indictment was defective, for not shewing that the party actually became bankrupt. *Re v. Jones*, 4 B. & Ad. 345; 1 N. & M. 78.

**Under 5 & 6 Vict. c. 122.]**—An indictment under 5 & 6 Vict. c. 122, s. 32, that a bankrupt was possessed of real estate, and that upon his examination, being sworn, he feloniously did not then and there discover when he disposed of, assigned and transferred the said real estate, was bad, because it did not appear by the indictment that he ever had disposed of the property. *Reg.*

*v. Harris*, 1 Den. C. C. 461; T. & M. 177; 19 L. J., M. C. 11; 13 Jur. 990.

**Disclosure required by Debtors Act, 1869—To what Property it relates.]**—By the Debtors Act, 1869, s. 11, sub-s. 1, it is enacted that a bankrupt shall be guilty of a misdemeanor "if he does not to the best of his knowledge and belief fully and truly discover to the trustee of his estate all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, &c."—Held, that such disclosure was not restricted to property in possession of the bankrupt at the commencement of his bankruptcy. *Reg. v. Mitchell*, 50 L. J., M. C. 76; 43 L. T. 572; 45 J. P. 239; 14 Cox, C. C. 490.

**Indictment—Concealment—Want of Certainty.]**

—An indictment under 24 & 25 Vict. c. 134, s. 221, charged that A. was duly declared and adjudged bankrupt by the Court of Bankruptcy; that upon his examination in the court, with intent to defraud and defeat the rights of his creditors, he did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and goods, and did not, as to part of his property (not being part really and bona fide before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expenses of his family) fully and truly discover, to the best of his belief, how and to whom, and for what consideration, and when he had disposed of, assigned or transferred such part. A. having been found guilty:—Held, first, that want of certainty in the statement of the property alleged not to have been discovered by A. was cured after verdict, by 7 Geo. 4, c. 64, s. 21, the indictment sufficiently following the words of the statute. *Nash v. Reg. (in error)*, 4 B. & S. 935; 33 L. J., M. C. 94; 10 Jur., N. S. 819; 9 L. T. 716; 9 Cox, C. C. 424.

—**In Contemplation of Bankruptcy.]**—An indictment alleged that the defendant and others unlawfully and wickedly did conspire and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against the defendant, fraudulently to remove part of his property to the value of 10*l.*, that is to say (enumerating the articles), the defendant then being a trader and liable to become a bankrupt. To this there was a plea of not guilty, and a verdict of guilty and judgment. Error was brought on the ground that there was no allegation that the defendant was ever adjudged bankrupt:—Held, that the fact of his having been adjudged bankrupt was not necessary to complete the offence of conspiracy; it was complete if the persons charged had agreed to remove the goods in contemplation of an adjudication being obtained; and that this, though not expressly alleged, must be taken after verdict to have been proved before the jury; and that the defect was therefore cured by verdict. *Heymann v. Reg. (in error)*, 8 L. R., Q. B. 102; 28 L. T. 162; 21 W. R. 357; 12 Cox, C. C. 383.

An indictment for fraudulently pledging prop-

erty within four months next before the presentation of a bankruptcy petition did not allege that the debtor was adjudicated bankrupt thereon. The debtor being convicted, the indictment was held bad after verdict. *Reg. v. Oliver*, 13 Cox, C. C. 588; 36 L. T. 114; 25 W. R. 323.

—**Averment of Liquidation.]**—An indictment charged that the defendant being a trader "did within four months next before the commencement of the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretence, &c., with intent to defraud." And in another count in similar terms the defendant was charged with unlawfully disposing of the goods otherwise than in the ordinary way of his trade. Both counts were framed under 32 & 33 Vict. c. 62, s. 11, sub-s. 14, 15:—Held, that the counts were good after verdict, and sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within s. 11. *Reg. v. Knight*, 37 L. T. 801; 14 Cox, C. C. 31.

**Removal of Property with Intent to Defraud Creditors—Removing Property to Defeat Execution.]**—A., B., and C. were convicted, under s. 13, sub-s. 3, of 32 & 33 Vict. c. 62, of having, with intent to defraud the creditors of A., removed the property of A. since the date of an unsatisfied judgment against A. The evidence was, that on the next night after a judgment, which was still unsatisfied, had been obtained against A., the property of A. was removed from his house by A., B., and C., in order to defeat the creditor who had obtained the judgment, and to prevent him from levying thereon to satisfy the judgment. There was no evidence that A. had any other creditors, or that there was any intention to defeat the claims of any creditors of A. other than this particular creditor. No petition in bankruptcy had been presented against A., nor had any proceedings been taken to have his affairs liquidated by arrangement:—Held, that the absence of proceedings in bankruptcy or for liquidation was not material; that the provisions in question of the above statute applied to all persons; but that the conviction must nevertheless be quashed, inasmuch as an intent to defraud creditors was charged but was not proved. *Reg. v. Rowlands*, 8 Q. B. D. 530; 51 L. J., M. C. 51; 46 L. T. 286; 30 W. R. 444; 46 J. P. 437; 15 Cox, C. C. 31.

**Married Woman a Bankrupt—Property of Husband.]**—A married woman having been adjudicated a bankrupt upon her own petition, in which she described herself as a widow, was afterwards convicted under 24 & 25 Vict. c. 134, s. 221, of having embezzled her property:—Held, that the conviction was wrong, as the property was her husband's. *Reg. v. Robinson*, 1 L. R., C. C. 80; 36 L. J., M. C. 78; 16 L. T. 605; 15 W. R. 966; 10 Cox, C. C. 467.

**Conspiring to Defraud.]**—A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud the creditors, is indictable at common law; and the clandestine removal of the goods, prior to an absconding, is evidence of such a conspiracy. *Reg. v. Hall*, 1 F. & F. 33.

## 4. TAMPERING WITH BOOKS.

**Making False Entries in Books.**—A bankrupt was convicted, upon an indictment under 12 & 13 Vict. c. 106, s. 252, of having made a false and fraudulent entry in a book of account. The jury found that the entry was made by him with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in the due course of bankruptcy, and to save him from having to account for the deficiency appearing in the genuine account, but that this was not done to defraud the creditors of any money or property, or to conceal any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation or preference by him:—Held, that the conviction was wrong, as the bankrupt was not found to have had any intent to defraud his creditors within the meaning of the statute. *Reg. v. Ingham*, Bell, C. C. 181; 8 Cox, C. C. 240; 29 L. J., M. C. 18; 6 Jur., N. S. 55.

**Indictment—Mutilating Books.**—In an indictment against a bankrupt under 12 & 13 Vict. c. 106, s. 252, for mutilating his books, it was alleged, that before and at the time of the offence, to wit, on the 23rd November, 1855, he was a trader liable to become bankrupt, and that he, for more than six months next immediately preceding the time of filing the petition for adjudication, did reside and carry on business, &c., within the jurisdiction, &c.: and that whilst he so resided, to wit, on the 23rd November, 1855, he filed with the registrar, a declaration that he was unable to meet his engagements; and that whilst he so resided, to wit, on the 23rd November, 1855, he did present his petition for adjudication:—Held, after verdict, that the averments were sufficient to shew that the requirements of 17 & 18 Vict. c. 119, s. 16, as to filing the declaration of insolvency, had been complied with. *Reg. v. Scott*, Dears. & B. C. C. 47; 25 L. J., M. C. 128; 2 Jur., N. S. 1096.

—“Unlawfully.”—An indictment averred that the bankrupt caused certain of his books to be altered, with intent to defraud, but it did not aver that it had been done “unlawfully.”—Held, that it was not necessary to make such averment, and that the indictment would be sufficient if the intent to defraud was proved. *Reg. v. Featherbarrow*, 10 Cox, C. C. 637; 17 L. T. 32.

## 5. PROSECUTION OF BANKRUPT.

**Order to Prosecute made ex parte—Omission to State specific Offences.**—An order of a commissioner, made on an ex parte application of petitioning creditors, before the appointment of assignees, stated that there were reasonable grounds for supposing that the bankrupt had been guilty of some one or more of the offences set forth in 24 & 25 Vict. c. 134, s. 221, and directed that he should be criminally prosecuted, and that the petitioning creditors should be the prosecutors:—Held, that the order was not invalid by reason of the bankrupt not having had an opportunity of explanation, or that the order omitted to state the specific offences with which he was charged. *Levi, In re*, 34 L. J., Bk. 23; 11 Jur., N. S. 97; 11 L. T. 527; 13 W. R. 209.

**Mere Suspicion insufficient.**—Prosecutions are not to be ordered in cases of mere suspicion or conjecture; the court should be satisfied of there being evidence sufficient to establish the guilt of the parties. *Still, Ex parte*, 32 L. J., Bk. 12; 9 Jur., N. S. 7.

**Order to Prosecute made by Court—Order Discharged.**—A bankrupt had been guilty of acts which amounted to a misdemeanor within 24 & 25 Vict. c. 134, s. 221, and the commissioner granted him an order of discharge, with a suspension of twelve months. On appeal, the court considered that the commissioner had jurisdiction to direct a prosecution before a court of criminal justice, and that it was not incumbent on him, with or without a jury, to try the case himself; and they discharged the order, and directed a prosecution by the assignees at the next assizes. Subsequently friends of the bankrupt subscribed money in order to provide a dividend, if the order made by the court should be discharged. The court discharged their order, and permitted the money to be accepted by the assignees. *Dobson, Ex parte, Wilson, In re*, 32 L. J., Bk. 1; 8 Jur., N. S. 1220; 7 L. T. 444, 815; 11 W. R. 100, 330.

**Reasonable Evidence.**—When there was reasonable evidence to go to a jury of a bankrupt having committed offences within s. 221 of the Bankruptcy Act, 1861, a prosecution would be directed, and the court would not try the question whether the evidence was sufficient to induce a jury to find him guilty, though a prosecution would not be directed on mere suspicion. *Stallard, Ex parte*, 3 L. R., Ch. 408; 37 L. J., Bk. 7; 16 W. R. 469.

**In Liquidation Proceedings.**—An order can be made under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 16, for the prosecution of a fraudulent debtor in a liquidation by arrangement, as well as in a bankruptcy. *Dempsey, Ex parte*, 8 L. R., Ch. 676; 42 L. J., Bk. 93; 28 L. T. 860; 21 W. R. 800.

—**Property fraudulently Removed—Property Recovered by Trustee.**—The application of the trustee in a liquidation under s. 16 of the Debtors Act, 1869, for an order to prosecute the liquidating debtor for fraudulently removing his property, ought not to be refused merely upon the ground that the trustee had recovered the property so removed. *Monkhouse, Ex parte, Ward, In re*, 40 L. T. 296.

**Under Debtors Act, 1869—Representation must be in Writing.**—The representation by a creditor to the court, mentioned in the Debtors Act, 1869, s. 16, as a foundation for an order directing the prosecution of a bankrupt for alleged offences under the act, must be made in writing, supported by proper evidence, and filed with the proceedings. *Leonard, Ex parte, Leonard, In re*, 19 L. R., Eq. 269; 44 L. J., Bk. 80; 31 L. T. 853; 28 W. R. 253.

—**Application by Trustee.**—When a trustee applies to the court, under the Debtors Act, 1869, s. 16, for an order to prosecute the bankrupt for offences under that act, the application is properly made ex parte, without any notice to him, and he cannot appeal from the order. *Marsden,*

*Ex parte, Marsden. In re. 2 Ch. D. 786; 45 L. J., Bk. 141; 34 L. T. 700; 24 W. R. 714.*

The order may be made without any further evidence than the report of the trustee, if the court is satisfied from that alone that there is a reasonable probability of a conviction. *Ib.*

**Order made by Registrar of County Court—Appeal.]**—When the order has been made by a registrar of a county court acting as judge, the judge has no power to re-hear the matter or to vary the order, which can only be altered by means of an appeal to the chief judge. *Ib.*

**Vexatious Indictments Act.]**—With reference to misdemeanors under the Debtors Act, 1869, the provisions of the Vexatious Indictments Act must be considered as controlled by 30 & 31 Vict. c. 35, s. 1. *Reg. v. Bell, 12 Cox, C. C. 37.*

**Indictment too general.]**—A count under the Debtors Act, 1869, s. 13, sub-s. 1, alleging simply that the defendant did obtain credit from the prosecutor "by means of fraud other than by false pretences," without setting out the means, will be quashed as being too general. *Ib.*

**Appeal—Who may Appeal—Accomplice.]**—When an order is made for the prosecution of a bankrupt and also for the prosecution of another person as his accomplice, the accomplice is not a person aggrieved within the Bankruptcy Act, 1869, s. 71, and has no right of appeal against the order. *Brown, Ex parte, Appleby, In re, 2 Ch. D. 799; 45 L. J., Bk. 115; 35 L. T. 10; 24 W. R. 750—C. A.*

**Prosecution of Trustee, Debtor, and Accomplices—"Persons Aggrieved."]**—The court has a discretionary power under the Debtors Act, 1869, s. 16, to order a creditor to prosecute the trustee, the debtor, and accomplices for conspiracy, and if the charge against the accomplices fails, they are not persons aggrieved within the 71st section of the Bankruptcy Act, 1869. *Evans, Ex parte, Orbell. In re, 44 L. T. 762; 29 W. R. 573—C. A. Affirming 43 L. T. 575; 29 W. R. 200.*

**Evidence—Interlineations in Affidavit.]**—G., one of two partners, who had been jointly adjudged bankrupts, was indicted under 12 & 13 Vict. c. 106, s. 251, for not surrendering. Before proceedings in bankruptcy had been taken, the bankrupts left the kingdom, and stayed abroad, with the intent to defraud their creditors, by depriving them of their right to examine the bankrupts, and to make them responsible. On the trial, the proceedings in bankruptcy were put in, and in the affidavit verifying the petition for adjudication there were erasures and interlineations, and it was not proved when they were made:—Held, that the affidavit was admissible, as the court, in the absence of proof to the contrary, would presume that the alterations were made previously to the affidavit being sworn and used. *Reg. v. Gordon, Dears. C. C. 586; 25 L. J., M. C. 19; 2 Jur., N. S. 67.*

**Document left at Counting-house—Secondary Evidence.]**—After the bankrupts had gone, and after they were adjudged to be bankrupts, and the messenger had taken possession of

their last known place of business, a duplicate adjudication was left at the counting-house there, and subsequently there was left there a copy of a summons or notice to surrender. Before the trial the counting-house was searched, and neither of these papers could be found. Notice to produce was served upon A. in prison:—Held, that secondary evidence might be given of the documents left at the counting-house. *Ib.*

**Charge heard by Magistrates—Subsequent Depositions by Bankrupt.]**—The 5 & 6 Vict. c. 39, s. 6 (similar to 24 & 25 Vict. c. 96, s. 85), contained a proviso, that no agent intrusted as aforesaid shall be liable to be convicted by any evidence whatsoever in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been bonâ fide instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioner of bankrupt. The defendants were charged before a magistrate with the offence for which they were afterwards tried under 5 & 6 Vict. c. 39, s. 6. By the depositions of witnesses on oath the charge was proved against them, and all the circumstances fully explained. They had previously been adjudged bankrupts, and subsequently, while the prosecution was pending against them, being examined in the Court of Bankruptcy at the instance of a creditor, they made a statement to the same effect as the depositions before the magistrate, and amounting to a confession of their guilt. Soon afterwards an indictment for the offence was preferred and found against them, upon which they were tried and convicted on exactly the same evidence which had been given before the magistrate:—Held, that the depositions in the Court of Bankruptcy were properly received in evidence at the close of the case for the prosecution under the plea of not guilty. *Reg. v. Skerrin, Bell, C. C. 97; 28 L. J., M. C. 91; 5 Jur., N. S. 151; 7 W. R. 255.*

Held, also, that such depositions were not a disclosure of the offence charged, within the meaning of the proviso in 5 & 6 Vict. c. 39, s. 6; and therefore that the defendants were not entitled to be acquitted. *Ib.*

**Trustee under Liquidation.]**—A debtor, whose affairs were liquidated by arrangement, was indicted under 32 & 33 Vict. c. 62, s. 11, for that he knowing that false debts had been proved under the liquidation, failed for the period of a month to inform B., the trustee, thereof. The evidence was that the debtor, on the 23rd September, 1870, filed his petition in the county court, alleging that he was unable to pay his debts, and that he was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors; that on the 10th October the first meeting under the petition was held, and three false debts proved with his connivance. At the first meeting of the creditors, it was resolved that a composition of 8s. in the pound, payable by instalments, and to be secured, should be accepted, and B. was appointed trustee in the matter. On the 12th October, the registrar of the county court certified that B. was appointed trustee, and

was declared to be trustee under the liquidation by arrangement. At the second meeting of creditors, it was resolved that the debtor's affairs should be liquidated by arrangement, and not in bankruptcy; that the remuneration of the trustee be left to a subsequent meeting, and that the trustee should pay the moneys received by him into a bank:—Held, that B. was proved to be the trustee under the liquidation by arrangement, notwithstanding that at the first meeting, when he was originally appointed, it was resolved to accept a composition of 8s., and nothing was then resolved as to a liquidation by arrangement. *Reg. v. Beaumont*, 26 L. T. 587.

— **Answers to Questions not relating to Debtor's Trade Dealings or Estate.**—By 12 & 13 Vict. c. 106, s. 117, the Court of Bankruptcy may summon any bankrupt before it, and examine him touching all matters relating to his trade dealings or estate. A bankrupt was summoned and examined before a commissioner in bankruptcy:—Held, that having answered questions which did not relate to his trade dealings or estate, without any objection on his part, his answers were voluntary, and his examination was admissible against him upon a subsequent criminal charge. *Reg. v. Sloggett*, Dears. C. C. 656; 25 L. J., M. C. 93; 2 Jur., N. S. 476.

— **Incriminating Answers.**—Upon an examination under 12 & 13 Vict. c. 106, s. 117, a bankrupt is bound to answer all questions touching "matters relating to his trade dealings or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts," although his answers may criminate himself; and such answers may afterwards be given in evidence against him upon a criminal charge. *Reg. v. Scott*, Dears. & B. C. C. 47; 25 L. J., M. C. 128; 2 Jur., N. S. 1096.

A compulsory examination of a bankrupt under 12 & 13 Vict. c. 106, s. 117, is admissible against him on a criminal charge. *Reg. v. Cross*, Dears. & B. C. C. 68.

— **Bankrupt's Balance Sheet.**—The balance sheet of a bankrupt given on oath under his commission is not admissible against him on a criminal charge. *Reg. v. Britton*, 1 M. & Rob. 297.

— **Under 32 & 33 Vict. c. 71.**—Under the Bankruptcy Act, 1869, Courts of Bankruptcy have power to compel bankrupts to give answers to questions incriminating themselves, and, therefore, such answers are admissible against them in a criminal prosecution. *Reg. v. Hillam*, 12 Cox, C. C. 174.

— **Answers of Debtor on his Examination—Irregularity of Summons.**—On an indictment of a trader for obtaining property on credit, under the false pretence of dealing in the ordinary way of his trade, within four months before his liquidation, contrary to the Debtors Act, 1869, s. 11, an examination of the trader in liquidation taken under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 37), was admitted in evidence against him. The summons to bring up the trader for examination was issued before the certificate of the appointment of the trustee was

given by the registrar. The trader attended, was examined, and the examination was taken after the giving of the certificate of appointment:—Held, that whether the summons was regularly issued or not, the trader by appearing and submitting to be examined waived the irregularity, if any, and the examination was properly taken and admissible against him on the trial of the indictment. *Reg. v. Widdop*, 2 L. R., C. C. 3; 42 L. J., M. C. 9; 27 L. T. 693; 21 W. R. 176; 12 Cox, C. C. 251.

— **Promise that Answers should not be used against Debtor.**—An examination of a debtor before the registrar of the Bankruptcy Court is admissible in criminal proceedings taken against him, although a promise was made to him, before his examination, that it would not be used against him or filed. *Reg. v. Cherry*, 12 Cox, C. C. 32.

— **Costs—Conspiracy with others.**—Where a bankrupt had been prosecuted by direction of the Court of Bankruptcy, under three indictments, in two of which he was charged, jointly with other persons, with conspiracy:—Held, that the costs of these indictments ought to be allowed out of the chief registrar's fund. *Levi, In re*, 2 L. R., Ch. 493; 36 L. J., Bk. 49; 16 L. T. 270; 15 W. R. 855.

— **Power of Judge to allow—Costs of Prosecution.**—When the prosecution of a bankrupt is not ordered by any court, the judge at the trial has no power to allow the costs of the prosecution. *Reg. v. Thomas*, 22 L. T. 138.

— **Prosecution compromised.**—When the assignees of a bankrupt, having commenced a criminal prosecution against him for offences under the Bankruptcy Act, 1861, compromise the prosecution without the sanction of the court, the court will not, save in exceptional cases, order the costs of the prosecution to be paid out of the chief registrar's fund or out of the bankrupt's estate. *Berry, Ex parte, Evans, In re*, 27 L. T. 53; 20 W. R. 849—L. J.

— **Appeal—"Expenses incurred by such Prosecutor."**—The costs of a successful appeal from an order of a commissioner refusing to direct a prosecution could not be ordered to be paid out of the chief registrar's account; for having been incurred before a prosecution had been directed, they were not "expenses incurred by such prosecutor" within s. 223. *Stallard, Ex parte*, 3 L. R., Ch. 408; 37 L. J., Bk. 7; 16 W. R. 469.

— **Debtors Act, 1869, s. 11, sub-s. 4, and ss. 16, 17.**—An order to the trustee to prosecute for offences under the Debtors Act, 1869, s. 11, sub-s. 4, having been refused, and the debtors having, subsequently to such refusal, been prosecuted by the trustee and convicted of offences under this section:—Held, that as under the circumstances the order to prosecute ought to have been made in the first instance, the trustee was now entitled to an order to prosecute nunc pro tunc in order to recover the costs of the prosecution. Costs of the appeal out of the estate. *Stanlake, In re, Priestley, Ex parte*, 10 Ch. D. 774; 48 L. J., Bk. 48; 39 L. T. 643; 27 W. R. 292.

## XXIII. PRACTICE AND PROCEDURE.

## 1. RULES AND ORDERS.

Under the authority of 5 & 6 Vict. c. 122, s. 70, rules and orders were made, directing the flats of a particular district, where there were two commissioners, to be allotted between them in a particular manner, and authorizing one commissioner to act in the flat allotted to the other in the absence of such other commissioner:—Held, that a court of common law will not take judicial notice of such rules and orders. *Ramsden, In re*, 1 B. C. Rep. 133; 3 D. & L. 748; 15 L. J., Q. B. 234; 10 Jur. 879.

The general orders are made by the lord chancellor under the Bankruptcy Act, 1869, s. 78, and no question as to their validity can be entertained by the court. *Davies, In re*, 21 L. T. 685.

The rules in the Bankruptcy Rules, 1870, relating to bankruptcy, and those relating to liquidation by arrangement, are to be read as distinct codes of rules. *Hopkins, Ex parte, Hart, In re*, 9 L. R., Ch. 506; 43 L. J., Bk. 127; 30 L. T. 447.

## 2. PETITIONS.

The court will hear the petition of a marksman, although the attestation of it is defective in not stating that the petition has been read to him, if the petitioner's affidavit, being an echo of the petition, is expressed in the jurat to have been read over to him. *Washbrook, Ex parte*, 2 Mont., D. & D. 490; 6 Jur. 156.

A petition of one of two bankrupts to annul the fiat was wrongly intitled:—Held, that the court might, after the expiration of twenty-one days from the insertion of the advertisement, permit the title to be amended, and the petition to be served on the other bankrupt, and that these steps did not render the amended petition a new proceeding, so as to be precluded by the lapse of the twenty-one days. *Lord, Ex parte*, 3 De G. & S. 607; 13 Jur. 1067.

Any application by a creditor to dismiss a bankrupt's petition, upon the ground of non-residence, should be by petition, and not by motion. *Austin, Ex parte*, 9 L. T. 492; 12 W. R. 177.

**Substituted Service.**—A non-trader, much indebted, left the realm, and an order was made under the Bankruptcy Act, 1861, s. 70, for service of a petition for adjudication on him abroad. His solicitor, with whom he was in communication, was present when this order was made; but gave no information, and declined to accept service. The petitioner sent a clerk abroad, who was unable to find and serve the debtor. Service of the petition was then ordered to be made on the solicitor, and the debtor was thereupon adjudged bankrupt:—Held, that, under the circumstances, the adjudication was good. *Calthrop, In re*, 3 L. R., Ch. 252; 37 L. J., Bk. 17; 18 L. T. 166; 16 W. R. 446.

**Amendment of Petition.**—When a bankruptcy petition is amended under an order of the court the judge has a discretion as to requiring the amendment to be verified by affidavit, and if the alteration is an immaterial one an affidavit will not be required. *Ritso, Ex parte, Ritso, In re*,

22 Ch. D. 529; 52 L. J., Ch. 535; 48 L. T. 376; 31 W. R. 373—C. A.

**Form of Petition.**—A petition need not state the consideration for the debt, provided it state with sufficient clearness the case that the debtor is required to answer. *Bass, Ex parte, Barnett, In re*, 23 W. R. 101—L. J.

See further, VI. THE PETITIONING CREDITOR AND HIS DEBT.

## 3. AFFIDAVITS.

A petition, and the affidavits in support of it, were filed under an incorrect title. The petition was amended. The affidavits were ordered to be taken off the file, amended as to the title, and then re-sworn. *Burton, Ex parte*, 3 De G. & S. 578; 18 L. J., Bk. 17; 13 Jur. 297, 420.

An affidavit inadvertently filed without signature will be allowed to be taken off the file, for the purpose of being signed and re-sworn, upon an undertaking by the applicant's solicitor that it shall be re-filed in the same state in all other respects. *Norton, Ex parte*, 11 Jur. 699.

On the hearing before the registrar of an application for an injunction, the applicant sought to use an affidavit which had been sworn but not filed. This was objected to; and the applicant's counsel suggested that the matter should stand over to enable the affidavit to be filed. The registrar said that he thought there was a case for an injunction without an affidavit, and thereupon the applicant's counsel accepted an order in his favour on the evidence then before the court:—Held, that leave ought not to be given to use the affidavit in question upon the hearing of an appeal from the registrar's decision. *Isaac, Ex parte, De Vecchj, In re*, 6 L. R., Ch. 58; 40 L. J., Bk. 19; 22 L. T. 523; 19 W. R. 38—L. J.

A warrant for the committal of a bankrupt was expressed to be made on the reading of the affidavits therein referred to. The commissioner before whom one of these affidavits was sworn had omitted to sign the jurat:—Held, that the warrant must be discharged, and that the court could not enter into the question whether there was enough in the other affidavits to support it, and that the defect could not be cured by the commissioner signing the jurat in court on the hearing of the application to discharge the warrant. *Heymann, Ex parte, Heymann, In re*, 7 L. R., Ch. 488; 26 L. T. 339; 20 W. R. 457.

**Cross-Examination on Affidavit.**—Held (in accordance with a certificate of the registrars of the London Court of Bankruptcy), that, according to the practice of that court, when an affidavit has been filed by one of the parties to an application, the opposite party is not entitled to cross-examine the deponent on the affidavit, until it has been read on behalf of the party who has filed it. *Child, Ex parte, Ottoway, In re*, 20 Ch. D. 126; 51 L. J., Ch. 494; 46 L. T. 118; 30 W. R. 282—C. A.

—**Right to withdraw Affidavit.**—A party on whose behalf an affidavit has been filed, has a right, if he pleases, not to make use of the affidavit, and if he does not use it, the deponent cannot be cross-examined on it. *Id.*

## 4. SERVICE OF SUMMONSES AND NOTICES.

**Discretion of County Court Judge.**—The judge of a county court has a discretion to direct whether a summons for examination under the Bankruptcy Act, 1869, s. 96, shall be served by the solicitor of the person applying for it, or by the high bailiff of the court. *Bolland, Ex parte, Holden, In re*, 19 L. R., Eq. 131; 44 L. J., Bk. 9; 31 L. T. 445; 23 W. R. 24.

**Service by Post.**—Notice of an application to continue an interim injunction may be served by post. *Lewis, In re, Mauthner, Ex parte*, 3 Ch. D. 113; 45 L. J., Bk. 125; 34 L. T. 662.

**Waiver of Irregularity.**—A notice of motion was served out of the jurisdiction on the respondent. No order authorizing the service had been obtained from the court. The respondent appeared on the hearing of the motion, and objected to the jurisdiction of the court. On his objection being overruled, he asked for and obtained an adjournment to enable him to answer the case on its merits:—Held, that there had been a mere irregularity in the service, and that it had been waived. *Robertson, Ex parte, Morton, In re*, 20 L. R., Eq. 733; 44 L. J., Bk. 99; 32 L. T. 697; 23 W. R. 906.

**Notice of Injunction by Telegram.**—A sheriff's officer and an auctioneer proceeded with the sale of the property of a trader seized under a fi. fa. after they had received notice by a letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the Court of Bankruptcy had made an order restraining further proceedings under the writ:—Held, that the sheriff's officer and the auctioneer had been guilty of contempt of court, and that they must pay the costs of a motion to commit them. *Bryant, In re*, 4 Ch. D. 98; 35 L. T. 489; 25 W. R. 230.

Seemle, that it is equally a contempt of court, if he has received notice of an act of bankruptcy. *Id.*

Sufficient notice of the granting of an injunction may be given by telegram; but, if it is sought to commit for contempt a person who, after receiving such a notice, disregards it, the court must decide upon the particular facts, whether he had in fact notice of the injunction, and it is the duty of those who ask for the commitment to prove this beyond reasonable doubt. *Langley, Ex parte, Smith, Ex parte, Bishop, In re*, 13 Ch. D. 110; 49 L. J., Bk. 1; 41 L. T. 388; 28 W. R. 174—C. A.

A person who has violated an injunction will not be committed for contempt when he swears that, though he had received notice of it by telegram, he bonâ fide believed that no injunction had been granted, and the circumstances shew that such a belief was not unreasonable. *Id.*

It is the duty of a sheriff's officer who receives notice by telegram, purporting to be sent by solicitors in London, of an injunction being granted by the Court of Bankruptcy to restrain a sale in the country under an execution, to telegraph to the Court of Bankruptcy, or to the London agents of the sheriff, to ascertain whether an injunction has really been granted. *Id.*

This, however, is not the duty of the auctioneer who is conducting the sale; he is only bound to communicate with the sheriff's officer who has instructed him to sell. *Id.*

A sheriff's officer, who is not himself present at the sale, and who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram. *Id.*

A London solicitor, who obtains an order from the Court of Bankruptcy in London restraining a sale under an execution in the country, ought, instead of telegraphing the order to the sheriff's officer, to telegraph it to a solicitor at the place, as his agent, asking him to give notice of it to the persons affected. *Id.*

## 5. TRIAL OF ISSUES OF FACT.

A feigned issue directed the following questions to be tried between the assignees and the execution creditors, at whose suit goods of the bankrupt had been seized; viz.—If, at the time of the seizing and levying of the goods, the plaintiffs were entitled to the same as against and free from the execution; and if the goods were not subject to be seized and levied under the writ as against the plaintiffs:—Held, that that issue raised the question, not only as to notice of the act of bankruptcy, but the plaintiffs' title as assignees. *Lott v. Melville*, 9 D. P. C. 882; 3 M. & G. 40; 3 Scott, N. R. 346; 5 Jur. 436.

The goods of H. were seized under several writs of execution. H., having subsequently become bankrupt, and his assignees claiming the goods, an issue was directed, the goods being sold, and the proceeds paid into court, to abide the event. In the result four of the executions were set aside:—Held, that the right of the assignees to the proceeds paid into court was subservient to that of the other execution creditors, whose judgments were impeached. *Goldschmidt v. Hamlet*, 6 Scott, N. R. 962; 1 D. & L. 801; 6 M. & G. 187.

**Trial in High Court, not in County Court.**—Although, as a general rule, cases in which the trustee in bankruptcy is asserting a claim to property by a higher title than that of the bankrupt himself, ought to be tried in the Court of Bankruptcy, yet the rule is not an inflexible one, but the court has a judicial discretion to be exercised with regard to all the circumstances of the case:—Held, that the fact that a large amount was at stake, and that questions of character were involved, were sufficient grounds for refusing to allow a case, in which the trustee in a liquidation was seeking to set aside some transactions of the debtors as fraudulent under the bankruptcy law, to be tried in a county court. *Armitage, Ex parte, Learoyd, Wilton & Co., In re*, 17 Ch. D. 13; 44 L. T. 262; 29 W. R. 772—C. A.

When the trustee in a bankruptcy which is proceeding in a county court impeaches a deed executed by the bankrupt as fraudulent under the Statute of Elizabeth, if the amount at stake is beyond the ordinary jurisdiction of a county court and serious questions of character are involved, and the person interested under the deed desires that the question should not be tried in the county court, the judge ought to decline to exercise the jurisdiction conferred by s. 72, and ought to leave the matter to be tried in an action in the High Court in the ordinary way. *Armi-*



*tage, Ex parte* (17 Ch. D. 13), approved. *Price, Ex parte, Roberts, In re*, 21 Ch. D. 553; 52 L. J., Ch. 131; 47 L. T. 402; 31 W. R. 104—C. A.

**Judge's Notes conclusive.**—When an issue of fact has been tried before a judge under the Bankruptcy Act, 1869, s. 72, and the Court of Appeal is furnished with the judge's notes of the trial, they are conclusive as to the evidence adduced before him, and the court will not receive the notes of a shorthand writer except by consent of both parties. *Gillebrand, Ex parte, Sidebotham, In re*, 10 L. R., Ch. 52; 31 L. T. 715; 23 W. R. 194.

**But not Findings.**—The Court of Appeal is not bound to accept as conclusive the finding of the judge on the trial of such an issue. *Ib.*

**Decision by Judge without Jury—Power of Court of Appeal to grant Issue.**—When a question of fact in which the evidence is conflicting has been decided by the county court judge without a jury, neither party having asked for an issue, and the decision is appealed from, and upon the hearing of the appeal one of the parties desires an issue, the Court of Appeal, if satisfied that the circumstances of the case require it, will direct an issue to be tried before itself with a jury. *Brown, Ex parte, Hooker, In re*, 44 L. J., Bk. 56; 31 L. T. 734; 23 W. R. 230.

**Right to Jury.**—Under the Bankruptcy Act, 1869, s. 72, the judge must exercise a judicial discretion whether a question of fact should be tried by a jury. One party is not entitled as of right to demand a jury. *Morgan, Ex parte, Simpson, In re*, 2 Ch. D. 72; 45 L. J., Bk. 36; 34 L. T. 329; 24 W. R. 414.

An order for the trial of a question of fact by a jury was made upon the demand of one party only:—Held, that the order was only irregular, that the irregularity could be waived, and that it had been waived by both the parties appearing on the trial without taking the objection. *Ib.*

**Interpleader—Notice of Motion.**—Under the Interpleader Act, 1830, s. 6, application for an interpleader order may be made to the Court of Bankruptcy by the sheriff by motion on notice to the several claimants, it not being necessary that the court should first order the latter to attend. *Streeter, Ex parte, Morris, In re*, 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127—C. A.

**Rehearing when Party improperly represented.**—Under a *fi. fa.* issued by an execution creditor the sheriff took possession of goods claimed by a bill of sale holder, and gave the parties notice of motion before the Bankruptcy Court that they should appear in support of their claims. At the hearing of the motion, the creditor was represented only by a managing clerk, who, though he asked for an adjournment in order to have time to consider an affidavit of the other side, was compelled to allow the matter to go on, and was permitted to cross-examine witnesses, the court being under a mistaken impression that he was a solicitor. This fact did not appear until just before the close of the proceedings, when the court decided against the creditor. An application by counsel on behalf of the creditor to the Bankruptcy Court for a rehearing having been refused:—Held, on appeal,

that the original order was wrongly made, as the creditor had a right to be properly represented, and that such order, as well as the refusal order, must be reversed. *Ib.*

**New Trial—Grounds for.**—When a question of fact has been tried by jury in the Court of Bankruptcy the court cannot set aside or disregard the verdict, unless either there was no evidence to go to the jury, or, by reason of some matter of law or of some new fact, the verdict has become immaterial to the decision of the case. *Morgan, Ex parte, Simpson, In re*, 2 Ch. D. 72; 45 L. J., Bk. 36; 34 L. T. 329; 24 W. R. 414.

If there was any evidence to go to the jury, and the verdict is, in the opinion of the court, against the weight of the evidence, the proper course to get rid of the verdict is to order a new trial. *Ib.*

**Time within which Application to be made.**—When a jury has found a verdict on an issue of fact, but no order consequent thereon has been made by the judge, it is not necessary that an application for a new trial should be made within twenty-one days from the finding. *Reader, Ex parte, Wrigley, In re*, 20 L. R., Eq. 763; 44 L. J., Bk. 139; 32 L. T. 36.

Rule 143 of the Bankruptcy Rules, 1870, does not apply to such a case, either directly or by analogy. *Ib.*

## 6. TRANSFER OF PROCEEDINGS.

The power given by the Bankruptcy Act, 1869, s. 80 (cl. 3), to direct the transfer of proceedings from one court to another, is not confined to proceedings commenced since the act came into operation. *Wieland, Ex parte*, 5 L. R., Ch. 486; 39 L. J., Bk. 46; 22 L. T. 324.

The creditors in a bankruptcy commenced under the Act of 1861, after the Act of 1869 came into operation, passed a resolution to transfer the proceedings to a county court. The registrar of the district Bankruptcy Court made an order for the transfer accordingly, and transmitted the proceedings to the registrar of the county court:—Held, that whether the registrar of the Bankruptcy Court had or had not power to make the order for the transfer, the receipt of the proceedings by the registrar of the county court was sufficient to give the county court jurisdiction in the matter. *Anderson, Ex parte*, 23 L. T. 274; 18 W. R. 1124.

**Transfer of Liquidation Petition.**—*See LIQUIDATION, ante.*

## 7. COMMITTAL FOR CONTEMPT OF COURT.

A commissioner acting in the prosecution of a fiat may commit for a contempt of court. *Watson v. Bodell*, 14 M. & W. 37; 14 L. J., Ex. 281; 9 Jur. 626.

An order of commitment should contain an express adjudication that a contempt has been committed. *Van Sandau, Ex parte*, De Gex. 55; 1 Ph. 650; 15 L. J., Bk. 13.

The circulation of a libel on a court relating to a matter disposed of by an order still in minutes is a contempt for which the court may commit. *Ib.*

An apology and petition to be discharged from custody, and other proceedings, by a party com-

mitted for contempt under the order of commitment, and the consequential orders, do not preclude the party committed from disputing the validity of the commitment. *Ib.*

Although an order of commitment should contain an express adjudication that a contempt has been committed, the want of an express adjudication is not sufficient ground for discharging the order. *Van Sandau, Ex parte, De Gex, 303.*

Such an order may direct the party committed to pay the costs of the party complaining, but not his costs, charges and expenses. *Ib.*

By an order of the Court of Review, it was ordered that the plaintiff should pay the defendant costs mentioned in the order within fourteen days after he should have been duly and personally served with it. The costs not having been paid, the defendant, by petition to the court, after reciting the order, prayed that the plaintiff might be committed to the Fleet for his contempt of the order; and thereupon the court, after reciting these matters, ordered that the plaintiff "do stand committed to her Majesty's prison of the Fleet for his contempt in the petition mentioned or referred to." The plaintiff having been committed to the Fleet upon a warrant, which, after reciting the order, directed the plaintiff to be arrested and conveyed to the Fleet, there to remain until the further order:—Held, that the order being bad for containing no adjudication of a contempt, or any fact found, or anything directed to be done by the plaintiff to clear himself, the warrant which referred to the order was illegal. *Green v. Elgie, 5 Q. B. 99; D. & M. 129; 14 L. J., Q. B. 162; 8 Jur. 187.*

Where a party comes to the court praying a commitment for contempt, he must be fully prepared to support his case; and should he fail in any particular, the court will not allow him further time, but will dismiss his petition with costs. *Saunders, Ex parte, 5 Jur. 1202.*

Where a party took forcible possession of a bankrupt's effects whilst in the custody of the messenger, but finding he had done wrong gave up possession, the court, on a petition to commit him for a contempt, only ordered him to pay the costs of the petition. *Fletcher, Ex parte, 2 Mont., D. & D. 129.*

**Length of Notice.]**—Three clear days' notice must be given of an application to commit a person for contempt of court, and if the last of the three days happens to be a Sunday it is not to be counted in the computation of the three days. *Ferrige, Ex parte, Ferrige, In re, 20 L. R., Eq. 289; 44 L. J., Bk. 96; 32 L. T. 507; 23 W. R. 612.*

The court has no power to abridge the three days' notice which is to be given of the hearing of an application to commit for contempt of court. *Bryant, In re, 3 Ch. D. 810; 35 L. T. 173.*

**Committal of Bankrupt.]**—When a bankrupt is employed by the trustees to assist them in realizing and collecting his assets, he acts in a fiduciary capacity; and his non-compliance with an order of the court to pay to the trustees moneys which he has received in such employment is a contempt of court within the meaning of the Bankruptcy Act, 1869, s. 19,

for which he can be committed to prison. *Waters, Ex parte, 18 L. R., Eq. 701; 43 L. J., Bk. 128; 30 L. T. 766; 22 W. R. 796.*

#### 8. RE-DIRECTION OF BANKRUPT'S LETTERS.

**Who may apply for Order.]**—Under s. 85 of the Bankruptcy Act, 1869, an application for an order for the redirection of letters addressed to a bankrupt can only be made by the trustee in the bankruptcy. The petitioning creditor has no locus standi either to make the application, or to appeal from an order made on the application of the trustee if he thinks that order not sufficiently extensive. If the trustee refuses to apply for such an order, or to appeal from an order made on his application, the petitioning creditor cannot apply to the court himself. Semble, that he might obtain authority to use the name of the trustee. *Lister, Ex parte, Halbertamm, In re, 17 Ch. D. 518; 29 W. R. 621—C. A.*

#### 9. RE-HEARING.

**In what Cases.]**—Courts having jurisdiction in bankruptcy are entitled to rehear cases which they have decided, even if they should, by varying their former orders, give a right of appeal, which would otherwise have been lost by lapse of time. *London and County Bank, Ex parte, Brown, In re, 16 L. R., Eq. 391; 42 L. J., Bk. 112; 29 L. T. 73.*

On an application to direct a rehearing of a case by the county court judge, it was held by the chief judge in bankruptcy that the jurisdiction to rehear given by the Bankruptcy Act, 1869, s. 71, in a proper case was almost without limit; and that the fact that an appeal from the original order was pending did not prevent the court from rehearing the case. But the chief judge held that under the circumstances the county court judge was right in refusing the rehearing. He also affirmed the original order. On appeal from both orders, the court of appeal affirmed the order refusing rehearing, and heard the other appeal with additional *viva voce* evidence. *Keighley, Ex parte, Wike, In re, 9 L. R., Ch. 667; 44 L. J., Bk. 13; 30 L. T. 407; 22 W. R. 630.*

The jurisdiction given to every court of bankruptcy, by the Bankruptcy Act, 1869, s. 71, to review, rescind or vary any order made by it, is almost without limit in proper cases, and the fact that an appeal from an order is pending will not prevent the rehearing of the case by the court. *Ib.*

When an order has been made, the court ought not to allow a rehearing of the matter merely for the purpose of enabling an appeal to be brought which would otherwise have been too late. *Lister, In re, Simmons, Ex parte, 2 Ch. D. 749; 45 L. J., Bk. 113; 34 L. T. 744.*

**Rehearing—Time for.]**—Though as a general rule a rehearing of a bankruptcy matter ought not to be allowed after the expiration of the time limited for appealing from the order, yet, there being no time fixed by the act or the rules for applying for a rehearing, the court will on special grounds allow a rehearing when it is applied for after the expiration of the time for appealing, even when the application is to rehear a bankruptcy petition which has been dismissed.

*Ritso, Ex parte, Ritso, In re*, 22 Ch. D. 529; 52 L. J., Ch. 535; 48 L. T. 376; 31 W. R. 373—C. A.

**Application, how made.**—Semble, that an application for a rehearing should not be made *ex parte*. *Id.*

**Rehearing by Registrar.**—A registrar sitting as chief judge has a discretion to rehear a case even after an appeal from his decision, if the point upon which a rehearing is desired is unaffected by the appeal. But an application for a rehearing ought, in an ordinary case, to be made within the time fixed by the 143rd of the Bankruptcy Rules of 1870 for entering an appeal; and where a long delay is unaccounted for a rehearing will not be granted. *Brown, Ex parte, Jeavons, In re*, 9 L. R., Ch. 304; 43 L. J., Bk. 105; 30 L. T. 108; 22 W. R. 602.

Although a rehearing before the same judge who originally heard the case is not within rule 143 of the Bankruptcy Rules, 1870, yet the court in granting a rehearing will have regard to that rule, and will not in general grant a rehearing after twenty-one days, unless the party seeking a rehearing can satisfactorily account for the delay. *Id.*

**Rehearing by Court of Appeal.**—Whether the Court of Appeal has jurisdiction to rehear a bankruptcy appeal, *quære*. *Banco de Portugal, Ex parte, Hooper, In re*, 14 Ch. D. 1; 49 L. J., Bk. 21; 42 L. T. 210; 28 W. R. 433—C.A.

— **Court will not rehear pending Appeal to House of Lords.**—But if there be such a jurisdiction, the court will not, while an appeal to the House of Lords from an order made by it on a bankruptcy appeal is pending, rehear the appeal *pro forma*, for the purpose of inserting in its order evidence which was not before it when the appeal was heard, leaving the date of the order unaltered, or for the purpose of making a new order, bearing a date subsequent to the date of the presentation of the appeal to the House of Lords, with the new evidence inserted in it, but in other respects unaltered. *Id.*

— **But will correct accidental slip.**—But, *semble*, that, if by an accidental slip evidence, which was really before the court on the hearing of the appeal, had been omitted from the order, the court could rectify the error, notwithstanding the pendency of an appeal to the House of Lords. *Id.*

#### 10. COSTS.

**In Liquidation—Taxation.**—Rule 8 of the Bankruptcy Rules, 1871, does not apply to a case of composition, and, therefore, the solicitor who acts for a debtor in relation to his liquidation petition is, if the creditors resolve to accept a composition, entitled as against the debtor to have his costs of the proceedings taxed on the ordinary (not the lower) scale, even though the debtor's statement shews that his debts do not exceed 750*l.*, or that his assets do not exceed 200*l.* *Castle, Ex parte, Meikle, In re*, 1 Ch. D. 111; 45 L. J., Bk. 13; 24 W. R. 143.

The court has jurisdiction in a case of composition to order the taxation of the bill of costs of the debtor's solicitor. *Dixon, In re, Shepherd,*

*Ex parte*, 2 Ch. D. 430; 45 L. J., Bk. 103; 34 L. T. 743; 24 W. R. 931.

Where a trustee was appointed, to whom the debtor gave a bill of sale of his property to secure the payment of the composition, the bill of sale containing a trust for sale of the property and for payment of the costs of the proceedings out of the sale moneys, an action, brought against the debtor by his solicitor for his costs incident to the proceedings, was restrained, on the terms of the trustee paying a sum of money into court, and giving an undertaking to pay whatever further sum might be found due on the taxation of the bill of costs. *Id.*

**Priority of Payment.**—A bankruptcy petition was presented against the debtor. Before the hearing he filed a liquidation petition. The hearing of the bankruptcy petition was several times adjourned, to await the result of the proceedings under the liquidation petition. Ultimately a liquidation was resolved upon, and the bankruptcy petition was then dismissed:—Held, that the petitioning creditor was entitled to be paid in priority, out of the estate, the costs of his petition, including therein the costs of and incident to a debtor summons on which the petition was founded, and the costs of the adjournment of the hearing. *Bunnett, In re, Jeavons, Ex parte*, 3 Ch. D. 320; 45 L. J., Bk. 128; 34 L. T. 804; 24 W. R. 851.

**Of Solicitor.**—One of two partners filed a petition for liquidation by arrangement which was duly resolved on, and a trustee appointed. At the time of filing the petition the stock-in-trade and effects of the firm had been seized under a *fi. fa.*, and were about to be sold. There was no separate estate, and an order was afterwards made, with the consent of the solicitor of the other partner, who was an infant, for administering the joint assets and for payment of the costs and expenses of the trustee:—Held, that the costs of the solicitor of the petitioning debtor down to the appointment of the trustee ought to be paid out of the joint assets. *Merr, In re, Pearce, Ex parte*, 2 Ch. D. 320; 45 L. J., Bk. 144; 35 L. T. 705; 24 W. R. 808—C. A.

Solicitors' costs incurred in abortive proceedings to reduce the amount of a composition, the resolution for which the registrar refused to register, will not be allowed. *Hopper, Ex parte, Elliott, In re*, 8 Ch. D. 53; 47 L. J., Bk. 41; 38 L. T. 366; 26 W. R. 488—C. A. Affirming, 26 W. R. 171.

A debtor being unable to carry out the terms of a composition which had been duly resolved upon, summoned a fresh general meeting of his creditors, at which it was resolved to accept a composition at a much reduced rate. The registrar, however, refused to register the second resolution on the ground of irregularity, and two days afterwards the debtor was adjudicated a bankrupt:—Held, that the proceedings for reducing the composition were not pending at the date of the bankruptcy, and the costs of such proceedings were not therefore payable out of the bankrupt's estate under r. 292. *Id.*

**Costs of Creditors' Solicitor in Registration of Resolutions.**—Where creditors agree to accept a composition, and employ a solicitor to register the resolutions without making any special provisions therein for payment of the solicitor's

costs, the court has no jurisdiction to enforce payment of these costs by the debtor. *Pratt, In re, Gush, Ex parte*, 12 Ch. D. 915; 48 L. J., Bk. 69; 27 W. R. 712.

**Costs—Solicitor to Trustee—Right to Costs out of Estate—Power of Court to go behind Allocatur.]**—The right of the solicitor to a trustee in bankruptcy to be paid his costs out of the bankrupt's estate is only the right of his client, the trustee; he has no independent right. If either the trustee or the solicitor has been guilty of misconduct, the court can refuse to allow the solicitor's costs to be paid out of the estate, and this notwithstanding that the costs have been taxed and an allocatur has been made by the taxing master. *Harper, Ex parte, Pooley, In re*, 20 Ch. D. 685; 51 L. J., Ch. 810; 47 L. T. 177; 30 W. R. 650—C. A.

It is an abuse of the bankruptcy law to purchase a debt due by a bankrupt in order to procure the appointment of a trustee favourable to the bankrupt or to a creditor or a particular class of creditors, or to purchase a debt for the purpose of making the debtor (*e. g.*, the trustee in a bankruptcy) a bankrupt with the view, not of recovering the debt, but of putting pressure upon him for a collateral object, or of injuring him in some way. *Griffin, Ex parte* (12 Ch. D. 480) approved and followed. The trustee in a bankruptcy and his solicitor having been engaged in transactions of this kind, the court, after taxation of the solicitor's costs, refused to allow them to be paid out of the bankrupt's estate. *Id.*

**When Bankrupt Defendant does not appear.]**—When a bankrupt defendant does not appear at the hearing of an action, and his trustees appear and defend, they are liable to the costs of the action. *Watson v. Holliday*, 20 Ch. D. 780; 51 L. J., Ch. 906; 46 L. T. 878; 30 W. R. 747.

**Trustees of Settlement—Costs of Appeal.]**—The judge of the county court set aside a voluntary settlement. He gave the trustee in the liquidation his costs out of the debtor's estate, but made no order as to the costs of the trustees of the settlement. The trustees of the settlement appealed to the chief judge, who discharged the order of the county court. The Court of Appeal restored the order of the county court:—Held, that the trustees of the settlement ought to have been satisfied with the decision of the county court, and that they must bear their own costs of both appeals, and must pay the costs of the trustee in the liquidation of both appeals. *Russell, Ex parte, Butterworth, In re*, 19 Ch. D. 588; 51 L. J., Ch. 521; 46 L. T. 113; 30 W. R. 584—C. A.

**Costs of Copy of Deposition.]**—With regard to the costs of the copies of the deposition which were supplied for the use of the respondent's counsel, I think that in the present case those costs should be allowed. It must not be supposed that we should in all cases allow such costs, we might in some cases allow only the costs of making extracts. *Hall, Ex parte, Cooper, In re*, 19 Ch. D. 580; 51 L. J., Ch. 556; 46 L. T. 549—C. A., per curiam.

**Sheriff's Costs of Appeal from Interpleader Order.]**—The sheriff's costs of an appeal from an interpleader order made by the chief judge in

bankruptcy were ordered to be paid by the party who should ultimately be decided to be in the wrong. *Streeter, Ex parte, Morris, In re*, 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127—C. A.

**Transcript of Shorthand Writer's Notes.]**—The costs of the transcript of a shorthand writer's notes of evidence are, like other costs, in the discretion of the judge within r. 188 of the Bankruptcy Rules, 1870, notwithstanding the provisions with reference to these costs made by r. 207. *Albezette, In re, Smith, Ex parte*, 8 Ch. D. 599; 48 L. J., Bk. 13; 38 L. T. 395; 26 W. R. 513.

The charge for a copy of a shorthand writer's notes of the proceedings in a county court may be allowed as part of the costs of an appeal. *Sawyer, Ex parte, Bowden, In re*, 1 Ch. D. 698; 45 L. J., Bk. 56; 33 L. T. 759; 24 W. R. 375.

**Recovery.]**—A solicitor who has not been allowed costs in bankruptcy is not entitled to file a bill or a plaint in a court of equity to recover them. *Graham v. Winterson*, 16 L. R., Eq. 243; 42 L. J., Ch. 633; 28 L. T. 803; 21 W. R. 227.

**Costs—Set-off.]**—The Court of Bankruptcy will not allow costs of proceedings in the High Court to be set off against costs of proceedings in bankruptcy. *Griffin, Ex parte, Adams, In re*, 14 Ch. D. 37; 49 L. J., Bk. 28; 42 L. T. 704; 28 W. R. 714—C. A.

## XXIV. APPEAL.

### 1. TIME FOR APPEALING.

**Under 12 & 13 Vict. c. 106.]**—The time of the commissioner signing and delivering out an order, and not the time of his pronouncing it, is its true date with reference to an appeal. *Heslop, Ex parte*, 1 De G., Mac. & G. 477.

A petition to annul an adjudication may be presented by a creditor to the commissioner, and it is sufficient if he appeals from the commissioner's decision upon it within twenty-one days, although much more time may have elapsed since the adjudication. *Bean, Ex parte*, 1 De G., Mac. & G. 486; 21 L. J., Bk. 26.

Under 12 & 13 Vict. c. 106, s. 12, the time allowed for appealing must be calculated from the date of the decision or order, and not from the time of its being drawn up. *Dudley and West Bromwich Banking Company, Ex parte*, 32 L. J., Bk. 68; 9 Jur. N. S. 702; 8 L. T. 189; 11 W. R. 576.

Where an appeal from an order in bankruptcy is by way of motion, it is sufficient if notice of motion is given within the twenty-one days limited in that section. *Bromley, Ex parte*, 34 L. J., Bk. 35; 11 Jur., N. S. 611; 12 L. T. 783; 13 W. R. 1051.

A petition of appeal against an order of a commissioner was presented within the twenty-one days fixed by 12 & 13 Vict. c. 106, s. 12, and a second petition by other parties was presented after the twenty-one days had elapsed, but before the earlier petition came on for hearing:—Held, that the second petition was presented within due time. *Mackenna, Ex parte*, 30 L. J., Bk. 24; 7 Jur., N. S. 668; 4 L. T. 459; 9 W. R. 674—L. J.

— **Proceedings in Colonies.**—Where a person has gone to an English colony, and is adjudicated bankrupt in this country, and his goods are taken in the colony by the authority of the assignee appointed in England, for which taking he institutes proceedings in the colonial court, and subsequently appeals from its decision to the Privy Council, if he petitions the Court of Appeal in Bankruptcy to annul the adjudication, his petition is not too late though presented after the time appointed by 12 & 13 Vict. c. 106, s. 233, the proceedings of the colony keeping alive his title to appeal. *Bunny, Ex parte*, 26 L. J., Bk. 83; 3 Jur., N. S. 1141—L. J.

**Under 32 & 33 Vict. c. 71—Sundays.**—In reckoning the twenty-one days within which an appeal must be entered, the computation must be made exclusive of Sundays. *Hicks, Ex parte, Ball, In re*, 20 L. R., Eq. 143; 44 L. J., Bk. 106; 32 L. T. 432; 23 W. R. 852.

And in reckoning the twenty-one days allowed by r. 143 of the Bankruptcy Rules of 1870 for appealing, Sundays are, by virtue of the rule in bankruptcy of 26th of May, 1873, not to be taken into account. *Hall, Ex parte, Alven, In re, infra*.

— **Appeal from County Court to Chief Judge.**—Notwithstanding the rules under the Judicature Acts, the time for appealing to the Chief Judge from an order made in a bankruptcy matter by a county court is still regulated by the Bankruptcy Rules. *Hall, Ex parte, Alven, In re*, 16 Ch. D. 501; 50 L. J., Ch. 400; 44 L. T. 8; 29 W. R. 298—C. A.

— **Notice to Registrar—"Forthwith."**—Rule 144 of the Bankruptcy Rules, 1870, requires that upon entering an appeal a copy of the appeal notice shall be sent forthwith to the registrar of the court appealed from:—Held, that "forthwith" must be read with reference to the period of twenty-one days within which, by r. 143, a notice of appeal must be entered with the registrar of appeals, and that it means within twenty-one days from the date of the order appealed from, or as soon as possible afterwards. *Sillence, In re, Sillence, Ex parte*, 7 Ch. D. 238; 47 L. J., Bk. 87; 37 L. T. 676; 26 W. R. 129.

Where the order appealed from was made on the 22nd of August, and notice of appeal was duly left and entered with the registrar of appeals and a deposit paid, but a copy of the appeal notice was not served on the registrar of the court appealed from until the 12th of November:—Held, that the appeal was out of time and irregular, and that it could not be heard. *Id.*

Where an appeal from an order of a county court annulling an adjudication was duly entered with the registrar of appeals within twenty-one days from the date of the order appealed from, but a copy of the appeal notice was not sent to the registrar of the court appealed from until seven days afterwards, such registrar being also the trustee in the bankruptcy:—Held, that the appeal was out of time, and that an affidavit explaining the reason of the delay was not admissible. *Donnithorne, Ex parte, Green, In re*, 40 L. T. 660; 27 W. R. 824.

When an act is required by a statute or a rule of court to be done "forthwith," the word "forth-

with" must be construed with regard to the object of the provision and the circumstances of the case. The London agents of the country solicitors of an appellant from an order made by a county court in bankruptcy entered the appeal with the registrar of appeals in London, on Friday, the 5th August, the last possible day, but did not post a copy of the appeal notice to the country solicitors until the following day, and it was not received by them until Monday, the 8th August, and on that day they sent a copy of the notice to the registrar of the county court:—Held, that the copy of the notice had not been sent to the registrar of the county court "forthwith" on entering the appeal as required by rule 144, and that consequently the appeal was out of time. *Lamb, Ex parte, Southam, In re*, 19 Ch. D. 169; 51 L. J., Ch. 207; 45 L. T. 639; 30 W. R. 126—C. A. Affirming 45 L. T. 446; 30 W. R. 64.

Where the registrar of the county court from which an appeal is brought did not in fact receive notice of an appeal until three days after the time for appealing had elapsed:—Held, that the notice not having been sent "forthwith," the appeal was out of time and could not be heard. *Lyon, Ex parte, Lyon, In re*, 45 L. T. 768.

— **County Court Office closed.**—An order of a county court was made on the 17th December. Notice of appeal was entered in London on the 22nd December. On the five following days the county court office was closed, and in consequence the county court registrar did not receive a copy of the appeal notice till the 28th. The respondents' country solicitors, however, received notice of the appeal on the 23rd December:—Held, that the copy notice had been sent to the county court registrar "forthwith" within the meaning of r. 144 of the Bankruptcy Rules, 1870. *Williams, Ex parte, Jones, In re*, 46 L. T. 242—C. A. Reversing 46 L. T. 237; 30 W. R. 416.

— **When Time begins to run.**—In construing r. 143 of the Bankruptcy Rules, 1870, the words "decision" and "order" mean the same thing; and the twenty-one days within which an appeal from a county court to the chief judge must be brought are to be reckoned from the date of the settling and signing of the order. *Cochrane, Ex parte, Sendall, In re*, 9 Ch. D. 698; 48 L. J., Bk. 31; 38 L. T. 820; 26 W. R. 818.

The decision in *Garrard, Ex parte* (5 Ch. D. 61) does not apply to the case of an appeal from a county court to the chief judge in bankruptcy. *Id.*

The twenty-one days within which an appeal from a county court to the chief judge must be brought, are to be reckoned from the day when the decision of the county court was pronounced. *Whitton, Ex parte, Greaves, In re*, 13 Ch. D. 881; 49 L. J., Bk. 31; 42 L. T. 63; 28 W. R. 432.

**To Court of Appeal—Before Judicature Acts.**—Notice of an appeal must be given within twenty-one days from the day on which the order appealed from was pronounced, not from the day on which it was drawn up. *Hinton, Ex parte, Hinton, In re*, 19 L. R., Eq. 266; 44 L. J., Bk. 36; 31 L. T. 852; 23 W. R. 488.

— **Since Judicature Acts.**—Since the Judicature Acts the time for appealing to the Court of Appeal from orders made by the chief judge in bankruptcy is regulated by the Rules of Court. 1875. *Viney, Ex parte, Gilbert, In re*, 4 Ch. D. 794; 46 L. J., Bk. 80; 36 L. T. 43; 25 W. R. 364—C. A.

Therefore, in calculating the twenty-one days allowed for appealing, Sundays are not to be excluded, and the material date is, not that of entering the appeal with the registrar, but that of service of the notice of appeal on the respondent. *Ib.*

Rule 143 of the Bankruptcy Rules, 1870, and the Bankruptcy Order of the 26th of May, 1873, do not now apply to appeals from the chief judge to the Court of Appeal. *Ib.*

An order, which was a refusal of an application, was made by the London Bankruptcy Court on the 10th of March. An appeal was entered with the registrar of appeals on the 4th of April, and on the same day notice was served on the respondent. The registrar's office had been entirely closed for the Easter Vacation from the 30th of March to the 3rd of April, both inclusive:—Held, that, notwithstanding the closing of the office, the notice of appeal might have been served on the respondent, and that, as it had not been served within twenty-one days, the appeal was too late. *Saffery, Ex parte, Lambert, In re*, 5 Ch. D. 365; 46 L. J., Bk. 89; 36 L. T. 532; 25 W. R. 572—C. A.

The time for appealing to the Court of Appeal from decisions of the London Court of Bankruptcy is now regulated entirely by the Rules of Court, 1875, and not by the Bankruptcy Rules. *Garrard, Ex parte, Lower, In re*, 5 Ch. D. 61; 46 L. J., Bk. 70; 37 L. T. 42; 25 W. R. 364—C. A.

Therefore, where the appeal is from an order actually made, the twenty-one days for appealing run from the signing, not from the pronouncing, of the order. *Ib.*

**Extension of Time.**—The court has jurisdiction to give leave to appeal after the expiration of the twenty-one days within which, under r. 143 of the Bankruptcy Rules, 1870, the notice of appeal is to be given. *Kireton Coal Company, Ex parte, Phillips, In re*, 7 L. R., Ch. 730; 42 L. J., Bk. 11; 27 L. T. 670; 20 W. R. 1026.

When an appellant had not given notice of appeal until the last day allowed for the purpose, the court gave the respondent leave to present a cross appeal, though the time for appealing had expired. *Ib.*

— **"Person. Aggrieved."**—A third person who is aggrieved by an adjudication of bankruptcy, by reason of the date of an act of bankruptcy on which the adjudication purports to be founded, is, after the expiration of the time limited for appealing, entitled, *ex debito justitiæ*, to an extension of the time for appealing, if he applies promptly after he becomes aware of the date of the act of bankruptcy which affects his rights. *Tucker, Ex parte, Tucker, In re*, 12 Ch. D. 308; 48 L. J., Bk. 118; 28 W. R. 219—C. A.

The limit of time for bringing an appeal fixed by r. 143 of the Bankruptcy Rules, 1870, applies equally to all "persons aggrieved," whether parties to the order or not. An order of adjudication, duly made, and not appealed against for

twenty-one days, is good against all the world. *Johnson, In re, Wigg, Ex parte*, 12 Ch. D. 905; 48 L. J., Bk. 119; 40 L. T. 528; 27 W. R. 804.

— **Annulling Adjudication.**—Notice of an appeal from the refusal to annul an adjudication must be served on the trustee as well as on the petitioning creditor. And if notice of the appeal is served on the petitioning creditor in time, but is not served in time on the trustee, the appeal must be dismissed. The time for appealing will not be extended in such a case. *Ward, Ex parte, Ward, In re*, 15 Ch. D. 292; 43 L. T. 183; 29 W. R. 206—C. A.

— **Mistake of Registrar's Clerk.**—A mistake of the registrar's clerk, misleading the appellant's solicitor as to the time for bringing an appeal, is no ground for extending the time to appeal. *Gilbert, In re*, 4 Ch. D. 794; 36 L. T. 43; 25 W. R. 364—C. A.

## 2. WHO MAY APPEAL.

**Creditor—Proof of Debt.**—A creditor whose debt was not objected to at a meeting for the choice of assignees, although not formally proved, may appeal from a decision come to at the meeting, provided his debt is proved before the hearing of the appeal. *Barnett, Ex parte*, 4 L. R., Ch. 68; 19 L. T. 406; 17 W. R. 88.

**Registration—Creditors not before Registrar.**—Creditors who have not appeared before the registrar on the application for registration, or before the chief judge, on an appeal from the order for registration, have a *locus standi* to appeal from the order of the chief judge. *Walter, Ex parte, Webb, In re*, 2 Ch. D. 326; 45 L. J., Bk. 105; 34 L. T. 701; 24 W. R. 834—C. A.

**Adjudication—Bill of Sale Holder.**—An adjudication was made, founded upon the execution by the debtor of a bill of sale which was held to be an act of bankruptcy:—Held, that the holder of the bill of sale was entitled to appeal from the adjudication. *Ellis, Ex parte*, 2 Ch. D. 797; 45 L. J., Bk. 159; 34 L. T. 705—C. A.

**Adjudication—Trustees for Benefit of Creditors.**—The act of bankruptcy upon which an adjudication was founded was the execution by the debtor of a deed of assignment to trustees for the benefit of his creditors:—Held, that the trustees were entitled to appeal against the adjudication as persons aggrieved within s. 71 of the Bankruptcy Act, 1869. *Sadler, Ex parte, Whelan, In re*, 48 L. J., Bk. 43; 39 L. T. 361; 27 W. R. 156.

**Adjudication—Partners.**—A joint adjudication was made against three partners. Two of them appealed. The third did not appeal within the twenty-one days allowed by the general rules:—Held, that he might be heard on the appeal, but on the terms of presenting a separate petition of appeal, and making the usual deposit to meet costs. Also, that as the case of the three partners was the same, the adjudication must be annulled against all three. *Hayward, Ex parte*, 6 L. R., Ch. 546; 40 L. J., Bk. 49; 24 L. T. 782; 19 W. R. 833.

**Persons affected.]**—Any person affected by an order of a county court judge made in bankruptcy (as, for instance, the solicitor of a trustee), may appeal therefrom to the chief judge. *Hunt, Ex parte, Winn, In re*, 19 W. R. 714.

By virtue of ss. 10 and 11 of the Bankruptcy Act, 1869, an adjudication of bankruptcy is, so long as it stands, conclusive as against a third person (e. g., the holder of a bill of sale executed by the bankrupt), that the act of bankruptcy, on which the adjudication was professedly founded, was in fact committed, and that the title of the trustee relates back to that act of bankruptcy. But a third person, whose title to property is affected by the adjudication, is under s. 71 a "person aggrieved" by it, and is entitled to appeal from it. Whether the limit of twenty-one days for bringing an appeal, fixed by rule 143 of the Bankruptcy Rules, 1870, applies to a third person, quære. *Learyd, Ex parte, Foulds, In re*, 10 Ch. D. 3; 48 L. J., Bk. 17; 39 L. T. 525; 27 W. R. 277—C. A.

A person who alleges himself to be a creditor under a bankruptcy, but who has omitted for several years to prove his debt in the regular way, is not a "person aggrieved," within the meaning of s. 71 of the Bankruptcy Act, 1869, by the refusal to make an order, the result of which, if made, would be to increase the assets available for the creditors, and is, therefore, not entitled to appeal from the refusal. *Ditton, Ex parte, Woods, In re*, 11 Ch. D. 56; 40 L. T. 297; 27 W. R. 401—C. A.

When the court has refused to act on a report by the comptroller in bankruptcy that the trustee in a bankruptcy has been guilty of a misfeasance, neglect or omission, by which the estate has sustained a loss which the trustee ought to make good, neither the bankrupt nor any of his creditors is entitled to appeal from the refusal. *Sidebotham, Ex parte, Sidebotham, In re*, 14 Ch. D. 458; 49 L. J., Bk. 41; 42 L. T. 783; 28 W. R. 715—C. A.

The comptroller alone is entitled to appeal. *Ib.*

*Ex parte Ditton* (11 Ch. D. 56) explained. *Ib.*

If the trustee has been guilty of a misfeasance, either the bankrupt or any of the creditors is entitled to make an application of his own to the court under s. 20, and, if the person so applying is dissatisfied with the order made, he has a right to appeal from it. *Ib.*

**—Two Petitions—First Petitioner.]**—When two petitions are presented against the same person, and he is adjudicated on the second, the first petitioner is not a "person aggrieved" by the adjudication, within the meaning of s. 71, and has no locus standi to appeal from it, *Mason, Ex parte, White, In re*, 14 Ch. D. 71; 49 L. J., Bk. 56; 42 L. T. 884; 28 W. R. 749—C. A.

**Receiver before Appointment of Trustee.]**—After the presentation of a bankruptcy petition and the appointment of a receiver, but before the appointment of a trustee, an order was made that the receiver should deliver up to the applicants some bills of exchange which had come into his hands, on the ground that they did not form part of the debtor's estate. Notice of the application had been addressed to the receiver, the debtors, and the petitioning creditor. Notice

of appeal was given in the name of the receiver alone:—Held, that the notice must be amended by naming the debtors and the petitioning creditor also as appellants. *Chalmers, Ex parte, Sawers, In re*, 11 Ch. D. 911; 41 L. T. 263—C. A.

### 3. FROM AND TO WHOM.

**From Registrar.]**—Where the lord chancellor has ordered any pending business to be disposed of by the registrar, an appeal will lie from the decision of such registrar to the Court of Appeal in Chancery. *Blair, Ex parte, Mackie, In re*, 5 L. R., Ch. 482; 39 L. J., Bk. 45; 22 L. T. 287; 18 W. R. 615.

The chief judge will not entertain an application made by way of appeal on the subject of a registrar's decision; there must be an adjournment by the registrar for his opinion. *Nicholson, In re*, 18 W. R. 250.

An appeal from the registrar to the judge, under rule 295, is not an appeal within the rule of practice, that a successful appellant is not generally entitled to the costs of the appeal; it is rather an application to the judge to set right an irregularity committed by the registrar. *Thorne, Ex parte, Butlin, In re*, 42 L. J., Bk. 60.

An appeal from the decision of a registrar sitting as judge cannot be heard by a county court judge, but must be to the chief judge in bankruptcy or the lords justices of appeal as the case may be. *Nicholson, Ex parte, Marsden, In re*, 34 L. T. 592.

An appeal from the registrar of a county court, sitting as registrar, must be before the judge of his court in the first instance. *Sidey, Ex parte, Sidey, In re*, 24 L. T. 143.

**—Notice of Appeal.]**—Notice of an appeal from a registrar acting as chief judge ought not (even if it is *ex parte*) to be addressed to or served on the registrar. *Izard, Ex parte, Meir, In re*, 20 Ch. D. 703; 61 L. J., Ch. 939; 47 L. T. 212; 30 W. R. 861—C. A.

**From County Court.]**—No appeal lies to the chief judge in bankruptcy from an order made by a county court for the trial of issues of fact before itself, when the order is such as the county court has jurisdiction to make. *Anderson, Ex parte*, 5 L. R., Ch. 473; 39 L. J., Bk. 32; 22 L. T. 361; 18 W. R. 715.

When pending proceedings in a district Court of Bankruptcy have been transferred by the lord chancellor to a county court, an appeal from a decision of the county court judge under the Bankruptcy Act, 1869, lies, in the first instance, to the chief judge in bankruptcy, not to the Court of Appeal in Chancery. *Ib.*

But under the Bankruptcy Act, 1861, where pending proceedings in a district court in bankruptcy have been transferred by the lord chancellor to a county court, an appeal from a decision of the county court judge lies to the Court of Appeal in Chancery, not to the chief judge in bankruptcy. *Palmer, Ex parte*, 5 L. R., Ch. 470; 39 L. J., Bk. 48; 22 L. T. 323; 18 W. R. 587.

An appeal lies to the chief judge in bankruptcy from an order made by a county court judge, under the Debtors Act, 1869, s. 16. *Dempsey, Ex parte*, 8 L. R., Ch. 676; 42 L. J.,

Bk. 93 ; 28 L. T. 860 ; 21 W. R. 800. Affirming *S. C.*, sub nom. *Strachan, Ex parte, Dempsey, In re*, 21 W. R. 523.

— **Decision on Facts of Particular Case.]**

—A shipbroker introduced a purchaser to a ship-builder who purchased a ship, and the broker received a commission. The purchaser afterwards purchased other ships. The broker claimed commission on the second sale also. It was a question of fact whether the broker was employed in the second sale; but he alleged a custom by which he was entitled to commission whether he was employed or not. The county court judge found that on the evidence the broker had been employed, and assessed his claim. The chief judge refused to interfere with the decision as to facts arrived at by a county court judge sitting as a jury:—Held, that there was no evidence to go to a jury that the broker was employed, and that the custom was not proved. *Humphrys, In re, Chatteris, Ex parte*, 22 W. R. 289—L. J.

**Under former Statutes.]**—The effect of the Bankruptcy Act of 1861, transferring the jurisdiction of the Insolvent Debtors Court to the Court of Bankruptcy, is to give the same right of appeal in insolvency cases as is given in bankruptcy cases. *Perkins, Ex parte*, 34 L. J., Bk. 37 ; 11 Jur., N. S. 895 ; 12 L. T. 784 ; 13 W. R. 1001.

Trover had been brought by assignees to recover from a mortgagee goods alleged to be in the reputed ownership of the bankrupt ; the assignees applied to the commissioner for an order for a sale of the goods, as in *Heslop, Ex parte* (1 De G., Mac. & G. 477). The commissioner declined to make the order on an ex parte application, and gave the assignees leave to serve the defendant in the action with notice of the application. On his attending by counsel, and objecting to the order being made, the commissioner refused the application, with costs:—Held, that the proper course of the assignees was to have appealed from the refusal to make the order on an ex parte application. *Barlow, Ex parte*, 2 De G., Mac. & G. 921 ; 22 L. J., Bk. 15.

A commissioner has no jurisdiction to annul his adjudication of bankruptcy, on the application of the bankrupt, except where the bankrupt shews cause against the adjudication under 12 & 13 Vict. c. 106, s. 104. After the advertisement of the adjudication, the bankrupt must appeal to the superior court. *Carter, Ex parte*, 22 L. J., Bk. 55 ; 17 Jur. 515—H. L.

The Court of Appeal has jurisdiction to review the decision of a commissioner refusing to grant an adjudication. *Crabb, Ex parte*, 25 L. J., Bk. 45 ; 2 Jur., N. S. 628—L. J.

A decision of a commissioner who declines to receive an affidavit, upon which an application for registration under 24 & 25 Vict. c. 134, s. 200, is founded, on the ground of the insufficiency of the affidavit, is not the subject of appeal. *Anon.*, 11 Jur., N. S. 69 ; 11 L. T. 466 ; 13 W. R. 302.

The Court of Appeal will not interfere with the discretion of a commissioner as to the admissibility of evidence at a private meeting. *Maw, Ex parte*, 11 Jur., N. S. 69 ; 11 L. T. 466 ; 13 W. R. 302.

Where a mortgagee submitted the question of the validity of his security to the jurisdiction of the commissioner on an application of the peti-

tioning creditor to set it aside:—Held, that the commissioner, in deciding the question, was acting judicially, and not as an arbitrator, and that his decision was subject to appeal. *Bland, Ex parte*, 6 De G., Mac. & G. 757.

**4. APPEAL TO THE HOUSE OF LORDS.**

An application for leave to appeal to the House of Lords against an order in bankruptcy must be made, if not immediately, at all events within a reasonable time. *Marcus, Ex parte*, 26 L. J., Bk. 15 ; 3 Jur., N. S. 602—L. J.

An application to the Lord Chancellor to certify for an appeal from an order of the Court of Appeal in Bankruptcy, to be presented to the House of Lords, is properly made ex parte, and the Lord Chancellor may, at his discretion, so certify. *Kempson, Ex parte*, 12 L. T. 43 ; 13 W. R. 446.

Notwithstanding the repeal of s. 18 of the 12 & 13 Vict. c. 106, by 24 & 25 Vict. c. 134, the discretionary power of the Lords Justices as to appeals to the House of Lords remains. *Newton, In re*, 31 L. J., Bk. 81 ; 8 Jur., N. S. 495 ; 6 L. T. 314 ; 10 W. R. 547.

There is no right of appeal by common law to the House of Lords. *Id.*

Where the court, differing from the commissioner, and holding the petitioning creditor's debt to be sufficient, referred back to him the question of the validity of the adjudication, an application for leave to appeal to the House of Lords from the decision as to the sufficiency of the debt was held premature, and was ordered to stand over till the commissioner should have given his decision. *Griffiths, Ex parte*, 3 De G., Mac. & G. 174 ; 22 L. J., Bk. 50 ; 17 Jur. 655.

An order having been made in July, 1861, granting a bankrupt his discharge, with a condition as to his after-acquired property, the Lords Justices refused an application by the bankrupt for leave to appeal to the House of Lords, and determined to rehear the case themselves, directing that a new deposit of 20*l.* should be made. After the case had been so reheard, an order was made, varying the former order, by suspending it for a certain time, giving the bankrupt protection in the meantime, and an unconditional discharge at its termination. *Drinkwater, Ex parte*, 32 L. J., Bk. 20—L. J.

Where the court of appeal considered that a point of law, upon which leave to appeal to the House of Lords was asked for, was one of considerable importance, but that it could be as effectually raised in an action, the leave was refused, on the ground of the great expense and delay of such an appeal. *Calthrop, Ex parte*, 3 L. R., Ch. 252 ; 18 L. T. 194.

Leave to appeal to the House of Lords having been granted to a bankrupt against a decree of the Lord Chancellor, whereby he reversed an order of a commissioner dismissing the petition for adjudication, upon a representation by the petitioning creditor that the bankrupt had recently made an assignment of all his property to a relative, with a view of avoiding payment of the very debt on which the petition was founded, it was ordered that security be given by the assignees of the deed, otherwise the stay of proceedings, which had been ordered, pending the appeal before the Lord Chancellor, could not be continued, but the advertisement must issue at



the expiration of a week. *Williams, Ex parte*, 10 L. T. 363.

**Under 32 & 33 Vict. c. 71.]**—The Court of Appeal will not grant leave for an appeal to the House of Lords under s. 71 of the Bankruptcy Act, 1869, unless it can certify that the decision sought to be appealed involves a question of law or of equity of sufficient difficulty or importance to require the decision of the House of Lords. *Attwater, Ex parte, Turner, In re*, 5 Ch. D. 27; 46 L. J., Bk. 31; 35 L. T. 917; 25 W. R. 328—C. A.

Appeal to House of Lords not allowed in the case of a small debt on the ground that it would determine the right to larger sums. *Butcher, Ex parte, Meldrum, In re*, 9 L. R., Ch. 595; 43 L. J., Bk. 98; 30 L. T. 482; 22 W. R. 721.

In determining under s. 71 of the Bankruptcy Act, 1869, whether leave should be granted to appeal to the House of Lords, the court will be guided by the same principles as under s. 18 of the Bankruptcy Act, 1849. *Jackson, Ex parte, Bouca, In re*, 14 Ch. D. 725; 43 L. T. 272—C. A.

Leave to appeal to the House of Lords refused, on the ground that the appeal would be from the discretion of the court. *East and West India Dock Company, Ex parte, Clarke, In re*, 17 Ch. D. 759; 50 L. J., Ch. 789; 45 L. T. 6; 30 W. R. 22—C. A.

**Leave granted.]**—See *Abbott, Ex parte, Gourlay, In re*, 15 Ch. D. 447; 50 L. J., Ch. 80; 43 L. T. 417; 29 W. R. 143—C. A.

#### 5. IN WHAT CASES.

**Disclaimer by Leave of Court—Appeal after Execution of Disclaimer.]**—After unconditional leave has been given by the court to a trustee in bankruptcy to disclaim a lease of the bankrupt, and the trustee has executed a disclaimer, it is too late for the lessor to appeal from the order even for the purpose of getting conditions imposed on the trustee. The Court of Appeal has then no power to impose conditions. If the lessor desires to appeal from such an order, he ought to apply when it is made for a stay of proceedings under it. *Ditton, Ex parte* (3 Ch. D. 459) followed. *Sadler, Ex parte, Hawes, In re*, 19 Ch. D. 122; 51 L. J., Ch. 201; 30 W. R. 173—C. A.

**Interpleader Order in Bankruptcy.]**—Any order in interpleader made by the chief judge in bankruptcy can be appealed from. *Streeter, Ex parte, Morris, In re*, 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127—C. A.

#### 6. PRACTICE ON APPEAL.

**Notice of Appeal.]**—On the application of a trustee in bankruptcy, the registrar of a county court declared two bills of sale which the bankrupt had executed void against the trustee. On appeals by the two grantees, the chief judge affirmed the decision as to the first bill of sale, but held that the second bill of sale was valid as against the trustee. The first grantee gave notice of appeal, addressed to the trustee and to the second grantee. The trustee gave no original notice of appeal, but served notice on both the grantees that, on the hearing of the first

grantee's appeal, he should contend that the decision of the chief judge as to the second bill of sale ought to be varied in his favour:—Held, that this was a good notice under Rules of Court, 1875, Ord. LVIII. r. 6. *Payne, Ex parte, Cross, In re*, 11 Ch. D. 539; 40 L. T. 296; 27 W. R. 368.

The effect of Rule 144 of the Bankruptcy Rules, 1870, which prescribes that four days' notice of an appeal shall be given, is merely that the appeal motion shall not be heard until the four days have elapsed. *Wood, In re, Lückes, Ex parte*, 7 L. R., Ch. 302; 41 L. J., Bk. 21; 26 L. T. 113; 20 W. R. 403.

Before notice of appeal can be given, an order must be drawn up to which the appeal can attach, though the appeal is from a refusal to make an order asked for by the appellant. *Sykes, Ex parte*, 19 W. R. 563.

**Debtor not shewing Cause against Petition.]**—When a debtor gives no notice under r. 36 of his intention to shew cause against a bankruptcy petition, and the petition is consequently heard in his absence, and the court refuses to make an adjudication, if the petitioning creditor desires to appeal against the refusal he must serve notice of the appeal on the debtor. *Warburg, Ex parte, Whalley, In re*, 24 Ch. D. 364; 49 L. T. 243—C. A.

**Substituted Service.]**—In a proper case the Court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the rules of court. *Id.*

**Cross Appeal—When Required.]**—When an appeal is brought from part of an order the whole case is not open to the respondent; but if he wishes to complain of another part of the order he must present a cross appeal. *Kiveton Coal Company, Ex parte, Phillips, In re*, 7 L. R., Ch. 730; 42 L. J., Bk. 11; 27 L. T. 670; 20 W. R. 1026.

**Payment of Deposit at or before Time of Entering—Formal Defect or Irregularity.]**—Rule 2 of November, 1878, has not altered the requirement of rule 145 of 1870, that the deposit on an appeal from a county court shall be paid "at or before the time of entering" the appeal:—Sensible, however, that the payment would be in time if it was made at the earliest possible moment after the entry of the appeal. *Rosenthal, Ex parte, Dickinson, In re*, 20 Ch. D. 315; 51 L. J., Ch. 736; 47 L. T. 266; 30 W. R. 667—C. A. Affirming 51 L. J., Ch. 559; 46 L. T. 320; 30 W. R. 492.

An appeal was entered on the 17th February, but the deposit was not paid till the 6th March:—Held, that this was not a formal defect or an irregularity which could be cured under the power given to the court by sect. 82, and that the appeal could not be entertained. *Id.*

Having regard to rule 2 of November, 1878, the proper practice now is for the registrar, before entering an appeal, to give a direction to the Bank of England to receive the deposit on the appeal, and, after receiving a certificate from the bank that the money has been paid, to enter the appeal. *Id.*

— Certificate that Money deposited before

**Entry.**—The practice laid down in *Rosenthal, Ex parte (supra)*, that before entering an appeal in bankruptcy the registrar ought now to give a direction to the Bank of England to receive the deposit payable on the entry, and not to enter the appeal until he receives from the bank a certificate that the money has been paid, applies to appeals from the chief judge to the Court of Appeal, as well as to appeal from a county court to the chief judge. *Luxon, Ex parte, Pidsley, In re*, 20 Ch. D. 701; 51 L. J. Ch. 928; 47 L. T. 211; 31 W. R. 71—C. A.

A notice of appeal from an order made by the chief judge on the 24th April was taken to the office of the registrar of appeals on the 28th April. The registrar's clerk entered the appeal, and gave a direction to the bank to receive the deposit. The money was paid to the bank on the 8th May. The certificate of the bank of the payment was then taken to the registrar's office, but the clerk made no further entry of the appeal.—Held, that the clerk had made a mistake in entering the appeal before receiving the bank's certificate of the payment of the deposit, but that as there had been no default on the part of the appellant, the appeal could be entertained. *Ib.*

**Increasing Deposit.**—After an appeal has been entered with the registrar, and the ordinary deposit of 20l. has been made by the appellant, it is too late for the respondent to apply to have the amount of the deposit increased. *Lovering, Ex parte, Thorpe, In re*, 15 L. R., Eq. 291; 42 L. J., Bk. 39; 21 W. R. 380.

Notwithstanding Rule 145 of the Bankruptcy Rules, 1870, the Court of Appeal can, under Ord. 58, r. 15, require such security as it thinks fit to be given for the costs of a bankruptcy appeal. *Isaacs, Ex parte, Baum, In re*, 9 Ch. D. 271; 47 L. J., Bk. 111; 38 L. T. 924; 26 W. R. 890—C. A.

Order made to increase the amount of the deposit on a bankruptcy appeal from 20l. to 70l., on the ground of the insolvency of the appellant. *Ib.*

An undischarged debtor will not be ordered personally to pay the costs of his unsuccessful appeal beyond the deposit. *Baum, Ex parte, Baum, In re*, 7 Ch. D. 719; 47 L. J., Bk. 48; 38 L. T. 367; 26 W. R. 568—C. A.

**Locus Standi—Appeal by Trustee removed before Hearing—Refusal of New Trustees to prosecute Appeal—Costs.**—The trustee in a bankruptcy presented an appeal against the admission of a proof. Before the appeal came on for hearing the appellant had been removed from his office, and a new trustee appointed, who declined to prosecute the appeal.—Held, that the appellant had no locus standi, but that the appeal must stand over for a fortnight to give the creditors an opportunity of prosecuting it. At the end of the fortnight no creditor had adopted the appeal.—Held, that the appeal must be dismissed, and that the respondent was entitled to have his costs paid out of the deposit, but that no personal order for costs could be made against the appellant. *Sheard, Ex parte, Pooley, In re* (No. 2), 16 Ch. D. 110; 44 L. T. 260—C. A.

**Fresh Evidence, when allowed.**—The 32nd of the General Orders in Bankruptcy, of 6th

November, 1861, providing that no new evidence shall be received on any appeal, unless the Court of Appeal shall, on the hearing thereof, so direct, applies to evidence upon the matters in issue, and not to evidence as to what took place in the court below. *Page, Ex parte*, 1 De G., J. & S. 283; 32 L. J., Bk. 14; 9 Jur., N. S. 8; 7 L. T. 408.

In the former case, some ground must be shewn for the admission of the new evidence *Ib.*

Where an application had been made to the Court of Appeal to allow further evidence to be admitted, and the affidavits had been filed, subject to such permission, and read by the respondents, the matter was ordered to stand over, with liberty to the respondents to answer the affidavits, without prejudice to the question of their admissibility. *Robertshaw, Ex parte*, 10 L. T. 254.

Where an application is made to the Court of Appeal to set aside an adjudication, the court has jurisdiction to allow further evidence to be adduced. *Miller, In re*, 32 L. J., Bk. 45; 7 L. T. 657; 11 W. R. 80—L. J.

When fresh evidence in a matter sent back to a district court for further consideration has been permitted, and it appears that the witnesses reside in London, the court will order that fresh evidence be taken before one of the commissioners in London. *Hill, Ex parte*, 7 L. T. 659—L. J.

The court will not receive fresh evidence not before the commissioner unless under special circumstances. *Holford, Ex parte*, 11 Jur., N. S. 69; 11 L. T. 465.

The court will refuse to permit fresh evidence to be used on an appeal if the party tendering it had the opportunity of using it in the court below, but omitted to do so. *Isaac, Ex parte, De Vecchi, In re*, 6 L. R., Ch. 58; 40 L. J., Bk. 19; 22 L. T. 523; 19 W. R. 38.

When additional evidence was necessary to enable the Court of Appeal to dispose of a case satisfactorily, such evidence was taken *vivâ voce* on the hearing of the appeal. *Keighley, Ex parte, Wike, In re*, 9 L. R., Ch. 667; 44 L. J., Bk. 13.

Upon an appeal from the decision of a county court the chief judge will not shut out evidence not before the court below, where the proposed evidence has been filed and notice given in ample time to allow the effect of such proposed evidence to be fully considered and answered by the other side. *Wigg, Ex parte, Johnson, In re*, 12 Ch. D. 905; 48 L. J., Bk. 119; 40 L. T. 528; 27 W. R. 804.

Evidence taken before, but not used upon the original hearing, admitted upon the hearing of an appeal. *Harris, Ex parte, James, In re*, 19 L. R., Eq. 253; 44 L. J., Bk. 31; 31 L. T. 621; 23 W. R. 536.

**New Case raised on Appeal.**—An appellant is not entitled to raise upon his appeal a new case inconsistent with that which he originally raised in the primary court, even though the evidence taken in that court supports the new case. *Reddish, Ex parte, Walton, In re*, 5 Ch. D. 882; 37 L. T. 237; 25 W. R. 741—C. A.

**Costs of Appeal.**—In appeals from orders made by county courts in bankruptcy since the 1st of November, 1875, a successful appellant will, as a general rule, be entitled to his costs of

appeal. *Masters, Ex parte, Winson, In re*, 1 Ch. D. 113; 45 L. J., Bk. 18; 33 L. T. 613; 24 W. R. 113.

A successful appellant from a decision of the county court, will not be allowed costs of appeal. *Cherry, In re, Matthews, Ex parte*, 40 L. J., Bk. 90; 25 L. T. 276; 19 W. R. 1005. Affirmed on appeal, 7 L. R., Ch. 24; 25 L. T. 646; 20 W. R. 136—L. J. See preceding case, *contra*.

— **New Evidence.**—When a party appeals, and, subsequently, further evidence is adduced which causes him to abandon his appeal, no costs will be given to either side. *Weir, Ex parte, Aird, In re*, 21 W. R. 785.

— **New Grounds.**—When an appellant succeeds only upon a ground not raised in the court of first instance, he will have to pay the costs of the original hearing. *Harris, Ex parte, James, In re*, 19 L. R., Eq. 253; 44 L. J., Bk. 31; 31 L. T. 621; 23 W. R. 536.

— **Cross Appeals.**—When an appeal and a cross appeal both fail, the appellants pay costs of the appeal as if no cross appeal had been presented, and the respondents only pay any extra costs which the cross appeal may have caused. *Ogle, Ex parte, Smith, Ex parte, Pilling, In re*, 8 L. R., Ch. 711; 42 L. J., Bk. 99; 21 W. R. 938.

— **Non-appearance of Appellant.**—When, on an appeal from an order of adjudication being called on for hearing, no one appears on behalf of the appellant, the court will dismiss the appeal with costs without requiring the respondent to prove that he has been served with notice of the appeal. *Lowe, Ex parte*, 7 Ch. D. 160; 47 L. J., Bk. 24; 37 L. T. 583; 26 W. R. 229—C. A.

— **Shorthand Writer's Notes.**—The charge for a copy of a shorthand writer's notes of the proceedings in a county court may be allowed as part of the costs of an appeal. *Sauyer, Ex parte, Bunden, In re*, 1 Ch. D. 698; 45 L. J., Bk. 56; 33 L. T. 759; 24 W. R. 375.

— **Trustee Respondent.**—A trustee in bankruptcy who is respondent to a successful appeal will not be ordered to pay costs personally. *Stapleton, Ex parte, Nathan, In re*, 10 Ch. D. 586; 40 L. T. 14; 27 W. R. 327—C. A.

— **One Respondent made to pay another Respondent's Costs.**—The Court of Appeal has jurisdiction to order one respondent to pay the costs incurred by a co-respondent. *Wollheim, In re*, 11 W. R. 128—L. J.

**Rehearing by Court of Appeal.**—See PRACTICE AND PROCEDURE (*Rehearing*), col. 1450.

## XXV. EVIDENCE IN BANKRUPTCY.

### 1. PROOF OF BANKRUPTCY.

**Under 12 & 13 Vict. c. 106, s. 232.**—This section applies to all cases against a bankrupt, both criminal as well as civil. *Reg. v. Levi*, 1 L. & C., C. C. 597; 10 Cox, C. C. 110; 34 L. J., M. C. 174; 12 L. T. 502; 13 W. R. 724.

**Proof by Gazette.**—The production of a copy of the London Gazette purporting to be printed by authority, containing an advertisement of an adjudication of bankruptcy, is sufficient proof of the adjudication under 12 & 13 Vict. c. 106, s. 240. *Reg. v. Raudnitz*, 11 Cox, C. C. 360; 21 L. T. 621.

The goods of M. having been seized and sold under an execution, notice was duly served on the sheriff of a petition in bankruptcy against him; this petition was preferred in a county court against him as a gentleman residing within the district of that court, and not residing or carrying on business in the London district, and alleged an act of bankruptcy which would render even a non-trader liable to be made bankrupt; no opposition was offered, and he was adjudged bankrupt and a trustee appointed. In an interpleader issue between the trustee and the execution creditor, to try whether the former was entitled to the proceeds of the sale as trustee of a bankrupt trader:—Held, by the majority of the court, that the trustee might rely on the copy adjudication in the Gazette as conclusive evidence of the bankruptcy, and also give evidence that he was a trader in London in order to shew that the goods were the goods of a bankrupt trader within 32 & 33 Vict. c. 71, s. 87. *Recell v. Blake*, 7 L. R., C. P. 300; 41 L. J., C. P. 129; 26 L. T. 578; 20 W. R. 756.

— **Cuttings from the Gazette.**—A petition in bankruptcy having been presented against the prisoner in the D. County Court, the court made an order that the publication of a notice of the petition in the London Gazette should be deemed service of the petition on the prisoner. The prisoner did not appear according to this notice, and there was no evidence that it had come to his knowledge. The prisoner was adjudicated bankrupt in his absence, and divers proceedings in the bankruptcy took place. Subsequently thereto the prisoner was arrested, and afterwards examined in court touching his affairs by the trustee in the bankruptcy, and the result was that he was indicted and convicted for various offences under the Bankruptcy Act. On the trial, in proof of the publication of the order of the county court in the Gazette, the file of the proceedings in the Bankruptcy Court was produced, containing a cutting from the Gazette of the advertisement of the order of the county court and notice to appear:—Held, that this cutting from the Gazette was improperly received as evidence of the publication of the notice in the London Gazette, and that the conviction could not be sustained. *Reg. v. Lowe*, 15 Cox, C. C. 286; 52 L. J., M. C. 122; 48 L. T. 763; 47 J. P. 535.

— **Married Woman.**—The London Gazette containing the advertisement of the bankruptcy is rightly admitted as conclusive evidence of the bankruptcy as against the bankrupt, although a married woman, the prescribed period to take proceedings to annul the bankruptcy having elapsed, under 12 & 13 Vict. c. 106, s. 233. *Reg. v. Robinson*, 1 L. R., C. C. 80; 36 L. J., M. C. 78; 16 L. T. 605; 15 W. R. 966; 10 Cox, C. C. 467.

Examinations of a bankrupt, taken compulsorily before the commissioner in bankruptcy, under 12 & 13 Vict. c. 106, are rightly admitted

against him on the trial of an indictment for embezzling property with intent to defraud creditors. *Ib.*

**File of Proceedings.**—The file of proceedings in bankruptcy is not a record, but may be questioned. *Bacon, Ex parte, Bond, In re*, 17 Ch. D. 447; 44 L. T. 834; 29 W. R. 574—C. A.

**In other Cases.**—In an action, not by a person claiming under assignees of a bankrupt against a third party, the proceedings in bankruptcy must be taken as conclusive, if either admitted or proved; and the validity of an order for sale under which a plaintiff claims property of the bankrupt, or of a debt, before and as a proof of which he has obtained it, cannot be disputed. *Mackley v. Pattender*, 2 F. & F. 61.

A certificate under 6 Geo. 4, c. 16, s. 126, was evidence, as against the bankrupt, as a valid bankruptcy, without proof of the petitioning creditor's debt, &c. *Fyson v. Chambers*, 9 M. & W. 461.

A fiat not prosecuted was admissible in an action brought by virtue of 6 Geo. 4, c. 16, s. 8, to recover money paid by a bankrupt, although not entered of record in the Court of Bankruptcy. *Belcher v. Sambourne*, 6 Q. B. 414; 13 L. J., Q. B. 297; 8 Jur. 858.

A fiat was sufficiently proved by shewing that it was under the hand of a Master in Chancery, without proving his appointment to sign fiats under 1 & 2 Will. 4, c. 56, s. 12. *Marshall v. Lamb, D. & M.* 315; 5 Q. B. 115; 13 L. J., Q. B. 75; 7 Jur. 850.

Office copies of proceedings in a bankruptcy which had been annulled, ordered to be delivered to a creditor for the purpose of being used by him on a trial abroad. *Sybrandt, Ex parte*, 3 De G. & J. 487; 28 L. J., Bk. 14; 5 Jur., N. S. 1190.

In order to prove his title as creditors' assignee, the plaintiff put in evidence a certificate, dated before action, certifying his proper appointment before action, signed by the registrar for the commissioner, and sealed with the seal of the Court of Bankruptcy:—Held, that the certificate so sealed was conclusive, and that the defendant could not go into evidence to shew that there was no signature by the commissioner or his deputy until after action. *Kelly v. Morray*, 35 L. J., C. P. 287; 14 W. R. 939.

Where in an indictment against a trader for fraudulently obtaining goods on credit, the act of bankruptcy relied on was the filing a petition in the insolvent debtors' court under 1 & 2 Vict. c. 110, s. 35, and the only evidence offered was a copy of the petition, duly signed and certified by the proper officer, in accordance with 12 & 13 Vict. c. 106, s. 239, but the time of filing such petition was only shewn by an indorsement on the back of the copy, such indorsement not being certified in any way, or referred to by the petition:—Held, that although the petition to, and adjudication of, the Court of Bankruptcy were proved, yet that it was also necessary to prove the act of bankruptcy, and that the evidence was not sufficient for that purpose. *Reg. v. Lande, Dears.* C. C. 567; 25 L. J., M. C. 14; 1 Jur., N. S. 1176.

**Who estopped from disputing Bankruptcy.**—In an action for goods against the person who

sold them, an advertisement of the defendant describing them as the goods of the bankrupt, precludes him from disputing the bankruptcy. *Maltby v. Christie*, 1 Esp. 342.

In an action of trover by the assignees of a bankrupt, the defendant's attorney admitted that the party had been duly declared bankrupt:—Held, that the defendant was thereby precluded from objecting to any of the proceedings under the commission, unless he had given notice to dispute it. *Perring v. Tucker*, 3 M. & P. 557.

If a person, against whom a commission issues, acquiesces in it so far as to take a part in the sale of his own effects under the commission, he will not afterwards be allowed to question it. *Clarke v. Clarke*, 6 Esp. 61.

But a bankrupt who assists in the sale of his own goods under the commission, for the purpose of protecting his property, and seeing that it is sold to the best advantage, is not thereby estopped from disputing the validity of the commission. *Hearne v. Rogers*, 4 M. & R. 486; 9 B. & C. 577.

Neither is he so estopped by giving notice to his lessors of a farm that he is a bankrupt, and is willing to deliver up the lease, which they accept, his assignees not being parties or privies to the transaction. *Ib.*

## 2. NOTICE TO DISPUTE BANKRUPTCY.

A notice to dispute the bankruptcy is too general. *Trimley v. Unwin*, 6 B. & C. 537; 9 D. & R. 548. See *Porter v. Walker*, 1 Scott, N. R. 568.

Notice of disputing the petitioning creditor's debt, the trading, or the act of bankruptcy, must be given, although under the new rules of pleading the denial of the bankruptcy may appear upon the record. *Moon v. Raphael*, 2 Scott, 489; 2 Bing. N. C. 310; 7 C. & P. 115; 1 Hodges, 289.

In the absence of a notice to dispute the petitioning creditor's debt, the debt upon the proceedings must be taken for all purposes of the action to be admitted. *Hernemann v. Barber*, 14 C. B. 583; 23 L. J., C. P. 145; 18 Jur. 790.

**Practice.**—Where a defendant, in an action brought against him by an assignee of a bankrupt, pleads the general issue, without giving notice of his intention to dispute the bankruptcy, he may have leave to withdraw such plea, and plead de novo, with the notice required by the statute. *Gardner v. Slack*, 6 Moore, 489; *S. P., Lawrence v. Crowder*, 1 M. & P. 511.

In an action by assignees of a bankrupt, the defendant gave notice to dispute the trading and act of bankruptcy. At the trial, the judge nonsuited them on the ground that the petitioning creditor's debt upon the proceedings was contracted at a period when the bankrupt had ceased to be a trader. The court set aside the nonsuit, holding that the objection was not open to the defendant under the notice to dispute the trading and act of bankruptcy. A judge at chambers having allowed the defendant to amend his notice, by adding thereto that he intended at the trial to dispute the petitioning creditor's debt,—the court refused to allow the assignees to dis-

continue without payment of costs. *Hernemann v. Barber*, 15 C. B. 774; 3 C. L. R. 239, 241.

**Omitting to give Notice—Effect.**—A party omitting to give notice to dispute the requisites admits them, but not the effect of the commission in point of law. *Phillips v. Hopwood*, 1 B. & Ad. 321, 619.

### 3. COMPELLING ATTENDANCE OF WITNESSES.

**Powers of Commissioners.**—A commissioner has power to summon parties to give evidence before him, although there are no facts in dispute, and the difference on which he is called to adjudicate turns on a question of law. *Watson v. Whitmore*, 14 L. J., Ex. 41; 8 Jur. 964.

Where the official assignee improperly issues a summons for the attendance of a party before a commissioner, it is the duty of that party to attend, and state the circumstances to the commissioner, in order that he may allow the costs of attendance, if he thinks the complaint well founded; but, if the party refuses to attend, and a warrant is subsequently issued for his apprehension, under which he is taken, he cannot maintain an action for malicious arrest. *Ib.*

Where a party summoned to attend before a commissioner in a district court of bankruptcy, and refusing to attend, on the ground that his expenses were not tendered in pursuance of 6 Geo. 4, c. 16, s. 35, was arrested under a warrant issued by the commissioner:—Held, in an action for false imprisonment against the solicitor to the fiat, who applied for the warrant, that the warrant was a justification to him, though the commissioner stated, at the time of the application, that he was in doubt whether the warrant ought to issue, and that the parties applying must take it upon their own responsibility. *Cooper v. Harding*, 7 Q. B. 928; 9 Jur. 777.

Where a party, who refused to attend and give evidence before a district court of bankruptcy, was arrested by the messenger on a warrant issued by the commissioner, and, on his afterwards submitting to be examined, was ordered by the commissioner to be discharged out of custody on payment of the costs incurred in bringing him up, and a memorandum to that effect, not under the seal of the commissioner, was indorsed on the warrant:—Held, first, that the operation of the warrant, as a legal cause of detainer, was expended either by the party's being brought before the commissioner, or on his submitting to be examined. *Watson v. Bodell*, 14 M. & W. 37; 14 L. J., Ex. 281; 9 Jur. 626.

Held, secondly, that the commissioner had no jurisdiction to make the subsequent order for the detention of the party until the costs were paid; and that the order was, consequently, no justification to the messenger for that detention. *Ib.*

Where a party, who has been summoned to attend, in order to be examined, and to produce a deed, fails to comply with the exigency of the summons, a warrant by the commissioners, directing him to be arrested and brought before them to be examined and produce the document, is good, although the document is one which was not in the party's possession, and over which he had no control. *Wright v. Maude*, 2 D., N. S. 517; 10 M. & W. 527; 12 L. J., Ex. 22; 6 Jur. 953.

Where a party, who has been duly summoned

to attend at a given hour, finds on his arrival that the commissioners are engaged on other business, he is bound to wait until they are either ready to examine him or dispense with his attendance. *Ib.*

A party bought land of a trader, and afterwards the trader was adjudicated bankrupt. A person holding the purchase-deed for the purchaser, after the adjudication, was summoned, under 12 & 13 Vict. c. 106, s. 120, before a county court judge, to produce the deed, who ordered it to be impounded and the property to be delivered up to the assignees to be sold for the benefit of the creditors. On appeal, the Lord Chancellor discharged the order, and ordered that the assignees should pay the costs. *Cole, Ex parte*, 32 L. J., Bk. 11; 9 Jur., N. S. 33; 7 L. T. 406; 11 W. R. 127.

**Liquidation Proceedings.**—The trustee in a liquidation sought to impeach a transaction entered into by the liquidating debtor with F. on the ground that it was a fraud upon the creditors, and issued a summons for the examination of F. under s. 96 of the Bankruptcy Act, 1869:—Held, that the Court of Bankruptcy had jurisdiction to order the examination for the purpose of discovery, irrespective of any consideration as to whether the Court of Bankruptcy would entertain subsequent proceedings arising out of such examination. *Eckersley, Ex parte. Lewtas, In re*, 48 L. T. 832.

**Discovery of Bankrupt's Property—Summoning Witnesses for Examination—Application by Creditor.**—A creditor who applies to the court under s. 96 for leave to summon witnesses for examination as to a bankrupt, his trade dealings or property, is bound to shew a *prima facie* probability that some benefit will result to the estate or to the creditors from the proposed examination. *Nicholson, Ex parte. Willson, In re*, 14 Ch. D. 243; 49 L. J., Bk. 68; 43 L. T. 266; 28 W. R. 936—C. A.

**Judicial Discretion of Registrar—Appeal.**—Where the registrar in the exercise of his judicial discretion has refused such an application, the Court of Appeal will not readily interfere. *Ib.*

**Opposition by Trustee—Filing of Affidavits.**—The trustee in the bankruptcy has no interest in the matter except for the purpose of saying whether he is willing to conduct the examination himself, and, semble, he ought not to file affidavits in opposition to the application. *Ib.*

**Service of Subpœnas.**—It is in the discretion of the judge to appoint by whom subpœnas issued out of the court under rr. 58 and 167 may be served. *Bolland, Ex parte. Holden, In re*, 19 L. R., Eq. 131; 44 L. J., Bk. 9; 31 L. T. 443; 24 W. R. 24.

Upon a question of practice between the trustee of a bankrupt's estate and the high bailiff of the court as to the person entitled to serve a subpœna upon a witness under the Bankruptcy Act, 1869, s. 96, the judge of the county court ruled that the high bailiff of the court, and not the solicitor of the trustee, was the proper person to make the service:—Held, that the judge of the county court had rightly exercised his discretion, and that there was no ground for interfering with his decision. *Ib.*

## 4. RIGHTS AND DUTIES OF WITNESSES.

**Obligation to answer Questions—What Questions material.**—Commissioners are authorized to examine a witness concerning the person, trade, dealings, estate, and effects of a bankrupt, and, incidentally to this power, they may examine him also respecting other individuals, through whom they may be likely to obtain information on those points; and, therefore, where a witness was asked questions as to when and where he last saw the bankrupt's wife:—Held, that such questions were legal and material, and that the commissioners were justified in committing him for giving unsatisfactory answers to these questions. *Vogel, Ex parte*, 2 B. & A. 219.

Held, also, that the true criterion by which to judge as to the propriety of the commitment, was to consider all the questions and answers collectively, and then to say whether the whole examination was satisfactory or not; and, therefore, where the commissioners in their warrant set out several questions, to some of which, taken alone, the answers were satisfactory:—Held, also, that this was no objection to a warrant committing the party "till he should full answer make to the questions so put to him as aforesaid." *Id.*

Where a bankrupt has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the commissioners for examination, is bound to answer the question, "To whom did you subsequently sell these goods?" for it materially concerns the estate of the bankrupt to ascertain whether the sale by him was *bonâ fide*. *Falk, In re*, 2 Deac. & Chit. 415.

On a question as to the legality of the commitment of a witness, all the questions and answers must be looked at as forming one examination; and a witness cannot be committed for not answering as to his belief of the intention of the bankrupt, unless other parts of his examination shew such belief to be material with reference to the person, trade, dealing, or estate of the bankrupt. *Baxter, Ex parte*, 7 B. & C. 673; 1 M. & R. 572.

A commitment must be for not satisfactorily answering a material question; and it is not sufficient that the witness, throughout his examination, was unwilling to make a full disclosure. *Id.*

Where a party was examined with a view to ascertain whether the bankruptcy had been concerted between him and the bankrupt, and how the stock of the latter had been disposed of, and was asked with what intention he believed the bankrupt had come to him on a certain day before the docket was struck; to which he answered, that he did not know the bankrupt's intention, and did not know what to say as to his belief:—Held, that the question was not material, and that, therefore, although the answer might not be satisfactory, the commissioners had not authority to commit the party. *Id.*

A witness who was being examined under the Bankruptcy Act, 1861, s. 216, was asked where the bankrupt's father was residing. The witness, who was the father's solicitor, declined to answer, and stated that "the place of residence of my client came to my knowledge in my professional capacity, and in the course and in consequence of the professional employment in which I was engaged on his behalf, and in no

VOL. I.

other way:—Held, that the witness had not made a case for excusing himself from answering on the ground of professional privilege. *Campbell, Ex parte, Cathart, In re*, 5 L. R., Ch. 703; 23 L. T. 289; 18 W. R. 1056.

Held, also, that the question was one which was authorized by the act. *Id.*

**Answer tending to Criminate.**—Commissioners have no right to ask questions, the answers to which may subject the witness to fine or other criminal punishment. *Smith v. Beadnell*, 1 Camp. 30.

Where a witness refuses to answer a question put to him on the ground that his answer might tend to criminate himself, his mere statement of his belief that his answer will have that effect is not enough to excuse him from answering, but the court must be satisfied from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer. But, if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject, however, to that reservation, the judge is bound to insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril. *Heg. v. Boyes* (1 B. & S. 311) approved and followed. *Reynolds, Ex parte, Reynolds, In re*, 20 Ch. D. 294; 51 L. J., Ch. 756; 46 L. T. 508; 30 W. R. 651; 46 J. P. 533—C. A. Affirming 46 L. T. 143.

A witness summoned for examination, under s. 96 of the Bankruptcy Act, 1869, as to the property of a bankrupt, is entitled to refuse to answer a question on the ground that his answer would tend to criminate himself. *Scholefield, Ex parte, Firth, In re*, 6 Ch. D. 230; 46 L. J., Bk. 112; 37 L. T. 281; 26 W. R. 9—C. A.

**Bankrupt must Answer.**—The bankrupt himself, however, being under a personal obligation to make a full disclosure of his property to his creditors, is not entitled to any such protection, but must answer all questions put to him about his property, whatever the consequences to himself may be. *Id.*

**What Answers Satisfactory.**—That a man cannot positively recollect a fact, but should rather believe the affirmative, is a full and satisfactory answer by a witness. *Miller's case*, 2 W. Bl. 881; 3 Wils. 427.

**Production of Documents.**—The commissioners may compel the production of a book, to enable them to read the entries. *Isaac v. Impey*, 10 B. & C. 442; 4 C. & P. 120; 5 M. & R. 377; *S. P., Isaac, Ex parte*, 3 Y. & J. 38.

They have no authority to commit a witness for refusing to read an entry in a book which he produces. *Id.*

A witness being required to read certain entries in a book to which, during his examination, he had referred, but which he had not been called upon to produce, refused to read the entries, whereupon he was committed for refusing to answer the said question:—Held, that the warrant was bad in substance and in form; a request to read not being a question. *Id.*

In determining whether an order for the pro-

3 B

duction of documents should be made under s. 96 of the Bankruptcy Act, 1869, the court has to exercise a discretion. From the examination of a person summoned for examination under s. 96, at the instance of the trustee of a bankrupt, it appeared that a policy of insurance on the life of the bankrupt's wife, which had been effected by her before her marriage with the bankrupt, and which had been after the marriage assigned by the husband and wife to trustees, on trust for the wife for her separate use, had after the bankruptcy been assigned by way of mortgage, by a deed to which the bankrupt and his wife were parties; that the mortgage had been afterwards transferred to the witness; and that the wife had subsequently executed a deed assigning the equity of redemption to him:—Held, that the witness must produce the mortgage deed, the deed of transfer, and the deed of assignment. *Tatton, Ex parte, Thorp, In re*, 17 Ch. D. 512; 50 L. J., Ch. 792; 45 L. T. 89—C. A.

Under the trusts of a deed executed in 1834, a debt was due to Y. & Co. In 1838, H. entered into partnership with Y., and a partnership deed was executed. After various changes in the firm, B. & Co., the liquidating debtors, became the successors in business of Y. & Co., and, in an action for the administration of the trusts of the deed of 1834, the trustee of B. & Co. claimed the debt due under that instrument. In order to prove his title, the trustee summoned the surviving executor of Y., who died in 1841, for examination under s. 96 of the Bankruptcy Act, 1869, and it appeared from his examination that the partnership deed of 1838 was under his control, but in the possession of his solicitor:—Held, that S. was not bound to produce the deed of 1838, unless there was *prima facie* evidence that the debt formed part of the property of the debtors. *Smith, Ex parte, Bevan, In re*, 45 L. T. 447.

—**Solicitor's Lien.**—A solicitor is not, on the ground of his lien on documents of a bankrupt in respect of professional services before the bankruptcy, entitled to refuse to produce such documents for examination by the trustee. *Toleman and England, In re, Bramble, Ex parte*, 13 Ch. D. 885; 42 L. T. 413; 28 W. R. 676.

**Jurisdiction to order Account.**—Under ss. 96 and 97 of the Bankruptcy Act, 1869, the Court of Bankruptcy has no jurisdiction to order a witness to furnish an account in writing (not on oath) of money transactions between himself and the bankrupt, or property of the bankrupt received by him. *Reynolds, Ex parte, Reynolds, In re*, 21 Ch. D. 601; 52 L. J., Ch. 223; 47 L. T. 495; 31 W. R. 187—C. A.

**Right to Costs.**—A witness summoned for examination under s. 96 of the Bankruptcy Act, 1869, is not entitled to the costs of employing a solicitor or counsel. *Waddell, Ex parte, Lutscher, In re*, 6 Ch. D. 328; 36 L. T. 345; 26 W. R. 9—C. A.

The managing director of a company in which a liquidating debtor had held some shares, which had been forfeited, was summoned by the trustee in the liquidation under s. 96 for examination, with the view of obtaining information for the purpose of impeaching the validity of the forfeiture. He attended at the time appointed, and two counsel were present on his behalf, but, as

the trustee's counsel did not attend, the examination was adjourned sine die, with costs to be paid by the trustee:—Held, that the witness was only entitled to the ordinary allowance for his expenses, and not to the costs of his solicitor or the fees paid to his counsel. *Id.*

**Right to Copy of Depositions.**—The court has a discretion whether to give a copy of the shorthand notes of the deposition of a witness examined under s. 96 of the Bankruptcy Act, 1869, but where a creditor had been so examined he was allowed a copy. *Pratt, Ex parte, Hayman, In re*, 21 Ch. D. 439; 52 L. J., Ch. 120; 47 L. T. 368; 31 W. R. 189—C. A.

## 5. DEPOSITIONS AND EXAMINATIONS.

**Depositions—When Admissible as Evidence.**—The depositions are conclusive evidence, so as not to admit evidence of fraud in the concoction of any of the requisites to support the commission. *Young v. Timmins*, 1 Tyr. 15; 1 C. & J. 148.

The depositions are conclusive evidence in a case where the bankrupt might have sued, if no bankruptcy had ensued, though the conversion which gave the right of action took place after the act of bankruptcy. *For v. Mahoney*, 2 C. & J. 325; 2 Tyr. 285.

It is only in actions by a bankrupt's own assignees for a debt or demand for which he might have sued, that the depositions are made evidence. *Musket v. Drummond*, 10 B. & C. 153; 5 M. & R. 210.

In an action by assignees, where there are some counts or causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are admissible in evidence, if the assignees elect to proceed only on those counts which the bankrupt might have sustained. *Jones v. Fort, M. & M.* 196.

A deposition of a witness, taken in the Court of Bankruptcy for one purpose, and filed, may be used against him as an admission in any other proceeding in the matter of the same bankruptcy. *Hall, Ex parte, Cooper, In re*, 19 Ch. D. 580; 51 L. J., Ch. 556; 46 L. T. 549—C. A.

—**Application to Use—Copy.**—But when a party to an application in the Court of Bankruptcy gives notice to his opponent of his intention to use as evidence on the hearing of the application a deposition which is on the file, though it was originally taken for another purpose, he ought not to serve his opponent with a copy of it, and if he does so, he will not, though successful on the application, be allowed the costs of the copy thus served. *Id.*

**Effect as Evidence.**—Where a bill of exchange for 1,600*l.* was deposited with A. by a bankrupt, as an indemnity to a third person against a bond which he had executed to the petitioning creditor under 1 & 2 Vict. c. 110, s. 8, and A. refused to deliver up the bill on the demand of the assignees of the bankrupt, although they shewed him the bond in a cancelled state, and he afterwards obtained 800*l.* on the bill:—Held, in trover by the assignees for the bill, that the obtaining money on the bill was an actual conversion of the bill, for which the bankrupt, if no bankruptcy had intervened, might have sued, and therefore

that the case was within 6 Geo. 4, c. 16, s. 92, and the depositions under the fiat were conclusive evidence of the bankruptcy. *Alsager v. Close*, 10 M. & W. 576; 12 L. J., Ex. 50.

In all actions by assignees of a bankrupt, which the bankrupt himself might have maintained, if no bankruptcy had occurred, the depositions taken before the commissioners are conclusive evidence of the trading, &c., although at the time of bankruptcy the cause of action may not have been complete. *Kitchener v. Power*, 4 N. & M. 710; 3 A. & E. 232; 1 H. & W. 174.

A bankrupt sold goods before his bankruptcy to the defendant for cash, but after they were delivered he refused to pay for them, and claimed to set off against the value the amount of some remaining acceptances of the bankrupt in his hands. The assignees, treating the purchase as a fraud, sued the defendant in trover, alleging the conversion to be after the bankruptcy. Notice to dispute the act of bankruptcy and petitioning creditor's debt having been given:—Held, that the depositions were conclusive evidence of these facts. *Id.*

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat:—Held, that the deposition then made was evidence of the act of bankruptcy as against such creditor in an action against him by the assignees, in which the act of bankruptcy was put in issue. *Garder v. Moulit*, 10 A. & E. 464; 2 P. & D. 403; 3 Jur. 1190.

**Examinations of Bankrupt.]**—If plaintiffs put in evidence an examination of the defendant before the commissioners of bankrupts, his admissions against himself are evidence against him, but his statements in his own favour are not evidence for him. *Groom v. Richardson*, 5 Jur. 1061.

Statements made by a legatee in his balance-sheet, or in his examination under his bankruptcy, will not constitute an acknowledgment of the debt within the Statute of Limitations, but such statements are evidence to shew the character of the advances made to the legatee by the testator, namely, whether made as gifts or as loans. *Courtney v. Williams*, 3 Harc, 539; 13 L. J., Ch. 461.

The plaintiffs in an action, in support of a part of their case, put in the examination and cross-examination of the defendant himself, taken under a commission of bankrupt issued against A., and the defendant rested his chief defence on another part of this same examination, which he insisted should be read, and which he himself could not have produced in evidence on his part. It was objected by the plaintiffs, that this evidence for the defendant could not be received; first, because it arose upon an improper question put before the commissioner, and one which he ought not to have allowed; and, secondly, because, even if it were a proper question before the commissioner, it was here secondary evidence of a deed duly executed, which had not been shewn to have been destroyed, or to be in the possession of the plaintiffs:—Held, that the defendant had a right to insist on the whole of the bankrupt's examination being read, and that the judge was right in not entirely withdrawing

from the jury that part of the examination to which objection was raised, but leaving it for so much of their consideration as it was worth. *Goss v. Quinton*, 3 M. & G. 825; 4 Scott, N. R. 471; 12 L. J., C. P. 173; 7 Jur. 901.

## XXVI. ACTIONS BY AND AGAINST ASSIGNEES AND TRUSTEES.

### 1. BY OFFICIAL ASSIGNEES.

The provision in 6 Geo. 4, c. 16, s. 67, for the non-abatement of suits by the death or removal of assignees, parties thereto, included official assignees. *Lloyd v. Waring*, 8 Jur. 1134.

### 2. INSTITUTING.

A plaintiff becoming insolvent after issue joined, the defendant, by leave of a judge given under 15 & 16 Vict. c. 76, s. 142 (the plaintiff's assignees not giving security for costs), pleaded a plea of the plaintiff's insolvency, withdrawing his former pleas. The plaintiff, confessing the plea, and giving notice to tax his costs under Reg. Gen., T. T., 16 Vict. r. 23:—Held, that the plaintiff was entitled to costs under the rule if the plea of insolvency stood, but the court allowed the defendant to withdraw that plea, and to substitute his former pleas again, and go on with the action. *Plummer v. Hedge*, 24 L. J., Q. B. 24.

The circumstance of an action having been brought by assignees of a bankrupt, without first obtaining the leave of the Court of Bankruptcy, pursuant to 12 & 13 Vict. c. 106, s. 153, gives the court in which the action is brought no power to stay proceedings on motion. *Lee v. Sangster*, 2 C. B., N. S. 1; 26 L. J., C. P. 156; 3 Jur., N. S. 156.

Nor can the absence of such leave be pleaded as a defence to the action. *Id.*

Neither is it a ground of objection on the part of the defendant, that the name of the official assignee has been used without his consent. *Id.*

The 15 & 16 Vict. c. 76, s. 142, applies only to actions pending at the time when an insolvency occurs. *Stanton v. Collier*, 3 El. & Bl. 274; 23 L. J., Q. B. 116; 18 Jur., N. S. 650.

Proceedings in an action, by assignees of a bankrupt, were allowed to be amended by making the official assignee a plaintiff with the other assignees. *Baker v. Neaver or Neave*, 1 D. P. C. 616; 1 C. & M. 112; 3 Tyr. 233.

A defendant, in an action by assignees, cannot plead the pendency of a former action brought against him by the bankrupt for the same cause of action; for the assignees have no power to proceed with the former action. *Biggs v. Coz*, 7 D. & R. 409; 4 B. & C. 930.

### 3. LIMITATION.

The right construction of s. 159 of 12 & 13 Vict. c. 106, appears to be, that if the assignee does an act directed by the statute but does it erroneously, he is protected; but if he does the act as the result of his ownership of that which was the bankrupt's property, and not by the direction of the statute, it is not done in pursuance of the statute, and he is responsible for it. *Edge v. Parker*, 8 B. & C. 697.



Where assignees entered the premises of a third person to seize goods, which were the property of the bankrupt, it is not necessary that an action against them should be brought within three months after the fact committed; the act of the assignees not being done in pursuance of the statute. *Ib.*

The section does not apply to actions against assignees, who only act in the disposition and distribution of the property of the bankrupt, and not under any power conferred on them by law, or for any special purpose under the act; for the act done applies to acts done for the purpose of taking possession of the bankrupt's property by the commissioners or messenger acting under their warrant. Therefore, trover for a chariot seized by assignees on the premises of the bankrupt is maintainable, although the action was not commenced by the owner against the assignees within three months after the seizure. *Carruthers v. Payne*, 2 M. & P. 420; 5 Bing. 270.

The official assignee was not within the protection of 6 Geo. 4, c. 16, s. 44. *Knight v. Twyquant*, 2 Gale, 187; 2 M. & W. 101.

#### 4. PARTIES.

Where one of two partners is a bankrupt, the order, authorizing the assignees to sue in their own names, and in that of the solvent partner, under 6 Geo. 4, c. 16, s. 89, may be a general order applicable to all actions and suits, and not a special order for each action or suit. —, *Ex parte*, 2 Deac. 387; 3 Mont. & Ayr. 219; 1 Jur. 213.

Three persons having been appointed and acted as assignees, two of them paid each half of his bill to the solicitor:—Held, that the two could not maintain a joint action against the third for his proportion of the money paid, but must each bring a separate action. *Brand v. Boulcott*, 3 B. & P. 235.

Assignees under a joint commission against two partners may recover, in the same action, debts due to the partners jointly and debts due to them separately. *Graham v. Mulcaster*, 4 Bing. 115; 12 Moore, 327.

But otherwise, if it is proved that one alone had committed an act of bankruptcy; neither are they entitled to recover the separate property of that one under such commission. *Hogg v. Bridges*, 2 Moore, 122; 8 Taunt. 200.

The payment of money to the defendant's use by a solvent partner, out of his separate property after the bankruptcy of his partner, in pursuance of a contract made before the bankruptcy, may be sued for in the name of the solvent partner only, without joining the assignees of the bankrupt partner. *Thacker v. Shepherd*, 2 Chit. 652.

Assignees of a bankrupt partner and a solvent partner opened an account at their bankers, and paid in 900*l.* to discharge a debt on an old account, which carried interest. The solvent partner then became bankrupt:—Held, that the assignees of the two could not recover this sum. *Woodbridge v. Swann*, 4 B. & Ad. 633; 1 N. & M. 725.

Where one member of a partnership becomes bankrupt, the solvent partner may use the names of the assignees of the bankrupt in bringing actions against the debtors of the firm. *Whitehead v. Hughes*, 2 C. & M. 318; 4 Tyr. 92.

The assignees are entitled to an indemnity against the costs, when they apply for it. *Ib.*

Assignees of A., a bankrupt, and also of B., a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the defendant to both the bankrupts, and also separate debts due to each; and if in such an action, the jury has assessed the damages severally, on the separate counts, the court will arrest the judgment on those counts which demand the debts due to each bankrupt separately. *Hancock v. Haywood*, 3 T. R. 433. And see *Stone v. Macnair*, 1 Moore, 126; 7 Taunt. 432; 4 Price, 48.

But where plaintiffs sued as assignees of A. and B., and also as assignees of C., for a joint demand due to all the bankrupts, such declaration was good, on motion in arrest of judgment after verdict. *Streetfield v. Halliday*, 3 T. R. 779.

Where A. and B. were partners, and A. committed an act of bankruptcy, and afterwards, but before the bankruptcy of B., the sheriff seized goods which belonged to A. and B., under an execution against them:—Held, that the assignees of A. and B. under a joint commission could not, in an action brought by them as such, recover A.'s share of the property. *Hogg v. Bridges*, 8 Taunt. 200; 2 Moore, 122.

A., B. and C., having been appointed assignees under three separate commissions of bankrupt, cannot sue as joint assignees, but must state their several and respective interests in the declaration. *Ray v. Davies*, 2 Moore, 3.

In an action of contract by assignees, the non-joinder of another assignee is a ground of non-suit, and the proper mode of taking advantage of the non-joinder is by a traverse that they are assignees, and not by a plea in abatement. *Jones v. Smith*, 1 Ex. 831; 5 D. & L. 728; 18 L. J., Ex. 145.

#### 5. FORM OF REMEDY.

**In Contract or Tort.**—Assignees cannot at first affirm the act of a creditor interfering with the bankrupt's effects as a contract, and afterwards disaffirm it as a tort; although such act, if disaffirmed in the first instance, would have amounted to a conversion of the bankrupt's goods, and would have rendered the creditor liable to the assignees in trover. *Brewer v. Sparrow*, 1 M. & R. 2; 7 B. & C. 310; 3 P. L. 180. *Lythgoe v. Vernon*, 5 H. & N. 180.

Trover will not lie by assignees against a person who had wrongfully continued the bankrupt's business, although bona fide for the benefit of the creditors, where, by accepting the proceeds, they had either affirmed his acts as their agent, or had received them as a satisfaction for the wrongful act. *Ib.*

S. was indebted to the defendant, an attorney, who had a lien on a lease relating to premises belonging to S. as a security for his debt. A commission of bankruptcy issued against S., and an assignee being appointed, the defendant acted as solicitor to the commission: a petition was presented to supersede the commission, on the ground that there was no valid petitioning creditor's debt, and the defendant, with notice of that fact, joined the assignee in an assignment of the lease to a purchaser: out of the purchase-money the assignee paid the defendant the debt due from the bankrupt, and also a part of the amount of

his bill as solicitor to the commission; the defendant also received, by the authority of the assignee, certain sums of money accruing from the rents of the premises, in part liquidation of the debts due to him; after these facts occurred, the commission was superseded, and assignees were appointed under a new fiat:—Held, that they could recover the sums received by the defendant in an action for money had and received; for by parting with the lease the defendant was guilty of a conversion, and the plaintiffs were therefore entitled to waive the tort and sue in assumpsit; and that as to the rents received by the defendant, it was money received to the use of the assignees after notice of an act of bankruptcy, and as the first assignee was not assignee de jure, his assent to the payments made no difference. *Clark v. Gilbert*, 2 Scott, 520; 2 Bing. N. C. 343; 1 Hodges, 347.

The defendant demised to E. and W. a fulling mill for fourteen years. The lease, after reciting that the machinery had been valued at a certain sum, contained covenants, that, at the end or other sooner determination of the term, the machinery should be again valued by two different persons, chosen by the lessees and the lessor; and that, if such second valuation should amount to less than the first, the difference should be paid by the lessees to the lessor, but if it should be greater, the surplus should be paid by the lessor to the lessees. During the existence of the lease the lessees became bankrupt, and the assignees declined to take the lease; but they required the defendant to appoint a person to value the machinery; and, on his refusal to do so, appointed one themselves, who valued the machinery then in the mill (most of which had been brought in by the bankrupts) at a sum exceeding the original valuation. The assignees then delivered possession of the premises to the defendant, and demanded of him the difference between the two valuations, which he refused to pay:—Held, that the assignees (having demanded the machinery) were entitled to recover it in trover; and that their remedy was not by an action on the covenants, which had been determined by the bankruptcy, and by their refusal to take the lease. *Fairburn v. Eastwood*, 6 M. & W. 679.

If A. fraudulently procures a bill from B. and afterwards becomes bankrupt, and his assignees receive the money for the bill, B. may recover it from them in an action for money had and received. *Harrison v. Walker*, Peake, 111. And see *Willis v. Freeman*, 12 East, 656; *Gladstone v. Hadwen*, 1 M. & S. 517; 2 Rose, 131; *Milward v. Forbes*, 4 Esp. 171; and *Haswell v. Hunt*, 5 T. R. 231.

#### 6. ON CONTRACTS OF BANKRUPT.

In an action by assignees of a bankrupt against the defendant for not delivering railway shares pursuant to a contract made with the bankrupt, the plaintiffs having in their declaration averred that the bankrupt, before his bankruptcy, and his assignees since, were always ready and willing to accept and to pay for the shares; the defendant took issue upon the averment:—Held, that the plea was sustained by proof that, before the time fixed for the performance of the contract, the bankrupt was in a state of total incapacity to pay the price agreed on, and his effects produced no assets to the as-

signees. *Lawrence v. Knowles*, 7 Scott, 381; 5 Bing. N. C. 399; 2 Arn. 43.

Where an order or one entire piece of work was given to a tradesman after the committing an act of bankruptcy, but before the fiat, and the work being only partly performed at the time of the fiat, the official assignee advanced money out of the estate to the bankrupt to complete it, subsequently to which the creditor's assignees were appointed:—Held, that this was evidence, whence it might be inferred that the assignees had adopted the contract, and employed the bankrupt as their agent in its completion, so as to entitle the official and creditors' assignees to sue jointly for the whole amount. *Whitmore v. Gilmore*, 12 M. & W. 808; 13 L. J., Ex. 201; 8 Jur. 672.

Action by the assignees of a bankrupt. The declaration stated, that the bankrupt before his bankruptcy agreed to buy from the defendant 2,000 quarters of screened Odessa linseed, at the rate of 30s. 10d. per quarter, free on board at Odessa, the shipment to be made on board the buyer's vessel on arrival at Odessa, which vessel was to be forthwith chartered for them, and the amount of invoice was to be paid, on handing over the same and the bill of lading to the buyers in London, in ready money, less two and a half per cent. discount; that the bankrupt despatched a vessel to Odessa, chartered by him, which arrived at Odessa within a reasonable time; that the vessel arrived at Odessa after his bankruptcy, and within a reasonable time after such arrival was ready and willing to receive the linseed on board, and that the master of the vessel was ready and willing to deliver to the defendant bills of lading for the linseed, of which the defendant had notice, and was requested by the master to deliver the linseed on board the vessel. That the defendant refused to deliver the linseed on board, by reason whereof the plaintiffs, as assignees, had sustained damage. The declaration then went on to allege that, although the defendant had notice of the bankruptcy, and that the plaintiffs, being appointed his assignees, were within a reasonable time ready and willing, and offered to pay for the linseed, and requested the defendant to hand over to them bills of lading for the linseed in London, or to deliver the linseed to the assignees in London, yet the defendant refused so to do. Plea, that the assignees did not within a reasonable time after the bankruptcy, and the arrival of the vessel at Odessa, give notice to the defendant of their intention to adopt the contract for the purchase of the linseed, and to abide by the terms thereof: Held, per Parke, B., Gurney, B., and Rolfe, B.; Lord Abinger, C. B., dissentiente; that the declaration disclosed a good cause of action, and that the assignees were entitled to recover. *Gibson v. Carruthers*, 8 M. & W. 321; 11 L. J., Ex. 138.

Held, also, that the matters contained in the plea formed no answer to the action. *Id.*

Action to recover an average loss on a policy of insurance on goods from the Havannah to a market in Europe, at 60s. per cent. premium, to return 23s. 9d. per cent. if the risk ended in the United Kingdom, and less if at other places in the north of Europe. Plea, bankruptcy of the plaintiff before action. Replication, that before he became bankrupt he sold the goods and transferred the policy, and his right and interest to recover for the loss of the goods, to F. and deli-

vered the policy to him. Rejoinder, that the cargo was delivered and the risk thereon ended in England before his bankruptcy; and that the right to have a return of premium was not transferred before the bankruptcy:—Held, that the two causes of action, being separate and totally distinct from each other, though arising upon the same instrument, the bankrupt was entitled to sue for an average loss as trustee for his vendee, that being a cause of action in which he had no beneficial interest at the time of his bankruptcy. *Boddington v. Castelli (in error)*, 1 El. & Bl. 879; 17 Jur. 781—Ex. Ch.

Assignees suing upon a contract made with the bankrupt are entitled to all the legal and equitable rights, and no other, which the bankrupt would have had if the action had been brought by him on the day of his bankruptcy. *Valpy v. Oakley*, 16 Q. B. 941; 20 L. J., Q. B. 380; 16 Jur. 38.

A. contracted to deliver to B. iron, to be paid for by bills. The bills were accordingly accepted by B., but upon maturity were dishonoured, and afterwards B. became bankrupt:—Held, in an action by the assignees of B. against A. for non-delivery of the goods, that they were entitled to recover only such damages as could have been recovered by B. if the action had been brought by him on the day of his bankruptcy, and therefore only the difference between the contract and the market prices of the iron. *Ib.*

S., being indebted to the defendants, who had acted as his solicitors, in a sum of money, they, before his bankruptcy, received certain sums belonging to S. from his agent, and applied them in discharge of their claims upon him. S. having afterwards become bankrupt, and his assignees having brought an action against the defendants to recover this money as money received to their use, the judge told the jury, that, if the defendants, before the bankruptcy, actually received the money to the use of the bankrupt, they held it, after the bankruptcy, to the use of the assignees, who were entitled to succeed on the plea of non-assumpsit:—Held, that this was a misdirection, and that there ought to be a new trial, unless it was clear that the jury was not misled, and that it was afterwards explained away. *Pennell v. Aston*, 14 M. & W. 415; 14 L. J., Ex. 309.

B., being indebted to the defendant in 500*l.* for the price of goods sold to him, and being pressed for part payment of the debt, handed to the defendant a bill of exchange drawn by himself for 600*l.*, which the defendant agreed to discount on the terms of retaining to his own use the sum of 100*l.* and the discount, and paying over the difference to B.; he, however, retained the bill, and paid no part of the proceeds over to B. B. shortly afterwards became bankrupt:—Held, that his assignees were entitled to recover from the defendant the full amount of the bill, minus the 100*l.*, and such discount as the jury should find to be receivable by the defendant. *Alder v. Keighley*, 15 M. & W. 117; 15 L. J., Ex. 100.

A., drawer of an accommodation bill, a few days before its maturity, handed over money to B., the acceptor, for the purpose of meeting the bill. A fiat having been issued against A. between the day of such deposit and the maturity and payment of the bill:—Held, that the money having been handed over to B. in pursuance of a binding contract upon a good consideration, viz.

an implied contract of indemnity, the bankruptcy of A. was no revocation of B.'s authority to apply the money in satisfaction of the bill, and consequently that A.'s assignees could not recover it back from him. *Yates v. Hoppe*, 9 C. B. 541; 19 L. J., C. P. 180; 14 Jur. 372.

A custom of exchanging acceptances existed between a bankrupt and other houses, through the agency of B.; notes were sent by A. to B., but never exchanged, as bankruptcy intervened, and they were stolen from B., and never formed any item in any settlement of the accounts between B. and the assignees:—Held, that A. could not recover the value of the notes from the assignees. *Watson, Ex parte*, 1 Mont. & Ayr. 685; 4 Deac. & Chit. 45.

M. and the Scotch bank mutually exchanged their notes at stated times. M. became bankrupt, his agent B. having notes of the Scotch bank in his hands. The assignees subsequently allowed B. to retain these notes in his account with them, he having claims against M.:—Held, that the Scotch bank could recover these notes against the assignees. *Bank of Scotland, In re*, 1 Mont. & Ayr. 644; 4 Deac. & Chit. 32.

#### 7. FOR CONVERSION OF BANKRUPT'S PROPERTY.

*Action.*]—In an action by assignees against a sheriff, for a conversion of the bankrupt's goods, seized under a fi. fa. against E. and D., it appeared that, immediately before the seizure, the bankrupt told the officer that the goods were the property of C., and immediately afterwards he contradicted that statement, and said they were the goods of D. The jury found that the goods were in reality the bankrupt's, but, also, that he represented the goods to the officer as the goods of C., so as to induce the officer, by that false representation, to seize them:—Held, that under a plea of not possessed, this finding did not estop the bankrupt, and his assignees, from complaining of the seizure of the goods as their own. *Freeman v. Cook*, 2 Ex. 654; 18 L. J., Ex. 114; 12 Jur. 777.

B. bought goods at the shop of A., after notice that A. had committed an act of bankruptcy, by absconding, and claimed to set off against the price a debt due to him from A. A fiat having afterwards issued against A., his assignees sent in an invoice, and demanded payment of the goods so bought by B.:—Held, that the assignees did not thereby so affirm the sale as to disentitle them to maintain an action for the goods upon a subsequent demand and refusal. *Valpy v. Sanders*, 5 C. B. 887; 17 L. J., C. P. 249; 12 Jur. 483.

A., by a deed dated the 28th September, 1845, conveyed goods to B., absolutely, subject to a proviso that if he should pay to B. the sum secured on the 22nd of March, 1850, or any earlier day, after receiving from B. fourteen days' notice, and should pay the interest meanwhile half-yearly, then the conveyance should be void. By the deed, it was also agreed that until a default in payment of the principal, as before specified, or until default in payment of the interest after notice to pay, A. should be allowed to hold and enjoy the goods. No notice for earlier payment was given to A. pursuant to the power contained in the deed, nor any notice for payment of the interest, and he continued in possession of the goods until the 18th of Decem-

ber, 1849, when he became bankrupt, and his assignees then took possession of the goods, and sold them on the 19th of February, 1850. B. had previously assigned the goods to the plaintiff:—Held, that although the right to the possession of the goods was vested in A. until the 22nd of March, 1850 (defeasible by non-payment of the principal and interest, according to the provisions of the deed), yet that the sale of the goods before that day put an end to the term, and that the assignees had thereby been guilty of a conversion, for which the plaintiff was entitled to maintain trover. *Fenn v. Bittleston*, 7 Ex. 152; 21 L. J., Ex. 41.

Where assignees declare in trover for property of the bankrupt converted since the bankruptcy, the conversion after the bankruptcy is a material allegation, and must be proved under the general issue. *Edwards v. Hooper*, 11 M. & W. 363; 12 L. J., Ex. 304; 7 Jur. 378.

The assignees of two bankrupt partners declared in trover for property which had belonged to the bankrupts, alleging a possession in themselves as assignees, and a conversion since the bankruptcy. A separate fiat had first issued against one partner, under which the property was seized by the sheriff and sold; subsequently to which a joint fiat was issued against both:—Held, that the assignees could not recover in trover against the sheriff for an undivided moiety of the whole as the property of the partner against whom the separate fiat had issued. *Ib.*

Assignees are not entitled to waive a sale of the goods as a conversion, and rely on a subsequent demand and refusal. *Ib.*

In trover for goods: at the trial it appeared that the plaintiff was in possession of the goods, which he claimed as his property, under an assignment to him from O. The defendant seized the goods in the plaintiff's possession, claiming them under an assignment from O. to him, made whilst O. was in apparent ownership of the goods, but of a later date than the assignment to the plaintiff. This was the conversion. The defence was that the assignment by O. to the plaintiff was fraudulent as against the defendant. This was left to the jury, who found for the plaintiff. The defendant also offered, as a defence, to prove that O. had become bankrupt before the plaintiff took possession, and that the goods were in his order and disposition, and therefore vested in his assignees before the conversion. The judge refused to permit this defence. On a motion for a new trial:—Held, that the judge did right; for that the plaintiff being in possession, and the defendant being a wrongdoer, not claiming in any way under the assignees, the defendant could not set up the *ius tertii* as a defence in trover. *Jeffries v. Great Western Railway Company*, 5 El. & Bl. 802; 25 L. J., Q. B. 107; 2 Jur., N. S. 230.

A. having become bankrupt, his goods were sold by order of his assignees. Some goods of his in B.'s hands at the time of the bankruptcy, and on which B. claimed a lien, were also included in the sale; but this was done by B.'s order, and the assignees refused to authorize it. The assignees afterwards signed a memorandum that all the goods included in the sale were the property of the bankrupt, to exempt them from auction duty:—Held, that this was no adoption of the sale, so as to prevent the assignees from maintaining trover against B. for the goods. *Blenden v. Hancock*, M. & M. 465.

A., the partner of B., was also in partnership with C. A., being indebted to the firm of A. & B., indorsed to A. & B. a bill belonging to the firm of A. & C., and immediately afterwards indorsed it in the names of A. & B. to D., a creditor of A. & B., who received the amount at maturity. A. & C. afterwards became bankrupts; their assignees cannot maintain trover against B. *Jones v. Yates*, 4 M. & R. 613; 9 B. & C. 532.

Nor can such assignees maintain an action against B. for money taken by A. from the funds of A. & C. and applied to the use of A. & B. *Ib.*

**Pleadings.**—In trover by the owner of the goods against assignees, the defence that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner, and that the title to the goods vested in the assignees by virtue of an order made by the Court of Bankruptcy, is admissible under the plea of not possessed, although the order was applied for and made after action. *Heslop v. Baker*, 8 Ex. 411; 22 L. J., Ex. 333.

In trover by assignees of H. & L., bankrupts, against the sheriff, the defendant pleaded, that H. & L., being indebted to S., he sued out a *fi. fa.*, directed to defendant as sheriff, and thereupon, after H. & L. became bankrupt, and before the fiat, he took the goods in execution, and that afterwards a fiat issued, under which the plaintiffs were appointed assignees, and, as such, entitled to the possession of the goods, which possession is the possession of the assignees in the declaration mentioned:—Held, first, that the defence might be given in evidence, either under the plea of not possessed, or not guilty. *Unwin v. St. Quintin*, 2 D., N. S. 790; 11 M. & W. 277; 12 L. J., Ex. 209.

Held, secondly, that the plea was not an argumentative plea of not possessed. *Ib.*

To trover by the assignees for goods the defendant pleaded that the bankrupt being indebted to him before the bankruptcy he had sued him, and recovered judgment against him, and sued out execution thereon; and that the sheriff seized the goods, and sold them under the writ, which was the conversion complained of:—Held, on special demurrer, that the plea was bad as amounting to the general issue. *Young v. Cooper*, 6 Ex. 259; 20 L. J., Ex. 136.

To a declaration by assignees of a bankrupt to recover damages for goods, chattels, and fixtures alleged to be in his possession at the time of his bankruptcy, and to have been since converted by the defendants, they pleaded that before the bankruptcy the bankrupt assigned the goods to them by deed, and that before the bankruptcy they took possession of them, and kept and retained such possession afterwards; the plaintiffs replied that the defendants did not take possession of the goods before the bankruptcy: issue was joined thereon, and a verdict found for the plaintiffs upon it:—Held, that the issue was immaterial, because the assignment by deed conveyed the property in the goods to the defendants, and the continued possession of the assignor only amounted to evidence of fraud. *Carr v. Burdiss*, 1 C., M. & R. 782; 5 Tyr. 309.

**Damages.**—A sheriff seized goods belonging to a bankrupt, and, after keeping them for a considerable period, and after trover brought

against him by the assignees, he delivered up the goods to them:—Held, that the assignees were not entitled to proceed in the action, and to recover as damages a quarter's rent which had been paid for the house where the goods were kept whilst in the possession of the sheriff, or the costs of keeping their messenger on the premises during the same period. *Moon v. Raphael*, 2 Scott, 489; 2 Bing. N. C. 310; 7 C. & P. 115; 1 Hodges, 289.

Goods were seized under fi. fa., issued upon a judgment on a warrant of attorney, after an act of bankruptcy committed by the debtor, against whom a fiat issued before the goods were sold. The assignees gave the sheriff notice not to sell, and he brought the parties before a judge by an interpleader order. The judge directed that the goods should be sold, and the money brought into court, to abide the event of an issue to be tried between the execution creditor and the assignees. The latter made no objection, and did not suggest any other mode of disposing of the goods, which were accordingly sold by the sheriff's auctioneer. The execution creditor subsequently abandoned all claim to the goods; and the proceeds of the sale were paid out of court to the assignees:—Held, that the assignees were not entitled, as matter of law, to recover in trover against the execution creditor the difference between the produce of the sale and the value of the goods at the time of the seizure; and that it was no misdirection in the judge to state to the jury, that, if they thought that the sale was bona fide, they might consider the produce of it as the measure of damages. *Whitmore v. Black*, 13 M. & W. 507; 2 D. & L. 445.

#### 8. WHERE DEBT INCURRED BY FRAUD.

In an action against liquidating debtors and their trustee, to recover advances of money obtained from the plaintiffs by the debtors through false and fraudulent representations before the liquidation, the plaintiffs claimed, inter alia, a declaration that they were entitled to prove for the amount of the advances, and interest at 5 per cent. to the date of the liquidation, either against the joint estate of the liquidating debtors or against the separate estate as the plaintiffs might elect:—Held, on demurrer by the trustee, that, as the plaintiffs might in this action obtain some relief against him, the claim was good. *Hale v. Boustead*, 8 Q. B. D. 453; 51 L. J., Q. B. 255; 46 L. T. 533; 30 W. R. 677; 46 J. P. 342.

#### 9. PLEADINGS.

Counts for money lent and money paid by the assignee of a bankrupt, may be joined with counts for money had and received to the assignee's use, and upon an account stated with him as assignee. *Richardson v. Griffin*, 5 M. & S. 294; 2 Chit. 325.

In an action by assignees of a bankrupt, it need not be stated in the declaration that they sue "as assignees;" it is enough if it sufficiently appears that they are assignees. *Ferguson v. Mitchell*, 2 C., M. & R. 687; 4 D. P. C. 513.

Plaintiffs declared as assignees of a bankrupt, concluding as follows: "Wherefore the plaintiffs, assignees as aforesaid,—instead of 'as' assignees

as aforesaid,—say they are injured:—"Held good, on special demurrer, as the words "assignees as aforesaid," might be rejected as surplusage. *Cobbett v. Cochrane*, 1 M. & Scott, 55; 8 Bing. 17.

A declaration in scire facias by assignees of a bankrupt, stating that he became a bankrupt within the meaning of the statutes relating to bankrupts, and that his goods and effects were afterwards in due manner assigned to the plaintiffs, is sufficiently certain, without alleging that the party was declared a bankrupt. *Winter v. Kretchman*, 2 T. R. 45.

The assignees under a joint commission against A. and B., in suing on a separate contract entered into with A., may describe themselves generally as the assignees of A., without noticing the name of B. *Stonehouse v. De Silva*, 3 Camp. 399; 2 Rose, 142; *S. P., Harcey v. Morgan*, 2 Stark. 17.

A defendant received money to the use of A. and B. as assignees. B. was afterwards removed, and A. became the sole assignee, the money still remaining in the hands of the defendant: A. may well declare as for money had and received to his own use as assignee, without mentioning B. at all. *Stewart v. Lee*, M. & M. 158.

Under a joint commission against two partners, the assignees may declare in the same action for separate as well as joint debts due to the bankrupts. *Graham v. Mulcaster*, 4 Bing. 115; 12 Moore, 327.

Assignees in an action against the vendee of goods sold by the bankrupt after the commission, need not name themselves assignees in the declaration; secus, if on a contract made by the bankrupt before the commission. *Evans v. Mann*, Cowp. 569.

#### 10. INTERROGATORIES.

In trover by assignees of a bankrupt, the defendant cannot deliver interrogatories for the purpose of compelling the assignees to state upon oath what act or acts of bankruptcy they intend to rely upon in support of their title. *Edwards v. Wakefield*, 6 El. & El. 462; 2 Jur., N. S. 762.

#### 11. EVIDENCE.

Where in an action by assignees the bankrupt was not called as a witness, but a witness was examined as to certain statements of the bankrupt with respect to his affairs:—Held, that the evidence was admissible. *Belcher v. Brake*, 2 C. & K. 658.

In an action against assignees for the conversion of goods seized by them as the property of the bankrupt, it appeared that the plaintiff claimed the goods by virtue of an alleged sale by the bankrupt to him a short time before his bankruptcy; and it was proposed on cross-examination to ask a witness who was present at the alleged sale, whether he himself would have acted upon the transaction by delivering the goods to the plaintiff:—Semble, that the question might be put. *Morgan v. Whitmore*, 6 Ex. 716; 20 L. J., Ex. 289.

Certain documents, purporting to be a receipt of and a delivery order for the goods, in the handwriting of the bankrupt, and dated as of the day of the sale, were delivered to a witness by the bankrupt, and after his bankruptcy, and

about a month after the alleged sale. There was no evidence independently of the documents themselves that they existed before the bankruptcy:—Held, that the documents were admissible as evidence of their existence at the time they bore date. *Ib.*

Trover of A., against the assignees of H., for seizing goods of A. The plaintiff gave evidence, that prior to the bankruptcy the person in possession, and apparently the owner, had assigned them to C., who had, for valuable consideration, assigned them to the plaintiff. The plaintiff had put a person in possession of the goods, but C. continued to carry on the business in the house where they were. On the part of the defendants, it was suggested that the transaction was colourable, and that the goods belonged to the bankrupt H. Before any evidence was offered of any connection between the plaintiff and H., one of the witnesses for the defence was asked whether he remembered C. making a claim to the goods after the bankruptcy. The question was disallowed:—Held, that the question ought to have been allowed. *Ford v. Elliott*, 4 Ex. 78; 18 L. J., Ex. 447.

An admission by a bankrupt in his balance-sheet will not take a debt out of the Statute of Limitations as against his assignees. *Pott v. Clegg*, 16 M. & W. 321; 16 L. J., Ex. 210; 11 Jur. 289.

An admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt by an accountant employed by them to wind up the affairs of the bankrupt's estate, will not take a debt of the bankrupt out of the Statute of Limitations. *Ib.*

A statement by a bankrupt in his balance-sheet of a debt due by him is not evidence as against his assignees of the debt being due. *Ib.*

## 12. COSTS.

The official assignee is entitled to be indemnified against the costs of an action brought in his name without his authority. *Laws v. Bott*, 16 M. & W. 300; 4 D. & L. 559; 16 L. J., Ex. 279.

An official assignee is liable to the costs of defending an action brought against him and the creditors' assignee, if he joined in retaining the attorney. *Sydney v. Belcher*, 2 M. & Rob. 325.

An action, by direction of a commissioner, was brought, with the assent of the creditors, to try a disputed point. The action failed, and some creditors objected to the allowance of the assignees' costs, on the ground that the commissioner had no jurisdiction to order the action to be brought, as not being an action within 12 & 13 Vict. c. 106, s. 153, but the Lords Justices ordered the costs to be paid out of the bankrupt's estate, on the ground that the objection ought to have been made earlier, that is, before the result of the action was known. *Edmondson, Ex parte*, 31 L. J., Bk. 32; 6 L. T. 234.

An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade assignee for the recovery of part of the bankrupt's estate, and the action proving unsuccessful, the trade assignee, having paid the costs, is entitled to sue the official assignee for contri-

bution. *Bevan v. Whitmore*, 15 C. B., N. S. 433. Affirmed, 19 C. B., N. S. 763—Ex. Ch.

## 13. PRACTICE.

Assignees seeking to set aside a judgment against a bankrupt for irregularity must come within the same time after their appointment as the bankrupt must have done after he had notice of the irregularity. *Alcock v. Sutcliffe*, 1 B. C. Rep. 313; 4 D. & L. 612.

Assignees applying to set aside proceedings on the ground of irregularity must come to the court within a reasonable time after notice of the irregularity. *Butterworth v. Williams*, 4 D. & L. 82; *S. P., Amadio v. Showell*, 1 B. C. Rep. 305.

Judgment was signed, and execution issued against the defendant, on the 29th of February, at which time notice was given to the sheriff that the judgment would be disputed; a fiat issued on the 15th of March; the official assignee was appointed on the 4th and the other assignees on the 12th of April; and the motion to set aside the judgment was made, on the part of the assignees, on the 25th of April:—Held, that it was made in time. *Brooks v. Hodson*, 2 D. & L. 256; 8 Scott, N. R. 223; 7 M. & G. 529; 13 L. J., C. P. 203.

In an action against the creditors' and official assignees of a bankrupt, for trespass, and for the conversion of fixtures by sale, the action will not, at nisi prius, be stayed as against the official assignee under 12 & 13 Vict. c. 106, s. 41, which refers only to claims for money paid into the Bank of England before issue. *Vansittart v. James*, 1 F. & F. 156.

## XXVII. INSOLVENT DEBTORS AND DEBTORS TO SMALL AMOUNTS.

### 1. STATUTES.

By 7 Geo. 4, c. 57, the court for relief of insolvent debtors in England was established; that statute repealed the previous acts, 1 Geo. 4, c. 119; 3 Geo. 4, c. 123; 5 Geo. 4, c. 61. The act was continued by 11 Geo. 4 and 1 Will. 4, c. 38; 2 Will. 4, c. 44; 3 & 4 Will. 4, c. 47, and subsequently by 1 & 2 Vict. c. 110, until the year 1861, when it was abolished by 24 & 25 Vict. c. 134, s. 1, and its jurisdiction transferred to the Court of Bankruptcy. See *Perkins, Ex parte*, 34 L. J., Bk. 37; 11 Jur., N. S. 895; 12 L. T. 784; 13 W. R. 1001.

The 5 & 6 Vict. c. 116, amended by 7 & 8 Vict. c. 96, enabled persons not being traders within the meaning of the statutes relating to bankrupts, or being traders within the meaning of those statutes, but owing debts amounting on the whole to less than 300l., to be petitioners for protection from process, by presenting a petition in a form prescribed, to any court or district court of bankruptcy within the district in which the petitioners resided twelve calendar months, without notice being given to their creditors, or in the *London Gazette*, or any newspaper.

The jurisdiction in these matters was transferred to the Insolvent Debtors' Court, and to the county courts, by 10 & 11 Vict. c. 102, and was vested in them by 24 & 25 Vict. c. 134, s. 3.

## 2. PERSONS ENTITLED TO BENEFIT.

**Infants.**—Where an infant tenant in tail took the benefit of the 49 Geo. 3. c. 115, his estate tail did not pass to his assignees, because he could not be legally in custody for debt. *Burton v. Haworth*, 5 Madd. 50.

**Married Women.**—A married woman in execution with her husband, for a debt contracted by her before her marriage, was not entitled to be discharged under 1 Geo. 4, c. 119, as she was not capable of executing a warrant of attorney, and complying with the other terms required by s. 25. *Deacon, Ex parte*, 5 B. & A. 759. And see *Chalk v. Deacon*, 6 Moore, 128.

**Outlaws.**—A prisoner in custody on a *capias utlagatum*, for non-payment of damages and costs, might be discharged under the 7 Geo. 4, c. 57, without a previous reversal of his outlawry. *Hamlin v. Crossley*, 8 A. & E. 677; 3 N. & P. 543; 1 W., W. & H. 502.

## 3. ASSIGNMENT.

**Warrant of Attorney to Provisional Assignee.**

—The judgment confessed by an insolvent under 1 & 2 Vict. c. 110, s. 87, operated to protect him from the ordinary remedy of a creditor by action, but did not extinguish the remedy by distress. *Phillips v. Sherrville*, 6 Q. B. 944; 14 L. J., Q. B. 144; 9 Jur. 179.

The 7 Geo. 4, c. 57, s. 57, requiring an insolvent debtor to execute a warrant of attorney to authorize the entering up judgment against him, and empowering the Insolvent Court to permit execution to be taken out if the insolvent died leaving assets, did not give power to enter up judgment after the death of the insolvent; and the court set aside a judgment entered up on it after the death of the insolvent. *Harden v. Forryth*, 4 P. & D. 547; 1 Q. B. 177; 5 Jur. 576; 1 Arn. & Hodges, 269.

Where a judgment was entered up upon a warrant of attorney, the property of the insolvent did not vest in the assignees, but was only a charge, and could not be realized without suit. *Seymour v. Lucas*, 8 W. R. 599.

**Provisional Assignee.**—The provisional assignee of an insolvent debtor might sell his reversionary interest without an order of the court, under 1 & 2 Vict. c. 110, s. 42. *Sturgis v. Evans*, 2 H. & C. 964; 9 L. T. 774; 12 W. R. 436.

A provisional assignee is entitled to charge against the estate of an insolvent all costs and charges properly incurred by him for the purpose of realizing or administering the estate, but is not justified in incurring costs for the purpose of realizing the estate at any time at which he had in his hands property of the insolvent sufficient to satisfy his creditors and pay the costs then due. *Perkins, Ex parte*, 34 L. J., Bk. 37; 11 Jur., N. S. 895; 12 L. T. 784; 13 W. R. 1001.

**Vesting Order.**—The assignee of an insolvent debtor on his acceptance of the appointment, had vested in him all the estate of the insolvent, from the date of the vesting order. *Forke v. Brown*, 10 M. & W. 78; 2 D., N. S. 283.

The effect of 7 Geo. 4, c. 57, was to vest in the assignee all the property of the insolvent, but subject to all equities to which it would be liable in the hands of the insolvent. *Atkinson, In re*, 2 De G., M. & G. 140; 16 Jur. 1003.

The vesting order of the Insolvent Debtors' Court, under 1 & 2 Vict. c. 110, s. 37, had the same legal operation as the assignment to the provisional assignee had, for which it was substituted. *Woodland v. Fuller*, 3 P. & D. 570; 4 Jur. 743; 11 A. & E. 859.

**Revesting of Property in Debtor.**—By virtue of 1 & 2 Vict. c. 110, s. 44, upon the discharge out of custody, by the consent or default of his detaining creditor, of an insolvent debtor, as to whose estate and effects a vesting order had been made by the Insolvent Debtors' Court the right of property in his estate, money and effects was at once, and without any further order of the Insolvent Court, divested out of the assignees of the estate, and revested in the debtor. *Grange v. Trickett*, 2 El. & Bl. 395; 21 L. J., Q. B. 26; 16 Jur. 287.

If a vesting order was made in the case of a prisoner who petitioned the court, his discharge, by default of the detaining creditor, without any adjudication being made, did not of itself render void the vesting order. *Kernot v. Pittis*, 2 El. & Bl. 421; 23 L. J., Q. B. 33; 17 Jur. 933.—*Ex. Ch.; S. P., Tidway v. Jones*, 1 Kay & Johnson, 691; 24 L. J., Ch. 507.

**Copyholds.**—The clauses of the act which provided that, in case the insolvent shall be entitled to any copyhold or customary estate, the assignment to or certified copy of the appointment of the assignee shall be entered on the court roll of the manor, and that the assignee shall, with all convenient speed, make sale of all the estate and effects of the insolvent, were not mandatory, but were directory only. *Cole v. Coles*, 6 Hare, 517.

**Estates Tail.**—In 1825, an insolvent was entitled to an equitable estate tail in remainder in real estate, and he then executed an assignment of all his property to his assignees in insolvency. In 1826, he became entitled to the estate tail in possession. In 1831, he became bankrupt, when he and the commissioners in bankruptcy executed a disentailing deed of the real estate, and it was conveyed to the assignees in bankruptcy. The insolvent died in 1844, leaving issue capable of inheriting the estate under the original entail, if not barred:—Held, that 4 Geo. 4, c. 119, s. 4, and the assignment of 1825, affected only such extent of interest in the real estate as the insolvent was then, at law or in equity, able to convey without a fine or recovery, or would have been so if there had been no insolvency; and that, as the insolvent could not then have so conveyed this estate tail, the assignee in insolvency was only entitled to the estate during the life of the insolvent. *Sturgis v. Morse*, 2 De G., F. & J. 223; 29 L. J., Ch. 766; 6 Jur., N. S. 766.

**Ecclesiastical Livings.**—A sequestration obtained by the assignees of an insolvent incumbent operated only from the time of publication, and did not entitle the assignees to the arrears of composition for tithes due before publication. *Waite v. Bishop*, 1 C., M. & R. 505; 3 D. P. C. 234; 5 Tyr. 90.

**Leases.**—A lease made to a person who took the benefit of the 1 & 2 Vict. c. 110, remained vested in him until taken to by the assignees, or given up to the landlord. *Bishop v. Bedford Charity (Trustees)*, 1 El. & El. 697; 29 L. J., Q. B. 53; 6 Jur., N. S. 220—Ex. Ch.

**Pensions.**—An annuity granted to a commissioner of bankruptcy under 1 & 2 Will 4, c. 56, and 5 & 6 Vict. c. 122, passed to his assignee under 1 & 2 Vict. c. 110, s. 56. *Spooner v. Payne*, 4 Ex. 138; 18 L. J., Ex. 401; S. C. in Chancery, 1 De G., M. & G. 383; 21 L. J., Ch. 791; 16 Jur. 367.

A pension during his Majesty's pleasure, granted by order in council for past services as advocate of the Admiralty, and charged on the navy estimates, might be appropriated under the 7 Geo. 4, c. 57, s. 29, with the consent of the Lords of the Admiralty, for payment of creditors. *Battine, Ex parte*, 4 B. & Ad. 690; 1 N. & M. 579.

**Honours.**—Diplomas conferring degrees and honours and certificates from medical institutions and practitioners did not pass to the provisional assignee by the vesting order. *Kernot v. Catlin*, 2 El. & Bl. 790.

**Trust Property.**—Under 1 Geo. 4, c. 119, nothing passed to the assignee in which the insolvent was not beneficially interested. *Sims v. Thomas*, 12 A. & E. 536; 4 P. & D. 233; 4 Jur. 1181; S. P., *Strachan v. Thomas*, 4 P. & D. 229; 4 Jur. 1183.

**Things in Action—Negligence of Attorney.**—A., being sued by B., retained C., an attorney, to defend him. By C.'s negligence, a judgment was obtained against A., upon which he (being then in custody) was charged in execution for a large sum, and was put to expense in endeavouring to procure his release, and to reverse the judgment by writ of error.—Held, that this was not a cause of action which passed to A.'s assignees upon his insolvency. *Wetherell v. Julius*, 10 C. B. 267; 19 L. J., C. P. 367; 14 Jur. 700.

But where a beneficed clergyman brought an action against his attorneys for having, through their negligence and want of skill, permitted a writ of sequestrari facias to remain in force against him longer than was necessary, whereby he during that time lost the rent, tithes, and profits of his living:—Held, that this was a cause of action which passed to A.'s assignees upon his insolvency. *Id.*

—**Contract.**—A declaration stated that the plaintiff and R. were in possession of documents and information to prove that the defendant was entitled to property, of which he was not aware, and proposed to give him all the documents and information in their possession on his agreeing to pay them each one-fifth of the property if it should actually come into his possession; to which the defendant assented; and thereupon an agreement was signed between the parties, whereby the defendant agreed, that if by the documents and information he should actually become possessed of any property not in his possession, and that he did not know of, he would pay to each one-fifth of the value of the property recovered; that if the defendant did not become possessed of any property he should not

be called upon to pay any money; and that if he did not think proper to proceed to recover the property he would return the papers, and thereupon the agreement should be cancelled. A plea, that after making the promise, the plaintiff petitioned the Insolvent Debtors' Court, and that a vesting order was made, whereby all his property vested in the assignee, was a bar to the action, as the plaintiff's interest in the contract was valuable property, which vested in the assignee without his interfering to claim it. *Sprye v. Porter*, 7 El. & Bl. 58; 26 L. J., Q. B. 64; 3 Jur., N. S. 330.

A declaration stated that the plaintiff was a printer, and that the sheriff seized his goods under a fi. fa. issued by the defendant, and that in consideration of the defendant withdrawing the execution, the plaintiff agreed to deliver to him, as a security, a printing-machine, which he was to be at liberty to remove, with a power to the plaintiff to redeem it on payment of 150*l.* within fourteen days; and alleged as a breach that, although within fourteen days the plaintiff offered to pay 150*l.*, the defendant refused to redeliver the printing-machine, whereby he lost great profits which he would have made by its use, and his whole trade and business were ruined and stopped, and he became insolvent. The defendant pleaded that after the accruing of the causes of action, the plaintiff became insolvent, and his estate and effects were vested in the provisional assignee:—Held, that this plea was good, without averring that the assignee had interfered. *Stanton v. Collier*, 3 El. & Bl. 274; 2 C. L. R. 1151; 23 L. J., Q. B. 116; 18 Jur. 650.

Held, also, that the cause of action stated in the declaration was an entire cause of action, which touched the personal estate of the insolvent, and therefore passed to the assignee. *Id.*

**Excepted Articles.**—Under 1 & 2 Vict. c. 110, s. 37, it was not a condition on the non-vesting in the assignee of privileged articles of the insolvent, not exceeding the value of 20*l.*, that those articles should be specified by him in his schedule. *Willmer v. Jacklin*, 1 B. & S. 641; 31 L. J., Q. B. 1; 8 Jur., N. S. 96; 5 L. T. 252; 10 W. R. 12.

An insolvent seeking to except his wearing apparel, bedding, and other necessities, and his working tools and implements, under the value of 20*l.*, from the operation of 7 & 8 Vict. c. 96, s. 9, must in his schedule have specified each article and its value. *Taylor v. Roberts*, 1 H. & N. 96.

It was not enough to state generally the character of the goods, and a gross sum as their value. *Id.*

No action would lie against a sheriff for taking in execution under a fi. fa. the bedding and other articles of an insolvent debtor who had petitioned under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96; but if the goods were protected from seizure, the remedy was by application to the court for an order to the sheriff to restore them. *Rideal v. Fort*, 11 Ex. 847; 25 L. J., Ex. 204.

**Fraudulent Preference and Conveyance.**—A transfer made by debtor upon apprehension of arrest was not fraudulent and void as voluntary. *Corbould v. Broadhurst*, 1 M. & Rob. 189.

In order to shew that a conveyance of property



by an insolvent to his creditors was not a voluntary and fraudulent conveyance, it was sufficient to prove that it was given by the insolvent in consequence of a bona fide demand made on him by the creditor for payment; and it was not necessary to give evidence of any more direct pressure upon him for that purpose. *Morgan or Mogg v. Baker*, 4 M. & W. 349; 1 H. & H. 461; 2 Jur. 1068; *S. P., Arnell v. Bean*, 1 M. & Scott, 151; 8 Bing. 87.

A debtor in embarrassed circumstances gave to a favoured creditor (within three months before the commencement of imprisonment) a warrant of attorney, under which the creditor afterwards entered up judgment, and seized the debtor's goods. The debtor subsequently petitioned the Insolvent Court, and was declared insolvent, and an assignee was appointed:—Held, that the warrant of attorney was voidable as against the assignee, under 1 & 2 Vict. c. 110, s. 59, but that the assignee could not treat the seizing and selling of the goods as an act of conversion committed against himself, as assignee, and proceed upon it as in trover against the execution creditor. *Young v. Billiter*, 8 H. L. Cas. 682; 30 L. J., Q. B. 153; 7 Jur., N. S. 269; *S. C.*, in Ex. Ch., 6 El. & Bl. 1; 25 L. J., Q. B. 169; 2 Jur., N. S. 438.

#### 4. OPERATION OF DISCHARGE.

**Debts and Liabilities.**—Under 1 & 2 Vict. c. 110, s. 69, the words "debts growing due," meant debts ascertained and payable in futuro. *Spelton v. Mott*, 5 Ex. 231; 19 L. J., Ex. 243.

The adjudication of the commissioner under 1 & 2 Vict. c. 110, s. 90, discharged the insolvent from all debts due or growing due at the time of the petition to creditors, or to persons claiming to be creditors. *Berry v. Irwin*, 8 C. B. 532; 7 D. & L. 282; 19 L. J., C. P. 110.

**Breach of Trust.**—The discharge of an insolvent extended to a breach of trust, although the amount due in respect of it might not be ascertained except by a decree made subsequently to the discharge. *Thompson v. Finch*, 8 De G., Mac. & G. 560.

**Contingent Liabilities.**—A contingent debt was not barred by a discharge. *Hawker v. Hallowell*, 8 De G., Mac. & G. 318; 25 L. J., Ch. 357; 2 Jur., N. S. 627.

Where A. purchased of B. his business of an attorney, the purchase-money to be paid by two instalments, and the conveyance contained a proviso, giving A. the power, within a limited time, either of completing the purchase or giving B. notice of his abandonment of the contract, in which case B. was to repay 50% of the purchase-money:—Held, that B.'s discharge, before the expiration of the time limited for giving such notice, was no answer to an action to recover back the 50% after such notice given, for that it was not a contingency capable of valuation at the time of the insolvency. *Brown v. Fleetwood*, 5 M. & W. 19; 7 D. P. C. 387; 2 H. & H. 6; 3 Jur. 289.

**Premiums on Insurance.**—A party who covenanted to pay the premiums on a policy of insurance upon his life, effected before his discharge, and to keep the same on foot, was not discharged from such covenant by the operation of 1 & 2 Vict. c. 110, s. 90. *Fletcher v. Turk*, 13 L. J., Q. B. 43; 8 Jur. 186; *S. P., Bennett v.*

*Burton*, 4 P. & D. 313; 12 A. & E. 657; 4 Jur. 1085. See *Allard v. Kimberley*, 12 M. & W. 410 1 D. & L. 635; 13 L. J., Ex. 107.

**Surety for Annuity.**—A surety upon an annuity bond, who had become insolvent, and obtained a final order for protection, was not protected thereby from being afterwards sued upon his bond, on default of the grantor, for instalments accrued subsequently to the filing of such petition; for the liability of the surety on the bond, before default of his principal, was not a debt of the surety, within 5 & 6 Vict. c. 116, s. 10; and 7 & 8 Vict. c. 96, s. 25, applied only to the liability of the grantor of an annuity, and not to the liability of his surety. *Thompson v. Whatley*, 16 Q. B. 189; 20 L. J., Q. B. 86; 15 Jur. 575.

**Liability to Surety who pays after Discharge.**—A discharge of the principal did not exonerate him from the claim of a surety on a bond, in respect of payments subsequently made under it by the latter. *Emery v. Clark*, 2 C. B., N. S. 582.

The discharge of an insolvent debtor was no release of a debt created by the payment by a surety, after the discharge, of a bill of exchange, the consideration for which was inserted in the schedule as a debt for money lent due to the payee. *Litten v. Dalton*, 17 C. B., N. S. 178.

**Unliquidated Damages.**—The discharge of an insolvent did not operate to release him from a claim for unliquidated damages for not redelivering mining shares pursuant to a contract for that purpose. *Owen v. Routh*, 14 C. B. 327; 2 C. L. R. 365; 23 L. J., C. P. 105; 18 Jur. 356.

**Fine on Conviction.**—A prisoner was not discharged from a fine on a conviction for perjury. *Rea v. Norris*, 4 Burr. 2142.

**Debt due by Wife.**—To an action against husband and wife for a debt due from the wife before coverture, the husband's discharge was a good plea. *Lockwood v. Salter*, 5 B. & Ad. 303; 2 N. & M. 255.

**Discharge of Wife before Marriage.**—The discharge of a wife before marriage was a bar to an action against husband and wife in respect of one of the scheduled debts. *Storr v. Lee*, 9 A. & E. 868; 1 P. & D. 633.

**Right of Distress.**—A landlord's remedy of distress for rent due before the commencement of a tenant's imprisonment, was not extinguished by the tenant's petition and discharge, though the amount of rent was inserted in his schedule as a debt due to the landlord, and the distress was not made until after the discharge. *Phillips v. Sherville*, 6 Q. B. 944; 14 L. J., Q. B. 144; 9 Jur. 179.

**Debt discharged cannot be Set-off.**—Although a discharge did not operate as a complete extinguishment of a scheduled debt, the creditor was not entitled to plead such debt by way of set-off to an action against him by the insolvent for a demand accruing subsequently to his discharge. *Francis v. Dodsworth*, 4 C. B. 202; 17 L. J., C. P. 185.

**Errors in Schedule of Debts.—Wrong Amount.]**

—An insolvent debtor inserted a creditor in his schedule, but, by mistake and without fraud, stated the debt to be 3*l.*, whereas, in fact, it was 7*l.*:—Held, that, inasmuch as the creditor was thereby deprived of the benefit of the notice to be given to creditors for 5*l.* and upwards, under 1 & 2 Vict. c. 110, s. 71, this was not a case within the protection of the 93rd section, and the debtor's discharge was no bar to an action for this debt. *Hoyles v. Blore*, 14 M. & W. 387; 15 L. J., Ex. 28.

To a plea of set-off, the plaintiff, as to 19*l.* 3*s.* 2*d.*, replied a discharge from a debt of 19*l.* 3*s.* 2*d.*, and averred, that he subscribed a schedule containing a full and true description of the debt of 19*l.* 3*s.* 2*d.*; and upon this averment issue was taken. The schedule, however, when produced in evidence, contained a debt of 6*l.* 10*s.* due to the defendant:—Held, that the plaintiff was not entitled to a verdict, inasmuch as there was no explanation of the difference between the amount of the debt inserted and of the debt claimed. *Maile v. Bays*, 2 D. & L. 964; 14 L. J., Q. B. 231; 9 Jur. 1108.

—**Omission of one of two Debts.**—A party who owed another two distinct debts was discharged as an insolvent debtor, having inserted only one of those debts in his schedule:—Held, that he was not discharged from the other debt, and might be sued for it. *Leonard v. Baker*, 15 M. & W. 202; 15 L. J., Ex. 177; 10 Jur. 226; *S. P.*, *Tyers v. Stunt*, 7 Scott, 349.

—**Error not Fraudulent.**—In February, 1846, the defendant executed a warrant of attorney to secure to the plaintiff 100*l.*, upon which judgment was entered up, and execution levied to the amount of 50*l.* In August, 1847, the defendant obtained an order for protection under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and in his schedule the consideration for the warrant of attorney was stated to be about 70*l.*, and the balance due upon it about 50*l.* In October, 1854, the plaintiff caused another *fi. fa.* to be issued to levy 70*l.* 14*s.* 11*d.*, which he alleged to be the balance remaining due upon the judgment. Upon application to set aside this writ:—Held, that the order for protection must be considered as valid until set aside, and that the issuing of execution was a violation of 7 & 8 Vict. c. 96, s. 21, unless the amount of the debt was inaccurately stated in the schedule by "culpable negligence, fraud or evil intention" on the part of the defendant. *Brook v. Chaplin*, 4 El. & Bl. 835; 24 L. J., Q. B. 188; 1 Jur., N. S. 590.

—**Wrong Description of Creditors.**—A party, having become security for another person to the plaintiffs, became insolvent, and obtained his discharge. In the list of creditors in his schedule, he described the plaintiffs as Birchring and Parmeter, brewers, Runham, Norfolk, their names and description being Bircham & Parmeter, brewers, Reepham, Norfolk. Runham is a small village thirty-five miles distant from Reepham, and in another post delivery. The plaintiffs never received any notice whatever of the insolvency:—Held, that the inaccuracy was such as to amount to a substantial misdescription; that therefore there was no full and true description of the plaintiffs in the schedule as required by the act, and that the debtor was not discharged from the debt. *Bircham v. Walker*, 1 L. T. 191—Ex. Ch.

An insolvent in his schedule described a debt as being due to "Messrs. Brown & Janson, bankers, 32, Clement's-lane, City;" the correct address of Messrs. Brown and Janson was No. 32, Abchurch-lane, and the notice of the hearing had been duly served at that place:—Held, although Messrs. Brown denied having received it, that the description in the schedule was a sufficient compliance with the 1 & 2 Vict. c. 110, s. 69. *Brown v. Thompson*, 17 C. B. 245; 25 L. J., C. P. 55.

—**Bills of Exchange and Promissory Notes.**—**Omission of Holder's Name.**—The discharge of an insolvent debtor from a debt, in respect of which he had accepted a bill of exchange, was no discharge as to the bill in the hands of a third person, unless the holder's name was inserted in the schedule, or stated therein that he was unknown. *Beck v. Beverly*, 11 M. & W. 845; *S. P.*, *Lambert v. Smith*, 11 C. B. 358; 2 L., M & P. 446; 20 L. J., C. P. 195.

—**Misdescription of Bill.**—A debtor was protected from payment of a bill if he described it substantially in his schedule, though inaccurately as to amount or length of time for which it was drawn, provided such misdescription was not intentional or fraudulent. *Booth v. Coldman*, 1 El. & El. 414; 28 L. J., Q. B. 137; 5 Jur., N. S. 844.

A debtor entered in his schedule a bill of exchange as follows: "Mr. Worman, 129, Sloane-street, Chelsea, attorney's clerk. Bill of exchange for 45*l.*, drawn by S. O'G. for (my use), and accepted by me; dated about November, 1858, at six months." The bill was dated the 30th October, 1858, and was drawn by the debtor, and accepted by S. O'G.:—Held, that the bill was sufficiently described to discharge the debtor in an action on the bill. *Romilio v. Halahan*, 1 B. & S. 279; 2 F. & F. 418; 30 L. J., Q. B. 231; 8 Jur., N. S. 11; 4 L. T. 402; 9 W. R. 737.

—**Omission with Consent of Creditor.**—One who petitioned for protection under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, omitted a debt from his schedule, with the knowledge and consent, and through the contrivance and procurement of the party to whom it was owing; the debt was barred. *Wilkin v. Manning*, 9 Ex. 575; 2 C. L. R. 563; 23 L. J., Ex. 174; 18 Jur. 271.

—**Giving new Security for discharged Debt.**—A defendant mortgaged to B. premises as a security for money lent, and B. obtained a judgment against him for the principal and interest. The mortgage debt was afterwards assigned to the plaintiff in trust. The defendant took the benefit of the Insolvent Debtors' Act, and the mortgage debt and judgment were inserted in his schedule. In order to get rid of the judgment he afterwards agreed with the plaintiff to pay a part of the principal and interest due on the mortgage, and to join with a surety in a bond for payment of the remainder by instalments. The money having been paid, and the bond given, satisfaction of the judgment was entered up. The plaintiff sued the defendant on the bond, and the jury found that in making the agreement the defendant's intention was to purchase the plaintiff's interest in the mortgaged premises and get rid of the judgment:—Held, that the transaction was not a new contract, or security for

payment of a debt, in respect of which the defendant had been discharged, within 1 & 2 Vict. c. 110, s. 91. *Ambrose v. Cook*, 2 H. & N. 73; 26 L. J., Ex. 278.

A new security given to a creditor by an insolvent petitioner under 5 & 6 Vict. c. 116, upon his agreeing not to oppose the granting of the final order for protection, could not be enforced, although the commissioner required the insolvent to make an arrangement with the creditor, and adjourned the petition for that express purpose, and intimated that no final order would be made, unless such an arrangement were effected, and was privy to and consented to the new security being delivered on account of the old debt. *Humphreys v. Welling*, 32 L. J., Ex. 33; 6 L. T. 250.

#### 5. PROTECTION FROM PROCESS.

**Interim Order.**—An interim order for protection extended to an attachment for non-payment into the Court of Chancery of a sum of money by a defaulting trustee. *Wyllie v. Green*, 1 De G. & J. 410; 26 L. J., Ch. 839; 3 Jur., N. S. 1046.

And protected only such property of an insolvent as would pass to and be distributed by his assignees. *Purry v. Jones*, 1 C. B., N. S. 399; 26 L. J., C. P. 36; 2 Jur., N. S. 1190.

An interim order protected the insolvent from arrest on a ca. sa. upon a judgment against him for a debt contracted since the filing of his petition, although the final order did not. *Wallinger v. Gurney*, 11 C. B., N. S. 182; 31 L. J., C. P. 55; 8 Jur., N. S. 513; 8 W. R. 81.

**Final Order.**—The final order was only a bar to actions brought in respect of debts mentioned in the schedule. *Phillips v. Pickford*, 1 L., M. & P. 134; 9 C. B. 459; 19 L. J., C. P. 171; 14 Jur. 272.

A final order obtained by an insolvent constituted an absolute bar to an action for the debt as to which it was a protection. *Jacobs v. Hyde*, *Platell v. Bevil*, 2 Ex. 508; 6 D. & L. 2; 17 L. J., Ex. 249; 12 Jur. 564; overruling *Toomer v. Gingell*, 3 C. B. 322; 4 D. & L. 182; 15 L. J., C. P. 255.

A final order constituted an absolute bar to the actions in respect of which it was a protection, though not in terms an order for distribution as well as for protection. *Markin v. Aldrich*, 11 C. B., N. S. 599; 5 L. T. 747; 10 W. R. 212.

The acts did not authorize the assignees to take profits of a benefice, there being no provision therein equivalent to 1 & 2 Vict. c. 110, s. 55. *Id.*

**After Verdict and before Judgment.**—An insolvent, against whom a verdict for damages, in an action of tort, had been returned, but judgment not entered at the time of the filing of his petition, was not protected by his final order from being taken in execution under process in respect of such verdict. *Beavan v. Walker*, 12 C. B. 480; 21 L. J., C. P. 161; 16 Jur. 547.

**After Judgment and before Execution.**—Where the goods of an insolvent had been seized under a fi. fa. issued upon a judgment signed against him, and between the date of the judgment and the writ he had obtained an order for

protection and distribution, the court, upon motion, set aside the writ on terms. *Turner v. Pulman*, 2 Ex. 508.

#### 6. RIGHTS OF INSOLVENTS AFTER DISCHARGE.

**Surplus of Estate.**—A debtor, who had been discharged under 1 & 2 Vict. c. 110, made an assignment of all his interest in the surplus of his assets after payment of his debts under the insolvency. He was afterwards again insolvent, and was discharged under the Insolvent Debtors' Act:—Held, that the Court of Chancery had jurisdiction to decide as between the assignee in insolvency and the assignee of the surplus, on their respective rights to the surplus, and a declaration was made accordingly in a suit instituted by the latter against the former assignee, and directing that the latter should be at liberty to apply to the insolvent court to give effect to the declaration, and that the amount received on such application should be paid to the credit of the chancery suit. *Cook v. Sturgis*, 3 De G. & J. 506; 28 L. J., Ch. 345; 5 Jur., N. S. 475.

Making an order for vesting the surplus of an insolvent's estate, under 1 & 2 Vict. c. 110, s. 92, was a judicial and not a ministerial act. *Reg. v. Law*, 7 El. & Bl. 366; *S. C.*, nom. *Cook*, *Ex parte*, 29 L. J., Q. B. 68; 6 Jur., N. S. 224.

A devisee of an insolvent debtor who had taken the benefit of the 5 & 6 Vict. c. 116, and who had obtained a release in full from all his creditors, was entitled to sustain a bill in equity in respect of surplus real property, which had been conveyed by the official assignee, without going through the process of applying to the insolvent court for an order re-vesting the property in the assignee of the insolvent. *Wearing v. Ellis*, 6 De G., Mac. & G. 596; 26 L. J., Ch. 15; 2 Jur., N. S. 1147. See *Dyson v. Hornby*, 7 De G., Mac. & G. 1.

An insolvent debtor, all the claims against whom have been satisfied, is not debarred from suing for relief in chancery (in a matter which the commissioners in bankruptcy are incompetent to try), on the ground that he has not obtained a re-vesting order in insolvency, when he could only have obtained that order upon such terms as would have been destructive of his rights. *Troup v. Ricardo*, 10 Jur., N. S. 1161; 11 L. T. 399; 13 W. R. 147.

#### 7. EFFECT OF 32 & 33 VICT. C. 83.

In 1836, C. took the benefit of the Insolvent Act (7 Geo. 4, c. 57) and obtained his discharge, having executed a warrant of attorney upon which judgment was entered up. Two creditors' assignees were then appointed, one being W., a creditor. C. subsequently became three times insolvent, and in July, 1864, he became bankrupt under the Act of 1849, and obtained his certificate. He died in January, 1880. C. had married the only daughter of a man who died possessed of very considerable property a few months after his first insolvency, whereupon he became entitled, in right of his wife, to that money, which came into his possession on her death in 1877. W., the survivor of the two creditors' assignees under the first insolvency, and himself a creditor, now applied for leave to prove his debt in an action to administer C.'s estate:—Held, that, under the act to provide for the winding up of the business of the insol-

33 Vict. c. 83), the close of  
for by s. 15 was in-  
close, and that if no  
the closing within  
encement of the  
twelve months  
at the ex-  
of the  
rt to  
ogy  
o  
ra-  
dham  
19; 30  
1. 26; 30

g matter" in  
in which some  
Id.

### H BANKRUPTCY OR SEQUESTRATION.

erty of a deceased debtor has been  
under 2 & 3 Vict. c. 41, the title of  
e, under the sequestration, is made out  
f of the act and warrant, in the manner  
cribed by s. 48, whether the property of the  
ceased debtor was subject to Scotch bank-  
rupt laws or not. *Miller v. Ker*, 1 C. & K. 38.

Property of a deceased debtor, who, at the time  
of his death, resided, or had a dwelling-house, or  
carried on business in Scotland, and was at the  
time owner of heritable or movable estates in  
Scotland, is liable to 2 & 3 Vict. c. 41; and it is  
not necessary that the deceased debtor should  
have been a trader; and the amount of his herit-  
able or movable estate in Scotland at the time  
of his death is immaterial. *Id.*

A., who had a warrant of protection under 2 &  
3 Vict. c. 41, s. 17, was arrested whilst in London,  
at the suit of a creditor (for a debt within the  
meaning of the section), upon a judge's order,  
made under 1 & 2 Vict. c. 110, s. 3, upon an affi-  
davit that he was about to leave England and go  
to Scotland:—Held, that the going to Scotland  
was not a fuga within 2 & 3 Vict. c. 41, s. 17,  
which meant an attempt to escape from the do-  
minions of Great Britain, and that he was en-  
titled to be discharged. *M'Gregor v. Fiskin*, 5 D.  
& L. 591; 2 B. C. Rep. 237; 17 L. J., Q. B.  
186.

A renewed warrant of protection from impri-  
sonment under 2 & 3 Vict. c. 41, might be signed  
either by the sheriff or sheriff's substitute.  
*Jones v. Anstruther*, 1 Ex. 867; 18 L. J., Ex.  
131.

The 2 & 3 Vict. c. 41, provided for two distinct  
species of warrants to be granted by the lord or-  
dinary, one for the protection of the debtor from  
arrest, the other for his liberation when in cus-  
tody. Thus, a warrant which recited that the  
lord ordinary had considered the petition of A.,  
and sequestered his estates, and declared them  
to belong to his creditors, and appointed the  
creditors to hold two meetings at a certain time  
and place, to elect interim factors and trustees,  
and remitted to sheriff to proceed according to  
the statute, and "granted a warrant of protection  
to A. against arrest or imprisonment for civil  
debt until the meeting of the creditors for the  
election of a trustee," was a warrant of protec-  
tion only, and therefore a party in custody at the

time the warrant was obtained was not entitled  
under it to his discharge. *M'Gregor v. Fiskin*,  
2 Ex. 226; 5 D. & L. 722.

A defendant was arrested on a ca. sa. upon a  
judgment obtained against him here, and was  
discharged by order of a judge, on the ground  
that he had at the time of the arrest obtained his  
protection from process under a Scotch sequestra-  
tion. Upon a motion to rescind that order, and  
for leave to issue another ca. sa.:—Held, that it  
was not competent to the court to inquire into  
the trading upon which the sequestration was  
founded, although fraud was suggested. *O'Brien*  
*v. Don*, 1 C. B., N. S. 702; 26 L. J., C. P. 96;  
3 Jur., N. S. 318.

By 19 & 20 Vict. c. 79, s. 47, the warrant  
granting protection shall protect the debtor from  
arrest in Great Britain and Ireland, and her Ma-  
jesty's other dominions, for civil debts contracted  
previous to the sequestration; but such warrant  
shall not be of any effect against the execution of  
a warrant of apprehension in *meditatione fugæ*:  
—Held, that the exception was not confined to  
the warrant in *meditatione fugæ* peculiar to Scot-  
land, but extended to analogous process in other  
parts of the Queen's dominions. Therefore a  
Scotch debtor, who has obtained a warrant of  
protection and then comes to England, is liable  
to be arrested on a *capias* when he is about to  
leave this country for New Zealand. *Dutton v.*  
*Hally*, 2 B. & S. 748; 31 L. J., Q. B. 297.

A sequestration issued against a debtor in  
Scotland, where he resided and carried on busi-  
ness, and creditors (also residing in Scotland)  
proved and received dividends under the seques-  
tration. The debtor did not obtain any order of  
discharge, and more than six years from the pay-  
ment of the last dividend he petitioned the Court  
of Bankruptcy in London for protection, having  
in the meantime carried on business in England;  
and a proposal for payment of a composition  
secured by inspectorship trusts was assented to,  
and confirmed according to the Bankrupt Act,  
1849:—Held, that the Statute of Limitations  
was a valid objection to the claim of the Scotch  
creditors to be paid a composition on the unpaid  
portion of their debt under the inspectorship, the  
sequestration being held not to create a trust of  
subsequently-acquired property for the purpose of  
taking the debts provable under it out of the  
statute. *Kidd, Ex parte*, 3 De G., F. & J. 640;  
7 Jur., N. S. 613; 4 L. T. 244.

**Bankruptcy—English Rule of Waring, Ex parte**  
(19 Ves. 345; 2 Rose, 182), inconsistent with  
Scotch Bankruptcy System.]—The rule of the  
English bankruptcy system fixed by *Waring*,  
*Ex parte* (19 Ves. 345; 2 Rose, 182), and as ex-  
tended in subsequent cases, has not been adopted  
in Scotland, and is inconsistent with Scotch  
bankruptcy law. *Royal Bank of Scotland v.*  
*Commercial Bank of Scotland*, 7 App. Cas. 366;  
47 L. T. 360; 31 W. R. 49—H. L. (Sc.)

**Lien—Bills accepted against Goods—Bank-**  
**ruptcy of both Drawer and Acceptor during**  
**Currency of Bills.]**—In Scotch practice, where B.  
accepts bills drawn by A. against goods left in  
B.'s hands as security, if both become bankrupt,  
the bill-holder can rank on the estate of each for  
the amount of the bills to the effect of recovering  
full payment; but B.'s estate is entitled to be  
indemnified for any dividends which his estate  
may be required to pay in respect of the bills,

vered the policy to him. Rejoinder, that the cargo was delivered and the risk thereon ended in England before his bankruptcy; and that the right to have a return of premium was not transferred before the bankruptcy:—Held, that the two causes of action, being separate and totally distinct from each other, though arising upon the same instrument, the bankrupt was entitled to sue for an average loss as trustee for his vendee, that being a cause of action in which he had no beneficial interest at the time of his bankruptcy. *Boddington v. Castelli (in error)*, 1 El. & Bl. 879; 17 Jur. 781—Ex. Ch.

Assignees suing upon a contract made with the bankrupt are entitled to all the legal and equitable rights, and no other, which the bankrupt would have had if the action had been brought by him on the day of his bankruptcy. *Valpy v. Oakley*, 16 Q. B. 941; 20 L. J., Q. B. 380; 16 Jur. 38.

A. contracted to deliver to B. iron, to be paid for by bills. The bills were accordingly accepted by B., but upon maturity were dishonoured, and afterwards B. became bankrupt:—Held, in an action by the assignees of B. against A. for non-delivery of the goods, that they were entitled to recover only such damages as could have been recovered by B. if the action had been brought by him on the day of his bankruptcy, and therefore only the difference between the contract and the market prices of the iron. *Ib.*

S., being indebted to the defendants, who had acted as his solicitors, in a sum of money, they, before his bankruptcy, received certain sums belonging to S. from his agent, and applied them in discharge of their claims upon him. S. having afterwards become bankrupt, and his assignees having brought an action against the defendants to recover this money as money received to their use, the judge told the jury, that, if the defendants, before the bankruptcy, actually received the money to the use of the bankrupt, they held it, after the bankruptcy, to the use of the assignees, who were entitled to succeed on the plea of non-assumpsit:—Held, that this was a misdirection, and that there ought to be a new trial, unless it was clear that the jury was not misled, and that it was afterwards explained away. *Pennell v. Aston*, 14 M. & W. 415; 14 L. J., Ex. 309.

B., being indebted to the defendant in 500*l.* for the price of goods sold to him, and being pressed for part payment of the debt, handed to the defendant a bill of exchange drawn by himself for 600*l.*, which the defendant agreed to discount on the terms of retaining to his own use the sum of 100*l.* and the discount, and paying over the difference to B.; he, however, retained the bill, and paid no part of the proceeds over to B. B. shortly afterwards became bankrupt:—Held, that his assignees were entitled to recover from the defendant the full amount of the bill, minus the 100*l.*, and such discount as the jury should find to be receivable by the defendant. *Alder v. Keighley*, 15 M. & W. 117; 15 L. J., Ex. 100.

A., drawer of an accommodation bill, a few days before its maturity, handed over money to B., the acceptor, for the purpose of meeting the bill. A fiat having been issued against A. between the day of such deposit and the maturity and payment of the bill:—Held, that the money having been handed over to B. in pursuance of a binding contract upon a good consideration, viz.

an implied contract of indemnity, the bankruptcy of A. was no revocation of B.'s authority to apply the money in satisfaction of the bill, and consequently that A.'s assignees could not recover it back from him. *Yates v. Hoppe*, 9 C. B. 541; 19 L. J., C. P. 180; 14 Jur. 372.

A custom of exchanging acceptances existed between a bankrupt and other houses, through the agency of B.; notes were sent by A. to B., but never exchanged, as bankruptcy intervened, and they were stolen from B., and never formed any item in any settlement of the accounts between B. and the assignees:—Held, that A. could not recover the value of the notes from the assignees. *Watson, Ex parte*, 1 Mont. & Ayr. 685; 4 Deac. & Chit. 45.

M. and the Scotch bank mutually exchanged their notes at stated times. M. became bankrupt, his agent B. having notes of the Scotch bank in his hands. The assignees subsequently allowed B. to retain these notes in his account with them, he having claims against M.:—Held, that the Scotch bank could recover these notes against the assignees. *Bank of Scotland, In re*, 1 Mont. & Ayr. 644; 4 Deac. & Chit. 32.

#### 7. FOR CONVERSION OF BANKRUPT'S PROPERTY.

*Action.*—In an action by assignees against a sheriff, for a conversion of the bankrupt's goods, seized under a fi. fa. against E. and D., it appeared that, immediately before the seizure, the bankrupt told the officer that the goods were the property of C., and immediately afterwards he contradicted that statement, and said they were the goods of D. The jury found that the goods were in reality the bankrupt's, but, also, that he represented the goods to the officer as the goods of C., so as to induce the officer, by that false representation, to seize them:—Held, that under a plea of not possessed, this finding did not estop the bankrupt, and his assignees, from complaining of the seizure of the goods as their own. *Freeman v. Cook*, 2 Ex. 654; 18 L. J., Ex. 114; 12 Jur. 777.

B. bought goods at the shop of A., after notice that A. had committed an act of bankruptcy, by absconding, and claimed to set off against the price a debt due to him from A. A fiat having afterwards issued against A., his assignees sent in an invoice, and demanded payment of the goods so bought by B.:—Held, that the assignees did not thereby so affirm the sale as to disentitle them to maintain an action for the goods upon a subsequent demand and refusal. *Valpy v. Sanders*, 5 C. B. 887; 17 L. J., C. P. 249; 12 Jur. 483.

A., by a deed dated the 28th September, 1845, conveyed goods to B., absolutely, subject to a proviso that if he should pay to B. the sum secured on the 22nd of March, 1850, or any earlier day, after receiving from B. fourteen days' notice, and should pay the interest meanwhile half-yearly, then the conveyance should be void. By the deed, it was also agreed that until a default in payment of the principal, as before specified, or until default in payment of the interest after notice to pay, A. should be allowed to hold and enjoy the goods. No notice for earlier payment was given to A. pursuant to the power contained in the deed, nor any notice for payment of the interest, and he continued in possession of the goods until the 13th of Decem-

ber, 1849, when he became bankrupt, and his assignees then took possession of the goods, and sold them on the 19th of February, 1850. B. had previously assigned the goods to the plaintiff:—Held, that although the right to the possession of the goods was vested in A. until the 22nd of March, 1850 (defeasible by non-payment of the principal and interest, according to the provisions of the deed), yet that the sale of the goods before that day put an end to the term, and that the assignees had thereby been guilty of a conversion, for which the plaintiff was entitled to maintain trover. *Fenn v. Bittleston*, 7 Ex. 152; 21 L. J., Ex. 41.

Where assignees declare in trover for property of the bankrupt converted since the bankruptcy, the conversion after the bankruptcy is a material allegation, and must be proved under the general issue. *Edwards v. Hooper*, 11 M. & W. 363; 12 L. J., Ex. 304; 7 Jur. 378.

The assignees of two bankrupt partners declared in trover for property which had belonged to the bankrupts, alleging a possession in themselves as assignees, and a conversion since the bankruptcy. A separate fiat had first issued against one partner, under which the property was seized by the sheriff and sold; subsequently to which a joint fiat was issued against both:—Held, that the assignees could not recover in trover against the sheriff for an undivided moiety of the whole as the property of the partner against whom the separate fiat had issued. *Id.*

Assignees are not entitled to waive a sale of the goods as a conversion, and rely on a subsequent demand and refusal. *Id.*

In trover for goods: at the trial it appeared that the plaintiff was in possession of the goods, which he claimed as his property, under an assignment to him from O. The defendant seized the goods in the plaintiff's possession, claiming them under an assignment from O. to him, made whilst O. was in apparent ownership of the goods, but of a later date than the assignment to the plaintiff. This was the conversion. The defence was that the assignment by O. to the plaintiff was fraudulent as against the defendant. This was left to the jury, who found for the plaintiff. The defendant also offered, as a defence, to prove that O. had become bankrupt before the plaintiff took possession, and that the goods were in his order and disposition, and therefore vested in his assignees before the conversion. The judge refused to permit this defence. On a motion for a new trial:—Held, that the judge did right; for that the plaintiff being in possession, and the defendant being a wrongdoer, not claiming in any way under the assignees, the defendant could not set up the *jus tertii* as a defence in trover. *Jeffries v. Great Western Railway Company*, 5 El. & Bl. 802; 25 L. J., Q. B. 107; 2 Jur., N. S. 230.

A. having become bankrupt, his goods were sold by order of his assignees. Some goods of his in B.'s hands at the time of the bankruptcy, and on which B. claimed a lien, were also included in the sale; but this was done by B.'s order, and the assignees refused to authorize it. The assignees afterwards signed a memorandum that all the goods included in the sale were the property of the bankrupt, to exempt them from auction duty:—Held, that this was no adoption of the sale, so as to prevent the assignees from maintaining trover against B. for the goods. *Bleaden v. Hancock*, M. & M. 465.

A., the partner of B., was also in partnership with C. A., being indebted to the firm of A. & B., indorsed to A. & B. a bill belonging to the firm of A. & C., and immediately afterwards indorsed it in the names of A. & B. to D., a creditor of A. & B., who received the amount at maturity. A. & C. afterwards became bankrupts; their assignees cannot maintain trover against B. *Jones v. Yates*, 4 M. & R. 613; 9 B. & C. 532.

Nor can such assignees maintain an action against B. for money taken by A. from the funds of A. & C. and applied to the use of A. & B. *Id.*

**Pleadings.**—In trover by the owner of the goods against assignees, the defence that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner, and that the title to the goods vested in the assignees by virtue of an order made by the Court of Bankruptcy, is admissible under the plea of not possessed, although the order was applied for and made after action. *Heslop v. Baker*, 8 Ex. 411; 22 L. J., Ex. 333.

In trover by assignees of H. & L., bankrupts, against the sheriff, the defendant pleaded, that H. & L., being indebted to S., he sued out a *fi. fa.*, directed to defendant as sheriff, and thereupon, after H. & L. became bankrupt, and before the fiat, he took the goods in execution, and that afterwards a fiat issued, under which the plaintiffs were appointed assignees, and, as such, entitled to the possession of the goods, which possession is the possession of the assignees in the declaration mentioned:—Held, first, that the defence might be given in evidence, either under the plea of not possessed, or not guilty. *Unwin v. St. Quintin*, 2 D., N. S. 790; 11 M. & W. 277; 12 L. J., Ex. 209.

Held, secondly, that the plea was not an argumentative plea of not possessed. *Id.*

To trover by the assignees for goods the defendant pleaded that the bankrupt being indebted to him before the bankruptcy he had sued him, and recovered judgment against him, and sued out execution thereon; and that the sheriff seized the goods, and sold them under the writ, which was the conversion complained of:—Held, on special demurrer, that the plea was bad as amounting to the general issue. *Young v. Cooper*, 6 Ex. 259; 20 L. J., Ex. 136.

To a declaration by assignees of a bankrupt to recover damages for goods, chattels, and fixtures alleged to be in his possession at the time of his bankruptcy, and to have been since converted by the defendants, they pleaded that before the bankruptcy the bankrupt assigned the goods to them by deed, and that before the bankruptcy they took possession of them, and kept and retained such possession afterwards; the plaintiffs replied that the defendants did not take possession of the goods before the bankruptcy: issue was joined thereon, and a verdict found for the plaintiffs upon it:—Held, that the issue was immaterial, because the assignment by deed conveyed the property in the goods to the defendants, and the continued possession of the assignor only amounted to evidence of fraud. *Carr v. Burdiss*, 1 C., M. & R. 782; 5 Tyr. 309.

**Damages.**—A sheriff seized goods belonging to a bankrupt, and, after keeping them for a considerable period, and after trover brought

against him by the assignees, he delivered up the goods to them:—Held, that the assignees were not entitled to proceed in the action, and to recover as damages a quarter's rent which had been paid for the house where the goods were kept whilst in the possession of the sheriff, or the costs of keeping their messenger on the premises during the same period. *Moon v. Raphael*, 2 Scott, 489; 2 Bing. N. C. 310; 7 C. & P. 115; 1 Hodges, 289.

Goods were seized under *fi. fa.*, issued upon a judgment on a warrant of attorney, after an act of bankruptcy committed by the debtor, against whom a fiat issued before the goods were sold. The assignees gave the sheriff notice not to sell, and he brought the parties before a judge by an interpleader order. The judge directed that the goods should be sold, and the money brought into court, to abide the event of an issue to be tried between the execution creditor and the assignees. The latter made no objection, and did not suggest any other mode of disposing of the goods, which were accordingly sold by the sheriff's auctioneer. The execution creditor subsequently abandoned all claim to the goods; and the proceeds of the sale were paid out of court to the assignees:—Held, that the assignees were not entitled, as matter of law, to recover in trover against the execution creditor the difference between the produce of the sale and the value of the goods at the time of the seizure; and that it was no misdirection in the judge to state to the jury, that, if they thought that the sale was *bonâ fide*, they might consider the produce of it as the measure of damages. *Whitmore v. Black*, 13 M. & W. 507; 2 D. & L. 445.

#### 8. WHERE DEBT INCURRED BY FRAUD.

In an action against liquidating debtors and their trustee, to recover advances of money obtained from the plaintiffs by the debtors through false and fraudulent representations before the liquidation, the plaintiffs claimed, *inter alia*, a declaration that they were entitled to prove for the amount of the advances, and interest at 5 per cent. to the date of the liquidation, either against the joint estate of the liquidating debtors or against the separate estate as the plaintiffs might elect:—Held, on demurrer by the trustee, that, as the plaintiffs might in this action obtain some relief against him, the claim was good. *Hale v. Boustead*, 8 Q. B. D. 453; 51 L. J., Q. B. 255; 46 L. T. 533; 30 W. R. 677; 46 J. P. 342.

#### 9. PLEADINGS.

Counts for money lent and money paid by the assignee of a bankrupt, may be joined with counts for money had and received to the assignee's use, and upon an account stated with him as assignee. *Richardson v. Griffin*, 5 M. & S. 294; 2 Chit. 325.

In an action by assignees of a bankrupt, it need not be stated in the declaration that they sue "as assignees;" it is enough if it sufficiently appears that they are assignees. *Ferguson v. Mitchell*, 2 C., M. & R. 687; 4 D. P. C. 513.

Plaintiffs declared as assignees of a bankrupt, concluding as follows: "Wherefore the plaintiffs, assignees as aforesaid,—instead of 'as' assignees

as aforesaid,—say they are injured:—"Held good, on special demurrer, as the words "assignees as aforesaid," might be rejected as surplusage. *Cobbett v. Cockrane*, 1 M. & Scott, 55; 8 Bing. 17.

A declaration in *scire facias* by assignees of a bankrupt, stating that he became a bankrupt within the meaning of the statutes relating to bankrupts, and that his goods and effects were afterwards in due manner assigned to the plaintiffs, is sufficiently certain, without alleging that the party was declared a bankrupt. *Winter v. Kretchman*, 2 T. R. 45.

The assignees under a joint commission against A. and B., in suing on a separate contract entered into with A., may describe themselves generally as the assignees of A., without noticing the name of B. *Stonehouse v. De Silex*, 3 Camp. 399; 2 Rose, 142; S. P., *Harvey v. Morgan*, 2 Stark. 17.

A defendant received money to the use of A. and B. as assignees. B. was afterwards removed, and A. became the sole assignee, the money still remaining in the hands of the defendant: A. may well declare as for money had and received to his own use as assignee, without mentioning B. at all. *Stewart v. Lee*, M. & M. 158.

Under a joint commission against two partners, the assignees may declare in the same action for separate as well as joint debts due to the bankrupts. *Graham v. Mulcaster*, 4 Bing. 115; 12 Moore, 327.

Assignees in an action against the vendee of goods sold by the bankrupt after the commission, need not name themselves assignees in the declaration; *secus*, if on a contract made by the bankrupt before the commission. *Evans v. Mann*, Cowp. 569.

#### 10. INTERROGATORIES.

In trover by assignees of a bankrupt, the defendant cannot deliver interrogatories for the purpose of compelling the assignees to state upon oath what act or acts of bankruptcy they intend to rely upon in support of their title. *Edwards v. Wakefield*, 6 El. & El. 462; 2 Jur. N. S. 762.

#### 11. EVIDENCE.

Where in an action by assignees the bankrupt was not called as a witness, but a witness was examined as to certain statements of the bankrupt with respect to his affairs:—Held, that the evidence was admissible. *Belcher v. Brake*, 2 C. & K. 658.

In an action against assignees for the conversion of goods seized by them as the property of the bankrupt, it appeared that the plaintiff claimed the goods by virtue of an alleged sale by the bankrupt to him a short time before his bankruptcy; and it was proposed on cross-examination to ask a witness who was present at the alleged sale, whether he himself would have acted upon the transaction by delivering the goods to the plaintiff:—Semble, that the question might be put. *Morgan v. Whitmore*, 6 Ex. 716; 20 L. J., Ex. 289.

Certain documents, purporting to be a receipt of and a delivery order for the goods, in the handwriting of the bankrupt, and dated as of the day of the sale, were delivered to a witness by the bankrupt, and after his bankruptcy, and

about a month after the alleged sale. There was no evidence independently of the documents themselves that they existed before the bankruptcy:—Held, that the documents were admissible as evidence of their existence at the time they bore date. *Ib.*

Trover of A., against the assignees of H., for seizing goods of A. The plaintiff gave evidence, that prior to the bankruptcy the person in possession, and apparently the owner, had assigned them to C., who had, for valuable consideration, assigned them to the plaintiff. The plaintiff had put a person in possession of the goods, but C. continued to carry on the business in the house where they were. On the part of the defendants, it was suggested that the transaction was colourable, and that the goods belonged to the bankrupt H. Before any evidence was offered of any connection between the plaintiff and H., one of the witnesses for the defence was asked whether he remembered C. making a claim to the goods after the bankruptcy. The question was disallowed:—Held, that the question ought to have been allowed. *Ford v. Elliott*, 4 Ex. 78; 18 L. J., Ex. 447.

An admission by a bankrupt in his balance-sheet will not take a debt out of the Statute of Limitations as against his assignees. *Pott v. Clegg*, 16 M. & W. 321; 16 L. J., Ex. 210; 11 Jur. 289.

An admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt by an accountant employed by them to wind up the affairs of the bankrupt's estate, will not take a debt of the bankrupt out of the Statute of Limitations. *Ib.*

A statement by a bankrupt in his balance-sheet of a debt due by him is not evidence as against his assignees of the debt being due. *Ib.*

## 12. COSTS.

The official assignee is entitled to be indemnified against the costs of an action brought in his name without his authority. *Laws v. Bott*, 16 M. & W. 300; 4 D. & L. 559; 16 L. J., Ex. 279.

An official assignee is liable to the costs of defending an action brought against him and the creditors' assignee, if he joined in retaining the attorney. *Sydney v. Belcher*, 2 M. & Rob. 325.

An action, by direction of a commissioner, was brought, with the assent of the creditors, to try a disputed point. The action failed, and some creditors objected to the allowance of the assignees' costs, on the ground that the commissioner had no jurisdiction to order the action to be brought, as not being an action within 12 & 13 Vict. c. 106, s. 153, but the Lords Justices ordered the costs to be paid out of the bankrupt's estate, on the ground that the objection ought to have been made earlier, that is, before the result of the action was known. *Edmondson, Ex parte*, 31 L. J., Bk. 32; 6 L. T. 234.

An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade assignee for the recovery of part of the bankrupt's estate, and the action proving unsuccessful, the trade assignee, having paid the costs, is entitled to sue the official assignee for contri-

bution. *Bevan v. Whitmore*, 15 C. B., N. S. 433. Affirmed, 19 C. B., N. S. 763—Ex. Ch.

## 13. PRACTICE.

Assignees seeking to set aside a judgment against a bankrupt for irregularity must come within the same time after their appointment as the bankrupt must have done after he had notice of the irregularity. *Alcock v. Sutcliffe*, 1 B. C. Rep. 313; 4 D. & L. 612.

Assignees applying to set aside proceedings on the ground of irregularity must come to the court within a reasonable time after notice of the irregularity. *Butterworth v. Williams*, 4 D. & L. 82; *S. P.*, *Amadio v. Showell*, 1 B. C. Rep. 305.

Judgment was signed, and execution issued against the defendant, on the 29th of February, at which time notice was given to the sheriff that the judgment would be disputed; a fiat issued on the 15th of March; the official assignee was appointed on the 4th and the other assignees on the 12th of April; and the motion to set aside the judgment was made, on the part of the assignees, on the 25th of April:—Held, that it was made in time. *Brooks v. Hodson*, 2 D. & L. 256; 8 Scott, N. R. 223; 7 M. & G. 529; 13 L. J., C. P. 203.

In an action against the creditors' and official assignees of a bankrupt, for trespass, and for the conversion of fixtures by sale, the action will not, at nisi prius, be stayed as against the official assignee under 12 & 13 Vict. c. 106, s. 41, which refers only to claims for money paid into the Bank of England before issue. *Vansittart v. James*, 1 F. & F. 156.

## XXVII. INSOLVENT DEBTORS AND DEBTORS TO SMALL AMOUNTS.

### 1. STATUTES.

By 7 Geo. 4, c. 57, the court for relief of insolvent debtors in England was established; that statute repealed the previous acts, 1 Geo. 4, c. 119; 3 Geo. 4, c. 123; 5 Geo. 4, c. 61. The act was continued by 11 Geo. 4 and 1 Will. 4, c. 38; 2 Will. 4, c. 44; 3 & 4 Will. 4, c. 47, and subsequently by 1 & 2 Vict. c. 110, until the year 1861, when it was abolished by 24 & 25 Vict. c. 134, s. 1, and its jurisdiction transferred to the Court of Bankruptcy. See *Perkins, Ex parte*, 34 L. J., Bk. 37; 11 Jur., N. S. 895; 12 L. T. 784; 13 W. R. 1001.

The 5 & 6 Vict. c. 116, amended by 7 & 8 Vict. c. 96, enabled persons not being traders within the meaning of the statutes relating to bankrupts, or being traders within the meaning of those statutes, but owing debts amounting on the whole to less than 300l., to be petitioners for protection from process, by presenting a petition in a form prescribed, to any court or district court of bankruptcy within the district in which the petitioners resided twelve calendar months, without notice being given to their creditors, or in the London Gazette, or any newspaper.

The jurisdiction in these matters was transferred to the Insolvent Debtors' Court, and to the county courts, by 10 & 11 Vict. c. 102, and was vested in them by 24 & 25 Vict. c. 134, s. 3.



do so. *London Engineering and Iron Ship-building Company v. Cowan*, 16 L. T. 573.

**When Charged with Contempt of Court.]—**A barrister, who was also an attorney of the supreme court of a colony, and a suitor in the court, wrote a letter, as such suitor, to the chief justice, reflecting on the administration of justice in the court, and amounting to a contempt of court, whereupon the court suspended him from pleading in the court:—Held, that although courts of justice have power to remove their officers when guilty of crime or moral delinquency, rendering them unfit to be intrusted with a professional status, yet, inasmuch as the offence was committed by him in his capacity as a suitor, and not as an officer of the court, punishment by fine or imprisonment was the appropriate punishment, and the order suspending him from practising in the court was reversed. *Wallace, In re*, 1 L. R., P. C. 283; 36 L. J., P. C. C. 9; 15 W. R. 533; 4 Moore, P. C. C., N. S. 140.

A barrister, engaged in his professional duty before the supreme court at Hong Kong, was, without notice of the alleged contempt, or rule to shew cause, and without being heard in defence, by an order of that court, fined and adjudged to have been guilty of several contempts of court in disrespectfully addressing the chief justice while conducting a cause. Such order, upon a reference by the crown to the judicial committee, was set aside, and the fine ordered to be remitted, first, on the ground that the order was bad, inasmuch as the offences charged were not of themselves such contempts of court as legally constituted an offence; and, secondly, that, even if they had been so, no distinct charge of the several alleged offences was stated, and no opportunity given to the party accused of being heard, before passing sentence. *Pollard, In re*, 2 L. R., P. C. 106; 5 Moore, P. C. C., N. S. 111.

**Freedom of Speech.]—**An action will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue. *Hodgson v. Scarlett*, 1 B. & A. 232.

But although counsel in the discharge of their duty are privileged to utter matter injurious to individuals, the subsequent publication of such matter is unlawful. *Flint v. Pike*, 6 D. & R. 528; 4 B. & C. 473. Compare *Munster v. Lamb*, 11 Q. B. D. 588; 52 L. J., Q. B. 726; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805—C. A.

A party in a matter before the court had kept a sum of money, which, by his contract, he ought not to have kept. Counsel, in reference to this matter, used the language, "This gentleman has defrauded us," and was interrupted by the court before he had finished his sentence:—Held, first, that the words were not actionable. *Needam v. Douling*, 15 L. J., C. P. 9.

Held, secondly, that they were not irrelevant to the matter before the court. *Id.*

**Abuse of.]—**A barrister may be punished for contempt of court, even for language professedly used in the discharge of his functions as advocate. *Pater, Ex parte*, 5 B. & S. 299; 9 Cox. C. C. 544; 33 L. J., M. C. 142; 10 Jur., N. S. 972; 10 L. T. 376.

Where, on a trial for felony at the Middlesex quarter sessions, the counsel for the prisoner, whose mode of conducting the case had been remarked

upon by the foreman of the jury, in his address to the jury uttered words which reflected upon the foreman, and being required by the judge to withdraw them, refused, and was thereupon adjudged guilty of contempt and fined; upon motion for a certiorari to remove the order:—Held, that as the words used might have been, and were by the judge adjudged to have been, used to insult the juror, there was no excess of jurisdiction, and the Court of Queen's Bench could not interfere. *Id.*

**In Actions brought against them.]—**No action lies against a barrister for misconduct in the management of a cause. *Fell v. Brown, Peake*, 96.

Nor to recover a fee given to him to argue a cause which he did not attend. *Turner v. Philpotts, Peake*, 122.

Scemle, an action cannot be maintained against a certificated special pleader for negligence or unskilful advice in the course of his profession. *Perring v. Rebutter*, 2 M. & Rob. 429.

An action against a barrister for negligence or non-attendance on a trial, is not maintainable. *Mulligan v. McDonogh*, 5 Ir. Jur., N. S. 101; 2 L. T. 136.

**As to Venue.]—**Serjeants and barristers, when they sue, are entitled to lay and retain the venue in Middlesex. *Sparke v. Stokes*, 3 Dougl. 355.

Even though the cause of action arose in another county. *Speiman's case*, 1 Wils. 159; 1 W. Bl. 19.

But when a barrister is a defendant, he has no privilege whatever respecting the venue. *Id.*

Action by a barrister and wife for an assault on the wife: the venue, which was laid in Middlesex, had been changed by defendant:—Held, that the plaintiff could not restore it by virtue of his privilege as a barrister. *Newton v. Harland*, 4 Bing. N. C. 406; 6 Scott, 186; 6 D. P. C. 630.

A plaintiff, who has been called to the bar since the commencement of an action, cannot claim his privilege in order to have the venue in the action brought back from York to Middlesex. *Id.*

**Immunity from Arrest whilst engaged on Professional Business.]—**A barrister is privileged from arrest whilst in attendance on the courts, and therefore will be discharged if arrested on the circuit. *Hippesley, In re*, 1 H. Bl. 636.

He is privileged from arrest while he is on his return from court. *Luntly v. Nathaniel*, 2 D. P. C. 51; 1 C. & M. 579; *S. P., Newton v. Harland*, 8 Scott, 70.

A barrister who has been actually engaged at petty sessions, but without a previous retainer, for a party in a case of summary conviction, where counsel are allowed, is not privileged from arrest redeundo. *Newton v. Constable*, 1 G. & D. 408; 9 D. P. C. 933; 2 Q. B. 157; 6 Jur. 317.

A barrister who had been attending in the hall of the Four Courts, Dublin, and had there received a brief in a cause set down for hearing upon that day, but which, prior to his receiving the brief, had been postponed till the next day, was arrested, while returning homewards, on the same day:—Held, that he was entitled to be discharged, on the ground of privilege. *Rubenstein v. —*, 10 Ir. C. L. R. 386.

A barrister of the Oxford circuit had attended court as a barrister at the Abingdon and Oxford assizes. The latter assizes concluded on

the 25th of July, and the commission-day at the next town (Worcester) was the 27th of July. The barrister being taken on a ca. sa. at Oxford on the 26th of July, was entitled to be discharged as being a barrister on the circuit. *Oxfordshire (Sheriff), In re*, 2 C. & K. 200.

The fact that he had no brief at Abingdon or Oxford, was immaterial with respect to his discharge. *Ib.*

The fact that he was not in the habit of attending the Worcester assizes, or that he made no affidavit that he intended to go on the circuit, was also immaterial to his discharge. *Ib.*

A barrister of the home circuit had attended the assizes at Hertford and at Chelmsford, which latter assizes had ended on Friday, the 6th of March. On Monday, the 9th of March, the commission-day at the next town (Maidstone), but before the commission was opened there, he was arrested at his own house, six miles from London, on a capias utlagatum, he having retainers in case at Maidstone:—Held, entitled to be discharged as being a barrister on the circuit. *Kent (Sheriff), In re*, 2 C. & K. 197; 15 L. J., Q. B. 268.

### III. RIGHT TO APPEAR BY.

**Counsel must be instructed by a Solicitor.**—There is no rule of law requiring that counsel appearing in court for a party who pleads in person should be instructed by an attorney. *Doe d. Bennett v. Hale*, 15 Q. B. 171; 19 L. J., Q. B. 353; 14 Jur. 830.

But the usage which has prevailed at the bar, that counsel, unless in some excepted cases, should take their instructions from attorneys only, is beneficial, and ought to be maintained. *Ib.*

**Undergraduate Summoned before University Authorities.**—The Vice-Chancellor and heads of colleges in the University of Cambridge have authority to make a decree, that every tradesman with whom any person in statu pupillari should contract a debt exceeding 5*l.* should be required to send notice thereof, at the end of every quarter, to the college tutor of the person so indebted, on pain of being punished by discommuning, or otherwise, as to the Vice-Chancellor and heads of colleges should seem fit. A tradesman resident in Cambridge was summoned before the Vice-Chancellor and heads of colleges, to answer a complaint of having violated this decree:—Held, that he was not entitled to appear by counsel or attorney, this not being a judicial proceeding. *Death, Ex parte*, 21 L. J., Q. B. 337; 17 Jur. 112; 18 Q. B. 647.

**Person Summoned before Magistrates.**—A magistrate convicted B. for an offence under the Copyright of Designs Act, 6 & 7 Vict. c. 65, adjudged him to pay a penalty, and, he not having paid it, afterwards summoned him to shew cause why he should not be further dealt with according to law. B. did not appear to the summons personally, but his counsel and attorney appeared. The magistrate refused to hear the case in his absence, and issued a warrant for his apprehension, reciting the summons and his neglect to appear, and directing his apprehension to answer to the complaint, and be further dealt with according to law. B., under this warrant, was apprehended and imprisoned. The conviction

was afterwards quashed, and he brought an action against the magistrate:—Held, first, that he was not protected by 11 & 12 Vict. c. 44, s. 2, the summons to appear after the conviction not being the summons spoken of in that section, the non-appearance to which was to prevent the maintenance of an action; and, secondly, that, even if the summons had been within the section, the appearance to it by counsel and attorney was sufficient, and the action was therefore maintainable. *Bessell v. Wilson*, 1 El. & Bl. 489.

**Right of Wife to be Heard on Behalf of her Husband.**—The wife of a plaintiff in an action has no right to appear and conduct the case of her husband at nisi prius. *Cobbett v. Hudson*, 15 Q. B. 988; 14 Jur. 982.

But in an application directly concerning liberty, as a motion for a habeas corpus, the wife may be heard on behalf of her husband. *Ib.*

**Party Conducting his own Case.—Right to give Evidence.**—The 14 & 15 Vict. c. 99, s. 2, does not abridge the former right of a party to a suit to act as his own advocate, and a judge at nisi prius has no authority to prevent a party to a cause addressing the jury as his own advocate, and afterwards giving evidence as a witness in support of his own case; but such a course of proceeding is most objectionable. *Cobbett v. Hudson*, 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 488.

A person who conducts a cause as advocate cannot be examined as a witness therein; and if he is so examined, the court will grant a new trial on that ground. *Dunn v. Parkwood*; 1 B. C. Rep. 312; 11 Jur. 242; *S. P., Stones v. Bacon*, 4 D. & L. 393; 1 B. C. Rep. 248; 16 L. J., Q. B. 32; 11 Jur. 44.

A plaintiff, who was a barrister, was not allowed to be heard on his own case after counsel had addressed the court. *Newton v. Chaplin*, 10 C. B. 356; 19 L. J., C. P. 374; 14 Jur. 1121.

A barrister, party in an action, civil or criminal, is in the same position as any other party. *Ib.*

**Where there are several Defendants.**—Several charged in one indictment with different illegal acts severed in their defence, and, being convicted and sentenced to different punishments, brought separate writs of error:—Held, that they were entitled to appear by separate counsel, and that such counsel were severally entitled to reply. *O'Connell v. Reg. (in error)*, 11 C. & F. 115; 9 Jur. 25.

Where defendants at a trial appear by different counsel, it is a matter for the discretion of the judge, to be exercised on all the circumstances of the case, whether more than one ought to be allowed to address the jury. *Nicholson v. Styles or Brooke*, 2 Ex. 213; 17 L. J., Ex. 229; 12 Jur. 681.

### IV. AUTHORITY TO BIND CLIENT.

**By Compromises or Arrangements.**—The court will not enforce by attachment an agreement of compromise made by counsel on behalf of his client, if it is at all doubtful whether the client is bound to perform the agreement. *Swinfen v. Swinfen*, 1 C. B., N. S. 364; 26 L. J., C. P. 97; 3 Jur., N. S. 85.

Nor will a court of equity enforce the com-

promise by a specific performance. *Swinfen v. Swinfen*, 2 De G. & J. 381; 27 L. J., Ch. 491; 1 Jur., N. S. 774.

Where there had been a conference between a party to an action and his counsel and attorney, as to the terms of compromising such action, and there was evidence that the client had authorized his counsel to do the best for him he could, and the counsel afterwards settled such action in court whilst the client was actually present, the court refused to set aside the order of nisi prius made according to the terms of such settlement, notwithstanding the client made an affidavit that the action was settled without his authority, and that, although present in court, he did not understand what was going on. *Chambers v. Mason*, 5 C. B., N. S. 59; 28 L. J., C. P. 10; 5 Jur., N. S. 148.

But where a jury had given excessive damages, and the court was reluctant to interfere to set aside the verdict, but recommended a compromise, counsel had authority to consent to such a compromise in the absence of their clients, such consent being clearly within their ordinary authority. *Thomas v. Harris*, 27 L. J., Ex. 353.

It is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within the counsel's apparent authority is binding on the client, notwithstanding he may have dissented, unless his dissent was brought to the knowledge of the opposite party at the time. *Strauss v. Francis*, 1 L. R., Q. B. 379; 35 L. J., Q. B. 133; 12 Jur., N. S. 486; 14 L. T. 322; 14 W. R. 634.

An order was made by consent in the presence of the defendant, his solicitor, and counsel. Upon an application by the defendant to set aside the order on the grounds that he had never consented to it; that his counsel had no authority to do so; that he had not himself understood it; and that so soon as he did understand it he repudiated it; the court, being of opinion that the defendant had understood the order at the time it was made, refused to set it aside. *Holt v. Jesse*, 3 Ch. D. 177; 46 L. J., Ch. 254; 24 W. R. 879.

The general authority, both of counsel and solicitor, extends to the entering a *stet processus*, and a compromise by *stet processus* announced by counsel in open court in the presence of his client must be repudiated openly and at once by the client, or it cannot be set aside. *Rumsey v. King*, 33 L. T. 728.

— **As to Costs.**—It was agreed that the trial of an indictment at the sessions should be postponed, the defendant agreeing to pay the costs of the day. The costs were taxed; and, at the subsequent sessions, the counsel for the prosecution asked if there was any objection to the amount. The defendant's counsel said there was not, except as to 1*l.* 9*s.* The attorney for the prosecution said he would give up that sum, and the defendant's attorney said he would give a cheque for the residue. After this, the defendant was applied to for payment, and he said his attorney, who received his rents, would arrange it:—Held, that the indorsement on the brief was an agreement, and, also, that on this evidence the plaintiff could recover the amount of the taxed costs, minus 1*l.* 9*s.* *Porter v. Cooper*, 1 C., M. & R. 387; 6 C. & P. 354; 4 Tyr. 456.

— **As to Nonsuit.**—The counsel of a party in an action has power at the trial to agree to a nonsuit, notwithstanding that his client objects to his so doing. *Lynch v. Coel*, 12 L. T. 548; 13 W. R. 846.

**By Admissions.**—A statement made by counsel upon his address to the jury, but in the hearing of his client, is binding on the client if he makes no objection. *Colledge v. Horn*, 3 Bing. 119; 10 Moore, 431.

Where a party appears by counsel before the court or a judge at chambers in any stage of a cause, and counsel makes an admission of a fact, though unsupported by affidavit, the court will regard such statement as presumably true, and will admit it in evidence when offered by the other side. *Haller v. Worman*, 3 L. T. 741; 9 W. R. 348.

In an action to recover possession of papers, the defendant took out a summons to change the venue, and appeared by counsel to support the application. In the course of the proceedings counsel admitted that the client had the papers:—Held, that this admission was rightly received at the trial of the cause, as a statement made by counsel in discharge of his functions as counsel relevant to the matter at issue, and made for the purpose of influencing the judge to take a step in favour of his client. *Id.*

When counsel makes before the court or a judge a statement, or does an act in the presence of the attorney on the record, or any authorized person who represents him, and the statement or the act is not repudiated by the attorney or his representative, that amounts to an assent to or adoption of it, and it becomes the statement or act of the attorney. *Id.*

**Counsel Withdrawing from Case in Favour of Client.**—When a party appears in court by counsel, and the case is on, and the counsel has been fully seised of it, his authority cannot be revoked by his client so as to give the client a right himself to address the court. But if counsel is not so seised, as where, upon a motion, the hearing has proceeded no further than the reading of affidavits, and the counsel has addressed no arguments to the court, he may at the instance of his client be permitted to withdraw and the client himself may be heard. *Reg. v. Maybury*, 11 L. T. 566.

**Counsel Retained but not Briefed.**—A counsel, to whom a retainer has been given, no brief having been delivered, cannot withdraw the record. *Doe d. Crake v. Brown*, 5 C. & P. 315.

**Evidence of Counsel as to Proceedings formerly conducted by Him.**—A party to a cause cannot object to his counsel in a former transaction, out of which the action arose, stating the condition of a document at the time it was produced by the opposite party. *Brown v. Foster*, 1 H. & N. 736; 26 L. J., Ex. 249; 3 Jur., N. S. 245.

Where, therefore, in an action for false imprisonment, the question was whether the plaintiff had been guilty of embezzlement, and this depended on whether an entry in his employer's books, stating the receipt of the money he was charged with embezzling, was inserted by him before or after he was taken before the justices:—Held, that the counsel who

attended for the plaintiff might be called, on the part of the defendant, to shew that the book did not then contain the entry in question. *Ib.*

**Agreement made by Counsel without Authority and out of Court.]**—A communication to or by the counsel of A., from or to the attorney of B., respecting the proceedings in a cause between A. and B., which takes place out of court, is not binding upon A. *Richardson v. Peto*, 1 M. & G. 96; 9 D. P. C. 73.

Where, therefore, pending a rule nisi, the attorney served with the rule inferred from a conversation out of court with the counsel who had moved the rule, that the latter would forbear to move to make it absolute for a certain time, and the rule was made absolute by that counsel within the time mentioned, the court refused to re-open the rule. *Ib.*

**How Compromise enforced.]**—To support an action against a party, founded on an undertaking entered into by him (after having appeared and pleaded to an indictment for an assault) to do an act in consideration of the prosecutor consenting to a nominal fine only being imposed on him, the indorsement to that effect of the terms of the agreement between the parties on the brief signed by the counsel on both sides is not sufficient to be left to the jury, without proving the assent of the defendant. *Elworthy v. Bird*, 13 Price, 222; 9 Moore, 430; 2 Bing. 258; Tam. 38.

## V. FEES.

**Right to.]**—A barrister cannot sue for his fees upon any implied contract for payment. *Hobart v. Butler*, 9 Ir. C. L. R. 127—Ex.

But they are recoverable by an express contract. *Ib. S. P., Egan v. Kensington Union (Guardians)*, 3 Q. B. 935, n.; 3 G. & D. 204.

An attorney has no implied authority to bind his client, by an undertaking to a barrister that the client will pay him, if he receipts, for the purpose of taxation, fees then due. *Ib.*

A subsequent receipt out of court by the client of taxed costs, which include those fees, will not, without more, make him liable to the barrister for money had and received. *Ib.*

The master having reduced counsel's fees, on taxation between party and party, not because the amount was excessive, but because the fee had been increased at the instance of the counsel, the court referred it back to the master to review his taxation as to those items. *O'Brien v. Cantuelli*, 12 Ir. Ch. R. 221.

It would be illegal for the bar, as a body, to fix a minimum fee for any particular class of business; but any individual member of the bar may decline to take a fee less than a certain amount. *Ib.*

**—When Paid by Client to Solicitor.]**—The court will not interfere to compel an attorney in a cause to pay counsel's fees which are unpaid, even though it is alleged that the attorney has received from the client the money to pay them with. *Angell, In re*, 29 L. J., C. P. 227; 6 Jur., N. S. 1373.

Conveyancing counsel, having been employed by a solicitor in the ordinary way, received from

the solicitor a part of his fees. The client had in fact paid to the solicitor the whole of his bill of costs:—Held, that the counsel could not recover the balance from the client. *Mostyn v. Mostyn, Barry, Ex parte*, 5 L. R., Ch. 457; 39 L. J., Ch. 780; 22 L. T. 461; 18 W. R. 657.

The fact of the payment by the client to the solicitor was immaterial, as a solicitor cannot pledge his client's credit to counsel, and the part payment therefore by him could not constitute a promise by the client to pay. *Ib.*

**—And Solicitor subsequently becoming Bankrupt.]**—A barrister was allowed to prove for fees in bankruptcy where the solicitor had actually received them before his bankruptcy. *Hall, In re*, 2 Jur., N. S. 1076.

**On a Commission.]**—A barrister has a lien for fees on a commission. *Smith v. Hallen*, 2 F. & F. 678.

**Retainers.]**—According to the ordinary practice of the court, retainer fees for both the leading and junior counsel are allowed on taxation. *The Neera*, 5 P. D. 118; 42 L. T. 743; 28 W. R. 816.

**—Taxation.]**—A retainer, on behalf of a defendant, was left at the Dublin residence of a Queen's counsel, then absent in London, attending Parliament. The cause being in the special jury list of causes for trial on Monday, the 23rd June, the plaintiff's attorney, not knowing of the defendant's retainer, sent a brief to London to the Queen's counsel, who, in ignorance of the previous retainer, sent a reply that he would be in court on the following Wednesday morning. The cause was unexpectedly called on Monday, and a postponement having been refused, was proceeded with, and concluded the following day. Counsel did not arrive until after its termination on Tuesday, and he was in court the following morning, and subsequently returned the defendant's retaining fee. The plaintiff having obtained a verdict, the master allowed the above brief and fee, on taxation, against the defendant:—Held, on a motion to review the taxation, that these items had been properly allowed, inasmuch as at the time of the delivery of the brief there was a bona fide intention on the part of the plaintiff's attorney that the Queen's counsel should attend the trial on behalf of the plaintiff, and a reasonable probability of his being able to do so; and that the fact of his not having attended did not alter the case. *Taylor v. Clarke*, 13 Ir. C. L. R. 571.

The master, in taxation between party and party, should only allow the usual and accustomed fee payable on each particular class of business, though a larger fee had been paid to counsel. *O'Brien v. Cantuelli*, 12 Ir. Ch. R. 221.

**Refreshers.]**—The taxing officer having disallowed refresher fees to counsel, in a case where the hearing commenced in the afternoon of one day, and was concluded at noon of the next, but the time occupied was less than one day's time, the court refused to interfere with his discretion. *The Neera*, 5 P. D. 118; 42 L. T. 743; 28 W. R. 816.

When the trial of an action commences on one

day and is concluded on the next day, refreshers to counsel will not be allowed unless the trial occupied in the whole more than one day's sitting, i.e., six hours. *Brown v. Sewell*, 16 Ch. D. 617; 44 L. T. 41; 29 W. R. 295.

**Master's Decision as to Counsel's Fees.**—The Taxing-Master's decision as to the amount of counsel's fees will not be interfered with unless a gross mistake is made. *Id.*

**Amount of—what Allowable.**—*See* COSTS.

**Receipt for.**—It is not necessary to affix a receipt stamp on a brief where counsel signs his name, acknowledging the payment of the fee. *Beavan, In re*, 23 L. J., Ch. 536—L. J.

**Promises to Pay.**—A promise made by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect. *Kennedy v. Brown*, 13 C. B., N. S. 677; 32 L. J., C. P. 137; 9 Jur., N. S. 119; 7 L. T. 626; 11 W. R. 284.

The relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation. *Id.*

A conveyance of a large estate by a client to a barrister, who had been successfully engaged for her in recovering the estate, in consideration of his services, was set aside for undue influence:—Held, that such a deed could not be supported, either on a previous contract to pay her 20,000*l.* or as executed in performance of a moral obligation. *Brown v. Kennedy*, 33 Beav. 133; 33 L. J., Ch. 71; 9 Jur., N. S. 1163; 9 L. T. 302. Affirmed on appeal, 33 L. J., Ch. 342; 10 Jur., N. S. 141; 9 L. T., 736; 12 W. R. 360; 4 De G., J. & S. 217.

**Special Contract with Client—Action for Breach not Maintainable.**—A barrister and his client are mutually incapable of entering into a binding contract of hiring with respect to the services of the former as an advocate. This incapacity of contract is reciprocal, and is an answer to any action brought, whether by client or advocate, upon such an alleged agreement. The principle is of universal application in all cases where the relation of counsel and client exists; it extends to an alleged engagement by counsel to give exclusive attention to the defence of a prisoner standing his trial upon a criminal charge; and to a case in which the client has entered into an express agreement with the barrister to pay special fees named by the barrister, for his exclusive attendance, in excess of the fees which would be ordinarily payable to counsel for the contemplated services. *Brown v. Kennedy, ante*, followed, and applied to the case of an action against a barrister for breach of contract. *Robertson v. McDonough*, 14 Cox, C. C. 469; 6 L. R., Ir. 433.

**Clerks'.**—Fees to counsel's clerks are mere gratuities, for which they have no legal demand. *Cotton, Ex parte*, 9 Beav. 107; 10 Jur. 84. *See Theed v. Beere*, 28 L. J., Ch. 782; 5 Jur., N. S. 381.

But see Rules of the Supreme Court, 1883, Order LXV., r. 51.

## VI. PRACTICE IN COURT.

**As to Motions.**—As a general rule, no counsel will be heard to move twice on the same day. *Hollis v. Hoscason*, 19 L. J., Ex. 269; 14 Jur. 463.

An application by counsel on the part of the crown to set down a cause for argument, does not count as a motion so as to prevent his moving another case on that day. *Lewis v. Rogers*, 16 Jur. 1024—Ex.

Upon special paper days counsel cannot bring on a contested motion when called upon to move for his argument. *Palmer v. Wagstaffe*, 22 L. J., Ex. 295; 17 Jur. 581.

It is the practice of the Bail Court, on the last day of term, that the junior barrister seated on the back row should be called upon to move first, both on the first and second rounds of motion. *Anon.*, 2 D., N. S. 929; 7 Jur. 399.

The practice of the Bail Court on the last day of term is, to commence by calling on the bar in the back rows twice round, not alone in motions of course and rules nisi, but in all motions whatsoever. *Anon.*, 7 Jur., 725.

**When a Party to the Proceedings.**—A barrister who is a party to an appeal in the House of Lords, must elect to conduct his own case or to have it conducted by counsel. *New Brunswick and Canada Railway and Land Company v. Conybeare*, 9 H. L. Cas. 711.

## BASTARD.

### I. PROOF OF BASTARDY.

1. *Absence or Non-Access*, 1521.
2. *Evidence of Mother or Father*, 1523.
3. *Establishment of Legitimacy*.—*See* HUSBAND AND WIFE, I. 5.

### II. AFFILIATION.

1. *Jurisdiction of Justices*, 1524.
2. *Second Application*, 1528.
3. *Summons to Appear*, 1530.
4. *Corroborative Evidence*, 1532.
5. *Form and Sufficiency of Orders*, 1534.
6. *Appeal against Orders*, 1538.
7. *Enforcing Orders*, 1542.
8. *Effect of Order in Evidence*, 1542.

### III. LIABILITY OF PUTATIVE FATHER.

1. *On Order of Affiliation*—*See ante*, II.
2. *Independently of Statutory Order*, 1543.

### IV. RIGHT TO INHERIT, 1546.

### V. CUSTODY OF CHILD, 1547.

### VI. MARRIAGE OF.—*See* HUSBAND AND WIFE.

### VII. ABANDONING.—*See* CRIMINAL LAW.

### VIII. ILLTREATING.—*See* CRIMINAL LAW.

IX. CONCEALING BIRTH OF.—*See* CRIMINAL LAW.X. PAROCHIAL SETTLEMENT OF.—*See* POOR LAW.

## I. PROOF OF BASTARDY.

## 1. ABSENCE OR NON-ACCESS.

**Presumption in Favour of Legitimacy—How Rebutted.**—Husband and wife, after living together for ten years, and having one child, agreed to separate. They accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent:—Held, that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation may be rebutted, not only by evidence to shew that the husband had not sexual intercourse with her, but also by evidence of their conduct; such as that the wife was living in adultery, that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted, up to his death, as if no such child was in existence; and also, that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will. *Morris v. Davies*, 5 C. & F. 163; 1 Jur. 911.

When husband and wife have been in such a situation that access may have taken place, the presumption of law is in favour of the issue, but may be rebutted on strong evidence. If access is proved, no inquiry can be made whether the husband or any other person be the parent. Lord Coke's doctrine of "inter quatuor maria" is exploded. *Ib.*

On a trial as to the legitimacy of children begotten when the husband and wife were living separate, the fact that they had opportunities of access is not conclusive of the legitimacy; but the presumption of intercourse may be rebutted by circumstances. *Reg. v. Mansfield*, 1 Q. B. 441; 1 G. & D. 7; 5 Jur. 505.

If there was an opportunity of access, but the wife was notoriously living in adultery, it does not necessarily follow that a child begotten while such opportunity existed was not the husband's. *Ib.*

A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption, thus established by law, is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by shewing that the husband was—first, incompetent; secondly, entirely absent, so as to have no intercourse or communication of any kind with the mother; thirdly, entirely absent at the period during which the child must, in the course of nature, have been begotten; fourthly, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of a child of a married woman. *Hargrave v. Hargrave*, 9 Beav. 552.

It is, however, very difficult to conclude against the legitimacy in cases where there is no disability, and where some society or communication is continued between husband and wife during the time in question, so as to have afforded

opportunities of sexual intercourse; and in cases where such opportunities have occurred, and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to shew that any man, other than the husband, may have been, or probably was, the father of the wife's child. Throughout the investigation the presumption in favour of legitimacy is to have its weight and influence, and the evidence against it ought to be strong, distinct, satisfactory and conclusive. *Ib.*

The presumption of law arising from the fact of husband and wife sleeping together, is irresistible as to the legitimacy of a child of the wife, unless there is clear and satisfactory evidence that some physical incapacity existed. *Legge v. Edmonds*, 25 L. J., Ch. 125.

Where such physical incapacity is satisfactorily made out according to the opinions of the medical witnesses, evidence of the adultery of the wife is still an important ingredient in determining the legitimacy of the child; because, if the wife were of irreproachable character, it would go far to modify the opinion as to the husband's incapacity. *Ib.*

A child of a married woman must be presumed to be the child of the husband, unless it is proved beyond all reasonable or serious doubt that no sexual intercourse could have taken place at the time within which the husband could be the father. The onus probandi lies entirely on the part of those who wish to shew the illegitimacy. *Plowes v. Bossey*, 31 L. J., Ch. 681; 8 Jur., N. S. 352; 10 W. R. 332.

A. was summoned under 5 Geo. 4, c. 83, s. 3, for wilfully refusing to maintain his child. He and his wife had lived separately for about three years before the birth of the child, though in the same town; she led a disreputable and profligate life, and he always avoided her, and she had been seen as a prostitute in company with several men, and the child was born in gaol. The justices dismissed the summons, holding that the legal presumption that the husband was the father of the child was rebutted by this evidence:—Held, that they came to a right conclusion. *Sibbet v. Ainsley*, 3 L. T. 583.

If the jury is satisfied that intercourse took place between the husband and wife at such times as in the course of nature to account for the birth of the child, such child must be taken to be the husband's child, although during the same period other men may have had intercourse with the mother. *Wright v. Holdgate*, 3 C. & K. 158.

**Non-Access.**—Where a husband, after a long absence, did not rejoin his wife till the 24th November, 1849, and when she, nevertheless, produced a full-grown child on the 18th May, 1850:—Held, that he could not have been the father. *Heathcote's Divorce Bill*, 1 Macq. H. L. Cas. 535.

Non-access of the husband need not be proved during the whole period of the wife's pregnancy: it is sufficient if the circumstances of the case shew a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth. *Rex v. Luff*, 8 East, 193.

If a husband is found to have gone beyond seas above two years before the birth of a child borne by his wife, she remaining at home, the

conclusion is irresistible that such child is a bastard. *Rex v. Maidstone*, 12 East, 550.

But the illegitimacy of a child born of a married woman is established beyond all dispute, by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible. *Saye and Sele (Barony)*, 1 H. L. Cas. 507.

## 2. EVIDENCE OF MOTHER OR FATHER.

**Of Mother.**—On a question of legitimacy, it appeared that the child had been born three months after the marriage. It was suggested that the wife had not seen the husband until immediately before the marriage, and that at the period of conception he was married to another person. In cross-examination of the mother it was proposed to ask her, "How long she had known her husband before her marriage?" This question was objected to, but the court allowed her to be asked, "When did you first become acquainted with your husband?" and she answered, twelve months before her marriage; the court would not permit this subject to be further pursued. *Anon. v. Anon.*, 22 Beav. 481; 23 Beav. 273.

The declaration of a mother is not admissible to prove non-access on the part of her husband; but where non-access has been established aliunde, the declaration of the wife is admissible to prove the paternity of the child. *Legge v. Edmonds*, 25 L. J., Ch. 125.

The mother of a child wrote a letter to the alleged father, declaring that he was the father of her child, which was born three months after the death of her husband. It did not appear that this letter was ever received by the person to whom it was addressed, nor even that she had ever voluntarily parted with the possession of it:—Held, that the letter was not admissible as evidence of the conduct of the mother. *Id.*

On an issue to try the legitimacy of a party born of a married woman, since dead, declarations by her that he was not the son of her husband, but of another man, are not admissible; nor are such declarations of the husband admissible. *Cope v. Cope*, 5 C. & P. 604; 1 M. & Rob. 269.

A woman cannot give evidence of the non-access of her husband, to bastardize her issue, though he is dead at the time of her examination as a witness. *Rex v. Kea*, 11 East, 132; *S. P.*, *Goodright d. Sterens v. Moss*, Cowp. 591.

But the mother is a competent witness to prove the illegitimacy of her children. *Rex v. Bramley*, 6 T. R. 330; *S. P.*, *Standen v. Standen*, 6 T. R. 331; Peake, 32.

**Of Father.**—On the trial of an issue as to the legitimacy of a child born of a married woman, the evidence of the husband is not admissible for the purpose of proving access, or for the purpose of proving any collateral fact which would tend to shew that he had opportunities of access. *Wright v. Holdgate*, 3 C. & K. 158.

Nor is evidence of expressions of feeling by the wife towards the husband admissible. *Id.*

## Description of Child on Baptismal Register.]

—But a baptismal register, in which the party is described as the illegitimate son of his mother, is

admissible on the trial of such an issue. *Cope v. Cope*, 5 C. & P. 604; 1 M. & Rob. 269.

## II. AFFILIATION.

### 1. JURISDICTION OF JUSTICES.

**To issue Summons.**—If a woman goes to, and lodges at a place for the purpose of applying to the magistrates there, for an order of affiliation, intending to leave the place as soon as she has got the order, she having at the time no other residence, and not having gone for any fraudulent or improper purpose, she is resident at the place within the meaning of the 7 & 8 Vict. c. 101, s. 2, which requires that application for such an order must be made to justices acting for the petty sessional division within which the woman resides. *Reg. v. Hughes*, Dears. & B. C. C. 188; 26 L. J., M. C. 133; 3 Jur., N. S. 448.

A summons was issued by a justice to the putative father of a bastard child upon an application made by the mother before the birth of the child. No written deposition was made at the time of the application. The parties appeared at the petty sessions according to the exigency of the summons, and the case was heard without objection, when the father swore wilfully and falsely as to a material fact:—Held, that the appearance at the petty sessions and the hearing without objection raised, cured the defect in the application for the summons, if there was any, and the justices had jurisdiction to hear the parties before them, and that the father was rightly convicted of perjury. *Reg. v. Fletcher*, 1 L. R., C. C. 320; 40 L. J., M. C. 123; 24 L. T. 742; 19 W. R. 781; 12 Cox, C. C. 77.

A woman, who has no settled place of residence, may make application to the justices of the division in which for the time being she happens to be for a summons. *Lawrence v. Inghire*, 20 L. T. 391.

If there is any corroboration whatever of the woman's testimony, the effect of such corroboration is for the justices alone, and the court will not interfere with their decision upon it. *Id.*

A woman having applied on two occasions for an order of affiliation to justices of the petty sessional division in which she had been residing with her parents, and had been refused after a hearing on the merits, took lodgings in a neighbouring borough, "because," as she deposed, "people said if she came there, she would have a better chance;" and when she had been there nearly a month, she applied to the borough justices and obtained an order of affiliation:—Held, that the object of the woman's removal was to obtain a new tribunal, and, therefore, that she did not reside within the borough so as to give the borough justices jurisdiction, under 7 & 8 Vict. c. 101, s. 2. *Reg. v. Myott*, 32 L. J. M. C. 138; 7 L. T. 785; 11 W. R. 424.

### —After lapse of more than Twelve Months.]

—A single woman, having been delivered of a bastard child, within twelve months obtained a summons upon the putative father; but he having absconded, it was not served. More than twelve months after the birth, the justice who issued the summons died; and the putative father having returned, she applied to another justice, and a summons was issued and served, and the justices made an order of maintenance, which recited the preceding facts:—Held, that

the second justice had no power, under 7 & 8 Vict. c. 101, s. 2, to issue a summons, and therefore the order was bad. *Reg. v. Pickford*, 1 B. & S. 77; 30 L. J., M. C. 133; 7 Jur., N. S. 568; 4 L. T. 210; 9 W. R. 634.

The mother of a bastard child, born on the 20th March, 1868, applied to a justice on the 18th April, 1868, for a summons against the putative father. A summons was issued on the same day, but never served, as he could not be found by the process-server to whom the summons was given. On the 14th January, 1870, about a fortnight after the mother had found out his address, she applied for and obtained another summons, which was served on him, and he appeared thereto, and, being examined on oath, committed the perjury assigned.—Held, that the justices had jurisdiction to hear the complaints, although at the time of service of the summons more than twelve months had elapsed from the birth of the child. *Reg. v. Chugg*, 11 Cox, C. C. 558; 22 L. T. 556.

**To make Orders.]**—On an application by a mother of a bastard child for an order of maintenance, it appeared that the father had contracted to pay the mother 5s. per week for the support of the child, and had paid her in advance sufficient to maintain the child for two years; he also paid her 10l., in consideration of which she agreed to release him from all payments in respect of the child. The magistrate was of opinion that he had no discretion in the matter, and made an order:—Held, that the payment by the father in advance, and the agreement by the mother, were no bar to the jurisdiction of the justices to make an order, but that they ought to take them into consideration with the other circumstances, and exercise their discretion as to making the order. *Follitt v. Koetzow*, 2 El. & El. 730; 29 L. J., M. C. 128; 6 Jur., N. S. 651; 2 L. T. 178; 8 W. R. 432.

A person having been summoned before justices was adjudged to be the putative father of a bastard child, and ordered to provide for its maintenance, according to the Bastardy Law Amendment Act, 1872, 35 & 36 Vict. c. 65, s. 3. The child was born in Cornwall. The father was an Irishman, and the mother an Englishwoman, and the connexion which resulted in the birth of the child took place in Ireland. The summons was duly served on the father:—Held, that, the child having become chargeable in England, the justices had jurisdiction, and the order was good. *Hampton v. Rickard*, 43 L. J., M. C. 133; 30 L. T. 636.

**— On Second Application after Conviction of one of Defendant's Witnesses for Perjury.]**—Where, after a bastardy summons has been dismissed on the merits, one of the defendant's witnesses is convicted of perjury in the evidence given by him on that summons, justices have jurisdiction to make a bastardy order on a second summons. *Reg. v. Gawnt*, 2 L. R., Q. B. 466; 36 L. J., M. C. 89; 16 L. T. 379; 15 W. R. 1172; 8 B. & S. 365.

**— Child Born on the High Seas.]**—According to the rule that a ship on the high seas is part of the territory of the state to which she belongs, a bastard of which a woman has been delivered on board an English ship is to be deemed born in England, and the mother is entitled to

an order of affiliation against the putative father resident in England. *Marshall v. Murgatroyd*, 6 L. R., Q. B. 31; 40 L. J., M. C. 7; 23 L. T. 393; 19 W. R. 72.

**— After Death of Mother.]**—The evidence of the mother of a bastard child, who is an applicant for an affiliation order against the putative father, is necessary at the hearing of the summons before justices sitting in petty sessions under the 8 & 9 Vict. c. 101, s. 3. *Reg. v. Armistage*, 7 L. R., Q. B. 773; 42 L. J., M. C. 15; 27 L. T. 41; 20 W. R. 1015.

Therefore, if the mother dies after making her application for a summons, and before the hearing of the summons at petty sessions, the justices have no jurisdiction to make an order thereon. *Id.*

Semble, it may be otherwise on the hearing of an appeal against an affiliation order under 8 & 9 Vict. c. 10, s. 6, if the mother dies after the hearing of a summons at petty sessions, and if she has been examined in the presence of the putative father and might have been cross-examined by him at the petty sessions. *Id.*

**When Mother is a Married Woman.]**—An order may be made upon the putative father for maintenance of a bastard child born of a married woman, though the 7 & 8 Vict. c. 101, s. 2, speaks only of any single woman. *Reg. v. Collingwood*, 12 Q. B. 681; 3 New Sess. Cas. 252; 17 L. J., M. C. 138; 12 Jur. 750.

And although the mother is a married woman, living apart from her husband. *Grimes, Ex parte*, 22 L. J., M. C. 153; nom. *Reg. v. Pilkington*, 2 El. & Bl. 546; 17 Jur. 554.

**When Mother Married after Birth of Child.]**—The 35 & 36 Vict. c. 65, s. 3, enacts, that "any single woman who may be with child, or who may be delivered of a bastard child, may either before the birth or at any time within twelve months from the birth of such child . . . make application for a summons against the putative father:—Held, that no such application can be made when the mother has married since the birth of the child, and is at the time of the application living with her husband. *Stacey v. Lintell*, 4 Q. B. D. 291; 48 L. J., M. C. 108; 40 L. T. 553; 27 W. R. 551.

A bastardy order under 35 & 36 Vict. c. 65, cannot be made where the mother has married since the birth of the child, and is at the time of the application living with her husband, although she took out a summons against the putative father before her marriage, and was prevented from serving it by his default. *Tozer v. Lake*, 4 C. P. D. 322.

The justices have a discretion under 35 & 36 Vict. c. 65, to order weekly payments for the maintenance of a bastard child for a less period than the maximum period given by s. 5 of the act, and consequently, where the justices made an order for weekly payments until the child attained the age of sixteen or the mother married, such order was held not to be in force after the marriage of the mother. *Pearson v. Heys*, 7 Q. B. D. 260; 50 L. J., M. C. 124; 45 L. T. 680; 30 W. R. 156; 45 J. P. 730.

An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of



the mother. *Sotheron v. Scott*, 6 Q. B. D. 518; 50 L. J., M. C. 56; 44 L. T. 522; 29 W. R. 666; 45 J. P. 423.

— **Though Husband capable of Maintaining.**—An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother although her husband is able to maintain the child. *Hardy v. Atherston*, 7 Q. B. D. 264; 50 L. J., M. C. 105; 44 L. T. 776; 29 W. R. 788; 45 J. P. 683.

— **Order until the Child attains Thirteen or Mother Marries—Power to make second Order after Death of Husband.**—Upon the hearing of an affiliation summons the justices made an order under 35 & 36 Vict. c. 65, for the payment of a weekly sum until the child should attain the age of thirteen years or die, or the mother should marry. The mother married, and her husband died before the child attained the age of thirteen. The mother took out a fresh summons upon which the justices made an order for payment of a weekly allowance.—Held (Hawkins, J., doubting), that the matter was *res judicata*, and the second order was bad. *Williams v. Davies*, 11 Q. B. D. 74; 52 L. J., M. C. 87; 47 J. P. 581.

— **Subsequent Agreement to release Father—Enforcement of Order.**—An order had been obtained by the respondent ordering the appellant to contribute to the support of her bastard child. Subsequently to the making of the order, the respondent, in consideration of a sum of money, agreed to release and indemnify the appellant for ever from all actions, suits, and proceedings in respect of the child.—Held, that this agreement was no bar to the jurisdiction of the justices to enforce the order on the application of the mother. *Griffiths v. Evans*, 46 L. T. 417; 30 W. R. 427.

— **Arrears—Discretion of Justices to Enforce Payment.**—By 7 & 8 Vict. c. 101, s. 5, all money payable under a bastardy order "shall be due and payable to the mother of the bastard child in respect of such time and so long as she lives . . ." By 35 & 36 Vict. c. 65, s. 4, if it be made to appear to any one justice that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant, cause the putative father to be brought up before any two justices, and in case he neglect or refuse payment they may, by warrant, direct the sum to be recovered by distress, and may detain him until the return to the warrant of distress; but if on the return, or by admission, it appear that no sufficient distress can be had, they may, if they see fit, cause him to be committed.—Held, by Grove, J., that the enforcement by the justices of the payment of sums due under such order is discretionary; by Huddleston, B., that the justices are bound to enforce it. *Davies v. Evans*, 9 Q. B. D. 238; 51 L. J., M. C. 132; 46 L. T. 418; 30 W. R. 548; 46 J. P. 471.

Although under 7 & 8 Vict. c. 101, s. 3, not more than thirteen weeks' arrears of the weekly payments accruing due after the making of an order of affiliation can be recovered, yet there is no such limit with reference to the sums ordered to be paid with respect to the period anterior to

the period of making such order. *Reg. v. Curme, Faber, Ex parte*, 18 L. T. 559.

A. applied to justices, in 1863, for a summons against B. as the father of her bastard child, born within two months. B. having absconded, he was not served, but having returned in 1868 he was duly served, and upon the hearing the justices made an order, and directed that he should pay 2s. 6d. per week from the date of the woman's application in 1863, amounting to the sum of 18l. 18s.—Held, that they were justified in so doing, and that the order was good. *Ib.*

— **Appeal to Quarter Sessions when no Bar to Proceedings before Justices.**—Upon the hearing of an appeal to quarter sessions against an order of affiliation, it appeared that the respondent and her witnesses were not present, having mistaken the day of hearing, and her counsel applied for an adjournment till the following morning, offering to pay the costs of the day. The appellant having declined to accede to this proposal, the sessions directed the case to proceed, and quashed the order, no evidence having been adduced on the part of the respondent.—Held, that the order of quarter sessions was not a decision upon the merits, and that fresh proceedings in respect of the same matter might be taken before justices. *Reg. v. May, or Essex JJ.*, 5 Q. B. D. 382; 49 L. J., M. C. 67; 28 W. R. 918; 42 L. T. 772, sub nom. *Reg. v. Phillips*.

35 & 36 Vict. c. 65—**Bastardy Act—Time of coming into Operation of.**—The 35 & 36 Vict. c. 65, s. 3, provides for an application for an order of affiliation by any single woman who may be delivered of a bastard child "after the passing of this act." The act, which came into immediate operation, received the royal assent on the 10th of August, 1872.—Held, that an order of affiliation might be made under the act in respect of a child born at any time of the day, on the 10th of August, 1872, inasmuch as the act in contemplation of law for this purpose came into effect from the commencement of the day on which it received the royal assent. *Tomlinson v. Bullock*, 4 Q. B. D. 230; 48 L. J., M. C. 95; 40 L. T. 459; 27 W. R. 552.

## 2. SECOND APPLICATION.

— **When it can be made.**—Where justices in petty sessions have heard an application for an order of affiliation, and refused to make an order, on the ground that the evidence of the mother was not corroborated in some material particular, the mother is not barred from making a second application within the period limited by 7 & 8 Vict. c. 101, s. 2. *Reg. v. Machen or Matchen*, 3 New Sess. Cas. 629; 14 Q. B. 74; 18 L. J., M. C. 213; *S. P.*, *Reg. v. Gloucestershire (Justices)*, *White, In re*, 13 Jur. 765.

Where an application for an order is dismissed not upon its merits, the woman is not barred from making another application. *Reg. v. Harrington*, 9 L. T. 721; 12 W. R. 420.

A dismissal upon the ground of there being no sufficient corroborative evidence is not a dismissal upon the merits. *Ib.*

The mother of a bastard child applied to the justices at a petty sessional division of W., in the county of O., for an order on the putative father, which was refused. She subsequently removed

into the county of B., and there made a second application, when the justices made an order. Against this order the putative father appealed, but it was confirmed by the quarter sessions:—Held, that the petty sessions had jurisdiction on such second application, and were bound to hear the complaint; and that the order of the quarter sessions in confirmation was correct, it not appearing that the former application was dismissed on the merits; and that the court could not review either the decision of the justices or of the quarter sessions. *Reg. v. Buckinghamshire (Justices)*, 3 New Sess. Cas. 500; 18 L. J., M. C. 113; 13 Jur. 1053.

Held, also, that if evidence had been adduced that the former application had been dismissed on the merits, it would have been a good answer. *Id.*

**Order on first Application must be Abandoned.**—A woman applied at a petty sessions for an order. The case was adjourned, and an order made at the adjourned petty sessions on the putative father, who appealed to the quarter sessions. Before those sessions were held, the attorney for the mother gave notice of abandoning his order, and tendered to the appellant's attorney a sum for costs, which he accepted, supposing the sum to be offered in discharge only of the costs of the adjournment, and the sum being in fact much below the whole amount of costs. The residue being unpaid, the mother's attorney requested the justices in petty sessions to rehear the case for the purpose of making another order. On their refusal a motion for a mandamus refused, because the abandonment had not been completed by replacing the appellant in his original situation, and therefore the order was still in force. *Reg. v. Hinchcliff*, 10 Q. B. 356; 16 L. J., M. C. 78; 11 Jur. 514.

**When really forming Part of Original Application.**—A woman, having been delivered of a bastard child, applied, within twelve months of the birth, to a justice for a summons upon the putative father. She (not being on oath) stated that she had learned that the putative father was in America, upon which the justice, without directly refusing the application, declined to issue a summons then. More than twelve months from the application she discovered that the putative father was in England; upon which she obtained and served a summons from the same justice, and the justices, upon this application, made an order of maintenance upon him. The summons professed to be on a renewed application:—Held, that the order was good, under 7 & 8 Vict. c. 101, s. 2, and 8 & 9 Vict. c. 10, Sched. No. 42; the whole proceeding being in effect founded on the original application, and it not being necessary that the summons should issue at the time when the application is made. *Potts v. Cambridge*, 8 El. & Bl. 847; 27 L. J., M. C. 62; 4 Jur., N. S. 72.

A was indicted for disobeying an order of justices, adjudging him to be the putative father of a bastard child, dated the 6th May. A previous order had been made on the 1st January, but, in consequence of errors and omissions on the face of it, it was a bad order, and the magistrates, who had made the order, executed a supersedeas of it:—Held, that, as the first order was a nullity, the magistrates had jurisdiction to entertain a second application, and make a new order. *Reg.*

*v. Brippy*, 3 New Sess. Cas. 591; 2 C. & K. 962; T. & M. 109; 1 Den. C. C. 416; 18 L. J., M. C. 157; 13 Jur. 520.

An application was made for a bastardy summons. It was heard and dismissed on an objection to the form of the summons, without discussion of the merits. A second summons was issued without any new application, and an order made upon the putative father:—Held, that the order was properly made on the original application, as the dismissal of the first summons on the objection to the form of the summons did not exhaust the application. *Reg. v. Lancashire (Justices)*, 29 L. T. 886; 22 W. R. 329.

**Evidence of Order having been made on Original Application.**—Under 7 & 8 Vict. c. 101, s. 2, an application was made by a woman for an order on a person whom she alleged to be the father of a bastard child, of which she had been delivered within twelve calendar months before the application. An objection was made, that an order had been antecedently made on the same complaint, and it was the duty of the applicant to shew that the previous order had been quashed, but not on the merits, in order to entitle her to apply again under 8 & 9 Vict. c. 10, s. 4. No evidence was tendered to shew that such prior order existed, but the justices decided, nevertheless, that the complainant was bound to prove that the order was quashed for a defect in form; and, on her failing in such proof, they refused to hear the application:—Held, that the justices were not at liberty to assume the existence of the former order, and that a mandamus should issue, commanding them to hear the complaint. *Reg. v. Bridgman*, or *Reg. v. Suffolk (Justices)*, 2 New Sess. Cas. 232; 15 L. J., M. C. 44; 10 Jur. 159, 738.

A former decision upon the merits in favour of a putative father is an answer to an application by the mother of a bastard child for an order of maintenance; but the petty sessions and the quarter sessions, on appeal, have jurisdiction to inquire whether or not such former decision was in point of fact come to, and if the proof in their estimation fails, to make the order, and the court will not interfere to review their decision, being upon a question of fact within their jurisdiction. *Reg. v. Robinson*, 6 D. & L. 295.

### 3. SUMMONS TO APPEAR.

**Within what Time Application for, must be made.**—An application for a summons for an order of affiliation, must be made within twelve calendar months after the birth of the child (unless money has been paid for its maintenance within that period); and when such summons has been heard and dismissed, no other summons can issue founded upon the same application. *Reg. v. Thomas*, 8 L. T. 466.

On the 26th March, 1860, A. applied for a summons against B. in respect of a child born on the 15th November, 1859. This summons was heard on the 30th April, and was dismissed on the ground of the want of sufficient corroborative evidence. Subsequently, in December, 1862, another summons was issued, and upon the hearing on the 26th an order was made. The order itself purported to be founded upon the application made on the 26th of March, 1860:—Held, that the order was bad, for that the application of the 26th March, 1860, was spent by the hearing

and judgment on the 30th April, and that being so, there was no application to support the order within twelve months of the birth of the child. *Ib.*

**Service—Sufficiency of.]**—The summons must be left at his present place of abode, if he has any at the time of the service; at his last place of abode, if he has none. *Reg. v. Evans*, 4 New Sess. Cas. 191; 1 L., M. & P. 357; 19 L. J., M. C. 151.

Proof of the proper service of the summons is essential to give the justices jurisdiction. *Ib.*

If the summons is left at a place which the person leaving it believes to be the last place of abode of the party summoned, and gives evidence of such service of the summons before the justices at petty sessions, the latter have *prima facie* jurisdiction to make the order of maintenance, but the party summoned is at liberty to shew that the summons was not served at his last place of abode, and if the fact is proved, the court will grant a certiorari to bring the order up to quash it, as being made without jurisdiction. *Ib.*

A summons duly issued by a justice against a putative father of an English bastard child was served on him in Scotland, where he had gone to reside. He did not attend before the justices in petty sessions. On proof of this service in Scotland, and that it was in sufficient time to have enabled him to attend; the justices heard the case, and made an affiliation and maintenance order. The order having been brought up by certiorari:—Held, that service out of England and Wales was not due service, and the order was quashed. *Reg. v. Lightfoot*, 6 El. & Bl. 822; 25 L. J., M. C. 115; 2 Jur., N. S. 786; 4 W. R. 655.

A person, expecting proceedings against him as the putative father of a bastard child, left his father's house on the 13th July, and went to reside with a farmer in another county, whom he assisted in his farm, having, as he deposed, no intention of returning to reside with his father:—Held, that service of a summons at his father's house on the 29th July was a good service at his last place of abode, within 7 & 8 Vict. c. 101, s. 3. *Reg. v. Higham*, 7 El. & Bl. 557; 26 L. J., M. C. 116; 3 Jur., N. S. 691.

An affiliation summons against H. was served at the house of his father. An attorney appeared to the summons before the justices for the petty sessional division of B., in the county, representing himself to be authorized to appear for H. In fact, he was retained and paid by H.'s father; he examined and cross-examined witnesses. An order was drawn up purporting to be made on the complaint of the mother, "residing at M. within this county," and to be made as on a contested summons, the defendant appearing by attorney. M. was not only in the county, but in the petty sessional division of B., as was well known to everyone; but nothing was said about it. H. deposed that, a few days before a summons was served, he, anticipating annoyance from the woman, left his father's house, which had up to that time been his abode, without any intention to return, and was not informed of the proceedings before the justices. A rule to quash the order having been obtained, on the ground that the attorney was not authorized to appear, and that the order did not mention that M. was within the division:—Held, that the court would infer that H., leaving his abode avowedly for a

temporary motive, did intend to return when the motive ceased, notwithstanding his deposition to the contrary; and that, such being taken to be the fact, the summons was duly served; and that, all proper to be proved in an unopposed summons having in fact appeared before the justices, and the state of proof being such as would justify them in drawing up an order, stating M. to be in the division of B., the omissions and mistakes were amendable under 12 & 13 Vict. c. 45, s. 7. *Ib.*

Under 7 & 8 Vict. c. 101, s. 3, justices have jurisdiction to make an order of bastardy upon the putative father, on proof that the summons mentioned in s. 2 was left at his last place of abode, notwithstanding he was abroad at the time of the service and never heard of it. *Reg. v. Damarell*, 3 L. R., Q. B. 50; 37 L. J., M. C. 21; 8 B. & S. 659.

**—Affidavit denying Service, but not denying Truth of Charge.]**—D. had left England and proceeded to America; a few days after his departure a summons in bastardy was left at his last place of abode in England, and an order of affiliation was subsequently made upon him; the order recited that he had been duly served with the summons. Two years afterwards he returned to England, and applied for a certiorari, upon an affidavit which disclosed these facts, but did not deny the truth of the charge:—Held, that the proceedings were regular on the face of them; and as there was no affidavit of merits, the court would not interfere. *Davis, Ex parte*. 1 B. C. C. 191; 22 L. J., M. C. 143; 17 Jur. 577; S. P., *Reg. v. Brown*, 1 L. T. 29.

#### 4. CORROBORATIVE EVIDENCE.

**Sufficiency of.]**—As to sufficiency of evidence to corroborate the mother in a material particular, see *Reg. v. Pearcey*, 17 Q. B. 902; 21 L. J., M. C. 129.

On the hearing of an affiliation summons, evidence was given of acts of familiarity on the part of the alleged father towards the mother having occurred several months before the child could have been begotten, and that in consequence he had been forbidden the house by her parents. It was also proved that the woman was a person of weak intellect. No corroborative evidence in direct relation to the actual begetting of the child was given:—Held, that the evidence given was in point of law admissible as corroborating the woman's statement. The effect of it on the question of paternity was for the consideration of the justices, who were entitled to act upon it if they thought it did materially corroborate her. *Cole v. Manning*, 2 Q. B. D. 611; 46 L. J., M. C. 175; 35 L. T. 941.

**—Of Non-Access of Husband.]**—Upon a complaint by a married woman who was living apart from her husband, charging a third party with being the father of a bastard child of which she had been delivered, evidence having been given which justified the magistrates in presuming non-access of the husband:—Held, that it was no ground of objection to their decision that they allowed the wife to be asked a question tending to prove non-access of the husband, the magistrates certifying that they found non-

access independently of her evidence. *Yates v. Chippindale*, 11 C. B., N. S. 512.

— **Of Connexion with Others.**—If, upon the hearing of a bastardy summons against A., the mother denies that B. has had connexion with her at a particular time, evidence may be given to shew that B. had such connexion with her, supposing that the effect of such evidence is not merely to contradict her, but also to shew that B. might by means of that connexion have been the father of the child; such evidence being material to the issue. *Garbutt v. Simpson*, 32 L. J., M. C. 186; 8 L. T. 423; 11 W. R. 751.

**By Putative Father.**—The alleged putative father is a competent witness. *Reg. v. Lightfoot*, 6 El. & Bl. 822; 25 L. J., M. C. 115; 2 Jur., N. S. 786.

A summons was issued on the application of a mother of a bastard child, against the putative father, more than twelve months after the birth of the child. The summons stated that the mother alleged that the defendant was the father of the child, and that he had paid money for its maintenance within twelve months after its birth. The justice had granted the summons upon the mere statement of the mother (not upon oath). The putative father appeared at the petty sessions, and made no objection to the proceedings, and the case was gone into upon the merits, when he swore that he had not paid any money for the maintenance of the child. He was thereupon indicted for perjury and convicted.—Held, first, that a proceeding against the putative father of a bastard child is not a proceeding in *pœnam* to punish for a crime, but is a civil suit. *Reg. v. Berry*, 1 Bell, C. C. 46; 28 L. J., M. C. 86; 5 Jur., N. S. 320; 32 L. T., O. S. 323; 7 W. R. 229; *S. P., Galliard v. Larton*, 2 B. & S. 363; 31 L. J., M. C. 123; 8 Jur., N. S. 642.

Held, secondly, that evidence of the payment of money by the putative father within the twelve months was material on the hearing of the summons; and that such payment was corroborate evidence of paternity. *Id.*

Held, thirdly, that assuming there ought to have been evidence on oath of the payment of the money before the summons issued, yet the putative father had submitted to the jurisdiction of the petty sessions, and waived any irregularity there might be in the process; and when he had thus submitted himself to its jurisdiction, the court had jurisdiction to hear and decide the suit. *Id.*

**Payments made by a Putative Father within Twelve Months of Birth.**—On an application against a father of a bastard child, more than twelve months after its birth, it is not necessary that the testimony of the mother that the father paid money for its maintenance within twelve months after its birth should be corroborated. *Hodges v. Bennett*, 5 H. & N. 625; 29 L. J., M. C. 224; 2 L. T. 190; 8 W. R. 463.

— **No Proof of—Waiver of Irregularity.**—A summons was issued, on the application of the mother of a bastard child, against the putative father, more than twelve months after the birth of the child. The summons was regular in form, but no proof had been given to the summoning justice that the defendant had paid any

money for the maintenance of the child within the twelve months next after its birth. No objection to the proceedings was made at the hearing of the summons before the petty sessions, and the defendant was afterwards convicted of perjury in the evidence that he then gave:—Held, that the fact that no proof had been given to the summoning justice of payment of money within the time limited was a mere matter of process which might be waived; that the party had waived it, and therefore the justices at petty sessions had jurisdiction. *Reg. v. Simmons*, 1 Bell, C. C. 168; 28 L. J., M. C. 183; 5 Jur., N. S. 578; 33 L. T., O. S. 153; 7 W. R. 439.

##### 5. FORM AND SUFFICIENCY OF ORDERS.

**Under 35 & 36 Vict. c. 65.**—By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4, justices may make an order on the putative father of a bastard child for the payment to the mother of a sum of money weekly "for the maintenance and education of the child; . . . and if the application be made . . . within two calendar months after the birth of the child, such weekly sum may, if the justices think fit, be calculated from the birth of the child:—"—Held, that an order of maintenance made under the above act, but which was in the form in the schedule to 8 & 9 Vict. c. 10, directing the payment to be made to the mother, without any provision for its application to the maintenance and education of the child, was invalid, and must be quashed. *Reg. v. Padbury*, 5 Q. B. D. 126; 49 L. J., M. C. 55; 28 W. R. 182; 44 J. P. 361.

Semble, that an order of maintenance under 35 & 36 Vict. c. 65, s. 4, may be made so as to operate from the date of the application for a summons. *Id.*

**Under 8 & 9 Vict. c. 10—Must Show Jurisdiction.**—The 8 & 9 Vict. c. 10, provides for the validity of proceedings in bastardy, if set forth, according to the forms in the schedule, or to the like tenor or effect. An order recited that application had been made for a summons to a justice of the peace "usually acting in this division:—"—Held, that as, by the statute, the words "in" and "for" are used synonymously, the jurisdiction of the justice who issued the summons sufficiently appeared on the face of the order. *Reg. v. Milner*, 2 New Sess. Cas. 54; 3 D. & L. 128; 14 L. J., M. C. 157; 10 Jur. 334.

An order under 7 & 8 Vict. c. 101, s. 3, did not state that the place of residence of the mother was in the sessional division for which the justices acted; but the summons, which was in evidence before the justices, stated that fact. The order having been removed by certiorari for the purpose of quashing it, the court amended it, in pursuance of 12 & 13 Vict. c. 45, s. 7, there being sufficient ground in proof before the justices to have authorized the drawing up of the order free from the omission. *Reg. v. Higham*, 7 El. & Bl. 557; 26 L. J., M. C. 116; 3 Jur., N. S. 691.

The caption of an order adjudicating a party to be the father of the bastard child, stated that it was made at a petty session of her Majesty's justices of the peace for the riding, &c., holden, &c., before us, the Rev. F. S., clerk, and T. P., esq., her Majesty's justices of the peace for the riding,

and a majority of the justices now present. The order was signed by F. S. and T. P. :—Held, on motion to quash the order, which had been brought up by a certiorari, that it must be taken in effect to state that F. S. and T. P. were justices of the peace, and a majority of those present. *Boytton, Ex parte*, 1 L., M. & P. 12.

— **Must shew that Evidence was on Oath.** ]

—Where an order of two justices on a putative father of a bastard child, made under 7 & 8 Vict. c. 101, omitted to state that the evidence of the mother was given on oath, but followed in substance the form in schedule No. 8 of 8 & 9 Vict. c. 10, passed for the purpose of curing defects of form under the former act :—Held, that it was no objection to the order that it did not state the evidence to be given on oath, and that the court would not intend that the blank in the form given was to be filled up with the words "on oath." *Reg. v. Cheshire (Justices)*, 3 D. & L. 337; 2 New Sess. Cas. 161; 15 L. J., M. C. 3; 10 Jur. 311.

An order commencing "Whereas S. (the putative father) having been duly served with the summons, &c., and now appearing in pursuance thereof," proceeded as follows :—"And it being now proved to us, in the presence, &c., of the attorney attending on behalf of S. (that the child was born a bastard), and we having, in the presence, &c., of the attorney, &c., heard the evidence of (the mother), and no evidence having been tendered on behalf of S.;" it then adjudged S. to be the putative father :—Sufficient, since 8 & 9 Vict. c. 10. *Reg. v. Shipperbottom*, 10 Q. B. 514; 2 New Sess. Cas. 641; 16 L. J., M. C. 113; 11 Jur. 520.

The form of order given in the schedule to that act does not require it to be set out that the evidence was given on oath. *Ib.*

— **And that Evidence was taken in the Presence of Defendant or his Solicitor.** ]—An order for the payment of expenses of the maintenance of an illegitimate child, whether the defendant appears in person or by attorney to answer the complaint of the woman before the justices, should state on the face of it that the evidence was given in the presence and hearing of the defendant, or of his attorney, as the case may be; and if, after appearance, there is any special reason for omitting that statement, it should be suggested on the face of the order. *Reg. v. Grafton (Duke), Bann, Ex parte*, 3 New Sess. Cas. 157; 2 B. C. Rep. 242; 5 D. & L. 568; 17 L. J., M. C. 125; 12 Jur. 539.

Where, in an order drawn up on a printed form, under 8 & 9 Vict. c. 10, it was stated that the putative father appeared before the justices in pursuance of the summons, but the words "in the presence and hearing of the," &c. (after the statement of the proof being given, and the evidence received) were struck out :—Held, that the order was bad, and that the court would not presume, these words being struck out, that the proof and evidence were nevertheless received and given in the presence and hearing of the putative father, or of his attorney. *Ib.*

— **As to Evidence tendered by Defendant.** ]

—A case from the quarter sessions set out a bastardy order under 8 & 9 Vict. c. 10, s. 1, which omitted the following words in form 8 : "And having also heard all the evidence ten-

dered by the defendant;" and found that no evidence was in fact tendered by the defendant. The case also set out the evidence which was given to corroborate that of the mother :—Held, first, that the order was good, without alleging that no evidence was tendered by the defendant. *Reg. v. Pearcey*, 17 Q. B. 902; 21 L. J., M. C. 129; 16 Jur. 193.

Held, secondly, that whether the evidence corroborated that of the mother, was a question for the justices; and therefore, unless it was incapable of doing so, the court would not quash the order. *Ib.*

— **Amount ordered to be Paid.** ]—A woman was delivered of a bastard child on the 27th of May, 1870. On the 11th of August she applied for a summons against the putative father, which, on coming on to be heard, was withdrawn. On the 11th of April, 1871, she applied for another summons, which was heard on the 25th of April, when an order was made adjudging the person to be the father of the child, and to pay to the mother 2s. 6d. per week, from the 11th of August, 1870, until the child should attain thirteen years. The order having been removed by certiorari :—Held, that as the adjudication was wrong in point of substance, the order could not be amended under 12 & 13 Vict. c. 45, s. 7. *Reg. v. Tomlinson*, 8 L. R., Q. B. 12; 42 L. J., M. C. 1; 27 L. T. 544; 21 W. R. 170.

A single woman made application on the 22nd of May, 1872, under 7 & 8 Vict. c. 101, for a summons in bastardy against K. The child was born on the 26th of July. The Bastardy Laws Amendment Act, 1872, passed on the 10th of August, which repealed ss. 2 and 3 of 7 & 8 Vict. c. 101, and itself applies only to a child born after the 10th of August. On the 3rd of September the summons was issued; on the 11th of September K. appeared to the summons, and an order was made adjudging him to be the putative father, and ordering him to pay 3s. a week for its maintenance from the birth till it should attain the age of thirteen. On the 24th of April, 1873, the Bastardy Laws Amendment Act, 1873, was passed, and by s. 8, all orders made before the passing of that act upon the father of a bastard child born before the 10th of August, 1872, for any payment in respect of such child, which would have been valid if the act of 1872 had not passed, shall be and shall be deemed to have been valid to all intents :—Held, that the order must be quashed, for that it was not made valid by s. 8, as it was for 3s. a week, whereas 7 & 8 Vict. c. 101, s. 3, only authorized an order for 2s. 6d., and the order would therefore not have been valid if the act of 1872 had not passed. *Reg. v. Kay*, 8 L. R., Q. B. 324.

An order of maintenance ordered a person, as putative father, to pay a weekly sum for the maintenance of a bastard child, from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth and the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father :—Held, that the order was valid, and might be enforced against the putative father, in respect of the weekly payments which became due after the date of the application to the magistrates. *Reg. v. Green*, 2 L., M. & P.

130; nom. *Coley, Ex parte*, 15 Jur. 128; 20 L. J., M. C. 168.

— **As to Complaint being made within Twelve Months.**—A bastard child was born on the 10th May, 1850, and a summons, dated the 23rd July, 1851, was served upon the putative father, which stated that the application had been made "within twelve calendar months from the date hereof." The hearing of this summons was adjourned from time to time till the 11th September, 1851, when an order was made which, after reciting that the mother "did on the 28th October, 1850, having been delivered of a bastard child within twelve calendar months prior thereto, make application," &c.; that the hearing was adjourned to the 11th September, 1851; and that it was proved that the child was, on the 10th May, 1850, born a bastard; adjudged H. to be the putative father, and ordered him to pay 2s. 6d. per week from the 28th October, 1850, the day upon which such application was made as aforesaid:—Held, that it sufficiently appeared upon the face of the order, that the complaint had been made within twelve months from the birth, and that the statement in the summons that the child was born within twelve months of its date was immaterial. *Harrison, Ex parte*, 16 Jur. 726.

— **Made Forty Days after Summons.**—Held, also, that the order was good, although the justices had directed payment from the time of the application, a period of more than thirteen weeks; and that the order was not vitiated by reason of its having been made more than forty days after the service of the summons, the delay being occasioned by the adjournments. *Id.*

An order must shew upon the face of it that it was applied for within forty days after the service of the summons on the putative father of the child. *Reg. v. Rose or Bailey*, 2 New Sess. Cas. 166; 3 D. & L. 359; 15 L. J., M. C. 6.

— **Appearing to be made at Petty Sessions which did not Exist.**—An order having the following caption—"At a petty sessions of, &c., holden in and for the petty sessional division of H., in the county of H. aforesaid,"—set forth an application by a woman "residing at N., within this division," to a justice "acting for this division." The justices who made the order were resident in the township of H.; they usually acted for divers townships in the neighbourhood, including the townships of N. and H.; and there was a petty sessional division called "the B. division," within which several petty sessions were held, and one of them at H. The quarter sessions determined, that, by the words "a petty session holden in and for the petty sessional division of H.," they understood the "petty sessions holden in and for the petty sessional division of B. holden at H."—Held, that the order appeared to be made at a petty sessional division which did not exist, and was therefore bad. *Reg. v. Whittles*, 3 New Sess. Cas. 397; 13 Q. B. 248; 18 L. J., M. C. 96; 13 Jur. 403. See 8 & 9 Vict. c. 10, s. 10, as to what the term "petty sessional division" includes.

— **Second Order when First incorrectly drawn up.**—When two justices had adjudicated

a person to be the father of a bastard child, but by mistake the order first drawn up and signed did not correctly embody the terms of such adjudication, and no step had been taken to enforce the order beyond serving it on the father who treated it as a nullity:—Held, that the same justices were entitled to cause a second order to be drawn up, and enforced, embodying correctly the terms of their adjudication, notwithstanding that the first order had not been quashed, and notwithstanding that there had been no fresh summons or hearing, or tender of costs. *Reg. v. Lanyon*, 27 L. T. 355.

**Before 8 & 9 Vict. c. 10.**—An order of bastardy, stated to be as well upon the oath of the wife, as otherwise, was good; for it would be presumed that the non-access of the husband was proved by competent witnesses on oath other than the wife; or, if proved by her also, that the judgment of the justices was founded on the other proof. *Reg. v. Luffe*, 8 East, 193.

An order made under 4 & 5 Will. 4, c. 76, s. 72, upon the oath of the mother, and upon evidence in corroboration thereof, without stating it to be of some material particular, was bad. *Reg. v. Reed*, 1 P. & D. 413; 9 A. & E. 619; 2 W., W. & H. 94.

An order of bastardy made twelve years after the death of the child, whereby the putative father (who had in the meantime absconded) was adjudged to pay two several sums, one for the bygone maintenance, and the other for the costs, was void in toto. *Addis, In re*, 2 D. & R. 167; 1 B. & C. 87.

#### 6. APPEAL AGAINST ORDERS. \*

**Notice of Appeal—Sufficiency.**—A verbal notice of appeal given to the mother, by the clerk of the attorney of the putative father, in the presence and by the direction of the latter, is a sufficient notice of appeal. *Reg. v. Huntingdonshire (Justices)*, 4 New Sess. Cas. 101; 1 L., M. & P. 78; 19 L. J., M. C. 127.

— **Service.**—A service of notice of appeal need not be made personally on the mother, if left at the usual place of her residence. *Reg. v. Cheshire (Justices)*, 1 B. C. Rep. 164; 15 L. J., M. C. 114; 10 Jur. 808.

— **Within what Time.**—The twenty-four hours within which notice of appeal must be given to the mother begin to run from the time of the oral adjudication and order of the justices in petty sessions, and not from the time of the formal drawing up and signature thereof. *Johnson, Ex parte*, 3 B. & S. 947; 32 L. J., M. C. 193; 9 Jur., N. S. 1128; 8 L. T. 275; 11 W. R. 620.

Where, therefore, at petty sessions holden on the 17th of February, the justices adjudged a person to be the putative father of a bastard child, and ordered him to pay a weekly sum for its maintenance, and a formal order, as of the 17th of February, was afterwards drawn up, and signed by one of the justices on the 1st of March, and by the others on the 3rd of March; and a verbal notice of appeal was given immediately on the adjudication, but a written notice was also given on the 2nd of March, and recognizances entered on the 4th of March:—Held, that

the recognizances were too late and the appeal could not be heard. *Ib.*

Held, also, that the irregularity in signing the order was not such as to vitiate it. *Ib.*

An order of maintenance was made at five o'clock in the afternoon of Saturday. At 10 o'clock on Monday morning notice of appeal was served on the mother:—Held, that the notice was given in sufficient time, as the twenty-four hours prescribed by 7 & 8 Vict. c. 101, s. 4, within which notice of appeal is to be given, must be reckoned exclusively of Sunday. *Reg. v. Middlesex (Justices)*, 3 New Sess. Cas. 152; 5 D. & L. 580; 2 B. C. Rep. 271; 17 L. J., M. C. 111; 12 Jur. 434.

— **When not Given.**—A justice of the peace, before whom a putative father appears to give security to prosecute an appeal against an order for the maintenance of a bastard child, is not to decide whether notice of appeal has or has not been given. The want of notice of appeal is an objection that may be taken at the sessions, which is the proper tribunal to inquire into and determine the fact. *Carter, Ex parte*, 3 C. L. R. 293; 24 L. J., M. C. 72; 1 Jur., N. S. 89.

**Summary Jurisdiction Act, 1879.**—An appeal against an order in bastardy may be brought, either on the conditions prescribed by the Bastardy Acts or on those prescribed by the Summary Jurisdiction Act, 1879. The 54th section of the Summary Jurisdiction Act, in applying that act to "an appeal from an order in bastardy," amongst other things, does not apply the appeal sections of that act exclusively of previously-existing appeal sections in the Bastardy Acts, but applies the act generally to orders in bastardy, so as to remove doubts whether they are "orders or convictions." *Reg. v. Montgomeryshire (Justices)*, 51 L. J., M. C. 95; 46 J. P. 517.

**Recognizances—Notice of entering into—When Made.**—A recognizance was entered into on the 14th, which was a Saturday, but the notice was not actually served until the 31st, though sent by a messenger on the 19th, who, on that day, and on the 21st, 23rd, and 28th ineffectually attempted to serve it personally:—Held, that the service was too late. *Reg. v. Worcestershire (Justices)*, 2 New Sess. Cas. 331; 1 B. C. Rep. 102; 15 L. J., M. C. 99; 10 Jur. 882.

8 & 9 Vict. c. 10, s. 3, requires notice of entering into recognizances to try a bastardy appeal to be forthwith given to the mother of the child, and it also provides that the sending such notice by post shall be sufficient:—Held, that the sessions were right in refusing to hear an appeal, where an interval of seventeen days had been suffered to elapse between the entering into the recognizances and serving the notice on the mother, although it was shewn that the delay that had occurred was owing solely to the appellant having sought to effect a personal service on the mother. *Lowe, Ex parte*, 3 D. & L. 737; *S. P., Reg. v. Cheshire (Justices)*, 11 Jur. 170.

To give the justices at sessions jurisdiction to hear an appeal against an order of bastardy, it is necessary that it should be proved before them that the notice of recognizance was given as provided for by 8 & 9 Vict. c. 10, s. 3; but if they have any evidence before them of the fact of such notice having been duly given, and decide

thereupon, the court will not review their decision. *Reg. v. Gloucestershire (Justices)*, 1 B. C. Rep. 291; 16 L. J., M. C. 57; 11 Jur. 674.

An order of maintenance was made on the 9th of April, and on the 13th the appellant entered into recognizances, but the notice was not served on the respondent till the 22nd of June. On the 29th, the respondent's attorney undertook to admit due service of the notice. At the trial it was objected, that the notice of the recognizances was not served forthwith, but the quarter sessions overruled the objection and quashed the order. The court refused a certiorari to bring up the order of sessions to be quashed, on the ground that the admission was evidence that the notice had been served in time. *Ib.*

— **On Death of Mother.**—Upon an appeal against an order being called on for hearing, and proof required of the appellant having complied with the requisitions of 8 & 9 Vict. c. 10, s. 3, it appeared that the necessary recognizance had been entered into by the appellant, and notice sent to the mother of the bastard child, by the post, addressed to the place at which she resided when the order was made; but on the part of the respondent it was proved, that when the notice was so sent by the post, the mother was dead. The sessions having refused to hear the appeal on the ground that the statute had not been sufficiently complied with in respect of the sending such notice:—Held, that the appellant was to be excused for the default occasioned by the death, the duty of sending the notice being one cast upon him by law, and its performance becoming impossible by the act of God, and therefore that the sessions were bound to hear the appeal. *Reg. v. Leicestershire (Justices)*, 4 New Sess. Cas. 124; 15 Q. B. 88; 19 L. J., M. C. 209; 14 Jur. 550.

— **Contents of Notice.**—The notice of recognizance need not state the conditions of the recognizance. *Reg. v. Holbourn*, 3 New Sess. Cas. 725; 14 Q. B. 421.

An order of sessions, whereby after reciting that an appeal has been entered by the putative father against an order of maintenance, the sessions refuse to allow the appeal, for insufficiency of the notice of recognizance, and confirm the order of maintenance, with costs, is bad by reason of the improper confirmation. *Ib.*

B. having been adjudicated the putative father of twin bastard children, two orders of affiliation were drawn up and served. He gave notice of appeal, and entered into two recognizances, and subsequently gave notice to the mother, under 8 & 9 Vict. c. 10, s. 3, that he had entered into a recognizance to try an appeal against an order of affiliation made, whereby he was adjudged to be the putative father of two bastard children:—Held, that such notice was sufficient, inasmuch as it must be taken to have given reasonable information to the mother that B. had entered into recognizances to try appeals against the two orders. *Reg. v. Leeds (Recorder)*, 1 B. C. C. 50; 21 L. J., M. C. 71; 16 Jur. 451.

**Grounds of Appeal.**—Grounds of appeal are not required to be given by the statute. *Reg. v. Derbyshire (Justices)*, 1 New Sess. Cas. 461; 9 Jur. 181.

**To what Sessions.]**—The 7 & 8 Vict. c. 71, s. 2, enacts, that the adjourned sessions in Middlesex shall be general sessions of the peace, and shall have power to try and determine all appeals, and all other powers which belong to the general quarter sessions:—Held, that the jurisdiction thus given was optional only, and that the putative father was not bound to appeal to those sessions, but might wait and appeal to the general quarter sessions. *Reg. v. Middlesex (Justices)*, 5 D. & L. 580; 3 New Sess. Cas. 152; 2 B. C. Rep. 271; 17 L. J., M. C. 111; 12 Jur. 434.

**Within what Time—Mandamus.]**—At a sessions held in January, the justices confirmed an order in bastardy, subject at the option of the appellant to a case for the opinion of the Queen's Bench, or to a mandamus. The appellant elected not to bring up the case, but in Easter Term applied for a mandamus:—Held, that the application was not made too late. *Reg. v. Cheshire (Justices)*, 1 B. C. Rep. 164; 15 L. J., M. C. 114; 10 Jur. 808.

**Hearing Appeal.]**—Upon an appeal to the sessions against an order of affiliation, the respondents are to begin by supporting their order as in all other cases. *Reg. v. Knill*, 12 East, 50. And see *Re v. Newberry*, 4 T. R. 475; Nolan, 25.

Appeal against an order of maintenance; the appellant raised a preliminary objection to the jurisdiction of the petty sessions to make the order, and upon its being overruled, declined proceeding further with the case:—Held, that the sessions were justified in confirming the order, without hearing further evidence, notwithstanding 8 & 9 Vict. c. 10, s. 6. *Reg. v. Robinson*, 6 D. & L. 295.

**Evidence on.]**—On an appeal by the putative father, the quarter sessions may confirm the order without corroborative evidence, if the appellant, after taking an unsuccessful objection in point of law, does not dispute the facts. *Reg. v. Buckinghamshire (Justices)*, 3 New Sess. Cas. 500; 18 L. J., M. C. 113; 13 Jur. 1053.

**—Of Mother.]**—On an appeal to the sessions by a putative father against an order of maintenance, the 8 & 9 Vict. c. 10, s. 6, requires the justices, on the trial of any such appeal, to hear the evidence of the mother:—Held, that the proof that notice of appeal had been given to her was part of the trial of the appeal, and that therefore she might be called as a witness to prove that fact. *Reg. v. Middlesex (Justices)*, 3 New Sess. Cas. 152; 5 D. & L. 580; 2 B. C. Rep. 271; 17 L. J., M. C. 111; 12 Jur. 434.

**Finality of Decision on.]**—When on appeal to quarter sessions an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence, as required by 8 & 9 Vict. c. 10, s. 6, the order of quarter sessions is a decision on the merits, and is final, and fresh proceedings cannot be taken before justices. *Reg. v. Glynn*, 7 L. R., Q. B. 16; 41 L. J., M. C. 58; 26 L. T. 61; 20 W. R. 94, sub nom. *Reg. v. Flintshire (Justices)*.

See further, JUSTICE OF THE PEACE.

## 7. ENFORCING ORDERS.

**By Warrant.]**—The jurisdiction given to a justice of the peace by 7 & 8 Vict. c. 101, s. 3, at any time after the expiration of one month from making an order for the maintenance of a bastard child, to grant a warrant against the putative father, for the purpose of enforcing payment under the order, is not suspended by an appeal to the quarter sessions by the putative father against the order, and the confirmation of the order by the sessions subject to a special case. *Kendall v. Wilkinson*, 4 El. & Bl. 680; 24 L. J., M. C. 89; 1 Jur., N. S. 538.

A justice issued a warrant directed to a constable, commanding him to apprehend G., who had been adjudged to be the putative father of a bastard child, and to convey him to prison under an order for the payment of money to the mother of the child. A police officer arrested him, but at the time of doing so the warrant was not in his possession:—Held, that the arrest was illegal, as the officer ought to have had the warrant ready to be produced at the time of the arrest, if required. *Galliard v. Laxton*, 2 B. & S. 363; 9 Cox, C. C. 127; 31 L. J., M. C. 123; 8 Jur., N. S. 642; 5 L. T. 835; 10 W. R. 353.

If an order of justices was made commanding a soldier in the Queen's service to pay a certain sum weekly for the maintenance of a bastard child, the soldier might be indicted for refusing to obey the order, and was not protected from punishment by s. 52 of the Mutiny Act, 12 & 13 Vict. c. 10, as such disobedience was a criminal matter, and criminal matters were expressly excepted from the operation of that section. *Reg. v. Ferrall*, T. & M. 390; 2 Den. C. C. 51; 20 L. J., M. C. 39; 15 Jur. 42. But since this decision the Annual Mutiny Act contained a provision that soldiers should not be liable to be taken out of the service for the misdemeanor of refusing to comply with orders of bastardy or for not maintaining their bastard children. See now 44 & 45 Vict. c. 58.

**After Marriage of Mother.]**—An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother. *Sotheron v. Scott*, 6 Q. B. D. 518; 50 L. J., M. C. 56; 44 L. T. 522; 29 W. R. 666; 45 J. P. 423.

**—Though Husband capable of Maintaining.]**—An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother, although her husband is able to maintain the child. *Hardy v. Atherton*, 7 Q. B. D. 264; 50 L. J., M. C. 105; 44 L. T. 776; 29 W. R. 788; 45 J. P. 683.

**When Father Abroad.]**—A putative father of a bastard child, born abroad, of a foreign mother, cannot be forced, by an order of justices, to pay to the mother a weekly sum of money for the maintenance of the child. *Reg. v. Blane*, 3 New Sess. Cas. 597; 13 Q. B. 769; 18 L. J., M. C. 216; 13 Jur. 854.

## 8. EFFECT OF ORDER IN EVIDENCE.

In ejectment, the question being as to the legitimacy of the plaintiff, his mother, who was a witness, stated, on cross-examination, that she "was never before the magistrate about the



child; that she never said the child was born before marriage; that she never affiliated the child:—Held, that an order of affiliation made by magistrates, who were dead, was admissible for the purpose of contradicting the witness. *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267; 2 L. T. 223; 8 W. R. 420.

### III. LIABILITY OF PUTATIVE FATHER.

#### 1. ON ORDER OF AFFILIATION.—*See ante*, II.

#### 2. INDEPENDENTLY OF STATUTORY ORDER.

**After adopting Child.**—A father of a bastard child, if he has adopted it as his own, though no order has been made on him, is liable for nursing and necessaries. *Hesketh v. Gowing*, 5 Esp. 131.

**Contract to Maintain.**—A person bound himself to pay an annuity to an unmarried woman, by whom he had had several children, on condition that he should not require their custody or management:—Held, that there was a sufficiently valuable consideration to support the bond as a specialty debt. *Plaskett, In re*, 30 L. J., Ch. 606; 4 L. T. 544; 9 W. R. 628.

A reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child, and keep secret their connexion:—Held, that the maintenance of the child was a sufficient consideration to sustain assumption. *Jennings v. Brown*, 9 M. & W. 496; 12 L. J., Ex. 86.

The father of an illegitimate child promised the mother that if she would abstain from affiliating the child he would pay her 2s. 6d. per week for its maintenance. The mother did so abstain, and suffered the time limited by the statute for obtaining an order of affiliation to expire:—Held, that the promise bound the father, and that an action lay, the consideration having been executed. *Linnegar v. Hood*, 5 C. B. 437; 17 L. J., C. P. 106.

A reputed father of an illegitimate child wrote to the mother: "As I always promised that you and your child should never want, I will allow you 100l. a year for your life and little Gunna's, to be paid quarterly into the bank wherever you live. Of course if I hear of your behaving ill, or bringing up the child improperly, I will stop the allowance to you":—Held, that the annuity was promised in respect of an executory consideration, the future bringing up of the child properly, which was sufficient to support an assumption, and that the promisee having executed her part of the contract the promise to pay was binding on the father. *Hicks v. Gregory*, 8 C. B. 378; 19 L. J., C. P. 81; 13 Jur. 1030.

The father and mother of an illegitimate child entered into the following agreement:—"Agreement between L., and G. single woman, respecting the maintenance of an illegitimate female child. L. agrees to pay 45l. to the child as follows: 12l. to be paid down, and the remaining 33l. in four equal payments in four years; the first of such payments, 8l. 5s., to be made on the 30th December, 1846, and every succeeding 30th December till the period of four years do expire. But if the child should die before the four years expire, the payments to cease at such decease." The 12l. were to be paid at the time, and the agreement was placed in the hands of the

attesting witness. The mother, having afterwards heard that the father had got possession of the agreement, obtained against him an affiliation order for payment of a weekly sum, which was duly paid. Subsequently, the mother married, and joined with her husband in an action against the father for necessaries supplied to the child by her before her marriage, and for necessaries supplied by her and her husband after their marriage:—Held, that if the meaning of the agreement was, that the father would make the stipulated payments if the mother would support the child, then the agreement was without consideration, but if the meaning of it was, that the mother would undertake the sole maintenance without affiliating the child, in which case there would be a good consideration, then the agreement had not been performed. *Crowhurst v. Laverack*, 8 Ex. 208; 22 L. J., Ex. 57.

A declaration stated that the plaintiff was the mother of two illegitimate children, of whom the defendant was the father; that she, having relinquished all immoral intercourse with him, had at his request undertaken the care and nurture of the children, and that in consideration of the premises she would at his request continue to take charge of the children, and to supply them with such things as should be necessary for their use and benefit; he promised her to pay her 50l. a year for and during a time not yet expired:—Held, that the declaration disclosed a sufficient consideration for the promise. *Smith v. Roche*, 6 C. B., N. S. 223; 28 L. J., C. P. 237; 5 Jur., N. S. 918.

A plea that after the promise and before any part of the money claimed began to accrue or became due or payable, one of the children died, is no answer. *Id.*

**Conditional.**—In an action on a contract to pay a woman a weekly sum for the support of a bastard child of hers by the defendant, on condition of her not molesting him; plea, that she molested him by charging him, falsely and maliciously, and without reasonable or probable cause, with being the father of another bastard child, and getting an order upon him as putative father (which had been quashed on appeal):—Held, that to find a verdict in favour of the defendant, the jury must be satisfied that the charge was falsely and fraudulently made, and that they must decide that question on the evidence before them, without any regard to the decision of the magistrate. *Lane v. Pantton*, 3 F. & F. 125.

**Refusal by Father to continue Payments.**—If the father of an illegitimate child has consented to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give the most distinct notice of his intention to discontinue the payment of such annual sum. *Cameron v. Baker*, 1 C. & P. 268; *S. P., Nicholls v. Allen*, 3 C. & P. 36. See *Mortimore v. Wright*, 6 M. & W. 482.

Where a putative father made various payments for maintenance, and then refused to continue its support until the mother obtained an order of affiliation:—Held, that no action would lie by the mother for arrears of maintenance. *Furriillio v. Crouther*, 7 D. & R. 612.

**How far Necessary to be in Writing.**—

A contract to support a child (six years old) "till it should be able to do for itself," is within the Statute of Frauds, and requires to be in writing. *Farrington v. Donohoe*, 1 Ir. C. L. R. 675; 14 W. R. 922.

The father of seven illegitimate children agreed with the mother verbally to pay her 300*l.* per annum by equal quarterly instalments for so long as she should maintain and educate the children. At the time of the making of the promise the eldest child was about fourteen years old:—Held, that this agreement was not one "not to be performed within a year from the making thereof," within the meaning of the Statute of Frauds, s. 4, and was therefore binding, though made by parol only. *Knowlman v. Bluett*, 9 L. R., Ex. 1; 43 L. J., Ex. 29; 29 L. T. 462; 22 W. R. 77. Affirmed on appeal, 9 L. R., Ex. 307; 43 L. J., Ex. 15; 22 W. R. 758—Ex. Ch.

— **Effect of subsequent Bankruptcy of Father.**—[Bankruptcy is no discharge of a promise to allow a weekly sum for the support of an illegitimate child. *Millen v. Whittenbury*, 1 Camp. 428. And see *St. Martin v. Warren*, 1 B. & A. 491; 2 Stark. 188.

— **Mother releasing Father from past Liability.**—[To an action for the maintenance of illegitimate children, the defendant pleaded a deed whereby the plaintiff (the mother), in consideration of 50*l.*, released the defendant from past claims, and covenanted to maintain the children thereafter without his assistance:—Held, that the plea was bad in law; first, because there might have been subsequently to the deed a binding contract for maintenance for new and valuable consideration—e.g. maintenance in a more expensive manner than the mother was by the covenant bound to provide; and, secondly, because the deed could not be relied upon for the purpose of avoiding circuitry of action, inasmuch as regarding it as a covenant not to sue, the damages recovered in the present action, and those recoverable in a counter action for breach of the covenant, would not necessarily be identical. *Magee v. Farrell*, 5 Ir. R., C. L. 579—Ex. Ch.

— **From future Liability.**—[An order had been obtained by the respondent ordering the appellant to contribute to the support of her bastard child. Subsequently to the making of the order, the respondent, in consideration of a sum of money, agreed to release and indemnify the appellant for ever from all actions, suits and proceedings in respect of the child:—Held, that this agreement was no bar to the jurisdiction of the justices to enforce the order on the application of the mother. *Griffiths v. Evans*, 46 L. T. 417; 30 W. R. 427.

— **To Support Two Children—Death of One.**—[The father of two illegitimate children executed a bond, conditioned for the payment of an annuity for the support of them and their mother during their joint natural lives; or in case of the death of the children, during the natural life of the mother. One of the children having died:—Held, that the executor of the obligor was liable on the bond for the arrears of the annuity accruing after the death of that child. *James v. Talent*, 1 D. & R. 548; 5 B. & A. 889.

**Expenses incurred by Mother during Confinement.**—[A woman who, at the request of her seducer, has taken lodgings, and laid out money in necessaries for her confinement and the support of her child, is entitled to sue him for money paid; and her letters to him not answered are admissible as evidence against him. *Gore v. Hawsey*, 3 F. & F. 509.

**Past Cohabitation with Mother—Subsequent Promise by Father.**—[A declaration in an action by a woman against a man, averring that he seduced and debauched her, and induced her to cohabit with him, whereby she had been injured in her character, and deprived of the means of procuring an honest livelihood; and that the two agreed to discontinue the immoral connexion and live apart; and that he as a compensation for the injury, and in consideration of the premises, undertook to pay her a yearly sum towards her maintenance, which he had failed to do, is bad, as disclosing no legal consideration for the undertaking. *Beaumont v. Reeve*, 8 Q. B. 483; 15 L. J., Q. B. 141; 10 Jur. 284.

#### IV. RIGHT TO INHERIT.

**Generally.**—[A bastard is not a child within the meaning of 9 & 10 Vict. c. 93, s. 2, and can therefore maintain no action under that statute. *Dickinson v. North-Eastern Railway Company*, 2 H. & C. 735; 33 L. J., Ex. 91.

It is a rule that a bastard cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person, which cannot be before birth. *Earle v. Wilson*, 17 Ves. 531.

Under a devise by a married man, having no legitimate children, "to the children which I may have by A., and living at my decease," natural children, who had acquired the reputation of being his children by her before the date of the will, are entitled. *Williamson v. Adam*, 1 Ves. & B. 422.

**Marriage with Mother after Birth of Child—French Law—Right of Child under English Will.**—[A domiciled Englishman, being the putative father of an illegitimate child born in France of a French woman, and afterwards becoming domiciled in France, cannot, on his subsequent marriage with the mother of the child, legitimize the child under the French law, so as to enable it to share in a bequest to his children contained in the will of a person in England. *Wright, In re*, 2 Kay & J. 595; 25 L. J., Ch. 621; 2 Jur. N. S. 465.

The reasons for this are, first, that marriage, being a personal contract, is, like other personal contracts, regulated by the law of the domicile of the party; secondly, that the law of the domicile of the putative father attached to the child at its birth, and by that law its bastardy was indelible; thirdly, that by the law of France a bastard cannot afterwards be made legitimate if, at the time of its conception, the parents were incapable of contracting to legitimize the child after its birth, and a domiciled Englishman could not bind himself by such contract; and fourthly, that by the law of France a bastard can never be made legitimate if it is uncertain who was the father; and a domiciled Englishman, by the law of this country, cannot, for civil purposes

be more than the putative father of a bastard child. *Ib.*

— **Scotch Law.**—A child born in Scotland, of parents domiciled there, but not married till after his birth, though legitimate by the law of Scotland, cannot take real estates in England as heir. *Doe d. Burtchistle v. Vardill*, 2 Scott, N. R. 828; 6 Bing. N. C. 385; West, 500; nom. *Birtchistle v. Vardill*, 9 Bligh, 32; 7 C. & F. 895; 4 Jur. 1076; *S. C.* in K. B., 8 D. & R. 185; 2 B. & C. 438.

A domiciled Scotchman had a son born in Scotland before marriage, and afterwards married the mother in Scotland. The son died seised of land in England, leaving his father surviving:—Held, that the father did not inherit from the son. *Don, In re*, 4 Drew, 193; 27 L. J., Ch. 98; 3 Jur., N. S. 1192.

By the law of Scotland, legitimation per subsequens matrimonium operates only from the time of the marriage, not from the time of the birth. *Shedden v. Patrick*, 1 Macq. H. L. Cas. 535.

#### V. CUSTODY OF CHILD.

**Right of Mother to.**—The mother of an illegitimate child is entitled to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it. *Knee, Ex parte*, 1 N. R. 148.

And if the putative father obtains possession of the child from the mother by fraud, the court will order it to be restored to the mother. *Rea v. Soper*, 5 T. R. 278; *S. P.*, *Rea v. Moseley*, 5 East, 224, n.

The court will grant a habeas corpus to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it has been taken, at one time by fraud, and afterwards by force; and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the Queen in Chancery. *Rea v. Hopkins*, 7 East, 579; 3 Smith, 577.

A woman placed her illegitimate female child soon after its birth with N. and wife, who were labouring people, intending to pay them for it. She fell into ill-health and was unable to continue her payments, but N. and wife continued to maintain the child till it was nearly seven years old. The mother then applied to have the child delivered to her, which N. and wife refused. She therefore applied for a writ of habeas corpus, which was refused by North, J., but granted by a divisional court. N. and wife appealed. The mother, who was a kept mistress, did not propose that the child should live with her, but with a respectable married sister, whose husband was in a station superior to that of N.:—Held, that the appeal must be dismissed, for that the mother of an illegitimate infant has a natural right to its custody, which will be regarded by the court. *Reg. v. Nash, Carey, In re*, 10 Q. B. D. 454; 52 L. J., Q. B. 442; 48 L. T. 447; 31 W. R. 420—C. A.

**When Child allowed to Elect.**—The mother of an illegitimate child between eleven and twelve years of age obtained a habeas corpus to compel the putative father to bring her before the court. The child being brought up, the court declared

her entitled to exercise her own discretion as to whither she would go, and would not allow her mother to take her against her will. *Lloyd, In re*, 3 M. & G. 547; 4 Scott, N. R. 200; 5 Jur. 1198.

**Maintenance of Child—Liability of Parish for.**—Where a bastard child is born, for whose sustenance the parents neglect to provide necessities, the parish officers are obliged to do it, without an order of justices for that purpose. *Hays v. Bryant*, 1 H. Bl. 253.

**Money belonging to Mother—Duty of Personal Representatives.**—There is no obligation upon the personal representatives of the mother of a bastard child to expend the money or property which belonged to the mother, in the maintenance of such child. *Ruttinger v. Temple*, 4 B. & S. 491; 33 L. J., Q. B. 1; 9 Jur., N. S. 1239; 9 L. T. 256; 12 W. R. 9.

#### BATHS AND WASH- HOUSES.

See CORPORATION—HEALTH.

#### BAWDY HOUSE.

See DISORDERLY HOUSE.

#### BEDFORD LEVEL.

**Qualification of Governor or Bailiff.**—Upon the true construction of the Bedford Level Act, by which it is enacted that "none shall be capable to be or continue governor or bailiff that hath not 400 acres or more of 95,000 acres" (being the tract over which the corporation of the Bedford Level has jurisdiction), a mere legal estate in the lands of the Level is a sufficient qualification for the office of governor or bailiff. *Childers v. Childers*, 1 De G. & J. 482; 26 L. J., Ch. 743; 3 Jur., N. S. 1277.

#### BEER-HOUSE.

See INTOXICATING LIQUORS.

#### BENEFICE.

See ECCLESIASTICAL LAW.

**BENEFIT SOCIETY.**

- I. BUILDING.—*See* BUILDING SOCIETY.  
 II. FRIENDLY.—*See* FRIENDLY SOCIETY.

**BERWICK-UPON-TWEED.**

**Part of Northumberland.]**—The town and liberties of Berwick-upon-Tweed are not for any purpose within, or part of the county of Northumberland. *Berwick-upon-Tweed (Mayor, &c.) v. Shancks*, 11 Moore, 372 ; 3 Bing. 459.

**BETTING AND BETTING HOUSE.**

*See* GAMING AND WAGERING.

**BICYCLE.**

*See* WAY.

**BIGAMY.**

*See* CRIMINAL LAW.

**BILLETING.**

*See* ARMY AND NAVY.

**BILLIARDS.**

*See* GAMING AND WAGERING.

**BILLS OF COSTS.**

*See* SOLICITOR.

**BILLS OF EXCEPTIONS.****I. UNDER JUDICATURE ACT.****II. BEFORE JUDICATURE ACT.**

1. *When it Lies*, 1550.
2. *Practice as to*, 1550.
3. *Form*, 1552.
4. *Signing and Sealing*, 1552.
5. *Abandoning or Staying*, 1554.
6. *Amending*, 1554.

**I. UNDER JUDICATURE ACT.**

**Abolition.]**—*By the Rules of the Supreme Court, Ord. LVIII. r. 1* (1875), *bills of exceptions are abolished.*

**II. BEFORE JUDICATURE ACT.****1. WHEN IT LIES.**

It lies on a non-suit, and to the judge of the common law county court. *Strother v. Hutchinson*, 4 Bing. N. C. 83 ; 5 Scott, 346 ; 6 D. P. C. 238 ; 3 Hodges, 294 ; 2 Jur. 16.

A bill of exceptions lies upon the reception of improper evidence on a trial at bar. *Rouse v. Brenton*, 3 M. & R. 266 ; 8 B. & C. 765.

**On Execution of Writ of Inquiry.]**—*Quære* whether a bill of exceptions lies for misdirection of a judge on the execution of a writ of inquiry. *Price v. Green*, 16 M. & W. 346.

**In Criminal Cases.]**—A bill of exceptions cannot be tendered by a prosecutor or a defendant in a criminal case, whether it is for a felony or a misdemeanor, because the Statute of Westminster is confined to civil causes. *Reg. v. Alleyne*, Dears. C. C. 505, 509 ; 1 Jur., N. S. 373 ; *S. P.*, *Reg. v. Eadaile*, 1 F. & F. 214.

Upon a trial for felony, a bill of exceptions cannot be taken by the prisoner. *Hayes, In re*, 3 J. & L. 568 (Irish).

A bill of exceptions does not lie in a criminal case, whether felony or misdemeanor ; and although there might be no objection to the court sealing a bill of exceptions, yet judgment should be passed at once, and no appeal exists in respect of such ruling. *Reg. v. Jelly*, 10 Cox, C. C. 553.

**To Quarter Sessions.]**—A bill of exceptions does not lie to the court of quarter sessions. *Roe v. Preston*, 2 Stra. 1040.

**2. PRACTICE AS TO.**

A bill of exceptions is in the nature of a writ of error, and consequently cannot be determined in the court in which it is executed. *Davenport v. Tyrrell*, 1 W. Bl. 679 ; Lofft, 84.

On the trial of a writ of right, the grand assize found a general verdict for the tenant, accompanying it with the following statement in writing :—" It is the unanimous verdict of the grand assize that the defendant has not made out her pedigree ; that the tenant had entered into and was in the actual possession of the estates devised by the will of T. J. Selby, before and at the time of levying the fine in 1784 ; and that he had taken and used and was then known by the name of William Selby ;" a name he was required by the will to assume, as the condition

upon which he was to take the estate on failure of the right heir presenting himself:—Held, that this written statement could not properly be introduced into the bill of exceptions, it being a statement of that which the grand assize was not called upon by law to find. *Davies v. Loundes*, 1 Scott, N. R. 328; 1 M. & G. 473.

A bill of exceptions tendered to the direction given by the judge to the jury, set forth the pleadings and evidence, and then referred to a lease, part of which was inserted by way of extract. The judgment of the court on the bill of exceptions having been brought up by writ of error to the House of Lords, the counsel for the plaintiff in error was not at liberty to read a part of the lease not extracted into the bill of exceptions. *Galway v. Baker*, 5 C. & F. 157.

If a bill of exceptions is tendered to a judge in the course of a trial at nisi prius, the facts still go to the jury, but a demurrer to evidence stops the cause. *Miller v. Warre*, 1 C. & P. 237, 240, n.; 7 D. & R. 1; 4 B. & C. 538.

Where an indorsement to a foreign bill of exchange turned out to be forged, and a question arose as to the proof of the identity of the indorser, if evidence is objected to as being insufficient for that purpose, the proper course for taking advantage of the objection is by demurring to the evidence and not by bill of exceptions. *Bulkeley v. Butler*, 3 D. & R. 625; 2 B. & C. 434.

If a plaintiff intends to bring a writ of error on the ground of misdirection in point of law, he should not submit to be non-suited, but appear and put the judge to express such opinion by way of direction to the jury, and thereupon tender a bill of exceptions. *Doe d. Tolson v. Fisher*, 2 Bligh, N. S. 9.

Upon an exception taken in a bill of exceptions in which the whole evidence was set out, that the evidence for the defendant was sufficient to entitle him to a verdict, and to bar the plaintiff's claim:—Held, that a court of error might look to the whole evidence on both sides, to see whether the verdict for the plaintiff was sustained by the evidence. *Vines v. Reading Corporation*, 1 Y. & J. 4; 12 Moore, 201; 4 Bing. 8.

Misdirection, and not non-direction, is the subject of a bill of exceptions. *Gregory v. Cotterill*, 5 El. & Bl. 571; 25 L. J., Q. B. 33; 2 Jur., N. S. 16; S. P., *Anderson v. Fitzgerald*, 17 Jur., 995; 4 H. L. Cas. 484.

Where evidence is rejected by a judge, the counsel relying on the evidence ought to make a formal tender of it to the judge, and request him to put it on his notes, and in the event of his refusal, tender a bill of exceptions, or counsel will not be allowed to raise before the court any questions arising out of such evidence, if the notes do not shew the point to have been raised at the trial. *Gibbs v. Pike*, 9 M. & W. 351; 1 D., N. S. 409; 12 L. J., Ex. 257; 6 Jur. 465.

If the judge directs a nonsuit, and the plaintiff does not appear when called, the plaintiff cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. *Corsar v. Reid*, 2 L. M. & P. 646; 21 L. J., Q. B. 18; 16 Jur. 57.

If a judge leaves as a fact for the jury to determine any matter which he should decide as a point of law, the counsel should interpose and tender a bill of exceptions; otherwise if, in the opinion of the court, the jury decides the question left to them correctly in point of law,

the judge's misdirection is no ground for a new trial. *Doe d. Strickland v. Strickland*, 19 L. J., C. P. 89.

Where a judge, in summing up, expresses an erroneous opinion on a point of law, adverted to for the collateral purpose of explaining other evidence, that is not a misdirection in respect of which a bill of exceptions can be tendered, and, therefore, a new trial will not be granted as of right, but only in the event of a failure of justice. *Black v. Jones*, 6 Ex. 213.

Evidence of foreign law was tendered on the trial of an issue before a jury. It was objected to on the ground that as the issue did not in terms raise any question of foreign law, the evidence was a surprise on the party against whom it was produced. The evidence was admitted, and the objection of surprise was put on the record as one of the heads of a bill of exceptions. The evidence was really inadmissible, on the ground that the *lex fori* was that by which alone the issue could be decided; but no notice of this ground of objection was taken in the bill of exceptions:—Held, that the court of error could not look beyond the bill of exceptions, but must decide on that alone, and that the objection of surprise was not sufficient to exclude the evidence. *Bain v. Whitehaven and Furness Junction Railway Company*, 3 H. L. Cas. 1; S. P., *Irish Society v. Derry (Bishop)*, 12 C. & F. 641.

The court cannot go behind a bill of exceptions on the record to ascertain what the objections made at the trial really were. *Whaley v. Carlisle*, 17 Ir. C. L. R. 792.

An objection was taken, that documents tendered in evidence were not admissible for a particular purpose. The court decided that they were admissible. An exception was taken to this decision:—Held, that if the documents were admissible on any ground, the exception could not be sustained. *Irish Society v. Derry (Bishop)*, 12 C. & F. 641.

### 3. FORM.

A bill of exceptions which sets forth what a judge was asked to direct, and alleges that he refused to give such direction, is informal and bad. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; 17 Jur. 995.

A bill of exceptions should state what directions the judge gave, as it is misdirection, and not non-direction, which is the subject of an exception. *Id.*

Where exceptions are taken to the direction of a judge, it is not enough to state in the bill of exceptions that he declined to direct the jury in the way suggested, without shewing what his direction was. *McAlpine v. Mangnall*, 3 C. B. 496; 15 L. J., C. P. 298.

Where exceptions are not properly taken (as where they appear upon the record after the finding of the jury), the court of error cannot give judgment thereon. *Armstrong v. Lewis*, 4 M. & Scott, 1; 2 C. & M. 274; S. P., *London Grand Junction Railway Company v. Freeman*, 2 Scott, N. R. 720, n.

### 4. SIGNING AND SEALING.

An information having been tried at the assizes, the defendant tendered a bill of exceptions to the judge, and on the day after the trial sup-

plied him with a sketch of the exceptions. On the 3rd November, the defendant furnished the prosecutor with a draft of the exceptions for his approval. On the 5th November, the draft being still in the hands of the prosecutor, the defendant moved for a rule to restrain the prosecutor from proceeding on his judgment until one week after the bill of exceptions had been sealed. On the 7th November (the 5th day of the term), the prosecutor signed judgment:—Held, that the defendant had been sufficiently prompt in his proceedings, and that he was entitled to a reasonable time to seal the bill of exceptions and to sue out a writ of error; and the court refused to compel him to pay the costs of the application, but directed them to be costs in the cause, or to impose a term upon him to enter the fact upon the record, that the bill of exceptions was sealed after judgment signed. *Reg. v. Rowley*, 2 D., N. S. 335.

A bill of exceptions was tendered to a judge's direction, and under 55 Geo. 3, c. 42, s. 7 (Scotland), was signed by him at the time of the trial. The draft thus prepared was some months afterwards more formally drawn up, and was tendered to him for signature. He refused to sign, unless a sentence explaining his direction was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with this explanation forming part of it, was presented to the court:—Held, that the introduction of this explanation was highly irregular; but that being on the record, the court below and the House of Lords on appeal could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed. *Glasgow (Earl) v. Hurlet and Campsie Alum Company*, 3 H. L. Ca. 25.

The court in banc has no jurisdiction to inquire into the propriety of an amendment made by the judge at nisi prius in a bill of exceptions after he has sealed it. *Mercy Docks and Harbour Board v. Penhallow*, 7 H. & N. 341; 30 L. J., Ex. 272; 8 Jur., N. S. 486; 5 L. T. 112—Ex. Ch.

Where defendants in error severed in pleading, and pleaded, in addition to the joinder in error respectively, that there was no record of the bill of exceptions, that the chief justice did not seal the bill of exceptions, and that he did not acknowledge his seal, the court ordered the respective pleas pleaded by each, except the joinder in error, to be struck out, with costs. *Fishmongers' Company v. Robertson*, 6 C. B. 896; 18 L. J., C. P. 55.

If the judge dies before sealing a bill of exceptions to his ruling, it is not competent for any other judge to seal it, nor for the executors of the deceased judge to affix their testator's seal to it. In such a case the court can only grant a new trial. *Nind v. Arthur*, 7 D. & L. 252; *S. P.*, *Newton v. Boodle*, 4 D. & L. 664; 3 C. B. 795; 16 L. J., C. P. 135; 11 Jur. 148.

Although, when a bill of exceptions has been tendered, but in consequence of the death of the judge has not been formally sealed, the only available course is to move for a new trial, yet the motion must be made within reasonable time, or good cause shewn for delay; and therefore where three terms had elapsed from the date of the death, and the only reasons for the delay were want of funds, and a change of attorneys, an application for a new trial was

refused. *Thomason v. Lancashire and Yorkshire Railway Company*, 28 L. T. 819.

A cause was tried before Lord Truro, when chief justice, and a bill of exceptions tendered, and the draft submitted to his lordship; but, in consequence of his elevation to the woolsack, and subsequent illness, all hope of getting it settled and sealed being at an end, the court directed a new trial. *Benett v. Peninsular and Oriental Steamboat Company*, 16 C. B. 29.

A judge will refuse to sign a bill of exceptions where he dissents from the view taken by the parties of the sense in which he used the words addressed to the jury. In such case the remedy is to move for a new trial, on the ground that the verdict was against evidence. After a bill of exceptions tendered, the court will not entertain a motion for a new trial on a point of law. *Att.-Gen. v. Sillim*, 9 L. T. 261.

##### 5. ABANDONING OR STAYING.

A party bringing a writ of error, and removing the record before he has obtained a judge's seal to a bill of exceptions tendered by him at the trial, on the ground of the rejection of evidence offered by him, waives the bill of exceptions. *Dillon v. Doe d. Parker*, 1 Bing. 17; 11 Price, 110.

A defendant sent to the plaintiff a copy of a bill of exceptions, in order to his concurring in the statement of facts, and at the same time sued out a writ of error:—Held, that the plaintiff had no right to retain the bill of exceptions, on the ground that the defendant had waived it by suing out a writ of error. *Willans v. Taylor*, 6 Bing. 512; 4 M. & P. 257.

A defendant tendered a bill of exceptions, and afterwards brought error. The bill of exceptions not having been ready when the writ of error was returned, the court, in consideration of the circumstances, allowed it to be tacked to the record afterwards. *Taylor v. Willans*, 2 B. & Ad. 846.

A party who moves for a new trial, on the ground that the verdict was against evidence, is not bound to abandon a bill of exceptions tendered by him at the trial to the ruling of the judge on a matter of law. *Salisbury (Marquis) v. Gladstone*, 5 Jur., N. S. 369. See *Doe d. Roberts v. Roberts*, 2 Chit. 272; *Allen v. Hayward*, 7 Q. B. 960.

If a party tenders a bill of exceptions, he cannot move for a new trial on a point which might have been included among the grounds of exception, unless the bill of exceptions is first abandoned. *Adams v. Andrews*, 15 Q. B. 1001; 20 L. J., Q. B. 39; 15 Jur. 149.

Where a defendant residing out of the jurisdiction, against whom a judgment had been obtained, under which nothing had been realized, tendered a bill of exceptions, the court, at the instance of the plaintiff, stayed the proceedings until security for costs of the bill of exceptions and in error had been given by the defendant, without interfering with the plaintiff's liberty to proceed on his judgment. *Hill v. Fox*, 3 H. & N. 547; 27 L. J., Ex. 416.

Such order does not stay the sealing of the bill of exceptions. *Id.*

##### 6. AMENDING.

A bill of exceptions may be amended after it is sealed. *Richardson v. Mellish*, 3 Bing. 334.

And the court in banc has no jurisdiction to inquire into the propriety of an amendment made by the judge at nisi prius in a bill of exceptions after he has sealed it. *Mersey Docks and Harbour Board v. Penhallow*, 7 H. & N. 341; 30 L. J., Ex. 272; 8 Jur., N. S. 486; 5 L. T. 112.

Where a bill of exceptions stated the direction of the judge to the jury, and thereupon the jury gave their verdict for the plaintiff, whereupon the counsel for the defendant did except:—Held, that an amendment might be made after the judge's seal had been affixed, by stating the exceptions to be made before the verdict was delivered. *Culley v. Doe d. Taylerson*, 3 P. & D. 539; 11 A. & E. 1008.

## BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES.

### I. FORM AND OPERATION OF.

1. *Generally*, 1558.
2. *Payable at all Events*, 1560.
3. *Distinction between Negotiable Instruments and Agreements*, 1564.
4. *Whether Bills or Notes*, 1567.
5. *Qualifying Stipulations*, 1569.
6. *Parties to whom Payable*, 1571.
7. *Fictitious Payees*, 1572.
8. *Interpretation of*, 1573.
9. *Drawn, Indorsed or Accepted on Special Account*, 1574.
10. *Sale of Bills*, 1575.
11. *As Donatio Mortis Causd.—See WILL.*
12. *Cheques.—See post, VI.*

### II. STAMPING.

1. *Inland Bills and Notes*, 1576.
2. *Foreign Bills*, 1582.
3. *Cancellation of Stamps*, 1584.
4. *Cheques.—See post, VI.*

### III. PARTIES TO.

1. *Agents*, 1584.
2. *Corporations*, 1589.
3. *Colonial Brokers*, 1590.
4. *Churchwardens*, 1590.
5. *Persons under the Influence of Drink, and Lunatics*, 1590.
6. *Executors and Administrators*, 1591.
7. *Husband and Wife*, 1592.
8. *Infants*, 1595.
9. *Liquidators*, 1596.
10. *Joint Stock Companies*, 1596.
11. *Joint or Several*, 1603.
12. *Partners*, 1605.
13. *Aliens.—See INTERNATIONAL LAW.*
14. *Clergymen.—See ECCLESIASTICAL LAW.*

### IV. FOREIGN BILLS AND NOTES, 1611.

### V. ALTERATION OF.

1. *When considered as Issued*, 1613.
2. *When Material*, 1613.

3. *Other Matters relating to*, 1619.
4. *Cheques.—See post, VI.*

### VI. CHEQUES.

1. *Generally*, 1622.
2. *Crossing*, 1625.
3. *Payment*, 1626.
4. *Cashing over the Counter*, 1630.
5. *Date of*, 1631.
6. *Presentment for Payment*, 1633.
7. *Honouring*, 1637.
8. *Lost or Destroyed*, 1640.
9. *Gift of*, 1641.
10. *When Forged*, 1642.
11. *Actions on*, 1645.

### VII. TRANSFER AND INDORSEMENT.

1. *By Indorsement.*
  - a. *Generally*, 1646.
  - b. *In Blank*, 1652.
  - c. *Conditional or Restrictive*, 1653.
  - d. *Striking out Indorsement*, 1656.
  - e. *Proof of Indorsement*, 1657.
2. *By Delivery*, 1658.
3. *Discounting or Depositing*, 1661.
4. *To what extent Negotiable*, 1662.
5. *When Issued in Blank*, 1664.
6. *Accommodation Bills*, 1664.
7. *Retiring from Circulation*, 1665.
8. *After Maturity*, 1665.
9. *With Notice of Pendency of Action*, 1668.
10. *After Death or Bankruptcy of Parties*, 1668.
11. *Of Stolen, Lost, or Fraudulently obtained Bills*, 1669.

### VIII. ACCEPTANCE.

1. *Presentment*, 1673.
2. *Protest and Notice of Refusal*, 1676.
3. *What is an Acceptance*, 1677.
4. *Conditional or Qualified*, 1685.
5. *Payment by Bankers*, 1686.
6. *Contracts and Undertakings to Accept*, 1687.
7. *Proof of*, 1688.
8. *Revocation and Cancellation*, 1690.

### IX. PRESENTMENT FOR PAYMENT.

1. *Necessity for*, 1693.
2. *When*, 1695.
3. *To whom and where.*
  - a. *Bills of Exchange*, 1697.
  - b. *Promissory Notes*, 1699.
4. *Cheques.—See ante, VI.*

### X. NOTICE OF DISHONOUR.

1. *Necessity for.*
  - a. *No Effects*, 1701.
  - b. *In other Cases*, 1705.
2. *By and to whom*, 1708.
3. *Sufficiency of Notice*, 1710.
4. *Where given*, 1714.
5. *Transmission by Post*, 1716.
6. *Within what Time*, 1717.
7. *Waiver of*, 1721.
8. *How Proved*, 1724.
9. *Consequence of Neglect*, 1726.
10. *Expenses Recoverable on*, 1727.
11. *Cheques.—See ante, VI.*

## XI. PROTEST FOR NON-PAYMENT, 1728.

## XII. LIABILITY OF PARTIES.

1. *Acceptor or Maker*, 1730.
2. *Drawer or Indorser*, 1742.
3. *Discharge of*.—*See post*, XIII.

## XIII. DEFENCES IN ACTIONS ON.

1. *No Original Liability*.
  - a. Sufficiency of Consideration, 1747.
  - b. Illegality of Consideration, 1760.
2. *Original Liability determined*.
  - a. Discharge by Payment or Release, 1763.
  - b. Giving Time and Renewing.
    - i. Giving Time to Acceptor, 1769.
    - ii. Giving Time to Drawer or Prior Indorser, 1771.
    - iii. Renewal, 1773.
3. *Forgery*.
  - a. Generally, 1776.
  - b. Liability of Parties on.—*See XII*.
  - c. Transfer of Stolen or Fraudulently obtained Bills.—*See VII*.
4. *Equitable Defences*, 1778.
5. *In other Cases*.—*See preceding sub-heads*.

## XIV. ACTIONS ON.

1. *Parties*, 1780.
2. *At what Time Action can be Brought*, 1781.
3. *By Summary Proceedings*, 1783.
4. *When Lost or Destroyed*, 1786.
5. *Amount Recoverable*.
  - a. Interest, 1788.
  - b. Re-exchange, 1790.
  - c. Costs and Expenses, 1791.
  - d. When for Accommodation.—*See XII*.
6. *Staying Proceedings*, 1793.
7. *For Consideration under Money Counts*, 1794.
8. *Pleadings*, 1796.
9. *Evidence*.
  - a. Production of Instrument, 1800.
  - b. To vary Terms, 1801.
  - c. Declarations and Admissions, 1804.
  - d. Proof of Consideration and Fraud, 1806.
  - e. Proof of Payment, 1811.

## XV. APPROPRIATION OF SECURITIES, 1813.

XVI. PROOF IN BANKRUPTCY—*See BANKRUPTCY*.XVII. DUTY OF BANKERS—*See BANKERS AND BANKING COMPANIES*.XVIII. FORGING OR STEALING—*See CRIMINAL LAW*.XIX. OTHER NEGOTIABLE INSTRUMENTS—*See NEGOTIABLE INSTRUMENTS*.

## I. FORM AND OPERATION OF.

## 1. GENERALLY.

**Particular Words not Necessary.**—No particular words are necessary to make an instrument a note. It is sufficient if a promise can be fairly implied. *Brooks v. Elkins*, 2 Gale, 200; 2 M. & W. 74; S. P., Bull. N. P. 272.

The following instrument:—"Port of London Sea, Fire and Life Assurance Company. To the cashier,—Fifty-three days after date, credit P. & Co., or order, with the sum of 500l., claimed, per Cleopatra, in cash, on account of this corporation. (Signed) A. C. (the drawer), Managing Director," the words "credit in cash" meaning pay, is a bill or note. *Eddison v. Collingridge*, 9 C. B. 570; 19 L. J., C. P. 268; 14 Jur. 869; S. P., *Allen v. Sea, Fire and Life Assurance Company*, 9 C. B. 574; 14 Jur. 870, n.

**For Value Received.**—It is not essential that a bill or note should import to be for value received. *White v. Ledwich*, 4 Dougl. 247; *Creswell v. Crisp*, 2 D. P. C. 653; 2 C., M. & R. 634; *Hatch v. Trayer*, 3 P. & D. 408; 11 A. & E. 702.

"Pay to B. or order, 315l. value received," subscribed by the drawer, may be alleged to be a bill for value received by the drawer. *Grant v. Da Costa*, 3 M. & S. 351.

A bill drawn by J. S. to his own order, value received, means value received by the drawee. *Higmore v. Primrose*, 5 M. & S. 65; 2 Chit. 333.

**Payable to Maker's own Order.**—A note made by several persons payable to "our and each of our order," and indorsed by one, is good, within 3 & 4 Ann. c. 9. *Absalom v. Marks*, 11 Q. B. 19; 17 L. J., Q. B. 7; 11 Jur. 1016.

A note payable to the maker's own order is not a note within 3 & 4 Ann. c. 9. *Brown v. De Winton*, *Gay v. Lander*, 6 C. B. 336; 6 D. & L. 62; 17 L. J., C. P. 281; 12 Jur. 678; S. P., *Flight v. Maclean*, 16 M. & W. 51; 16 L. J., Ex. 23; *Wood v. Mytton*, 10 Q. B. 805; 11 Jur., N. S. 967; *Hooper v. Williams*, 2 Ex. 13; 17 L. J., Ex. 315; 12 Jur. 270.

But such maker may, by indorsing it, give a right of action to the indorsee; and where the indorsement is in blank, and the note is circulated, it is in effect a note payable to bearer. *Id.*

The indorsement in such a case is not a new drawing, so as to render a fresh stamp necessary. *Id.*

**Drawn and Accepted by same Person.**—Although bills of exchange, drawn and accepted by the same parties, may be in strictness promissory notes rather than bills, yet where the intention to give and receive such documents as instruments capable of being negotiated in the market as bills of exchange is clear, both the holders and the parties may treat them accordingly. *Willans v. Ayers*, 3 App. Cas. 133; 47 L. J., P. C. 1; 37 L. T. 732.

**Without Drawer's Signature.**—An instrument in the following form: "Three months after date pay to my order 11l. 10s. for value received," directed to C., accepted by him, payable at a bank, and transmitted to B., with the



intent that he should place his name to it as drawer, is not a bill, or note, or a security for the payment of money, or a writing the value of which exceeds 10*l.* within 11 Geo. 4 & 1 Will. 4, c. 68, s. 1 (the Carriers Act). *Stoeniger v. South-Eastern Railway Company*, 3 El. & Bl. 549; 2 C. L. R. 1595; 23 L. J., Q. B. 293; 18 Jur. 605.

No an instrument in the following form, "Four months after date pay to my order 300*l.* for value received," addressed to and formally accepted by the party, but having no date and no drawer's name, is neither a bill nor a note. *McCall v. Taylor*, 19 C. B., N. S. 301; 34 L. J., C. P. 365; 11 Jur., N. S. 529; 12 L. T. 461; 13 W. R. 840.

**Bona fide Holder may Fill up.**—Where an instrument in the form of a bill of exchange is accepted, with a blank space for the drawer's name, a bona fide holder, or his personal representative, is entitled to fill up the blank as drawer, and thus make the instrument a complete bill of exchange. *Dutch v. O'Leary*, 5 L. R., Ir. 92.

— **Even after Death of Acceptor.**—A bill of exchange accepted for valuable consideration, with the drawer's name left blank, may be completed by the drawer's name being added after the death of the acceptor. *Carter v. White*, 20 Ch. D. 225; 51 L. J., Ch. 465; 46 L. T. 236; 30 W. R. 466.

**Debenture Bonds.**—A company issued instruments called "debenture bonds," executed under seal and bearing a stamp sufficient for a bond, by which the company bound itself to pay the amount to the bearer simply. One of the objects of the company, stated in their memorandum of association, was, "the borrowing of money and the issue of transferable or other bonds or mortgage debentures;" and the directors had specific powers to issue bonds, obligations or mortgage debentures upon such terms and conditions as they might think fit, and (as a distinct power) to make, draw, accept, or indorse any promissory note, bill of exchange, or other negotiable instrument. The instruments, which were irregularly issued, had found their way into the hands of purchasers for value without notice of any irregularity:—Held, that the purchasers were entitled to prove on them, on the winding up of the company, in their own names. *Imperial Land Company of Marseilles, In re, Colborne, Ex parte*, 11 L. R., Eq. 478; 40 L. J., Ch. 93; 23 L. T. 515; 19 W. R. 223.

Held, that the fact that in one case the purchase was made after the commencement of the voluntary winding-up, but without notice of it, did not affect the purchasers' position. *Ib.*

Held, also, that such instruments were promissory notes which passed to the bearer free from any equities which might have attached to them as between the company and the original holders. *Ib.*

A company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), issued a debenture under the seal of the company, and countersigned by two of the directors and the secretary. By it the company promised, subject to conditions indorsed, to pay to the bearer the sum of 100*l.* upon the 1st of May, 1872, or upon any earlier day upon which it should be entitled to

be paid off or redeemed according to the conditions. By the conditions the company contracted not only to pay the money, but also to cause a portion of the debentures to be drawn in a stipulated manner. Of late years a custom of trade had prevailed to treat such bonds as negotiable instruments:—Held, that the debenture was not a negotiable instrument, and that therefore, where it had been stolen from the owner, no action could be maintained upon it against the company by a person who claimed through the thief. *Crouch v. Crédit Foncier Company*, 8 L. R., Q. B. 374; 42 L. J., Q. B. 183; 29 L. T. 259; 21 W. R. 946.

**Deposit Notes.**—A deposit note for money, like a deposit note for goods, passes by delivery, and requires no assignment. *Woodham v. Anglo-Australian and Universal Family Life Assurance Company*, 3 Giff. 238; 8 Jur., N. S. 148; 5 L. T. 629.

**Seaman's Advance Note.**—A seaman's advance note is not a promissory note nor an order for payment of money. *Reg. v. Howie*, 11 Cox, C. C. 320.

**Mortgage of.**—Bills of exchange are not proper subjects of mortgage, and are *prima facie* presumed to be given in part payment as they become due. *Hills v. Parker*, 14 L. T. 107—H. L.

## 2. PAYABLE AT ALL EVENTS.

**On Contingency—Generally.**—A bill or note payable on a contingency is absolutely void. *Palmer v. Pratt*, 9 Moore, 358; 2 Bing. 185; *S. P., Carlos v. Fancourt*, 5 T. R. 432.

Even though accepted. *Ralli v. Sarell*, D. & R., N. P. C. 33.

An instrument, by which money is payable on a contingency, cannot be given in evidence as a note, on the counts for money lent, or on the account stated, though sued on between the original parties, and expressing value to have been received. *Morgan v. Jones*, 4 Tyr. 21; 1 C. & J. 162.

The contingency, in order to vitiate a bill or note as such, must be apparent on the face of the instrument. *Richards v. Richards*, 2 B. & Ad. 447.

The happening of the contingency on which the payment of the instrument is dependent will not cure the defect. *Hill v. Halford*, 2 B. & P. 413.

So, a note, promising to pay "on the sale or produce, immediately when sold, of the White Hart, St. Albans, Herts, and the goods, value received," cannot be declared upon as a note, though the White Hart and the goods were sold. *Ib.*

A note to pay when the circumstances of the drawer will admit, without detriment to himself or family, creates no debt. *Tootell, Ex parte*, 4 Ves. 372.

The following instrument is payable on a contingency, and therefore not a note:—"Twelve months after date I promise to pay A. and B. 500*l.*, to be held by them as collateral security for any moneys now owing to them by C., which they may be unable to recover on realising the securities they now hold, and others which may be placed in their hands by him." *Robins v.*

May, 3 P. & D. 147; 11 A. & E. 213; 3 Jur. 1188.

An order to pay "14l. 3s. out of the fifth payment, when it should be due, and should be allowed by J. S.," is no bill. *Haydock v. Lynch*, 2 Ld. Raym. 1563.

An instrument whereby the defendant promised to pay to the plaintiff, or order, a sum certain by instalments; but it was declared, "that it was thereby considered and fully intended by the receiver, as well as the giver of that note of hand, that all installed payments thereupon whatsoever, from and immediately after the decease of the plaintiff, should cease and become null and void to all intents and purposes against the executors," is not a note, being payable only on a contingency. *Worley v. Harrison*, 5 N. & M. 173; 3 A. & E. 669; 1 H. & W. 426.

An order for a sum "payable ninety days after sight, or when realized," is not a bill, as the latter alternative makes the sum payable on a contingency. *Alexander v. Thomas*, 16 Q. B. 333; 20 L. J., Q. B. 207; 15 Jur. 173.

— **On Receipt of Prize-money.**—But a note given to pay 8l. on receipt of prize-money, is a negotiable note. *Evans v. Underwood*, 1 Wils. 262.

— **To Infant on Coming of Age.**—A note given to an infant payable when he comes of age is good, if it specifies the particular day. *Goss v. Nelson*, 1 Burr. 226; 1 Ld. Ken. 498.

— **On Condition.**—An order or a promise to pay money, "provided the terms mentioned in certain letters written by the drawer were complied with," is not a bill or note. *Kingston v. Long*, Bayl. Bills, 13; 4 Dougl. 9.

A note in the name of two, but signed by one only, promising to pay "on the death of G. H., provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay," is not negotiable. *Roberts v. Peake*, 1 Burr. 323. See *Leeds v. Lancashire*, 2 Camp. 205.

"I promise to pay to D. or bearer, on demand, 16l. at sight, by giving up clothes and papers," was sued on as a note.—Held, that if the jury thought that the clothes and papers had been previously given up by the payee to the maker, it was a good note, as the words in that case would only import the value received. *Dixon v. Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320; 4 Tyr. 1013.

— **"As per Memorandum of Agreement."**—But an instrument as follows:—"I promise to pay to Mr. S., or his order, at three months after date, 100l. as per memorandum of agreement," is a note. *Jury v. Barker*, El. Bl. & El. 459; 27 L. J., Q. B. 255; 4 Jur., N. S. 587.

— **As to Date of Payment.**—A note to pay to A., or order, six weeks after the death of the maker's father, is a negotiable note, for there is no contingency whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable at so many days after sight. *Coleman v. Cooke*, 2 Str. 1202; *S. C. (in error)*, Willes, 393.

But a note to pay money within so many days after the maker should marry is not nego-

table. *Beardsley v. Baldwin*, 2 Stra. 1151; 7 Mod. 417.

**Payable out of a Particular Fund.**—The following instrument, "Douglas, Isle of Man, 13th July, 1865. On the first day of August next, please to pay Messrs. G., or order, 600l. on account of moneys advanced by me for the Isle of Man Slate and Flag Company. (Signed) J. J. To Messrs. W. and H., official liquidators of the company," is a bill of exchange, as the amount mentioned in it is not directed to be paid out of any particular fund. *Griffin v. Weatherby*, 3 L. R., Q. B. 753; 37 L. J., Q. B. 280; 18 L. T. 881; 17 W. R. 8; 9 B. & S. 726.

A bill or note, drawn on a particular fund, and not payable generally, is not valid. *Dawkes v. Deloraine (Earl)*, 2 W. Bl. 782; 3 Wils. 207.

An instrument in this form, "Out of my half-pay, which will become due the 1st January, pay to Stevens 15l.," and addressed to a navy agent, is not a bill. *Stevens v. Hill*, 5 Esp. 247.

A. & Co. being indebted to S., gave him an unstamped letter or order directed to B. & Co., requiring them to pay him 200l. out of moneys which would become payable from B. & Co. to them on the completion of a certain contract. A. & Co. became insolvent and the trustee under their liquidation disputed the validity of the letter:—Held, that the order operated as a bill of exchange, and being unstamped, was not receivable in evidence. *Shellard, Ex parte, Adams and Kirby, In re*, 17 L. R., Eq. 109; 43 L. J., Bk. 3; 29 L. T. 621; 22 W. R. 152.

An instrument by which A. promises to pay to the bearer 50l., "being the portion of a value, as under, deposited in security for the payment thereof," may be declared upon as a note. *Hausoul-lie v. Hartinck*, 7 T. R. 733. And see *Collis v. Emmett*, 1 H. Bl. 313.

An order or promise to pay money "in good East India bonds," or "in cash or Bank of England notes," is in neither case a bill or note. *Anon.*, Bull. N. P. 272; *S. P., Ineson, Ex parte*, 2 Rose, 225; *Re v. Wilcox*, Bayl. Bills, 8; *Davidson, Ex parte*, Buck, 31.

M., by deed, assigned to the plaintiff a ninth part of his share in the residue of the estate of H., deceased. By an order of the 29th of July, 1842, in a suit in Chancery, of *Powell v. Norwood*, the Vice-Chancellor ordered the defendant in that suit to retain 250l., being part of the produce of M.'s share of the residuary estate of H., to be paid to such person as the defendant and M. should jointly direct. It was afterwards agreed between the parties that 50l., to be considered as part of the 250l., should be paid by the defendant to the solicitors for M. and the plaintiff. An action having been brought to recover this 50l., he tendered in evidence the following document:—To the executors of H., deceased: *Powell v. Norwood*. Gentlemen,—We do hereby authorize and require you to pay to Mr. Powell, or his order, 250l., being the amount directed by the order of the 29th of July last to be paid to our order. We are your very obedient servants, J. M. Dec. 16th, 1842." This document was signed by J. M. only, and was unstamped:—Held, that it was not a bill, and that it was admissible without a stamp. *Russell v. Powell*, 14 M. & W. 418; 14 L. J., Ex. 269.

**Definite Sum.**—An instrument, by which a party promises to pay 65l., "and also all other

sums which may be due." is too indefinite to be a note. *Smith v. Nightingale*, 2 Stark. 375.

A note payable to the representatives of S. three months after his decease, "first deducting thereout any interest or money which S. might owe the maker on any account," is a note for the payment of a definite sum at all events. *Barlow v. Broadhurst*, 4 Moore, 471.

A. having given his daughter, on her marriage, the stock of a public-house, amounting in value to 1,200*l.*, she and her husband signed the following instrument:—"On demand, we promise to pay to A. or his order for value received in stock, this being intended to stand against me, M. (the daughter), as a set-off for that sum left me in my father's will above my sister Ann's share:—"Held, that this was not a note. *Clarke v. Percival*, 2 B. & Ad. 661.

A promissory note made on the 25th April, 1872, to pay 170*l.*, with interest at 5 per cent., as follows: The first payment, to wit, 40*l.* or more, to be made on the 1st February, 1873, and 5*l.* on the first day of each month following, until the note and interest should be fully satisfied; and upon default in payment of any of the instalments, the full amount then remaining due is to be forthwith payable,—is a valid note. *Cooke v. Horn*, 29 L. T. 369.

The following instrument is an agreement, and not a note:—"I agree to pay the plaintiff, or order, 695*l.*, at four instalments, viz., the first on &c., being 200*l.*; the second on &c., being 150*l.*; the third on &c., being 150*l.*; the fourth on &c., being 100*l.*: the remainder 95*l.* to go as a set-off for an order of R. to G., and the remainder of his debt from D. to him." *Davies v. Wilkinson*, 2 P. & D. 256; 10 A. & E. 98; 3 Jur. 405.

So a paper in the following form:—"I owe Mrs. E. 6*l.*, which is to be paid by instalments, for rent. Signed, R. J. M.," is not a note, as no time is stipulated for the payment of the instalments. *Moffat v. Edwards*, Car. & M. 16.

A paper consisting of a promise to "pay A., or order, 13*l.* for value received, together with interest at 5*l.* per cent. per annum, and all fines according to rule," is not a note, on account of the introduction of the last words. *Airey v. Fearnsides*, 4 M. & W. 168; 2 Jur. 596.

"On demand, I promise to pay Mr. S. 50*l.*, in consideration of his foregoing and forbearing an action for damages, ascertained by consent to amount to that sum, by reason of the injuries sustained by his wife in respect of my non-repair of a footway," is a note. *Shelton v. James*, 1 C. & K. 136; 5 Q. B. 199; D. & M. 331; 13 L. J., Q. B. 90; 7 Jur. 1130.

An instrument in the following terms: "I undertake to pay to R. L. 6*l.* 4*s.* for a suit of, ordered by D. P.," is not a note, but good as a guarantee, as the consideration can be collected by necessary inference from the instrument itself. *Jarvis v. Wilkins*, 7 M. & W. 410; 5 Jur. 9.

**Certainty of Payee.**—A bill or note payable to the order of a person is payable to himself. *Smith v. McClure*, 5 East, 476; 2 Smith, 43.

And a note payable to A. without the words, or bearer, or order, is valid. *Smith v. Kendall*, 6 T. R. 123; 1 Esp. 231.

To constitute a bill, the payee must be a person capable of being ascertained at the time the instrument is drawn. *Yates v. Nash*, 8 C. B., N. S. 581; 29 L. J., C. P. 307; 6 Jur., N. S. 1343; 2 L. T. 430; 8 W. R. 764.

Therefore a bill payable "to the order of the treasurer for the time being" of a benevolent institution, is null and void. *Id.*

A document as follows: "On demand, we jointly and severally promise to pay to Messrs. W. P. & M., or to their order, or the major part of them, 100*l.*," is a note upon which the three payees may maintain an action. *Watson v. Evans*, 1 H. & C. 662; 32 L. J., Ex. 137.

— **Trustees.**—"On demand, I promise to pay to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being, 100*l.*," is a good note, for there is no uncertainty in the payees, as the trustees alone are to be considered as payees, and their treasurer as their agent merely to receive payment. *Holmes v. Jacques*, 1 L. R., Q. B. 376; 35 L. J., Q. B. 130; 12 Jur., N. S. 486; 14 L. T. 252.

— **"A. or B. and C."**—A note whereby the maker promised to pay to A. or to B. and C. a sum therein specified, is not a note. An action cannot be maintained upon such an instrument, even by the payee against the maker, although it is stated on the face of the note to be given for value received. *Blanchenhagen v. Blundell*, 2 B. & A. 417. And see *Morgan v. Jones*, 1 Tyr. 21; 1 C. & J. 162.

"Nine months after date, I promise to pay to the secretary for the time being of the Indian Laudable and Mutual Insurance Society, or order, company's rupees twenty thousand." In an action upon this instrument, as upon a note, after the nine months, by the person who was secretary then and also at the time of making the instrument:—Held, that the instrument was not a note, the payee being uncertain at the time of making it. *Cowie v. Stirling*, 6 El. & Bl. 333; 25 L. J., Q. B. 335; 2 Jur., N. S. 663—Ex. Ch.; S. C. nom. *Storm v. Stirling*, in Q. B., 3 El. & Bl. 832; 23 L. J., Q. B. 298; 17 Jur. 788, affirmed.

**By Instalments.**—A note, payable by instalments, is assignable within 3 & 4 Ann. c. 9. *Oridge v. Sherbone*, 11 M. & W. 374; 12 L. J., Ex. 313; 7 Jur. 402.

And the maker is entitled to three days of grace, on the falling due of each instalment. *Id.*

But if such a note is subject to a condition, that, on default in payment of the first instalment, the whole shall become payable, and default is made, an indorser is liable for the whole amount. *Carlton v. Keenaly*, 12 M. & W. 139; 1 D. & L. 331; 13 L. J., Ex. 64.

A non-transferable note, payable in two instalments, or, on default in the former, at once, is within 3 & 4 Ann. c. 9, s. 1, and the maker has three days' grace. *Miller v. Biddle*, 11 Jur., N. S. 980; 13 L. T. 334; 14 W. R. 110.

In an action on a bill payable by instalments, it appeared that the action was commenced on the last day of grace, but as there was no plea to that effect, a nonsuit was refused. *Gaskin v. Davis*, 2 F. & F. 294. See *Padwick v. Turner*, 11 Q. B. 124.

### 3. DISTINCTION BETWEEN NEGOTIABLE INSTRUMENTS AND AGREEMENTS.

**What Constitutes a Negotiable Instrument.**—An instrument in the following terms: "Received of Mr. B. 100*l.*, which I promise to pay on

demand, with lawful interest. *J. D.* is a note. *Green v. Davies*, 6 D. & R. 306; 4 B. & C. 235; 1 C. & P. 451; *S. P.*, *Ashby v. Ashby*, 3 M. & P. 186.

So this instrument: "W. W. lent to J. R. 19l. 19s. 11d., to receive five per cent. for the same 19l. 19s. 11d.; to pay on demand to W. W., giving J. R. six months' notice for the same," is a note and not an agreement. *Walker v. Roberts*, Car. & M. 590.

"Memorandum, Aug. 25, 1837. I, Benj. Payne, had 5l. 5s. for one month, of my mother, from this date, to be paid to her by me, Benj. Payne," is a note. *Shrivel v. Payne*, 8 D. P. C. 441; 4 Jur. 485.

An instrument in this form: "John Mason, 14th Feb., 1836, borrowed of Mary Ann Mason, his sister, 14l., in cash, as per loan, in promise of payment, of which I am truly thankful for, and shall never be forgotten by me, John Mason, your affectionate brother. 14l.," is a note. *Ellis v. Mason*, 7 D. P. C. 598; 2 W., W. & H. 70; 3 Jur. 406.

Semble, that an instrument in the following terms is a note:—"I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80l. 7s., which sum I will pay in two years." *Wheatley v. Williams*, 1 M. & W. 533; 2 Gale, 140.

So a paper, "I O U eighty-five pounds, to be paid May the 5th," is a note. *Waithman v. Elsee*, 1 C. & K. 35.

T. made a note in the following terms: "On demand I promise to pay H., or order, 500l., for value received, with interest; and I have lodged with H. the counterpart leases signed by D., for ground let by me to them as a collateral security for the 500l. and interest."—Held, that this might be sued on as a note, and read in evidence, though stamped as a note only. *Fancourt v. Thorne*, 9 Q. B. 312; 15 L. J., Q. B. 344; 10 Jur. 639.

**What an Agreement.]**—An instrument, acknowledging the receipt of drafts for the payment of money, and promising to repay the money, is an agreement and not a note. *Williamson v. Bennett*, 2 Camp. 417; *S. P.*, *Scholey v. Walsby*, Peake, 24.

"I have received 20l., which I borrowed of you, and I have to be accountable for the said sum with interest," is an agreement, and not a note. *Horne v. Redfearn*, 4 Bing. N. C. 433; 6 Scott, 260; 2 Jur. 376.

An instrument whereby B. acknowledges a loan of money, and promises re-payment, and engages to pay an unliquidated demand out of the interest, and to pay the principal and the remainder of the interest to the lender, his executors, administrators and assigns, is not a note, and it is properly stamped with an agreement stamp. *Bolton v. Dugdale*, 1 N. & M. 412; 4 B. & Ad. 619.

A bill, expressing the terms of an agreement between a landlord and an in-coming tenant, is not admissible in evidence without an agreement stamp. *Nicholson v. Smith*, 3 Stark. 128.

An agreement, between the plaintiff and defendant, for the sale of a lease, concluding with the following clause, signed by both parties:—"The (plaintiff) doth, at the same time and place, lend to the (defendant) 84l. in cash, to be repaid by instalments," is not a note. *Mitchell*,

*v. Westover*, 14 Jur. 816; *S. P.*, *Follett v. Moore*, 4 Ex. 410.

An action was brought upon the following instrument as a note:—"Market Rasen, July 1st, 1836. Borrowed and received of the Lincoln and Lindsey Banking Company 100l., which we jointly and severally promise to pay to M. C. and W. W. (trustees of the banking company), or their order, on demand, with lawful interest for the same. Witness, T. S., sen., T. S., jun., T. D." The following indorsement was written on the back of the note at the time of making:—"The within note is given for securing floating advances from the Lincoln and Lindsey Banking Company to the within-named T. S., sen., with lawful interest for the same from the respective times when such advances have been or may be made, together with commission, stamps, postages, and all usual charges and disbursements, not exceeding in the whole, at any one time, 100l., within mentioned. Witness, T. S., sen., T. S., jun., T. D.:"—Held, that the instrument and indorsement required an agreement stamp. *Cholmley v. Darley*, 14 M. & W. 344; 14 L. J., Ex. 328.

#### **Acknowledgments or Memorandums merely.]**

—A document in the following form: "I have this day received a bill of exchange, which I hold as your attorney, to recover the value from the parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity reasonable and proper," is a mere acknowledgment of the duty which the party took upon himself to perform, and therefore admissible without a stamp. *Longdon v. Wilson*, 7 B. & C. 640; 2 M. & R. 10.

A paper stating that the party signing it has received certain bills in his hands, which he has "to get discounted, or return on demand," does not require an agreement stamp. *Mullett v. Hutchinson*, 1 M. & R. 522; 7 B. & C. 639; 3 C. & P. 92.

"Mem. Mr. S. has this day deposited with me 500l. on the sale of 10,300l., 3l. per cent. Spanish, to be returned on demand," is a memorandum of the deposit of money to be returned, and not a note. *Sibree v. Tripp*, 15 M. & W. 23; 15 L. J., Ex. 318.

A document in this form: "Borrowed, this day, of J. H., 100l. for one or two months, cheque 100l. On the Naval Bank. J. D.," is a mere acknowledgment, and does not require a stamp, either as an agreement or a note. *Thyne v. Dewdney*, 21 L. J., Q. B. 278.

The following document is admissible in evidence without either a note or an agreement stamp: "I, J. D., have this day borrowed of J. C. 300l. at 4l. per hundred, payable yearly." *Cory v. Davis*, 14 C. B., N. S. 370.

The following document, "Nottingham, August 3, 1844. Borrowed of Mr. J. W. 200l., to account for on behalf of the Alliance Club, at — months' notice, if required," is not a note. *White v. North*, 3 Ex. 689; 18 L. J., Ex. 316.

Nor is a similar instrument with the blank filled up with the word "two," a note. *Id.*

Nor is the following instrument a note:—"Drury v. Vaughan. In consideration of W. D. not taking any further proceedings in the actions, I undertake with W. D. that I will pay him 3l. 5s. every quarter of a year from this day, until the whole of the principal now due from J. and V. to Mr. Drury—26l. 1s., with lawful interest, be paid

and satisfied; the first of such quarterly payments to become due on the 30th of October next. It is understood that this undertaking is not to be a release or discharge of the note signed by Messrs. Vaughan to W. Drury, but as an additional security for the above-mentioned amount now due on such note, with the interest." *Drury v. Macaulay*, 16 M. & W. 146; 16 L. J., Ex. 31.

W. & Sons wrote to a person to whom they had supplied type as follows, viz.:—"Dear Sir,—We authorize you to pay on our account, to the order of G., 6,000*l.* at the following periods, deducting the amount from the quarterly accounts furnished to you and to E. & S., viz. 11th November, 1843, 1,000*l.* W. & Sons." Underneath which the person, to whom it was addressed, wrote thus, viz.:—"To W. S.,—Having received the foregoing authority from W. & Sons, I undertake to make you the payments above stated. A. S.:—"Held, that the first letter did not require to be stamped as a note or bill. *Hamilton v. Spottinwoode*, 4 Ex. 200; 18 L. J. Ex. 393.

**I O U.]**—An I O U is neither a note nor a receipt, and may be received in evidence to prove an acknowledgment of a debt, without any stamp. *Childers v. Boulnois*, D. & R. N. P. C. 8; *S. P., Fisher v. Leslie*, 1 Esp. 426.

An acknowledgment in this form: "Sept. 15, 1824, Mr. T. has left in my hands 200*l.* J. A.," does not require a stamp. *Tomkins v. Ashby*, 6 B. & C. 541; 9 D. & R. 543.

A memorandum, "I owe J. G. 200*l.*, value received. J. C.," does not require a stamp. *Gould v. Coombes*, 1 C. B. 543; 14 L. J., C. P. 175; 9 Jur. 494.

"1839, Nov. 1.—I O U 45*l.* 13*s.*, which I borrowed of Mrs. M.; and to pay her five per cent. till paid. R. T.," does not require a stamp, either as a note or as an agreement. *Melanotte v. Teasdale*, 13 M. & W. 216; 13 L. J., Ex. 358; *S. P., Taylor v. Steele*, 16 M. & W. 665; 16 L. J., Ex. 177; 11 Jur. 806; *Smith v. Smith*, 1 F. & F. 539.

**Warrant annexed to Debenture.]**—A debenture issued by a company under its common seal, in the following form:—"The Governor and Company of C. promise to pay to —, 500*l.*, value received; and, to pay to the holder of the warrants annexed, on presentment as they shall fall due, interest on the 500*l.* at 5*l.* per cent." The form of the warrants annexed was as follows:—"The Governor and Company of Copper Miners in England. Warrant for 12*l.* 10*s.*, for half a year's interest on debenture No. 5252, due 15th January, 1849. W. I., secretary." And as they became due they were cut off, and presented at the company's office for payment:—"Held, that the warrant was not a bill or a note, and did not require a stamp. *Enthoven v. Hoyle*, 13 C. B. 375; 21 L. J., C. P. 100; 16 Jur. 272—Ex. Ch.

**More Request to Pay.]**—A paper in these words: "Mr. L., please to let the bearer have 7*l.*, and place it to my account, and you will oblige your humble servant, R. S.," is not a bill. *Little v. Slackford*, M. & M. 171.

#### 4. WHETHER BILLS OR NOTES.

**Generally.]**—If it is ambiguous whether an instrument is a bill or a note, the person who receives it may treat it as against the maker as

either. *Edis v. Bury*, 6 B. & C. 433; 9 D. & R. 492; 2 C. & P. 559.

An instrument which is in the form of a note, but which is in addition addressed to a third party, who accepts it, is a note. *Id.*

And may be declared on as such. *Block v. Bell*, 1 M. & Rob. 149.

The directors of a bank at Calcutta, under the authority of the deed of settlement of the bank, signed and issued instruments in the following form:—"Union Bank Post Bill, Calcutta, July 1. 1847. Company's rupees, 10,000. At sixty days after sight of this our first bill of exchange, we promise to pay on account of the proprietors of the Union Bank of Calcutta to the order of C. L. & Co. the sum of Company's rupees 10,000, value received." These instruments were discounted in London, and dishonoured after acceptance at Calcutta:—"Held, in an action by an indorsee against a shareholder of the bank, that these instruments were bills of exchange. *Forbes v. Marshall*, 11 Ex. 166; 24 L. J., Ex. 305.

Seemingly that such instruments may be declared on, either as notes or bills. *Id.*

An instrument in the form of a bill, drawn upon a bank, by the manager of one of its branch banks, by order of the directors, may be declared upon as a note. *Miller v. Thompson*, 3 M. & G. 576; 4 Scott, N. R. 204; 1 D., N. S. 199.

An instrument purporting on the face of it to be a bill drawn by A., payable to the plaintiff or order, was accepted by B., and handed to the plaintiff in satisfaction of a claim for rent due to her from A. In the place where the direction to the drawee is usually found, the name and address of the payee were inserted. The whole instrument (except the drawer's name) was in the handwriting of B.:—"Held, that the payee was entitled to recover upon it, as a note. *Fielder v. Marshall*, 9 C. B., N. S. 606; 30 L. J., C. P. 158; 7 Jur., N. S. 777; 3 L. T. 858.

An instrument in the following form: "Two months after date, I promise to pay to T. R. L., or order, 99*l.* 15*s.* H. Oliver." Underneath was written, on the left hand of the instrument, "J. E. Oliver." Across it was written "Accepted: payable S. & Co., bankers, London, E. Oliver." "E. Oliver" was signed by J. E. Oliver,—may be sued upon as a bill drawn by H. Oliver upon, and accepted by J. E. Oliver. *Lloyd v. Oliver*, 18 Q. B. 471; 21 L. J., Q. B. 307; 16 Jur. 833.

Such an instrument would be as good as a bill as against the drawer, even before acceptance. *Id.*

An instrument in the form of a bill, except that the word "at" is substituted for "to" before the name of the drawee, is a bill, and not a note. *Shuttleworth v. Stephens*, 1 Camp. 407.

Particularly where "at" is written so as to be scarcely legible, for the purpose of deceit. *Allan v. Mawson*, 4 Camp. 115.

**Omission of Drawer's Name.]**—It is not absolutely essential that the drawee's name should be mentioned on the bill by the drawer, if there is a place of payment fixed, and the drawee accepts the bill in such form, by writing his name thereon, which will be an adoption of the bill on his part. *Gray v. Milner*, 3 Moore, 90; 8 Taunt. 739; 2 Stark. 336.

**Description of Instrument in Indictment for**

**Forgery.**—An instrument payable to the order of A., and directed “at Messrs. P. & Co., Bankers,” may be described in an indictment for forgery as a bill. *Reg. v. Smith*, 2 M. C. C. 295.

A writing directed to A. & Co., requiring them to pay the bearer on demand a sum of money therein specified, is not, on an indictment for forgery, a bill. *Reg. v. Curry*, 2 M. C. C. 218.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum, at a certain time, “without acceptance,” is a bill, and may be so described in an indictment for forgery. *Reg. v. Kinnear*, 2 M. & Rob. 117.

See further, **CRIMINAL LAW**.

**Extrinsic Evidence—Facts connected with making—Stamp.**—Action for 500*l.* upon a promissory note in the following form: “Witness, John Hutley, Rivenhall, October 2, 1860. Three months’ notice I promise to pay Mr. Jonathan Hutley interest 5*l.* per cent. per annum for 500*l.* value received. Dan Marshall, Charles Marshall. [5*s.* stamp.] 500*l.*” It was admitted that upon the 2nd October 500*l.* was advanced by Jonathan Hutley to Dan Marshall, and that Charles Marshall, the defendant, signed as surety for his brother:—Held, a good promissory note for 500*l.* *Hutley v. Marshall*, 46 L. T. 186—C. A.

—**Figures differing from Words.**—Where the words in the body of a note are ambiguous, the figures at the bottom of the note and the stamp may be looked at in construing them. *Id.*

#### 5. QUALIFYING STIPULATIONS.

**Indorsed on Note.**—A stipulation indorsed on a note by the payee, is not to be taken as part of that instrument, without evidence that it was written at the time the note was made. *Stone v. Metcalfe*, 4 Camp. 217; 1 Stark. 53.

A note promising to pay J. F. or order a sum certain, the amount of the purchase-money of a quantity of fir, belonging to H., with an indorsement thereon at the time of making the note, that it was given on condition that it should be void if any dispute should arise between H. and W. respecting the fir, is not a note within 3 & 4 Ann. c. 9. *Hartley v. Wilkinson*, 4 M. & S. 25; 1 Camp. 127.

In pursuance of an agreement made in consideration of the postponement of the trial of a cause, the defendant and his attorney gave a joint and several note, which the agreement stipulated should be held as a security for any damages to be recovered, and to be given up if the defendant obtained a verdict. Immediately after the note was signed, an indorsement, not signed by the parties, was made upon it, stating that the note was given upon the condition mentioned in the agreement:—Held, that the indorsement formed no part of the note, therefore there was no contingency in the terms of it, and that it was consequently admissible in evidence stamped as a note. *Brill v. Crick*, 1 Gale, 441; *S. C.*, *Brill v. Cock*, 1 M. & W. 232.

To an action by a payee against one of two makers of a note, he pleaded that he made the note jointly with E., for his accommodation, and as his surety only, to secure payment of a loan made by the plaintiff to E., and that at the time of the note being signed by the defendant and

E., a memorandum was by agreement between the plaintiff, E., and the defendant indorsed upon the note, and signed by E., in the following words: “Memorandum, this note is to be paid off within three years from date;” and that the plaintiff did not compel payment of the note within the period of three years, which elapsed before the action:—Held, that this plea afforded no defence. *Lawrence v. Walmaley*, 12 C. B., N. S. 812.

**Avoidance of Statute of Limitations by.**—A note was given more than six years before action, with a memorandum indorsed on the back, by the payee, to the effect that they undertook that no demand should be made for payment during the life of the maker. An action being brought, within six years after the death of the maker against his executor, he pleaded the Statute of Limitations:—Held, that the payee was entitled to recover, if not upon the note itself, at all events, on a count setting forth the effect of the arrangement. *Watkins v. Figg*, 11 W. R. 258.

**“Accepted on myself, payable everywhere,” written in Margin.**—The words “accepted on myself, payable everywhere,” written in the margin of a note payable at a specified time after sight by the maker at the time of making it, constitute no part of the original instrument, and need not be noticed in the declaration. *Splitgerber v. Kohn*, 1 Stark. 125.

**Making Instrument an Agreement.**—An instrument in the form of a joint and several note, signed by three, is indorsed with a memorandum made at the time of signature, which states that it is taken as a security for all the balances, to the amount of the sum within specified, which one of the three might happen to owe to the payee; that it shall be in force for six months, and that no money shall be liable to be called for sooner in any case. In an action against one of the sureties, the payee cannot declare on this instrument as a note, payable either on demand or at six months after date. Between these parties the instrument is an agreement, and must be stamped and declared upon as such. *Leeds v. Lancashire*, 2 Camp. 205.

**As to Deposit of Title-Deeds—Mortgage Stamp.**—An instrument, which in other respects was a note, and had been properly stamped as such before making, contained in the body of it a memorandum that the maker had deposited title-deeds with the payee, as a collateral security. After it was made, it was stamped with a mortgage stamp, on payment of the penalty:—Held, that this was an assignable note, and that it might be sued on by an indorsee, though the mortgage stamp was put on after the making, and though there was no assignment stamp. *Wise v. Charlton*, 4 A. & E. 786; 6 N. & M. 364; 2 H. & W. 49.

**Words qualifying Acceptance—Question of Fact.**—Upon a bill, dated 8th September, 1856, drawn on B. & Co., payable in London, at four months after date, an acceptance was written as follows: “Accepted. Payable at Messrs. Overend, Gurney & Co., London. No. 1756. Due 11 Decr. 1856. B. & Co.” The words before the signature were written in red ink, and in a hand differing

from the signature:—Held, that if it was a question of law, the bill must be taken to have been accepted according to its tenor; and that if it was a question of fact, there was evidence that the words "Due 11 Decr. 1856" were not intended to qualify the acceptance. *Funshawe v. Peet*, 2 H. & N. 1; 26 L. J., Ex. 314.

#### 6. PARTIES TO WHOM PAYABLE.

**Title of Holder to.**—The title of a creditor to a negotiable security given to him on account of a pre-existing debt, and received by him *bonâ fide* and without notice of any infirmity of title on the part of the debtor, is indefeasible, whether that security is payable at a future time or on demand. *Currie v. Misa*, 10 L. R., Ex. 153; 44 L. J., Ex. 94; 23 W. R. 450—Ex. Ch. Affirmed in Dom. Proc., 1 App. Cas. 544; 45 L. J., Q. B. 852; 35 L. T. 414; 24 W. R. 1049.

**Father and Son having same Name.**—Proof of a note payable to A. generally is *primâ facie* evidence of a promise to A. the father, and not A. the son, the names being the same; and A. the son, although styled in the declaration A. the younger, bringing the action, and being in the possession of the note, is entitled to recover upon it. *Sweeting v. Fowler*, 1 Stark. 106.

In an action on a note payable to J. H., and indorsed by J. H., to the plaintiff, it appeared that there were two persons of the same name, father and son, and there was no evidence to shew to which of them the note had been given, but it appeared that the indorsement was in the handwriting of the son:—Held, that although, *primâ facie*, the presumption would be that the father was meant, that presumption was rebutted by the son's indorsement. *Stebbing v. Spicer*, 8 C. B. 827; 19 L. J., C. P. 24.

**Executors.**—In an action on a note payable "to the executors of the late W. B.," the proof that they are the executors of W. B. is the production of the probate of his will, and the reading in evidence so much of it as shews that he appointed them his executors. *Hamilton v. Aston*, 1 C. & K. 679.

**Identity of Holder.**—A plaintiff suing upon a note, which purports to be payable to a person of a different name, may shew by evidence that he was the person intended. *Willis v. Barrett*, 2 Stark. 29.

A letter written by the drawer to the payee of a bill, expressing his apprehension that it would be dishonoured, coupled with the fact that the place to which the bill is directed is the usual residence of the drawer, when in England, is evidence from which a jury may infer the identity of the drawer and drawee. *Roach v. Ostler*, 1 M. & R. 120.

**Identity of Indorser—Foreign Bill—Forgery.**—Where a foreign bill was drawn by A. upon, and accepted by B., payable to the order of C., and a person representing himself to be C. indorsed the bill to D. for value, and the alleged indorsement turned out to be forged:—Held, that in an action by indorsee against acceptor, it was unnecessary to give positive proof of the identity of the indorser, as the person to whom the bill was really payable; *primâ facie* evidence being sufficient for that purpose. *Bulkeley v. Butler*, 3 D. & R. 625; 2 B. & C. 434.

#### 7. FICTITIOUS PAYEES.

**Bill Payable to—Void.**—A bill payable to a fictitious person or order is completely void. *Bennett v. Furnell*, 1 Camp. 130.

An indorsee of a bill payable to a fictitious payee cannot recover against the acceptor. *Id.*

Such a bill is not a bill payable to bearer. *Were v. Taylor*, 1 Camp. 131, cited.

**When Fact is known to all Parties concerned in drawing Bill.**—Where a bill was drawn by the defendant and others, on the defendant alone, in favour of a fictitious person (which was known to all the parties concerned in drawing the bill), and the defendant received the value of it from the second indorser:—Held, that a *bonâ fide* holder for a valuable consideration might recover the amount of it, in an action against the acceptor, for money paid, or money received. *Tatlock v. Harris*, 3 T. R. 174.

If a bill is drawn in favour of a fictitious payee, and that circumstance is known as well to the acceptor as the drawer, and the name of such payee is indorsed on the bill as indorsing it to the drawer, who indorses it to an innocent indorsee for a valuable consideration, the latter may recover on it against the acceptor, as on a bill payable to bearer. *Gibson v. Minet (in error)*, 1 H. Bl. 569; 3 T. R. 481; 2 Bro. P. C. 48. And see *Collis v. Emmett*, 1 H. Bl. 313.

A person discounting a bill payable to a fictitious payee, for the benefit of the drawers, and with knowledge of the transaction, cannot recover against the acceptor. *Hunter v. Jeffery*, Peake's Add. Cas. 146.

**Evidence to prove such Knowledge.**—A. drew a bill upon B., payable to a fictitious payee or order, and indorsed in the name of such payee, which B. accepted. In an action by an innocent indorsee, for a valuable consideration, against B. in order to draw an inference, either that B. at the time of his acceptance knew the name of the payee to be fictitious, or that B. had given an authority to A. to draw the bill, by having given a general authority to A. to draw bills on B. payable to fictitious persons, evidence is admissible of irregular and suspicious transactions and circumstances relating to other bills drawn by A. on B. payable to fictitious payees and accepted by B., though none of these transactions or circumstances have any efficient relation to the bill in question, and though none of them prove that B. accepted any of those other bills with a knowledge that the payees mentioned in them were fictitious. *Gibson v. Hunter (in error)*, 6 Bro. P. C. 255; 2 H. Bl. 288.

**Evidence to shew that Payee is Fictitious Person.**—In an action by indorsee against acceptor of a bill payable to A. or order, he may give in evidence, that the person who indorsed to the plaintiff was not the real payee, though of the same name, and though there was no addition to the name of the payee on the bill. *Mead v. Young*, 4 T. R. 28.

And so where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and, therefore, an indorsee may adduce evidence to show that the signatures of

the supposed drawer to the bill and to the first indorsement are in the same handwriting. *Cooper v. Meyer*, 10 B. & C. 469.

**Acceptor estopped from disputing Validity of Bill.**—A bill purporting to be drawn by a really existing firm, payable to their order, and to be indorsed by them, was negotiated by the acceptor, with that indorsement upon it. The drawing and indorsement were forgeries:—Held, that, if the bill was accepted and negotiated by the acceptor, with knowledge of the forgery, he was estopped to deny the indorsement, as well as the drawing. *Beeman v. Duck*, 11 M. & W. 251; 12 L. J., Ex. 198.

But, semble, where the name of the real party, as the drawer, is forged, a party who accepts in ignorance of the forgery is estopped to deny the drawing only, but not the indorsement, although in the same handwriting. *Ib.*

An acceptor *supra* protest of a bill for the honour of the drawer, is, like the drawer himself, estopped from denying that the bill is a valid bill, and consequently, it is not competent to set up as a defence to an action against him by an indorsee, that the payee is a fictitious person, and that he was ignorant of that fact at the time when he accepted the bill. *Phillips v. In Thurn*, 18 C. B., N. S. 694; 11 Jur., N. S. 489; 12 L. T. 457; 13 W. R. 750.

#### 8. INTERPRETATION OF.

Where a note stated that J. S. promised to pay to A., or order, a certain sum, and was signed J. S., or else J. G.:—Held, not a note of J. G. *Ferris v. Bond*, 4 B. & A. 679.

A note whereby a party promises "to pay or cause to be paid 130*l.*" is a note. *Lorell v. Hill*, 6 C. & P. 238.

An order to pay so many "pound," instead of "pounds," is a bill or note. *Res v. Post*, Bayl. Bills, 8.

A bill for twenty-five, seventeen shillings, and three pence, is a bill for twenty-five pounds, seventeen shillings, and three pence. *Phipps v. Tanner*, 5 C. & P. 488.

A bill drawn in Ireland for 25*l.* 18*s.* sterling, payable in England, meant English money. *Taylor v. Booth*, 1 C. & P. 286.

A foreign bill is accepted for the payment of 100*l.* sterling: the omission of the word "sterling" is not a material variance. *Glossop v. Jacob*, 1 Stark. 69; 4 Camp. 227.

A note in these words, "Borrowed of J. S. 10*l.*, which I promise not to pay," the word "not" may be rejected, as a man cannot be allowed to say, I am a cheat, and have defrauded. *Russel v. Lanstaffe*, Bayl. Bills, 6.

A note payable on demand, with interest, is a note payable immediately. *Norton v. Ellam*, 2 M. & W. 461; 1 Jur. 433.

A bill payable at sight is not to be considered as a bill payable on demand. *Anson v. Thomas*, Bayl. Bills, 79; *S. C.*, nom. *Janson v. Thomas*, 3 Dougl. 421. See *Dixon v. Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320; 4 Tyr. 1013.

An indorsee may recover against the acceptor of a bill dated on a Sunday, when there is no evidence that the bill was accepted on that day. *Begbie v. Levy*, 1 Tyr. 130; 1 C. & J. 180.

A bill must, in the absence of evidence to raise a presumption to the contrary, be taken to have been drawn on the day on which it bears

date. *Anderson v. Weston*, 8 Scott, 583; 4 Jur. 105.

In an action on a note, it was proved that the note was made and given to the holder in January, 1855, it bore date "1st January, 1854," but across it at the time it was delivered by the maker, "Due 4th March, 1855." In fact, the date of 1854 was a mistake for 1855:—Held, that the memorandum that the note was due on 4th March, 1855, was equivalent to a correction of the error in the date, and being made before the note was issued, operated as a correction. *Fitch v. Jones*, 5 El. & Bl. 238; 24 L. J., Q. B. 293; 1 Jur., N. S. 854.

#### 9. DRAWN, INDORSED, OR ACCEPTED ON SPECIAL ACCOUNT.

**Against Special Goods—Right of Drawer to have Proceeds of Sale applied to Retirement of Bill.**—By the custom of Liverpool cotton brokers (and semble also as a general proposition), a drawer of a bill drawn against certain specified goods deposited with the acceptor, is entitled, as against the latter, to have the proceeds of such goods applied, in the first instance in retiring the bill, before any part of such proceeds can be applied in discharge of what may be due from the drawer to the acceptor upon the general account between them. *Inman v. Clara*, Johns, 769; 5 Jur., N. S. 89; 32 L. T., O. S. 353; *S. P.*, *London and Westminster Bank*, *Ex parte*, 3 L. T. 484.

The drawer may transfer this right to a party discounting the bill, who may maintain a suit in equity to have the proceeds of the goods in the hands of the acceptor applied accordingly. *Ib.*

But a party discounting the bill would have no equity to maintain a suit for this purpose in the absence of such a transfer. *Ib.*

If goods are consigned by merchants in India to merchants in England, they are subject to the general lien which the merchants in England may have for any balance against the merchants in India, though the bills of lading were accompanied by bills of exchange in favour of a third firm of merchants. And a realization of the cargo by the consignees does not make them liable to pay the bills of exchange annexed to the bills of lading, unless by some act of their own they have made themselves liable. *Frith v. Forbes*, 31 L. J., Ch. 793; 7 L. T. 261; 10 W. R. 658. Affirmed on appeal, 8 Jur., N. S. 1115; 11 W. R. 4.—L. J.

T., carrying on business on his own account in America, and being also a partner in the firm of T. & Co. in England, drew bills on T. & Co., which he employed T. & B., another American firm, to sell for him, undertaking to provide T. & Co. with remittances to meet them at maturity. T. & B., in accordance with their usual course of dealing with T., indorsed the bills and sold them, giving to T. bills on their agent in England for the amount. T. being on the eve of insolvency, sent the bills so received from T. & B. to the English firm of T. & Co., with instructions to accept the bills drawn by himself, and to hold the remittance for the purpose of meeting the payment thereof on the receipt of the remittance. T. & Co. accepted the bills drawn by T., and, disregarding the instructions, handed the bills of T. & B. to L., in accordance with a previous promise made to him, in order to enable him to meet some liabilities incurred by him on behalf



of T. & Co. :—Held, that these bills were specifically appropriated by T. to meeting the bills drawn by him; that T. & Co. had received the remittances as agents of T., who had remitted them in a character distinct from the partnership in the firm of T. & Co.; consequently T. & Co. had no other authority to apply the remittances to any other purpose than that directed, and L., who had notice of the specific appropriation, was bound to account to T. & B. for the proceeds. *Thayer v. Lister*, 30 L. J., Ch. 427; 4 L. T. 50.

The indorsee of a bill has a lien upon property deposited with the drawer as security. *Perfect, Ex parte*, 1 Mont. 25.

— **Bankruptcy of Payee.**—M., in March, 1859, consigned oats to the correspondents of the plaintiffs at Melbourne for sale, the proceeds to be remitted to the plaintiffs, and against this consignment the plaintiffs accepted, in favour of M., a bill at four months for 600*l.*, it being agreed that the plaintiffs should be repaid that sum out of the proceeds of the sale of the oats; any deficiency to be made good by M., who was also to pay interest to the plaintiffs on the 600*l.*, from the time the bill became due till the arrival in this country of the proceeds of the oats. In June, 1859, M. became bankrupt, the plaintiffs' acceptance remaining in his hands unnegotiated. His assignees took possession of the bill, and paid it into the Bank of England, to the credit of the accountant in bankruptcy, for the estate of M., and the bill was presented to the plaintiffs' bankers at maturity, and paid by them, the plaintiffs being in ignorance of the fact of its having remained in M.'s hands unnegotiated. The account sales of the shipment were received from Melbourne in 1860, shewing that M.'s estate had been overpaid to the extent of 269*l.* 4*s.* 6*d.* :—Held, that the plaintiffs were not entitled to recover back that money from the assignees. *De Pass v. Bell*, 10 C. B., N. S. 517.

#### 10. SALE OF BILLS.

**Responsibility of Vendor.**—A vendor of a bill impliedly warrants that it is of the kind and description that it purports on the face of it to be. *Gompertz v. Bartlett*, 2 El. & Bl. 849; 2 C. L. R. 395; 23 L. J., Q. B. 65; 18 Jur. 266.

A vendor of a bill, though not a party to the bill, is responsible for the genuineness of the instrument; and if the name of one of the parties is a forgery, and the bill becomes valueless, the vendee is entitled to recover the price. *Gurney v. Womersley*, 4 El. & Bl. 139; 3 C. L. R. 3; 24 L. J., Q. B. 46; 1 Jur., N. S. 328.

**For special Purpose—Misapplication of Proceeds of Sale.**—Where bills are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And where the money realized by the sale is wrongfully applied by the agent the remitter is entitled to recover the value of the bills from the purchaser of them, who has notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent. *Mutytoll Seal v. Dent*, 8 Moore, P. C. C. 319.

## II. STAMPING.

### 1. INLAND BILLS AND NOTES.

**Description of Instruments.**—A note payable to bearer, generally, is in law payable on demand. *Whitlock v. Underwood*, 3 D. & R. 356; 2 B. & C. 157.

But a note payable to A., generally, is not one payable to bearer on demand, but a note payable otherwise than to bearer on demand. *Cheetham v. Butler*, 5 B. & Ad. 837; 2 N. & M. 453; *S. P.* *Dixon v. Chambers*, 1 C., M. & R. 845; 5 Tyr. 502; 1 Gale, 14.

A joint and several note was made by several parties concerned in a joint undertaking, for the purpose of securing the repayment of a loan of money; and one of the parties signed it some days after the party who borrowed the money:—Held, that the note did not require an additional stamp, if the last signature was put before the money was advanced, or if the party last signing had promised to sign the note before the advancement of the money, notwithstanding it might not have been signed till afterwards. *White, Ex parte*, 2 Deac. & Chit. 334.

If a note is signed by A., and subsequently by B. as a surety for A., unless such signature of B. is in virtue of a previous agreement, it will be void without an additional stamp. *Clerk v. Blackstock*, Holt, 474.

**Whether Document is Debenture or Promissory Note.**—An instrument issued by a company incorporated under the Joint Stock Companies Acts, 1856 and 1862, purporting upon the face of it to be a "debenture," with coupons for the payment of interest half-yearly attached to it, and containing an engagement on the part of the company to pay "the amount of this indenture" to A. B. or order on a given day, with interest at 5 per cent., is under the Stamp Act, 1870, chargeable with a debenture-stamp of 2*s.* 6*d.*, and not with a promissory-note stamp. *British India Steam Navigation Company v. Commissioners of Inland Revenue*, 7 Q. B. D. 165.

**Date of Instrument.**—In the absence of evidence to the contrary, a bill must be taken to have been issued at the time it bears date. *Anderson v. Weston*, 6 Bing. N. C. 296; 8 Scott, 583; 4 Jur. 105.

A bill, purporting to be payable two months after date, was properly stamped with the duty imposed on bills payable at two months after date, though issued before the day on which it bore date. *Williamson v. Garratt*, 2 N. & M. 49; *S. C.*, nom. *Williams v. Jarrett*, 5 B. & Ad. 32; *S. P.* *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161; 8 L. T. 317; 11 W. R. 648; *Bunyard v. Smith*, 34 L. J., Q. B. 217; 11 Jur., N. S. 874.

A bill drawn on the 21st December for 30*l.* payable at two months after date, on a 2*s.* stamp, and altered on the same day, before acceptance, to the 31st December, did not require a 2*s.* 6*d.* stamp within 55 Geo. 3, c. 184, the word "date," as used in that statute, meaning the period of payment expressed on the face of the bill. *Upston v. Marshall*, 3 D. & R. 198; 2 B. & C. 10.

But a note payable two months after sight required a stamp appropriate to a note pay-

able more than sixty days after sight, or two months after date, as the two months began to run not from the day of the date, but on the presentment for sight. *Sturdy v. Henderson*, 4 B. & A. 592.

**Reservation of Interest.**—A note for 200*l.* with lawful interest reserved from a day prior to the date, requires a stamp applicable to a note for 200*l.* only. *Wills v. Noott*, 4 Tyr. 726.

So a note for the payment of 30*l.* at three months after date, with interest from the date, only required a stamp applicable to a note not exceeding 30*l.* *Preussing v. Ing*, 4 B. & A. 204.

**Payable out of a Particular Fund, which may not be Available.**—A consignor of goods sent to the consignee the following order: "Please to pay to N. on account of G. & Co. the proceeds of a shipment of twelve bales of goods, value about 2,000*l.*, consigned by me to you." The consignee, in a letter by way of answer, agreed to do so:—Held, that neither of these two instruments required such a stamp as the above statute imposes on bills, drafts, or orders, for the payment of money. *Jones v. Simpson*, 3 D. & R. 545; 2 B. & C. 318.

Where C. was directed by a letter from B. to pay out of the proceeds of his goods, unsold, in his, C.'s, hands, a certain sum of money to D., which C. consented to do by letter to D. (which letter was stamped with an agreement stamp), and these letters being given in evidence to prove that the money was paid by order of B.:—Held, that they did not amount to an agreement between B. & C. and, consequently, that the stamp was improper, and that the order itself for payment should be stamped, as being an order for the payment of money out of a fund, which might or might not be available. *Firbank v. Bell*, 1 B. & A. 36.

A letter written from A. to B., requesting him to pay C. & Co., or their order, 600*l.* out of the first proceeds of a stock of gunpowder, then in the hands of B., and to charge the same to the account of A., although followed by a subsequent correspondence between the parties, requires a stamp, as an order for the payment of money within the provisions of the above statute; and consequently, an agreement stamp affixed on payment of a penalty is improper. *Butts v. Swan*, 4 Moore, 484; 2 B. & B. 78.

A. gave to B. the following document addressed to C., who was indebted to A. on a contract: "I hereby authorize you to pay to B. 365*l.*, being the amount of my contract at the new workhouse, B. having advanced me that sum:—Held, that it did not require to be stamped as an order for payment of money out of a particular fund. *Diplock v. Hammond*, 2 Eq. R., 738; 23 L. J., Ch. 550.

An order signed by A., addressed to his bankers, directing them, out of the balance due to him on the final arrangement of his account, to pay to B. a certain sum, and which order was forthwith placed in the hands of B., who, accompanied by A., immediately proceeded to the banking-house, and delivered it to the bankers, is an instrument requiring a bill stamp. *Parsons v. Middleton*, 6 Hare, 261.

Held, also, that although the intention of A. and B. was, that the order should be forthwith delivered to the bankers, yet the fact that the order was, according to the agreement, delivered

by A. to B. (the payee), brought it within the provisions of the 55 Geo. 3, c. 184, applicable to an instrument of that character. *Id.*

Mortgagees of two estates, in possession of the rents and profits of only one of them, advanced a further sum to the mortgagor upon the same securities; but the rents and profits of the one estate not being sufficient to keep down the interest on the entire mortgage, the mortgagor wrote the following order to M., who in fact was the tenant of the other estate, which consisted merely of a prebend, rectory, tithes and glebe lands: "Please to remit to Messrs. H., W. & T. 700*l.*, and charge it in account with me in settling for the present year's tithes of the prebend of L." H., W. & T., the solicitors of the mortgagees, sent that order in a letter to M., whom they treated as the receiver of the mortgagor, and stated, that if the 700*l.* was remitted, they would not require to be put in possession of the receipt of the tithes. M., in his answer, not setting the parties right as to his being tenant of the tithes, said that he had not the money at that time, but held out a prospect of paying it in the course of nine days. In the meantime, he received the tithes which were about to become due, and applied them in payment of a debt, which he alleged to be due to him from the mortgagor. Upon a bill in equity by the mortgagees against M. for payment of the 700*l.*, and for an account:—Held, that the order from the mortgagor upon M. was such an order as required a stamp, and the want of which was a fatal objection. *Braybrooke (Lord) v. Meredith*, 13 Sim. 271; 12 L. J., Ch. 289; 7 Jur. 144.

L. being indebted to the plaintiff, and about to sell his property by auction, gave an order in writing signed by him and addressed to the auctioneer, "to pay to the plaintiff, out of the produce of the sale of his goods and furniture, 200*l.*, and interest from the 23rd June last, due to the plaintiff on warrant of attorney; and also 110*l.* due to the plaintiff for goods sold, for which several sums the receipt of the plaintiff was to be the auctioneer's discharge:—Held, that this order required an inland bill stamp. *Emly v. Collins*, 6 M. & S. 144.

But where A. being indebted to B., and B. to C., B. by letter requested A. to pay C. the balance due to him (B.), and stated that C.'s receipt should be a sufficient discharge:—Held, that this was not a bill of exchange, or requiring a stamp as such. *Crowfoot v. Gurney*, 2 M. & Scott, 473; 9 Bing. 372.

A note written by a creditor at the foot of an account, requesting the debtor to pay that account to A., and which the creditor delivered to A. for the purpose of his getting in the money of the creditor, is not a bill of exchange or order for payment of money within 55 Geo. 3, c. 184. *Norris v. Solomon*, 2 M. & Rob. 267.

The following letter, sent to the holder of the fund out of which payment is to be made does not require a bill stamp:—"We now authorize you to pay to R. & Co. (having revoked the former order in their favour), after you have paid yourselves the balance we owe you, from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of the shipments, provided the same shall not exceed 5,000*l.* H. & J."—since it neither required payment to bearer or order, nor was delivered to the payee or any person on his behalf. *Hutchinson v.*

*Heyworth*, 1 P. & D. 266 ; 9 A. & E. 375 ; W., W. & D. 730.

**Stamping after Execution.**—There is so strong a presumption that a note was made on or after the date of the stamp impressed upon it that a verdict obtained upon the oath of an interested party, that the note was made previously to such date, was set aside as against the weight of evidence, although the note purported to be dated the day on which it was so sworn to have been made, and there was no evidence except the stamp to shew that such date was not the true date. *Jones v. Coppinger*, 18 W. R. 701.

A. put his name as acceptor upon a blank bill stamp, before 3 & 4 Will. 4, c. 97, by which new stamps were substituted for those previously in use. After the day appointed for that act to come into operation, the other particulars requisite to constitute the paper a bill of exchange were added:—Held, that it was not a perfect bill at the time the acceptance was written upon it, and therefore that the old stamp was insufficient. *Abrahams v. Skinner*, 4 P. & D. 358 ; 12 A. & E. 763 ; 5 Jur. 97.

A bill for 25*l.* was written on a threepenny receipt stamp. After 16 & 17 Vict. c. 59, which altered the stamp duty on receipts, the bill was restamped with a threepenny bill stamp, by authority of the Commissioners of Inland Revenue, upon payment of the penalty:—Held, that the Commissioners had power, under 37 Geo. 3, c. 136, s. 5, to restamp the bill. *Hiser v. Grout*, 5 H. & N. 35 ; 29 L. J., Ex. 20 ; 1 L. T. 44 ; 8 W. R. 79.

Where a bill in equity was filed for the administration of an estate, and in proof of a debt notes insufficiently stamped were offered in evidence, and on objection taken to the reception of them, the proper stamp duty, with the penalty, under 17 & 18 Vict. c. 125, s. 28, was tendered to the registrar:—Held, that the notes could not be received, nor the deficient amount of duty. *Stubbin v. Fisher*, 9 Jur., N. S. 38 ; 7 L. T. 63.

**Inappropriate Stamp.**—A note written on a receipt stamp of the same amount as the necessary note stamp under the same stamp act was admitted in evidence. *Aitcheson v. Sharland*, 1 Esp. 292.

Seemingly, a note stamped as an agreement, with a stamp of equal value to the proper note stamp, is admissible in evidence, unless it is shewn that it was stamped after it was written. *Wheatley v. Williams*, 1 M. & W. 593 ; 2 Gale, 140 ; S. P., *Wilson v. Vysar*, 4 Taunt. 288 ; *Ruff v. Webb*, 1 Esp. 129.

— **Previous to 37 Geo. 3, c. 136.**—The proper stamp for a note of 45*l.* was 1*s.* 6*d.* composed of three different sums applicable to different funds, under three acts of parliament. But such a note on a 2*s.* stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was valid. *Taylor v. Hague*, 2 East, 414.

A note written upon a stamp of greater value than the proper stamp required could not be received in evidence, though the stamp was applicable to the same kind of instrument. *Farr v. Price*, 1 East, 55.

So, a note drawn before 37 Geo. 3, c. 136, upon a receipt stamp of equal value with that re-

quired for a note, was not available in law. *Chamberlain v. Porter*, 1 N. R. 30.

**33 & 34 Vict. c. 97—Exemption under.**—A draft drawn for the amount of bills of exchange, purchased for transmission abroad, which amount by the usage of bill brokers is due on the first foreign post-day next after the purchase, and which draft was dated as of that day, is an order for the payment of money on demand, and under 33 & 34 Vict. c. 97, falls within the description in the schedule to that act, "bill of exchange, payable on demand," and is sufficiently stamped with a penny stamp. *Misa v. Currie*, 1 App. Cas. 554 ; 45 L. J., Ex. 852 ; 35 L. T. 414 ; 24 W. R. 1049.

Such a draft or order made by a person who has sold the bills, and addressed to the purchaser of them, constitutes a valuable consideration for a cheque given by the purchaser of the bills. *Ib.*

It does so, though the bills sold may be dishonoured when due. *Ib.*

**Unavailability for Want of Stamp.**—The enactment of 31 Geo. 3, c. 25, s. 19, that no bill, draft or order shall be given in evidence, or available in law, unless the paper be lawfully stamped, is incorporated in 55 Geo. 3, c. 184, by s. 8. *Field v. Woods*, 7 A. & E. 114 ; 6 D. P. C. 23 ; 2 N. & P. 117 ; W., W. & D. 482 ; 1 Jur. 496.

An unstamped bill drawn in England, but purporting to be drawn abroad, came into the hands of an indorsee for value without notice, who brought an action upon it against the acceptor:—Held, that the indorsee could not recover, as the acceptor was not estopped from shewing that the bill was void for want of a stamp, although cognizant of this fact when he made the acceptance. *Steadman v. Duhamel*, 1 C. B. 888 ; 14 L. J., C. P. 270.

Although a note without a stamp cannot be received in evidence as a security, or to prove the loan of money, it may be looked at by the jury with a view to ascertain a collateral fact. *Gregory v. Fraser*, 3 Camp. 454.

It is no defence to an action by an indorsee of a note or bill, that it was not stamped at the time of making it, if it has a proper stamp when produced at the trial. *Wright v. Riley*, Peake, 173. But see *Green v. Davies*, 6 D. & R. 306 ; 4 B. & C. 235.

A party who admitted his handwriting to a bill is not thereby precluded from objecting to the sufficiency of the stamp. *Vane v. Whittingham*, 2 D., N. S. 757 ; 7 Jur. 95.

**Judgment by Default on Unstamped Instrument—Effect of.**—The plaintiff sued on a note for 34*l.* 10*s.*, and the defendants, who were makers of the note, allowed judgment to go by default, and a writ of inquiry issued thereupon. On the trial it was found that the note was insufficiently stamped, and the under-sheriff withdrew it from the consideration of the jury. The jury found, nevertheless, for the plaintiff to the whole amount ; and the court afterwards, on application to set aside the verdict and send down another writ of inquiry, refused the rule. *Watson v. Glover*, 12 L. J., C. P. 184 ; 7 Jur. 68.

**Evidence to prove Debt for which Note was given.**—Though a note has not the proper stamp, so that it cannot be given in evidence,

the plaintiff may go into evidence of the debt for which it was given. *Wilson v. Kennedy*, 1 Esp. 245; *S. P.*, *Brown v. Watts*, 1 Taunt. 353; *Tyte v. Jones*, 1 East, 58, n.

A receipt for interest on the back of a note without a stamp, and which cannot therefore be given in evidence, is evidence to go to the jury, from which they may presume that, from the payment of so much for interest, there was a principal sum in proportion due. *Manley v. Peel*, 5 Esp. 121.

When fraud has been committed by giving a cheque, which the party knows will not be honoured, the cheque, though otherwise inadmissible for want of a stamp, may be given in evidence to prove the fraud. *Keable v. Payne*, 3 N. & P. 531; 8 A. & E. 555.

In an action for a debt, the defendant pleaded never indebted, and payment. The plaintiff gave in evidence, a memorandum, in which the defendant admitted the debt; but the inference arising from the same memorandum was, that the debt had been paid by a bill, given at the time to the plaintiff by the defendant:—Held, that the plaintiff might, in order to rebut that inference, and negative by anticipation the plea of payment, give in evidence the bill referred to, though on an insufficient stamp. *Smart v. Nokes*, 6 M. & G. 911; 7 Scott, N. R. 786; 13 L. J., C. P. 79; 8 Jur. 44.

**Want or Insufficiency of Stamp when Available by Plea.**—In an action on a bill by indorsee against acceptor, he pleaded pleas, denying the acceptance, the drawing and the indorsement, and also a plea founded on 3 & 4 Will. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die; the court struck out the last plea. *Dawson v. Macdonald*, 2 M. & W. 26; 2 Gale, 215.

To an action on a bill a plea that the bill was not duly stamped, is bad. *Haward v. Smith*, 4 Bing. N. C. 684; 6 Scott, 438; 1 Arn. 257.

Quære, whether the stamp laws can be pleaded in bar of an action on a note or bill; but at all events they can only be so pleaded in cases where the instrument cannot be made good by being stamped before the trial. *Bradley v. Bardsley*, 14 M. & W. 873; 3 D. & L. 476; 15 L. J., Ex. 115.

To an action by indorsee against acceptor, he pleaded that the bill was accepted for the accommodation of the drawer, and without consideration; that it was negotiated by the drawer for his own use, and paid to him when it became due; and that afterwards it was reissued by him without a fresh stamp, and indorsed with notice:—Held, first, that the plea was not bad for duplicity, but contained one defence only, viz. the reissuing of the bill under the circumstances without a fresh stamp. *Lazarus v. Cowie*, 2 G. & D. 407; 2 Q. B. 459; 11 L. J., Q. B. 310; 6 Jur. 854.

Held, secondly, that the reissuing the bill without a fresh stamp was a good defence; inasmuch as, being an accommodation bill, which had been satisfied by the drawer, who was the party ultimately liable upon it, it was no longer a negotiable instrument, and could not be put into circulation again without a fresh stamp, as required by 55 Geo. 3, c. 184, s. 19. *Ib.*

Held, thirdly, that it was a defence that did not arise only on the evidence, but might well be pleaded, inasmuch as s. 19 inflicts a penalty

on reissuing a bill after it has been paid, and a bill reissued contrary to such prohibition becomes void. *Ib.*

**Indorsement.**—A note, indorsed as follows:—"I hereby assign this draft, and all benefit of the money secured thereby, to J. G., of &c., and order the within-named T. T. H. (the maker of the note) to pay him the amount and all interest in respect thereof. (Signed) H. O. R.:"—Held, that this indorsement did not require a stamp. *Richards v. Frankum*, 9 C. & P. 221.

## 2. FOREIGN BILLS.

**What constitutes, so as not to require an English Stamp.**—Where the body of a bill was written, and the acceptance of it made in England; yet if it was afterwards transmitted to the drawer abroad for his signature, and it was there drawn, the bill was a foreign bill; and, consequently, did not require an English stamp. *Boehm v. Campbell*, Gow, 56.

A., in Jamaica, drew a bill on B., in London, on a Jamaica stamp, leaving the payee's name in blank; C. got possession of the bill, and inserted his own name as payee, without any other authority than a letter from B., promising to accept it; but having the address torn off, and containing nothing to shew to whom it was addressed:—Held, that though the bill might not require an English stamp, the letter, had it been sufficient, being a separate contract, would require a stamp. *Crutchley v. Mann*, 1 Marsh, 29; 5 Taunt. 529.

A bill drawn in England upon a person abroad, but accepted by him, payable in England, was an inland bill, and required a stamp as such. *Amner v. Clark*, 2 C., M. & R. 468; 1 Gale, 191; 5 Tyr. 942.

Where partners resident in Ireland signed and indorsed a copper-plate impression of a bill, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B., in England, for his use, who filled up the blanks and negotiated it:—Held, that this was to be considered a bill by relation from the time of the signing and indorsing in Ireland, and consequently, that an English stamp was not necessary. *Snaith v. Mingay*, 1 M. & S. 87.

Where a bill, drawn in blank in a foreign country, was sent by the drawer to his agent in London to be accepted by a customer of the drawer as a mode of payment for goods, and the agent, without any authority from the drawer, filled it up and induced a customer of the drawer to accept it, and afterwards, in fraud of the drawer, indorsed it to the plaintiff for value:—Held, that the bill being drawn partly abroad and partly in this country did not require a stamp. *Barker v. Sterne*, 9 Ex. 684; 2 C. L. R. 1020; 23 L. J., Ex. 201.

In an action upon a bill purporting to have been drawn by A., resident abroad, upon B., resident in England; the plaintiff having proved that it was seen abroad immediately after the date of it:—Held, that it was not necessary, in order to shew that it was a foreign bill, also to prove that the bill was then in an unaccepted state. *Dempilliers v. Holden*, 2 H. & W. 394.

J. was indebted to the plaintiffs, and was also a creditor of the Isle of Man Slate and Flag Company, being wound up, and the defendant was the official liquidator. J. signed the fol-

lowing document: "Isle of Man, July 15, 1865. On 1st of August next, please to pay to Messrs. (the plaintiffs) or order 600l., on account of moneys advanced by me to the Isle of Man Slate and Flag Company. To Mr. (the defendant), official liquidator of the company." This document, which was unstamped when produced at the trial, was sent by J. to the plaintiffs in England, and they forwarded a copy to the defendant, who was also in England, requesting to know whether he would honour the order, and he replied he would when funds came into his hands about the 15th of August. Funds did come into his hands soon after that time, but owing to a dispute as to the amount remaining due to J. nothing was paid:—Held, that the order, on the face of it, was not an order to pay out of a particular fund, but a bill of exchange; but, being drawn in the Isle of Man, it was a foreign bill for stamp purposes, and therefore need not be stamped except as required by 17 & 18 Vict. c. 83, ss. 3 and 5, viz., when "presented for payment, indorsed, transferred, or otherwise negotiated in the United Kingdom;" that it had not been dealt with in any of these ways, and was therefore admissible without a stamp. *Griffin v. Weatherby*, 3 L. R., Q. B. 753; 37 L. J., Q. B. 280; 18 L. T. 881; 17 W. R. 8; 9 B. & S. 726.

**Presumption as to Date of Stamping.]**—In an action on a foreign bill of exchange, the required stamp was upon the bill at the time of the trial, but no evidence was given to shew that it was on the bill at the time when it was indorsed to the plaintiff:—Held, that it must be presumed to have been so, the contrary not having been shewn by the defendant. *Bradlaugh v. De Rin*, 3 L. R., C. P. 286; 37 L. J., C. P. 146; 16 W. R. 1128.

**Alteration made in Bill.]**—A bill, drawn for one sum in Paris, and accepted for a smaller sum in England, was altered to correspond with the acceptance: it was not shewn where the alteration was made:—Held, that no stamp was necessary. *Hamelin v. Bruck*, 9 Q. B. 306; 15 L. J., Q. B. 343; 10 Jur. 1094.

**Admissibility in Evidence of.]**—Where the admissibility of a bill purporting to be a foreign bill, and stamped accordingly, was objected to on the ground, that, though it purported to be drawn abroad, it was in fact an inland bill, drawn in London, and evidence was offered to prove that fact:—Held, that the judge ought to have received the evidence in that stage of the cause, and decided upon the admissibility of the instrument, and not to have received the evidence afterwards, as part of the defendant's case, and submitted it to the jury. *Bartlett v. Smith*, 11 M. & W. 483; 12 L. J., Ex. 287; 7 Jur. 448.

By the Stamp Act, 1870, 30 & 31 Vict. c. 97, ss. 24, 51, 54, a foreign bill, in order to be admissible in evidence, requires only that the proper stamp should have been duly affixed. Although not cancelled, if the holder proves that the proper stamp was affixed before the bill came into his possession, the burden of proof that it was not duly stamped is thrown upon the person objecting to its admission. *Marc v. Rouy*, 31 L. T. 372; 23 W. R. 89.

Seem, that such an objection can be raised only by plea. *Id.*

**Evidence as to.]**—In an action by indorsee against acceptor of a bill, which upon the face of it purported to be a foreign bill:—Held, that the acceptor was not estopped from shewing, that, though dated abroad, the bill was in fact drawn in London; although it was proved that this was done at his express request, and that the plaintiff, who took the bill for value, was not cognizant of the circumstances. *Steadman v. Duhamel*, 1 C. B. 888; 14 L. J., C. P. 270.

To prove that a bill, purporting to be drawn abroad, was in point of fact drawn in England, and was therefore void for want of a stamp, it was not sufficient barely to shew that the drawer was in England at the time the bill bore date. *Abraham v. Du Bois*, 4 Camp. 269; *S. P.*, *Birie v. Moreau*, 2 C. & P. 376.

### 3. CANCELLATION OF STAMPS.

The duty of cancelling the stamp on a foreign bill lies equally on the holder and transferee, under 17 & 18 Vict. c. 83, s. 5. *Poolcy v. Brown*, 11 C. B., N. S. 566; 31 L. J., C. P. 134; 8 Jur., N. S. 938; 5 L. T. 750; 10 W. R. 345. See 24 & 25 Vict. c. 91, s. 33.

Where a party had bought a parcel of foreign bills, with their stamps uncanceled, both he and the seller being ignorant of the defect at that time:—Held, that he could not recover back the money paid for them on discovering the defect, as upon failure of consideration, the parties being in *pari delicto*. *Id.*

A foreign bill bearing a stamp, defaced by the person who affixed it prior to the indorsement to the plaintiff, but the defacement having no date, is inadmissible in evidence. *Gilmore v. Whitmarsh*, 2 F. & F. 295.

The cancellation by stamping of an adhesive stamp on a bill is clearly sufficient. *Viale v. Michael*, 30 L. T. 453.

Seem, that the cancellation may be made in open court at any time before verdict—Per Blackburn, J. *Id.*

## III. PARTIES TO.

### 1. AGENTS.

**What Sufficient to give Authority to.]**—A. & B. & S. M., in 1832, assigned their stock-in-trade to trustees, who were to carry on the business in the name of S. M. alone, for the benefit of creditors. S. M. was employed by them as their agent to carry on the business accordingly. S. M., while conducting such business, carried on also a separate business of his own up to 1834. The plaintiff had been in the habit of discounting bills for the old firm of A. & B. & S. M., and after the assignment to the trustees, had been accustomed to discount bills, indorsed in the name of S. M. for him in his private business, and other his private purposes, the proceeds of which S. M. applied sometimes for carrying on the assigned business, and sometimes for his own private purposes. After he had ceased to carry on his private business, he indorsed bills in the name of S. M., which the plaintiff discounted. S. M. applied the proceeds indiscriminately to his private purposes and to carry on the assigned business. In an action on the bills against the

trustees :—Held, that the signature of S. M. to the bills was *prima facie* their signature. *Furze v. Sharwood*, 2 Q. B. 388 ; 2 G. & D. 116 ; 6 Jur. 554.

A bailliff of a farming establishment, through whose hands all payments and receipts take place, has no implied authority to pledge the credit of his employer by drawing and indorsing bills in the name of the latter. *Davidson v. Stanley*, 3 Scott, N. R. 49 ; 2 M. & G. 721.

In the absence of all direct evidence of authority, the nature of the employment of such bailliff does not furnish any ground for inferring the existence of such an authority upon slight, or upon any other than clear and distinct, evidence of assent or acquiescence. *Ib.*

Where, therefore, it is sought to charge a party by the acceptance or indorsement of a bill by an agent, by reason of the latter having similarly drawn and indorsed bills on former occasions, it must be distinctly shewn that the principal knew or had the means of knowing that fact. *Ib.*

A. employed B. to manage his business, and to carry it on in the name of B. & Co., the drawing and accepting bills were incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of B. & Co. :—Held, that A. was liable on the bill in the hands of an indorsee, who took it without any knowledge of A. and B. or the business. *Edmunds v. Bushell*, 1 L. R., Q. B. 97 ; 35 L. J., Q. B. ; 12 Jur., N. S. 332.

Where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills, by means of a clerk, in this form, "for agents of the R. V. B., J. G. :"—Held, no answer to a joint action against them by an indorsee, to shew that it was accepted for the private advantage of one without the knowledge of the other, although the indorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact. *Sanderson v. Brooksbank*, 4 C. & P. 286.

**Extent of Authority.]**—The authority of an agent to receive payment by an acceptance of a bill drawn in blank does not carry with it an authority to the agent to draw a bill payable to his own order. *Hogarth v. Wherley*, 10 L. R., C. P. 630 ; 44 L. J., C. P. 330 ; 32 L. T. 800.

The plaintiff supplied the defendant with goods ordered through M., the traveller of the plaintiff, and the defendant by way of payment accepted a bill drawn by M. upon the plaintiff, and made payable to his own order. M. absconded, having cashed the bill, and its value did not reach the plaintiff, who sued the defendant for the price of the goods. It was proved in support of the plea of payment that M. had, on a prior occasion, taken payment by a bill drawn in blank and accepted by the defendant, which the plaintiff had afterwards filled up and cashed, and also that the plaintiff had written a letter to M., which was shewn to the defendant, in which he intimated a wish to draw upon him for an amount due :—Held, that neither the previous dealing, nor the letter of the plaintiff to M., was evidence of an authority to M. to draw a bill in his own favour. *Ib.*

An authority given to A., to draw bills in the name of B., may be exercised by the clerks of A. *Sutton, Ex parte*, 2 Cox, 84.

P. & C., foreign correspondents of H., G. & Co., remitted to them a bill upon the defendant for 300*l.* inclosed in a letter, advising them that it was sent to meet a draft on H., G. & Co. of the same amount. Before the arrival of the letter, G. (who alone constituted the firm of H., G. & Co.) had absconded, having previously addressed a letter to L., authorizing him, for and in the name of H., G. & Co., to indorse any bill or bills which might be remitted to them, and to dispose of them in a particular way :—Held, that the last-mentioned letter did not authorize L. to indorse the bill in question, inasmuch as that bill never became the property of H., G. & Co., the condition upon which it was sent to them not being capable of fulfilment. *Fearn v. Filica*, 8 Scott, N. R. 241 ; 7 M. & G. 513 ; 14 L. J., C. P. 15.

**Personal Liability of.]**—If an agent for A. draws a bill upon B. in favour of C., though he directs B. to place the amount to A.'s debit, he will be personally liable to C. if the bill is not paid, though C. knew he was only agent for A., unless he uses proper words to prevent such liability. *Leadbitter v. Farrow*, 5 M. & S. 345.

A bill was drawn on the consignees of a cargo of coals shipped to R. by a broker at N., who had effected the purchase there. That bill was returned to the payees, the coal-owners, unaccepted, on account of the date being too short. The broker having directed the payees to prepare another bill at a longer date, they did so, and sent it to his counting-house in N. for his signature. The broker had, in the meantime, left N. in pecuniary embarrassment ; and his brother, the defendant, had come to the counting-house to investigate his affairs. The defendant, in the absence of his brother, and at the request and for the convenience of the plaintiffs, signed the bill they had prepared, without qualification of his liability :—Held, that he was personally liable. *Sowerby v. Butcher*, 2 C. & M. 368 ; 4 Tyr. 320.

A bill directed as follows : "To Messrs. Jackson and Shepherd, joint managers of the Royal Mutual Marine Insurance Association," was accepted thus : "Accepted, J. J., W. S. as joint managers of the Royal Mutual Marine Association :"—Held, that they were personally liable, and that the introduction of the word "as" before the words "joint managers," made no difference with respect to such liability. *Jones v. Jackson*, 22 L. T. 828.

A promissory note in this form : "On demand we promise to pay Mr. James Allan 200*l.*, value received for the Second Gateshead Provident Benefit Building Society, and interest thereon at 5 per cent. per annum, payable half-yearly," signed thus : "G. M., C. D. G., J. M., trustees : T. N., secretary :"—Held, that the trustees were personally liable on the note. *Allan v. Miller*, 22 L. T. 825.

B. acted as agent in Malta for A., for the purpose of buying and remitting to him in England bills on England, on account of money received by B. in Malta. In the course of his agency he purchased bills in Malta, and indorsed them to A. without any reservation in the indorsement as to his liability :—Held, that in the absence of special circumstances, shewing that any liability was intended by the general mercantile law which must be taken to be in force in Malta, B. was not liable to A. upon the bills being dishonoured. *Castrique v. Buttigieg*, 10 Moore, P. C. C. 94.

The executor and surviving partner of B. engaged his brother to wind up the partnership business. B.'s brother, using and signing the name of the firm, drew a bill upon a debtor to the firm, who accepted it, but, the bill not being paid, an action was brought against B.'s brother:—Held, that he could not be made liable without some proof that he had no authority to draw the bill for his employer, or that he had not acted *bonâ fide*. *Wilson v. Barthrop*, 2 M. & W. 863; M. & H. 81; 1 Jur. 949.

The defendants, merchants in London, received orders from St. Petersburg for a quantity of Havannah sugars; that order was revoked, and another given for Brazil sugars, for the amount of which the defendants were to draw on the plaintiff, G.'s agent at Hamburg, by a bill at three months. The plaintiff accepted the bill; wrote to G. for instructions, because the defendants had been accredited for Havannah sugars and not Brazil; and then to the defendants, to say, that he had accepted the bill under their guarantee for the present, as he had not received the accreditive. G. then wrote to the plaintiff, giving him credit for the Brazil sugar, and requesting him to release the defendants from their guarantee. G. failed before the acceptance became due:—Held, that the plaintiff was liable to the defendants on this acceptance, notwithstanding the defendants, after G.'s failure, wrote to the plaintiff, "We have received from G. the assurance that he has arranged with you the needful for the protection of the draft. We reserve to ourselves any advantage from the insurance of the goods: if you have written to G., that you have not honoured the draft, we cannot consider your acceptance as valid in any way than on account of G." *Lohmann v. Rougemont*, 6 Bing. N. C. 253; 8 Scott, 520.

The following note was signed by the secretary of an incorporated company:—"1,500*l*. On demand I promise to pay Messrs. Alexander & Co., or order, the sum of 1,500*l*., with legal interest thereon until paid, value received, the 16th of August, 1865. For Mistley Thorpe and Walton Railway Company.—John Sizer, secretary:—Held, that the secretary was not personally liable to be sued thereon. *Alexander v. Sizer*, 4 L. R., Ex. 102; 38 L. J., Ex. 59; 20 L. T. 38.

V. D., of Constantinople, a consignee of coals from his brother S. D., of Cardiff, accepted a bill of his brother's in the following form:—"Four months after date pay to my order the sum of 500*l*. sterling, value received in coals and advance per Eskdale s.s.:"—Held, that there being uncontradicted evidence that he was a mere agent selling the coal on commission, the statement on the face of the bill that value had been received in coal was not sufficient to shew that he had such a legal interest as would make the coal applicable to the satisfaction of a judgment recovered against him by the holders. *Hood v. Stallybrass*, 3 App. Cas. 880; 38 L. T. 826; 27 W. R. 1—P. C.

**Liability of Principal.**—If A. permits B. to draw bills in his name, he is liable as drawer to ignorant indorsees, although he had neither any interest nor knew of the particular bills drawn; but he is not liable to a payee having knowledge of the transaction. *Smith v. Strange*, Peake's

Add. Cas. 116; S. C., *Curtis v. Barre*, Peake's Add. Cas. 119.

If a principal authorizes an agent to accept a bill, such principal is liable as acceptor, though wrongfully described by his agent in the acceptance. *Lindus v. Bradwell*, 5 C. B. 583; 17 L. J., C. P. 12; 12 Jur. 230.

**Agent employing Agent.**—Where an agent is authorized to indorse the name of his principal, he may do so by the instrumentality of a third party. *Lord v. Hall*, 2 C. & K. 698.

**Evidence as to Authority.**—In an action against a party as acceptor of a bill accepted in his name by another person, when evidence has been given of a general authority in that person to accept bills in the defendant's name an admission by the defendant of liability on another bill so accepted is good evidence confirmatory of the former. *Llewellyn v. Winckworth*, 13 M. & W. 598; 14 L. J., Ex. 329.

From the fact that the defendants' confidential clerk had been accustomed to draw cheques for them; that in one instance, at least, they had authorized him to indorse; and in two other instances had received money obtained by his indorsing in their name, a jury is warranted in inferring that the clerk had a general authority to indorse. *Preacott v. Flynn*, 9 Bing. 19; 2 M. & Scott, 18.

**Acting under Powers of Attorney.**—Where one gives a power of attorney to another, to demand and receive all moneys due to him, on any account whatsoever, and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, "and to do all other business;" the latter words must be understood, with reference to the former, as meaning all business appertaining thereto, and although the attorney may receive moneys due in *autre droit* to the principal, yet he cannot indorse a bill for him, which comes to his hands under the power. *Hay v. Goldsmidt*, 2 Smith, 79.

A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and in conclusion authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal. *Esdale v. La Nauze*, 1 Y. & C. 394.

A power of attorney having been given by the payee of notes to agents, empowering them to sell, indorse and assign, they, under the power, indorsed the notes to a bank, by way of security for a loan to them. The agents failed:—Held, that the transaction was valid, and that the payee could not recover from the bank. *Bank of Bengal v. McLeod*, 5 Moore, Ind. App. 1; 7 Moore, P. C. C. 35; 13 Jur. 945; S. P., *Bank of Bengal v. Fagan*, 5 Moore, Ind. App. 27.

**Per Procuration.**—An indorsee of a bill accepted by procuration is bound to use due caution, and should not only see the power of the agent to accept, but also inquire into the propriety of his accepting that particular bill; and if he does not, and it was improperly accepted,

he cannot recover against the acceptor. *Attwood v. Munnings*, 7 B. & C. 278; 1 M. & R. 66.

An acceptance or an indorsement expressed to be per procuration, is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority. *Alexander v. Mackenzie*, 6 C. B. 766; 18 L. J., C. P. 94; 13 Jur. 346.

Where a bill upon the face of it purports to be accepted per procuration, that circumstance is notice to any party who takes the bill, that the acceptor has but a limited authority; and the holder cannot maintain an action against the principal if the authority has been exceeded. *Stagg v. Elliott*, 12 C. B., N. S. 373; 31 L. J., C. P. 260; 9 Jur., N. S. 153; 6 L. T. 433; 10 W. R. 647.

Declaration by an executor of B. upon a bill purporting to be drawn by A., and accepted by the defendant, and indorsed by A. to B. A., who was possessed of goods, being the stock-in-trade upon his premises, died intestate, and indebted to the defendant and other persons; and it was arranged between B. and the defendant, who were two of his next of kin, that the defendant should take possession of the goods, and accept a bill for their value, purporting to be drawn and indorsed by A. The goods were accordingly delivered to the defendant, and the bill was drawn and indorsed to the plaintiff by procuration in the name of A., and accepted by the defendant:—Held, that he could not be allowed to set up as a defence that the bill was not indorsed by A. *Ashpittel v. Bryan*, 3 B. & S. 474; 3 F. & F. 183; 33 L. J., Q. B. 328; 9 Jur., N. S. 791; 11 L. T. 221; 12 W. R. 1082. Affirmed on appeal, 5 B. & S. 723—Ex. Ch.

A person who accepts a bill by procuration, having no authority so to do, is liable to an action of tort, by an ulterior indorsee, for falsely, fraudulently and deceitfully representing that he was so authorized, although he may have thought at the time that he had authority, or that his act would be recognized or ratified by the drawee. *Polhill v. Walter*, 3 B. & Ad. 114.

An averment in a declaration that A. B. & Co. accepted a bill is supported by evidence that the bill was accepted by C. D., their authorized agent, thus, "for A. B. & Co., C. D." *Hays v. Haseltine*, 2 Camp. 604.

**Pleading—Variance.**—In an action on a bill alleged to have been drawn on the defendant, and accepted for him by A. as his agent, the bill, on being produced, appeared to be drawn on the director of a mining company, of which the defendant was one, and which company had given a general authority to A. to accept bills on its behalf:—Held, no variance. *Firth v. Buckingham*, 2 D., N. S., 555; 6 Jur. 956.

## 2. CORPORATIONS.

**Acceptors of Bill at less than Six Months.**—By the provisions of several statutes for the protection of the Bank of England, before the passing of the 7 & 8 Vict. c. 32, it was enacted, that "it shall not be lawful for any body corporate to borrow, owe, or take up any money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof:—"

Held, that a corporation not established for trading purposes could not become acceptors of a bill payable at a less period than six months from the date. *Broughton v. Manchester Waterworks*, 3 B. & A. 1.

**Action against.**—An action may be maintained on a bill against a trading corporation, whose power of drawing and accepting bills is recognized by statute. *Murray v. E. I. Company*, 5 B. & A. 204.

**Powers of Directors of.**—The directors of a mining association cannot bind the members by accepting a bill, unless they are authorized to do so by the deed or instrument of co-partnership, by the necessity of such a power to the carrying on of the business, by the usage of similar establishments, or by the express assent of the party sought to be charged. *Dickinson v. Valpy*, 5 M. & R. 126; 10 B. & C. 128.

Directors of a cemetery company were by their act of incorporation empowered to make contracts and bargains touching the undertaking, and to do and transact all other matters and things requisite to be done and transacted for the direction and management of the affairs of the company:—Held, that they had no power to accept or indorse bills for the purposes of the undertaking. *Harmer v. Steel (in error)*, 4 Ex. 1; 19 L. J., Ex. 34—Ex. Ch.; *S. C.*, in court below, 14 M. & W. 831; 3 D. & L. 506; 15 L. J., Ex. 217. See also *Brown v. Byers*, 16 M. & W. 252; 16 L. J., Ex. 112.

**Railway Company.**—A railway company, incorporated by a special act of parliament containing the usual clauses in such acts, cannot accept bills of exchange. *Bateman v. Mid Wales Railway Company*, 35 L. J., C. P. 205; 12 Jur., N. S. 453.

## 3. COLONIAL BROKERS.

In an action against a colonial broker on a bill, as to his authority to accept:—Held, that the jury might be asked, of their own knowledge as commercial men, whether colonial brokers did business by means of bills of exchange; and evidence being given to shew that they did not, but the witnesses admitting that they did so sometimes, though it was not usual, the question left to the jury was, whether it was not one mode by which they carried on business. *Schweitzer v. Long*, 3 F. & F. 687.

## 4. CHURCHWARDENS.

A. & B. signed a formal note, by which they promised "as churchwardens and overseers," to pay to C. or order a sum of money with interest; which sum was in fact the amount of a loan made by C. for the use of the parish. A. and B. are personally liable upon such note. *Crow v. Petit*, 3 N. & M. 456; *S. C.*, *Rew v. Pettet*, 1 A. & E. 196. See *Furnival v. Coombs*, 6 Scott, N. R. 522.

## 5. PERSONS UNDER INFLUENCE OF DRINK, AND LUNATICS.

In an action by indorsee against a prior indorser, it is a good plea that when he indorsed the bill, he was so intoxicated and under the



influence of liquor, and thereby so entirely deprived of the use of his reason, as to be unable to understand the nature or effect of the indorsement; and that the plaintiff, at the time of the indorsement, was aware of his being in that state. *Gore v. Gibson*, 13 M. & W. 623; 14 L. J., Ex. 151; 9 Jur. 140.

A maker of a note, sued by an indorsee, was allowed to plead that the indorser was a lunatic at the time of the indorsement. *Alcock v. Alcock*, 3 M. & G. 268. But see *Molton v. Camroux*, 4 Ex. 17; *Beavan v. McDonnell*, 9 Ex. 309.

#### 6. EXECUTORS AND ADMINISTRATORS.

**Liability of Executor.**—A note, given to a creditor by one of the executors in the name of the testator's firm, while the executor was carrying on the business pursuant to directions in the will, but was ignorant that the estate was insolvent, is personally binding on the executors. *Lucas v. Williams*, 3 Giff. 150; 8 Jur., N. S. 207.

Executors carried on their testator's trade in that character, and in the ordinary course of the business accepted a bill, describing themselves in it simply as executors of their testator:—Held, that neither these circumstances, nor the form of the acceptance, relieved the estate of one of the executors, who died in the lifetime of the other, from the ordinary equitable liability upon the bill. *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24.

When an executor had continued the testator's business in pursuance of the will, and had in so doing, and according to the ordinary course of business pursued by the testator, given a promissory note for goods supplied to the testator himself:—Held, that the executor could not obtain in a creditors' suit for the administration of the testator's estate, an injunction to restrain the creditor to whom the note had been given from proceeding upon it at law, although there might have been an understanding that the executor was not to be personally liable, and that the creditor was to look only to the testator's assets for payment, and although the money produced by the executor's trading had been paid into court under an order in the suit. Such relief, if to be obtained, must be sought in a distinct suit. *Lucas v. Williams*, 4 De G., F. & J. 436.

#### Payee of Note making the Maker his Executor.]

—Where the payee of a note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note even by a person to whom the executor has indorsed it. *Freakley v. Fox*, 9 B. & C. 130; 4 M. & R. 18.

A creditor, by becoming executor of his debtor, does not extinguish the debt, although he cannot sue himself for it; and therefore, when the debt is secured by a negotiable instrument, such as a note, the executor may transfer it, so as to give a right of action on it to the transferee. *Lowe v. Penkett*, 16 C. B. 400; 24 L. J., C. P. 196; 1 Jur., N. S. 1049.

**Forgery of Name of one out of four Executrices as Indorsement on Bill.**—A bill was payable to "Mrs. E. I., widow, M. I., spinster, A. M. I., spinster, and A. M., the wife of E. B., or order, the executrices of the late J. I." W. was indicted for forging "a certain indorsement of

the bill, which indorsement is as follows, that is to say, 'A. M. I.'" It was objected that the bill was only negotiable on the indorsement of all the payees, and, therefore, that this was not a forged indorsement of the bill. He was convicted, and the judges held the conviction right. *Reg. v. Winterbottom*, 2 C. & K. 37; 1 Den. C. C. 41. It has been so held in America, *Smith v. Whiting*, 9 Mass. Rep. 320. It has also been there held that a note may be transferred by one of several administrators, *Sanders v. Blane*, 6 J. J. Marsh, 446: and by one of several executors, as a collateral security for a judgment against the estate; *Wheeler v. Wheeler*, 9 Cowen, 34.

#### 7. HUSBAND AND WIFE.

**Note Payable to Feme Sole—Subsequent Marriage.**—Where a note is payable to a feme sole, or order, and she marries, it becomes her husband's property, and she cannot indorse it while she is covert. *Connor v. Martin*, 3 Wils. 5.

**Indorsement of Bill by Wife—With Husband's Consent.**—But an indorsement with her husband's assent, of a bill drawn by her, is binding upon him, and will pass the interest in the bill to the indorsee, so as to enable him to sue the acceptor. *Prestwick v. Marshall*, 5 M. & P. 513; 7 Bing. 565; 4 C. & P. 594.

—Without Husband's Consent.]—Though a note was given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff, in payment of a debt which she owed him (in the course of carrying on a trade in her own name, by the consent of her husband), yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff. *Barlow v. Bishop*, 1 East, 432; 3 Esp. 266.

**Indorsement by Husband alone.**—So a note payable to a woman who is married at the time of the making, passes by the indorsement of the husband alone during the coverture. *Mason v. Morgan*, 2 A. & E. 30; 4 N. & M. 46.

**Indorsement or Acceptance by Wife—When Agent for Husband.**—Where, in an action on a bill by an indorsee, it is pleaded by the acceptor that the drawer is a married woman, the plaintiff may shew in his replication that she drew and indorsed the bill with the authority of her husband, without its being deemed a departure. *Prince v. Brunatt*, 3 D. P. C. 382; 1 Scott. 342; 1 Bing. N. C. 435.

A defendant, who carried on business on his own account, and in partnership, gave a general power of attorney to his wife and partners to act for him and in his name, and to his use, and to indorse bills, and generally to act for him while abroad. He gave another power to his wife alone, to act for him and on his behalf, and to pay and accept such bills as should be drawn by his agents and correspondents as occasion should require. One of the partners drew a bill on the defendant for money to supply the partnership concerns, the defendant having received while abroad money on the partnership account, and the wife accepted the bill for her husband:—Held, first, that the partner could not be called the defendant's agent; and therefore that the

wife had not power to accept the bill. *Attwood v. Munnings*, 1 M. & R. 66; 7 B. & C. 278.

Held, secondly, that she had not power to accept a bill for partnership transactions, but only bills on his account. *Id.*

The fact that a wife constantly manages her husband's business, is no evidence of an authority to accept bills for him, although there is also evidence that the proceeds of the bills have been received by the husband, or applied, with his knowledge, to his benefit. *Goldstone v. Tovey*, 6 Bing. N. C. 98; 6 Scott, 394; 3 Jur. 1175.

A bill addressed to William B. was accepted by his wife, by writing across it her own name, Mary B. There was no evidence of any express authority in the wife so to accept the bill; but, on its being presented to the husband after it became due, he said he knew all about it, that the bill was a millinery bill (for which the husband appeared to be liable), and that he would pay it very shortly:—Held, that he was liable as acceptor. *Lindus v. Bradwell*, 5 C. B. 583; 17 L. J., C. P. 121; 12 Jur. 230.

It is not competent to the acceptor of a bill made payable to the order of a wife to say that the latter has no power to indorse, when he himself has, by his acceptance of the bill so drawn, asserted that she has such power, and notwithstanding the acceptor may in such case be compelled to pay the bill twice. the husband's property in the bill not being changed by the indorsement by the wife, unauthorized by her husband. *Smith v. Marack*, 6 C. B. 486; 6 D. & L. 363; 18 L. J., C. P. 65; 12 Jur. 1050.

Upon an issue as to the indorsement of a note by S., it was proved that his wife had the general management of his business; that she was in the habit of drawing, accepting and indorsing bills and notes in his name; and that the name of S. was indorsed upon the note by his daughter, by the direction and in the presence of her mother, by whom the note was afterwards handed to the plaintiff:—Held, that it was a question of fact for the jury, whether the indorsement so made was within the scope of the wife's authority, and that the evidence warranted them in concluding that it was. *Lord v. Hall*, 8 C. B. 627; 19 L. J., C. P. 47.

**Liability of Wife's Separate Estate.**—A woman, married since the passing of the Married Women's Property Act, 1870, joined her husband in signing a joint and several promissory note for money lent to him. The husband became bankrupt:—Held, that her separate estate was liable for the amount due on the note, and that it was not necessary to make any trustees for the wife parties to the action. *Davies v. Jenkins*, 6 Ch. D. 728; 46 L. J., Ch. 761; 26 W. R. 260.

A married woman holding herself out as a feme sole, or as a person whose separate property would repay advances to her, gave to her amanuensis negotiable instruments bearing her name, to enable him to raise money on them:—Held, that her separate estate was liable to make good the amount to the person who discounted them. *McHenry v. Davies*, 10 L. R., Eq. 88; 39 L. J., Ch. 866; 22 L. T. 643; 18 W. R. 855.

A wife, having property settled to her own use during coverture, made a promissory note jointly with her husband and another person. The husband died before action brought:—Held, that she was not liable. *Roberts v. Watkins*, 46 L. J., Q. B. 552; 36 L. T. 799.

#### **Non-reduction into Possession by Husband.**—

Where a note is given to a married woman during coverture, and the husband does not do any act during his life to reduce it into possession, the right to the note survives to her. *Gaters v. Madeley*, 6 M. & W. 423; 4 Jur. 724.

To an action by the executors of M., deceased, on a note payable to him in his lifetime, the defendant pleaded that the note was made payable to the wife of M., and in her name, with the consent of her husband, and not otherwise, and that he did not in her lifetime, she having died in the lifetime of her husband, do any act to reduce the note into possession, nor did he ever reduce it into possession:—Held, good in substance. *Howard v. Oakes*, 3 Ex. 136; 6 D. & L. 231; 18 L. J., Ex. 485. See *Halifax v. Lyle*, 6 D. & L. 424; 3 Ex. 446.

A feme sole, payee of a note, payable with interest, married, and her husband survived her:—Held, that, in an action on the note by her administrator, the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life, for that he did not thereby reduce the chose in action into possession. *Hart v. Stephens*, 6 Q. B. 937; 14 L. J., Q. B. 148; 9 Jur. 225.

In an action by payee against maker, a plea that, when the note was made, the payee was the wife of B., and that he elected to take the note in his marital right, and caused the payee to indorse, and she by his authority indorsed the note, and B. delivered it so indorsed to F.; and that after the note became due, and before action, B. died, and that the note came to the payee's possession by delivery from F., is bad, because it does not clearly shew such a reduction of the note into possession by the husband as disentitled the wife to sue upon it after his death. *Scarpellini v. Atcheson*, 7 Q. B. 864; 14 L. J., Q. B. 333; 9 Jur. 827.

#### **Note passed to Wife dum sola, in Fraud of Husband's Marital Rights.**—

To a count by husband and wife upon a note passed to the wife dum sola, the defendant pleaded that the note was passed in fraud of his marriage, and therefore void. The plaintiffs replied, upon equitable grounds, that the husband married before the note became due, upon the faith that it would be duly paid, and without notice of the fraud:—Held, that the note was void ab initio upon grounds of public policy, and was not set up by the mere fact of the marriage of the payee before its maturity. *Lee v. Hayes*, 17 Ir. C. L. R. 394.

Seemle, that if the defence had been unsustainable at law, the equities being equal the legal right to recover upon the note would have turned the scale in favour of the plaintiffs. *Id.*

Seemle, that in a court of equity the plaintiffs would fail, because the equities being in the other respects equal, the defendant's equity would be preferred as prior in point of time. *Id.*

When a married woman has property settled to her separate use during her life, with a power of appointment by deed or will over the corpus, although she exercises such power by her will, the corpus, after her death, will not be liable for a note given by her in her life. *Shattock v. Shattock*, 2 L. R., Eq. 182; 35 L. J., Ch. 509; 12 Jur., N. S. 405; 14 W. R. 600.

**Action by—Husband and Wife.]**—Husband and wife may sue on a note made to her during coverture. *Philliskirk v. Pluckwell*, 2 M. & S. 393.

**—Husband alone.]**—Where a bill is payable to a feme sole, who intermarries before it becomes due, the husband may sue in his own name, without joining the wife, although the latter has not indorsed the bill. *McNeilage v. Holloway*, 1 B. & A. 218; *S. P.*, *Burrough v. Moss*, 10 B. & C. 558.

**Forgery of Wife's Name by Husband.]**—A bill, payable to the order of a married woman, was remitted to her in respect of her separate estate. Her husband got possession of it without her knowledge, forged her name on the back, then indorsed his own name, and gave the bill to P. to get it discounted, stating that she had indorsed it. P. got it discounted, and in order to do so, was obliged himself to indorse it. He then paid the proceeds to the husband. The acceptor, in consequence of a notice from the wife, refused to pay the holder, who thereupon had recourse to P., who paid the holder. A suit having been instituted in equity by the wife, to establish her title to the bill, and to restrain P. from suing the acceptor:—Held, that P. was to be treated as a purchaser of the bill for value. *Dawson v. Prince*, 2 De G. & J. 41; 27 L. J., Ch. 169; 4 Jur., N. S. 497.

Held, also, that assuming P. to have notice that the bill was drawn in respect of the wife's separate estate, yet, as there was nothing to excite suspicion of the forgery, he was justified in relying on the husband's statement that the bill had been indorsed by her, and was not bound to inquire further as to the genuineness of her signature, and that there was, therefore, no equity to restrain him from the assertion of the legal title which he had acquired by the husband's indorsement. *Id.*

**Pleading Coverture.]**—To an action on a note against maker he pleaded that, at the time of making the note, the plaintiff was the wife of A.; that the consideration for the note was the loan of money of A., advanced by the plaintiff to the defendant without A.'s authority and against his will; that the plaintiff took the note, and holds the same without the authority and against the will of A., and that he never had any property in or right to the note:—Held, an informal plea of coverture, and therefore a bad plea in bar. *Guyard v. Sutton*, 3 C. B. 153; 15 L. J., C. P. 225; 10 Jur. 459.

## 8. INFANTS.

In an action against acceptor by an indorsee, it is no defence that the drawers who had drawn the bill payable to themselves, and of course indorsed it, were infants when it was drawn. *Taylor v. Croker*, 4 Esp. 187.

The infancy of the payee is no answer in an action by the indorsee against the drawer. *Grey v. Cooper*, 3 Dougl. 65; 1 Selw. N. P. 306.

An infant cannot accept a negotiable bill even for necessities. *Williamson v. Watts*, 1 Camp. 522.

A person is liable as acceptor of a bill which was drawn while he was an infant, but was accepted by him after he came of age. *Stevens v.*

*Jackson*, 2 Rose. 285; 1 Marsh. 469; 6 Taunt. 106; 4 Camp. 164.

A declaration stated that the plaintiff drew a bill, which the defendant accepted. A plea that the defendant accepted the bill whilst he was an infant, being at the time of its acceptance without a date; that the plaintiff afterwards altered the bill by writing a date thereon, and that there never was any licence or ratification given by the defendant to such alteration, after he attained twenty-one, is a good plea, and discloses only a single defence—infancy. *Harrison v. Cotgreave*, 5 D. & L. 159; 4 C. B. 562; 16 L. J., C. P. 198.

An indorsement by an infant, though he is not capable of making a new contract, transfers the property in the bill, his indorsement being a condition of the contract. *Lebel v. Tucker*, 8 B. & S. 833.

## Evidence as to Age—At Date of Acceptance.]

—A declaration by indorser against acceptor stated that the bill was drawn on the 20th of September, 1847, payable four months after date; and that the defendant then accepted the bill. Plea, infancy of the defendant. It was proved that he became of age on the 24th of December, 1847:—Held, that this was no evidence of his being an infant at the time of his accepting the bill. *Harrison v. Clifton*, 17 L. J., Ex. 233.

Action by indorsee against acceptor of a bill at four months' date. Pleas, that he did not accept, and that he was an infant when he accepted. Proof, that the acceptance to the bill was his writing, that he came of age one day before the maturity of the bill, and resided in the same town as the drawer and indorser:—Held, evidence for the jury, from which they might infer that the bill was accepted during his minority. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J., C. P. 69; 16 Jur. 1087.

## 9. LIQUIDATORS.

The four liquidators of a company passed a resolution that one of them should have power to accept bills of exchange. They afterwards resolved that bills to the amount of 7,500*l.*, which had been accepted to the credit of C., should be renewed. Fresh bills were accordingly drawn and accepted by one liquidator:—Held, that the acceptances were invalid. *London and Mediterranean Bank, In re, Agra and Masterman's Bank, Ex parte*, 6 L. R., Ch. 206; 24 L. T. 376; 19 W. R. 486.

## 10. JOINT STOCK COMPANIES.

**General Principle.]**—A railway company, incorporated by a special act of parliament containing the usual clauses inserted in such statutes, cannot accept bills of exchange. *Bateman v. Mid-Wales Railway Company*, 1 L. R. C. P. 499; 35 L. J., C. P. 205; 12 Jur., N. S. 453; 14 W. R. 672.

Under the Companies Act of 1862, s. 47, a company, not otherwise having this power, has not power to accept bills of exchange. *Peruvian Railway Company v. Thames and Mersey Marine Insurance Company*, 2 L. R., Ch. 617; 36 L. J., Ch. 864; 15 W. R. 1002.

**Limited—Liability of Directors.]**—A bill drawn on a company, limited, by a shareholder in that

company, was accepted, "W. Ellis, secretary, by order of the Royal Surrey Gardens Company, Limited." This acceptance was in fact written by order of certain directors of the company. At the time when the bill became due the company was insolvent. In an action by a second indorsee (who did not shew that either he or the first indorsee had given value to the drawer) against the directors who authorized the acceptance, alleging in one count that they accepted the bill, and in another charging them with falsely representing that they had authority on behalf of the company to accept it:—Held, first, that the directors were not liable as acceptors. *Eastwood v. Bain*, 3 H. & N. 738; 28 L. J., Ex. 74; 7 W. R. 90.

Held, secondly, that assuming there had been a false representation, the plaintiff not having proved that he thereby sustained damage, the directors were entitled to a verdict. *Ib.*

A note was signed by three persons describing themselves as directors of a company incorporated, with limited liability, under 19 & 20 Vict. c. 47, and was countersigned by a person who described himself as secretary of the company, in the following form, "London, December 31, 1856: three months after date we jointly promise to pay S., or order, 600*l.*, for value received in stock, on account of the London and Birmingham Hardware Company, Limited":—Held, that the directors who signed it were not personally liable upon the note. *Lindus v. Melrose*, 3 H. & N. 177; 27 L. J., Ex. 326; 4 Jur., N. S. 488—Ex. Ch.

But a note, signed by four persons describing themselves as "directors of the Financial Insurance Company (Limited)" and countersigned "C. G. G., Manager, London, 28th July, 1866, three months after date we promise to pay the English Joint Stock Bank (Limited), or order, 1,000*l.* value received," is binding on the directors who sign it. *Courtauld v. Sanders*, 16 L. T. 562; 15 W. R. 906.

A person advanced money for purposes of a company in which he was a shareholder, and received a promissory note: "We, the directors of the Isle of Man Slate and Flag Company Limited, do promise to pay to John Dutton 1,600*l.*, with interest at the rate of 6*l.* per cent. per annum until paid." It bore the seal of the company, and was signed by four directors. The lender had stated that he would lend the money to the directors only:—Held, that the directors who had signed the note were personally liable upon it. *Dutton v. Marsh*, 6 L. R., Q. B. 361; 40 L. J., Q. B. 175; 24 L. T. 470; 19 W. R. 754.

A resolution to wind up a banking company voluntarily was confirmed on the 22nd, and advertised in the London Gazette on the 26th of November. On the 24th of the same month one of the directors, who had been appointed one of the liquidators, accepted, as director, a bill of exchange on the bank. This bill was afterwards indorsed for value to a person who had no notice that the bank was in liquidation:—Held, that the bill was not a bill of the company, and therefore that the holder could not prove against the company for the amount. *London and Mediterranean Bank, In re, Bolognesi, Ex parte*, 5 L. R., Ch. 567; 40 L. J., Ch. 26; 18 W. R. 976.

A bill of exchange to pay to the drawer's order at three months after date 137*l.* 10*s.* value received in account (fire policy, No. 597), was directed to Henry Connah, Esq., general agent

of L'Unione Compagnia D'Assicurazione Generale (Firenze), 8 York Street, Manchester, who wrote upon it: "Accepted, payable at 8, York Street, Manchester, on behalf of the company. H. Connah." In an action against him on this bill:—Held, that he was personally liable as acceptor. *Herald v. Connah*, 34 L. T. 885.

— **Powers of Directors.**—The articles of association of a company contained no provisions as to the issue of negotiable instruments, but the objects of the company were such that a power to issue them was to be implied. The directors gave to H. for value an instrument under the seal of the company, headed "debenture," and stamped as a deed, by which the company "undertakes to pay to the order of J. H., on 1st July, 1867, 1,000*l.* with interest half-yearly, on presentation of the annexed interest warrants:"—Held, that the indorsee and transferee for value of this instrument was entitled to prove on it against the company free from equities between H. and the company. Per Wood, L. J., scilicet, that the instrument was a promissory note, but, if not, the company was bound by their promise, publicly held out by the instrument, that they would pay to the order of H., and could not set up against a transferee equities between themselves and H. Per Selwyn, L. J., the instrument was a promissory note. *General Estates Company, In re, City Bank, Ex parte*, 3 L. R., Ch. 758; 16 W. R. 919.

The directors of a general trading company, part of whose business was to accept bills of exchange, and whose articles conferred the most extensive powers of management on the directors, passed a resolution authorizing the chairman to accept bills drawn on the company by L., upon L.'s depositing securities to a certain amount. The chairman accordingly accepted the bills, and L. deposited some securities, but not nearly to the specified amount. The directors by resolution affirmed the transaction, but it did not appear that they knew that the requisite amount of securities had not been deposited. The bills were entered in the books of the company, and treated as binding on them. On the company being wound up, a bonâ fide holder of some of the bills claimed to prove:—Held, that the proof ought to be admitted, for that the bills were binding on the company, as they had been accepted modo et formâ by the authority of the board of directors, and the provision as to the deposit of securities was a collateral matter, into the observance of which a holder of the bills was not bound to inquire. *Land Credit Company of Ireland, In re, O'cand, Gurney & Co., Ex parte*, 4 L. R., Ch. 460; 39 L. J., Ch. 27; 20 L. T., N. S. 641; 17 W. R. 689.

A bill directed to a company was accepted thus: "Accepted, payable at Messrs. Barclay, Bevan & Co., C. M., directors of the Great Snowdon Mountain Copper Company Limited," such acceptance being countersigned by the secretary. The directors were in fact authorized to accept bills. In an action against C. and M. personally:—Held, that the acceptance complied with the requirements of the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 47, and bound the company. *Okell v. Charles*, 34 L. T. 822—C. A.

— **Acceptance of Bill by Secretary—Misdescription of Company.**—A. directed a bill to a company of limited liability by the name of the

Saltash Watermen's Steam Packet Company, its full name being the Saltash Watermen's Steam Packet Company, Limited. J. M., who was secretary to the company, wrote across it, "Accepted, payable at Messrs. B. & Co., J. M., secretary to the company." The bill was not honoured:—Held, that the secretary was personally liable to A. on the bill, under 19 & 20 Vict. c. 47, s. 43, by reason of the omission of the word "limited" to the name of the company. *Penrose v. Martyr*, El. Bl. & El. 499; 28 L. J., Q. B. 28; 5 Jur., N. S. 362.

**Registered—Powers of Directors to bind Company.**—By the deed of settlement of a company, registered under 7 & 8 Vict. c. 110 (repealed by 25 & 26 Vict. c. 89, s. 205), it was provided that it should not be lawful for the directors to contract any debts in conducting the affairs of the company, beyond 100*l.*, at any one time, except in the case of the purchase-money for a newspaper, of which the board of directors might leave unpaid any part not exceeding 1,000*l.*, and might issue a promissory note or accept a bill of exchange on behalf of the company for such balance:—Held, that the substance of the authority was, that the directors might contract a debt to the amount of 1,000*l.*, and secure it by a negotiable instrument; and that the directors, having contracted a debt to that amount, were not precluded from giving security for it, with its legal accretions, by several notes or bills, instead of a single note or bill. *Thompson v. Wesleyan Newspaper Association*, 8 C. B. 849; 19 L. J., C. P. 114.

A declaration alleged that the defendants were a company, having obtained a certificate of complete registration under 7 & 8 Vict. c. 110 (repealed by 25 & 26 Vict. c. 89, s. 205); that P. and L., being two directors, made their note, and thereby promised, on behalf of the company, to pay the plaintiff, or order, 32*l.* 4*s.* 9*d.*, the balance of an account due to him from the company, three months after date, which note was signed by P. & L., and made by them, and in their names, on behalf of the company; and thereupon the company, in consideration of the premises, promised the plaintiff to pay him the note:—Held, that the declaration was insufficient, and did not shew any authority in P. & L. to bind the company. *Thompson v. Universal Salvage Company*, 5 D. & L. 380; 1 Ex. 694; 17 L. J., Ex. 118.

Under 7 & 8 Vict. c. 110, s. 45 (repealed by 25 & 26 Vict. c. 89, s. 205), if a bill drawn upon a company regulated by that act is accepted by two of the directors, the acceptance is void as against the company, if not expressed to be accepted by such director on behalf of such company, though the clause does not contain any words of nullification. *Halford v. Cameron's Coalbrookdale, &c., Railway Company*, 16 Q. B. 442; 20 L. J., Q. B. 160; 15 Jur. 335; *S. P.*, *Edwards v. Cameron's Coalbrookdale, &c., Railway Company*, 16 Q. B. 446, n.; 6 Ex. 269.

But where a bill drawn upon the company by its corporate name and sealed with its seal, having the name of the company circumscribed, was accepted by two persons styling themselves directors, appointed to accept the bill, and the acceptance was countersigned by the company's secretary:—Held, that such acceptance was sufficiently express. *Ib.*

The following instrument was signed by two

directors of a registered company under 7 & 8 Vict. c. 110 (repealed by 25 & 26 Vict. c. 89, s. 205), and sealed with the seal of the company: "Three months after date, we, two of the directors of the Ark Life Assurance Society, by and on behalf of the society, promise to pay to Mr. May, or order, 67*l.* 15*s.* 6*d.*, value received." There was no counter signature by the secretary of the company:—Held, a note binding on the company, and not on the parties who signed it. *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J., Ex. 348.

**Instrument not Drawn in Accordance with Deed of Settlement.**—An instrument issued by a company completely registered pursuant to 7 & 8 Vict. c. 110, in this form: "Sea, Fire, Life Assurance Company. To the cashier, Thirty days after date, credit Mrs. A., or order, with 311*l.* 9*s.* 6*d.* claims per Susan King, in cash, on account of this corporation," and signed by two of the directors of the company, is a note, and binding on the company, notwithstanding it may not have been drawn strictly pursuant to the provisions of the deed of settlement, so as to be binding upon the shareholders. *Allen v. Sea, Fire and Life Assurance Company*, 9 C. B. 574; 19 L. J., C. P. 305; 14 Jur. 869, n.

A deed of settlement of a company under 7 & 8 Vict. c. 110, contained a clause that "the directors shall, and they are authorized to make and issue, indorse and accept, in the name of and on account of the company, such bills of exchange and notes as they may think expedient, provided that the total amount of such bills and notes due at any one time shall not exceed 100,000*l.*; and all such bills and notes, and no other, shall be so made and issued, indorsed or accepted, as to be binding on the company and on the shareholders, and each of them, to the extent of the shares held by them in the capital of the company, and no further or otherwise":—Held, that this clause afforded no answer to an action on a bill accepted by the company, in the form prescribed by s. 45. *Gordon v. Sea, Fire and Life Assurance Society*, 1 H. & N. 599; 26 L. J., Ex. 202; 3 Jur., N. S. 188.

**Or within Scope of Company's Business.**—A bill drawn on behalf of a company, though in the form prescribed in 7 & 8 Vict. c. 110, s. 45, does not bind the company, and is not available in the hands even of a bona fide holder, if the bill is drawn for any purpose not within the scope of the business of the company, and not such as the directors have power by the deed of settlement to bind the company by bills in respect of. *Balfour v. Ernest*, 5 C. B., N. S. 601; 28 L. J., C. P. 170; 5 Jur., N. S. 439; 32 L. T., O. S. 295; 7 W. R. 207.

**Proviso in Deed of Settlement restricting Liability of Shareholders upon Bills—Void.**—A proviso in a deed of a company under 7 & 8 Vict. c. 110, restricting the liability of the shareholders upon bills of exchange, which the directors have by the deed authority to draw and accept, is repugnant and void as regards the public; and a bill drawn under such authority binds, even in the hands of a holder with notice of the deed, both the company and the individual shareholders to its full extent. *State Fire Insurance Company, Ex parte, Meredith, In re*, 32 L. J., Ch. 300; 9 Jur., N. S. 298; 8 L. T. 146; 11 W. R. 416.

**Unregistered or Unincorporated Companies—Powers of Directors.]**—The Union Bank of Calcutta was a partnership carrying on the business of banking there; and by its deed of settlement it was provided that the business of the company should be to issue notes payable to bearer on demand, to discount bills and notes, and to lend money on the security of personal property or of cash accounts. It was further provided, that no note should be issued to an extent exceeding twenty-five lacs of rupees, and that no notes or bills should be issued, nor bills or notes discounted, nor money lent, otherwise than of the description and in the manner above mentioned. An action was brought against a shareholder of the bank, on certain instruments which were in the following form:—

"No. 445. Union Bank Post Bill.

Calcutta, 1st July, 1847.

Company's rupees, 10,000.

At sixty days after sight this our first bill of exchange, second and third of the same tenor and date not paid, we promise to pay on account of the proprietors of the Union Bank of Calcutta, to the order of Messrs. Cockerell, Larpent & Co., the sum of Co.'s rupees, 10,000, value received.

J. RENIER, } Directors."  
W. P. GRANT, }

Held, that the two directors had power to bind the shareholders by these instruments, and that the co-partnership was sufficiently described in the instruments by the name of "the Proprietors of the Union Bank of Calcutta," although their proper name was the "Union Bank of Calcutta." *Forbes v. Marshall*, 11 Ex. 166; 24 L. J., Ex. 305.

The defendants agreed by deed to form themselves into a mining company; that B. should be the resident director or manager; that he should employ workmen, provide all needful implements, materials and machinery, and so direct the mine as most effectually to promote the interests of the company; that he should transmit to the secretary his accounts monthly of the sums paid for wages, salaries, materials and otherwise, together with a statement of all debts and liabilities due from the company; provided always, that he should not expend or engage the credit of the company for any sum exceeding 50*l*. in any one month, without the express authority in writing of the managing directors:—Held, that under this deed B. had no authority to bind the company by the acceptance of bills of exchange. *Brown v. Byers*, 16 M. & W. 252; 16 L. J., Ex. 112.

**Liability of Directors.]**—An action was brought against a defendant on a note signed by himself and other directors, as follows:—"We, the directors of the Royal Bank of Australia, for ourselves and the other shareholders of the company, jointly and severally promise to pay G. H. W., or bearer, on the 19th of February, 1860, at the Union Bank of London, 200*l*. for value received, on account of the company":—Held, that he was personally liable on the note. *Penkiri v. Connell*, 5 Ex. 381; 19 L. J., Ex. 305.

Directors of a joint-stock newspaper company gave the plaintiff the following note, in part payment for the purchase of a newspaper, which the company had agreed to purchase of him:—"On demand, we jointly and severally promise to pay Mr. H., or order, 250*l*. value received, for

and on behalf of the Wesleyan Newspaper Association." Signed by the directors:—Held, that the words jointly and severally were equivalent to jointly and personally; and that the directors were therefore personally liable on the note. *Healey v. Story*, 3 Ex. 3; 18 L. J., Ex. 8.

**Manager Signing but not as Acceptor—Liability of.]**—Declaration on a bill made by R. P., directed to A., B., C., D., E., and F., and accepted by them. Pleas by A., B. and C.: that R. P. did not make the bill, and that A., B. and C. did not accept. Judgment by default against D., E. and F. The bill produced at the trial was drawn upon the directors of the I.S. company, and accepted "for the company" by D. and E., signing as directors. F. signed his name with theirs, as manager; all the defendants were shareholders, and all but F. were directors. The jury found that F., as manager, was not an acceptor of the bill: it was not put to them to say (nor did counsel desire that they should be asked), whether or not D. and E. had authority to bind the company by acceptances. Verdict for the plaintiffs:—Held, that F. was not, in point of law, liable as an acceptor, either by his having actually signed his name with those of D. and E., or by their having accepted the bill as directors of a company in which he held shares, and that the plaintiffs had failed on both issues. *Bult v. Morrell*, 12 A. & E. 745.

**Acceptance of one Trustee for five.]**—Indorsee against three persons as acceptors of a bill drawn on "E. M. and others, trustees of Clarence Temperance Hall, Liverpool," and accepted thus—"Accepted, E. M." The three with E. M. and another, were the five trustees of a body of persons associated together for the purpose of building the Temperance Hall. E. M. had authority from all the trustees to accept the bill on their behalf:—Held, that they were bound by the acceptance, though it did not shew on the face of it that E. M. intended to accept not individually, but for himself and four others. *Jenkins v. Morris*, 16 M. & W. 877.

**Acceptance by Purser.]**—A bill directed to "J. D., purser, West Downs Mining Company," was accepted by him as follows:—"J. D., per proc. West Downs Mining Company." J. D. was a member of the company which was not incorporated:—Held, that J. D. was personally liable on his acceptance. *Nicholas v. Diamond*, 9 Ex. 154; 23 L. J., Ex. 1.

An order to pay to the drawer's order at three months after date a sum of money "for value received in machinery supplied the adventurers in Hayter and Holne Moor Mines," was delivered to Mr. W. Charles. W. Charles wrote upon it, "Accepted for the company, W. Charles, purser":—Held, that this made W. Charles personally liable as the acceptor. *Mare v. Charles*, 5 El. & Bl. 978; 25 L. J., Q. B. 119; 2 Jur., N. S. 234.

**Acceptance by Secretary of Benefit Building Society.]**—A secretary of a benefit building society signing a note in the following form: "Midland Counties Building Society, No. 3, Birmingham, 1st September, 1856. One month after demand, we jointly and severally promise to pay J. B. 120*l*. with interest thereon after the rate 6*l*. per cent. per annum (payable half-yearly), for value received. W. H., S. B., directors;

W. F., secretary," is personally liable on the note. *Hottumley v. Fisher*, 1 H. & C. 211; 31 L. J. Ex. 417; 8 Jur., N. S. 895; 6 L. T. 688; 10 W. R. 669; *S. P., Price v. Taylor*, 5 H. & N. 540; 29 L. J. Ex. 331; 6 Jur., N. S. 402; 2 L. T. 221; 8 W. R. 419.

**Negotiation by Liquidators.**—The holders of dishonoured bills of an insolvent company, being also the acceptors of other bills not arrived at maturity which are in the possession of the official liquidator of the company, are not entitled under the Companies Act of 1862 to have their acceptances retained by the official liquidator, and not negatived until due, when a right of set-off would arise. *Commercial Bank Corporation of India and the East, In re*, 36 L. J., Ch. 333.

Holders of dishonoured acceptances of a company which is being wound up cannot, either at law or in equity, set off the present liability of the company upon such acceptances against a future liability of themselves on other bills accepted by them, and which the company holds. Nor does set-off in bankruptcy apply to such a case. *Id.*

#### 11. JOINT OR SEVERAL.

**Joint and Several.**—A note beginning, "I promise to pay," and signed by two, is joint and several. *Clerk v. Blackstock*, Holt. 474; *S. P., March v. Ward*, Peake, 130. But see *Ridd v. Moggridge*, 2 H. & N. 568.

A joint and several note, although it contains two promises in the alternative, is one contract and one instrument. *Gardner v. Walsh*, 5 El. & Bl. 83; 24 L. J., Q. B. 285; 1 Jur., N. S. 828.

A note in these words, "I, J. C., promise to pay J. F., or his order, 50l., with interest, at six months' notice. (Signed) J. C., or else H. B.," is no note as against H. B. *Ferns v. Bond*, 4 B. & A. 679.

A bill, drawn in this form—"Pay to our order," signed in the name of two persons and Co., and accepted, may be declared upon by the indorsee as a bill drawn by an aggregate firm; and if proved that the firm consists of only one person, yet it is not a variance. *Bass v. Clive*, 4 M. & S. 13; 4 Camp. 78.

**Joint or Several.**—A declaration that the defendant and another made their note, by which they jointly "or" severally promised to pay, is good. *Rees v. Abbott*, Cowp. 832.

**Joint.**—Messrs. J. C., R. M., J. P. and T. S., carrying on business as bankers, a note in the following form, was signed by R. M.:—"I promise to pay the bearer, on demand, five pounds; value received. For J. C., R. M., J. P. and T. S.—R. M."—Held, that the holder of this note had not a separate right of action against the party so signing, but that the firm was liable. *Buckley, Ex parte*, 14 M. & W. 469; 14 L. J., Ex. 341; *S. P., Galway (Lord) v. Matthew*, 10 East, 264; 1 Camp. 403.

A note, which appears on the face of it to be the separate note of A. only, cannot be declared on as the joint note of A. and B., though given to secure a debt for which A. and B. were jointly liable. *Stiffin v. Walker*, 3 Camp. 308; *S. P., Emly v. Lye*, 15 East, 7.

Directors of an unregistered joint-stock com-

pany called "The Royal Bank of Australia," issued promissory notes at five years' date, in the following form:—"We, directors of the Royal Bank of Australia, for ourselves and the other shareholders of the company, jointly and severally promise to pay 200l. for value received on account of the company." (Signed by three directors.) In an action upon the note against two directors, one of whom had signed the note, and four shareholders:—Held, that this note bound the shareholders jointly, inasmuch as it clearly expressed an intention that they should be jointly bound; though it professed to bind them separately also, which it could not do. *MacLae v. Sutherland*, 3 El. & Bl. 1; 2 C. L. R. 1320; 23 L. J., Q. B. 229; 18 Jur. 942; *S. P. & S. C. nom. Galloway, In re*, 18 Jur. 888.

A., B. & C. drew a cheque for 500l. on a banking company, C. being a surety for A. & B.:—Held, that this was a joint debt and could not be treated as a joint and several debt. *Other v. Iveson*, 3 Drew. 177; 24 L. J., Ch. 654.

**Two Payees not Partners—Indorsement by One only.**—If a bill is drawn by two, payable to "us or our order," and subscribed by both, though not in partnership, they make themselves partners by the form of the bill, to the effect of making an indorsement by one of them valid. *Carriek v. Vickery*, 2 Dougl. 653, n.

In an action by indorsee against acceptor of a bill, payable to two persons not partners, and, when accepted, indorsed by one of those persons in the name of both; the defendant cannot dispute the regularity of this indorsement. *Jones v. Radford*, 1 Camp. 83, n.

**On Representation, or on Faith of others Joining.**—When a person signs a note on a representation that others are to join, and one afterwards refuses to sign, the payee cannot recover against the person who signed it, unless the jury is satisfied that such person, knowing the facts, and being aware of his rights, consented to waive his objection. *Leaf v. Gibbs*, 4 C. & P. 466.

A. agreed to join his brother in a note for his accommodation, provided B. would also join. A. accordingly signed an instrument in the form of a note, a blank being left for the name of the payee. B. refused to join, and afterwards A.'s brother delivered the imperfect instrument to C. for value, representing that he had authority to deal with it, and C.'s name was inserted as payee:—Held, that C. could not recover on this note against A. *Awde v. Dixon*, 6 Ex. 869; 20 L. J., Ex. 295.

A., as surety to a firm, signed a joint and several bill, on the faith that B. would join as a co-surety. B. never signed it; but A. was afterwards compelled to pay it by proceedings at law at the suit of an indorsee. One of the firm died, and the others became bankrupt:—Held, that the firm were not entitled to avail themselves of the bill, and were liable to repay the amount and the costs of the proceedings, both at law and in equity. *Rice v. Gordon*, 11 Beav. 265.

**Payment by One.**—An acknowledgment by one of several drawers of a joint and several note does not (since 19 & 20 Vict. c. 97, s. 14), take it out of the Statute of Limitations as against the others. *Cockrill v. Sparke*, 1 H. & C. 699;

32 L. J., Ex. 118; 9 Jur., N. S. 307; 7 L. T. 752.

A payment by one of several makers of a joint and several note may be pleaded by any one of the parties as a payment by himself. *Beaumont v. Greathead*, 3 D. & L. 631; 2 C. B. 454; 15 L. J., C. P. 130.

**Pleadings in Actions on.]**—Action by A. and B., payees of a joint and several note, against C., one of the makers. A plea, that the note was made by B., C. and another, and that C., in case A. and B. were to recover from him the amount of the note, would be entitled to call on B. for contribution, is a bad plea, as being no answer to the action upon the several contract by C. *Beecham v. Smith*, El. Bl. & El. 442; 27 L. J., Q. B. 257; 4 Jur., N. S. 1018.

Semble, per Lord Campbell, C. J., that even if the plea had been good, a replication that A. & B. made the note only as sureties for third parties, would have been a good answer. *Id.*

A declaration against a party, as maker of a note, is supported by the production of a joint and several note made by him and another person. *Bulbeck v. Jones*, 5 Jur., N. S. 1317.

In an action against one of several makers of a joint note, or one of several drawers of a joint bill, if it is stated as a several one made by one alone, the objection can only be taken by a plea in abatement. *Evans v. Lewis*, 1 B. & A. 226.

A joint and several note of A. and three others may be set off against a claim of A. in an action by him against the payee upon a money demand. *Owen v. Wilkinson*, 5 C. B., N. S. 526; 28 L. J., C. P. 3; 5 Jur., N. S. 102.

**What Constitutes a Variance.]**—The non-joinder of one of two joint drawers of a bill, is no variance in an action by an indorsee against the other. *Wilson v. Reddall*, Gow, 161.

Where a declaration stated a bill to be drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by the three jointly with a fourth.—Held, that this was no variance. *Mountstephen v. Brooke*, 1 B. & A. 224.

## 12. PARTNERS.

**Acceptance in Name of Firm.]**—A partner has no implied authority by law to bind his co-partners by his acceptance of a bill except by an acceptance in the true style of the partnership. *Kirk v. Blurton*, 9 M. & W. 284; 12 L. J., Ex. 117.

Therefore, where a firm consisted of J. B. and C. H., the partnership name being J. B. only, and C. H. accepted a bill in the name of J. B. & Co.:—Held, that J. B. was not bound thereby. *Id.*

Where Thomas Seymour and Sarah Ayres carried on business in the name of "Seymour and Ayres," and Seymour signed a note "Thomas Seymour and Sarah Ayres":—Held, that this was a sufficient signature in the name of the firm, and was binding upon Ayres. *Norton v. Seymour*, 3 C. B. 792; 16 L. J., C. P. 100; 11 Jur. 312.

A., who was a cheesemonger at Woolwich, carried on at Woolwich the hosiery trade in partnership with C., but in his own name. C. accepted,

in the name of A., a bill drawn for goods supplied to the partnership, and which was addressed to A. at Woolwich:—Held, that the acceptance was binding on A., although the bill was not addressed to the place where the partnership business was carried on. *Stephens v. Reynolds*, 5 H. & N. 513; 2 F. & F. 147; 29 L. J., Ex. 278; 2 L. T. 222.

**Effect of Misdescription is for Jury.]**

—Where a partner accustomed to issue notes on behalf of the firm, indorsed a particular note in a name differing from that of the partnership, and not previously used by them, which note was objected to on that account, in an action upon it by an indorsee, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account and not in the exercise of his general authority as partner. *Faith v. Richmond*, 11 A. & E. 339; 3 P. & D. 187.

**Effect of Person holding Himself out as being Partner.]**—A. employed B. to manage his business, and to carry it on in the name of B. & Co.;

the drawing and accepting bills were incidental to the carrying on of such business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of B. & Co.:—Held, that A. was liable on the bill in the hands of an indorsee, who took it without any knowledge of A. and B. or the business. *Edmunds v. Bushell*, 1 L. R., Q. B. 97; 12 Jur., N. S. 332.

Goods having been ordered by E., were invoiced to E. & Son, and a bill was drawn for the price on E. & Son. The bill was accepted in the handwriting of the son, in the name of E. & Son. The son was not a partner, and it was alleged that he accepted the bill only as his father's amanuensis:—Held, that if the son had so conducted himself that the drawer might reasonably have believed, and did believe, that he was a partner, he was liable on the bill. *Gurney v. Evans*, 3 H. & N. 122; 27 L. J., Ex. 166.

**Authority to Draw, Accept, or Indorse.]**—S. & S., trading in that name, becoming embarrassed, executed a deed, to which they were parties of the first part, certain of the creditors, as trustees, of the second part, and the general scheduled creditors (among whom the trustees were named) of the third part. The deed assigned their property to the trustees, and empowered the trustees to carry on the business, under the name of the Stanton Iron Company, to execute all contracts and instruments necessary to carry it on, to divide the net income to be taken among the creditors, in rateable proportions (such income to be deemed the property of S. & S.), with power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business, or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred by the trustees to S. & S. Two of the creditors, C. & W., were named among the trustees; C. never acted; W. acted for six weeks, and then resigned. Some time afterwards the other trustees, who continued to carry on the business, became indebted to H., and gave him bills, ac-



cepted by themselves "per proc. the Stanton Iron Company."—Held, that there was no partnership created by the deed, and that, consequently C. and W. could not be sued on the bills as partners in the company. *Cox v. Hickman*, 8 H. L. Cas. 268; 9 C. B., N. S. 847; 30 L. J., C. P. 125; 7 Jur., N. S. 165.

Held, also, that they could not be sued for goods sold and delivered, there being no distinction upon the question of liability between the bills and the consideration for which they were given. *Ib.*

Four mercantile firms, each of whom carried on a separate trading business of its own, agreed to carry on jointly a particular trade which had been theretofore carried on by the Adanson Fibre Company, one of the four firms, alone. The agreement between the four firms provided that the business should be carried on under the style of the Adanson Fibre Company, who were to keep separate books for the purpose, and that each party to the agreement should be liable in respect of the business in proportion to his share in the undertaking, and in the event of being under cash advance he should receive interest for the same; but it was "understood and agreed, that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged." The association was known to the members as the Adanson Fibre Company, but its name and existence were kept secret. In order to raise money for the purposes of the business bills of exchange drawn by M., one of the firms, upon each of the other three, were accepted by them, and were discounted by bankers, the money thus obtained being applied to the purposes of the joint business. The bankers were ignorant of the existence of the association. An order was afterwards made to wind up the association, as an unregistered partnership consisting of more than seven members:—Held, that only those of the firms whose names appeared upon the bills of exchange were liable in respect of them, and that consequently the holders of the bills could not prove upon them in the winding-up. *Adanson Fibre Company, In re, Miles's Claim*, 9 L. R., Ch. 635; 43 L. J., Ch. 732; 31 L. T. 9; 22 W. R. 889. Reversing 30 L. T. 776.

The acceptor of a bill drawn in the name of a firm, without the authority of one of its members, to the order of the firm, is not estopped from disputing the indorsement on the ground that the same member of the firm did not give his authority. *Garland v. Jacob*, 8 L. R., Ex. 216; 28 L. T. 877; 21 W. R. 868—Ex. Ch.

B., a member of the firm of W. and B., attorneys and solicitors, drew and indorsed for value to the plaintiff in the partnership name, a bill of exchange payable to the order of W. and B., which the defendant accepted without consideration. The indorsement was in respect of an entirely private matter of business between B. and the plaintiff, unconnected with partnership purposes; B. had no authority from W. either to draw or indorse the bill. In an action by the indorsee against the acceptor, he having traversed the indorsement:—Held, that he was not estopped from shewing that there had been no indorsement in fact by the firm. *Ib.*

A partner has no implied authority to bind his firm by issuing acceptances in blank. *Hogarth v. Latham*, 3 Q. B. D. 643; 47 L. J., Q. B. 339; 39 L. T. 75; 26 W. R. 388—C. A.

F., of the firm of L. & Co., gave an acceptance purporting to be made by the firm, with a blank for the name of the drawer. C. gave it to H. for value. H. filled up the bill, putting the name of his firm, H. & Co., as drawers, and indorsed it to himself, knowing when he did so that F. had no authority to accept the bill:—Held, that L. & Co. were not liable on the bill at the suit of H. *Ib.*

Semble, that a bona fide holder for value to whom the bill had come in a perfect state would have been entitled to sue. *Ib.*

The defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt, and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepted, in the name of the firm, a bill drawn by him on them. The partnership deed contained a clause, that if any partner should for his own use, or for any other purpose than the immediate use of the partnership, draw, accept, or indorse any bill of exchange in the name of the firm, the others might determine his interest in the partnership:—Held, that the managing partners had authority to bind the partnership by borrowing the money, and accepting the bill. *Brown v. Kidger*, 3 H. & N. 853; 28 L. J., Ex. 66.

Two partners carried on business as brokers, under an agreement that they were to get orders on commission and divide the expenses. One of them travelled for orders, and having incurred expenses, drew a bill for the first time in the partnership name, to raise funds to execute an order. The other partner accepted it, but before it was issued countermanded the authority to negotiate it, and it was negotiated without his knowledge:—Held, that the mere partnership did not render him liable upon it. *Yates v. Dalton*, 28 L. J., Ex. 69.

A bill accepted in the name of a firm, in the hands of a bona fide holder, is valid against the firm, although the partner who accepted had no authority to do so and his doing so was fraudulent. *Wiseman v. Easton*, 8 L. T. 637.

— **In Case of Firm of Solicitors.**—The implied authority of one partner to bind another by a note or bill is confined to partnerships for the purpose of trade. *Hedley v. Bainbridge*, 3 Q. B. 316; 2 G. & D. 483; 6 Jur. 853.

One of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt, as for money handed to the firm by a client to be laid out on mortgage. *Ib.*

L., a partner in a firm carrying on the business of solicitors, gave, without the knowledge of his partners, a note in the joint name of the firm, as security for a sum of money advanced to him by C., and applied the money to his own private use. The partners filed a bill in equity against C. and L. for the delivery up of the note:—Held, that the note was not binding on the partners, either as between them and L., or as between them and C. *Smith v. Coleman*, 7 Jur. 1052. See also **SOLICITOR**.

— **Drawing post-dated Cheque.**—A post-dated cheque, put into circulation with the express intention of its being held over till a

subsequent day, is for all practical purposes a bill of exchange; and, therefore, one member of a firm of attorneys cannot bind the firm by drawing a post-dated cheque in the name of the firm without authority for purposes unconnected with the partnership business. *Forster v. Mackreth*, 2 L. R., Ex. 163; 36 L. J., Ex. 94; 16 L. T. 23; 15 W. R. 747.

**Liability of Retiring Partner.**—A party who had been a member of a trading firm, non-resident, and in general not taking any ostensible part in its affairs, retiring, but giving no notice of his retirement, is liable for bills afterwards discounted to the managing partner in the ordinary way, and for the purposes of the firm. *Western Bank of Scotland v. Needell*, 1 F. & F. 464.

**Authority of new Firm to bind old Firm.**—A new firm has not authority to bind the old firm without the authority of the retiring members, by acceptances in its name for the debts of the old firm; but when such an acceptance has been given in renewal of a bill given by the old firm, the liability of the retiring members on the old bill remains. *Spenceley v. Greenwood*, 1 F. & F. 297.

**Acceptance by Partner "for Company and Self."**—A bill drawn upon and addressed to the Milford Spinning Company as the drawees was accepted by F. Malcolmson, one of the partners, "for the Milford Spinning Company and self."—Held, that the acceptance did not entitle the drawer to be paid out of the separate estate of F. Malcolmson in a suit for administration of his assets. *Malcolmson v. Malcolmson*, 1 Ir. L. R., Ch. D. 228.

**Given or taken in Fraud of Partnership.**—Where, to an action upon an acceptance purporting to be in the name of the firm, and given in their ordinary style and description, they deny the acceptance, and prove that the acceptance was given by one partner in fraud of the firm, such proof does not call upon the holder to shew that he gave consideration for the bill, unless the evidence of the defendant affects him with knowledge of the fraud. *Musgrave v. Drake*, D. & M. 347; 5 Q. B. 185; 13 L. J., Q. B. 16; 7 Jur. 1015.

In an action by indorsee against members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, the onus is cast on the holder of the bill, of shewing that he gave value. *Hogg v. Sheen*, 18 C. B., N. S. 426; 34 L. J., C. P. 153; 11 Jur., N. S. 244; 12 L. T. 709; 13 W. R. 383.

A bill drawn by a partner in the name of his firm, indorsed by him also in such name to himself, and discounted at his private bankers, for his own account, cannot be proved against the joint estate of the firm, unless he had authority from partners to act as he did, with regard to the bill, or unless the proceeds have actually been applied to partnership purposes, and the firm is indebted to his private account to an amount to cover the amount of the bill. *Darlington and Stockton Banking Company, Ex*

*parte, Riches. In re*, 34 L. J., Bk. 10; 11 Jur., N. S. 122; 12 L. T. 372; 13 W. R. 335.

**Liability of Partner accepting Individually.**

—One who individually accepts a bill, addressed to a firm of which he is a member, is individually liable thereon. *Owen v. Van Ester*, 10 C. B. 318; 20 L. J., C. P. 61.

**Non-Liability of Partner where the Name of the Firm is an Individual.**

—If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm. *Yorkshire Banking Company v. Beatson* (1); *Leeds and County Banking Company v. Beatson* (2), 4 C. P. D. 204; 48 L. J., C. P. 428; 40 L. T. 654; 27 W. R. 911.

**Evidence to shew Authority of Partner.**—If a bill or note is drawn, accepted or indorsed, by one of two persons who are partners in a business which is not a trade (e.g. as attorneys), in the name of the firm, and the partner, who did not write the name of the firm, by his plea denies the drawing, acceptance, or indorsement, the plaintiff must give evidence of the authority of the other partner to draw, accept or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority. *Levy v. Pyne*, Car. & M. 453.

One who takes from a member of a trading firm, in satisfaction of his separate debt, a negotiable security in the name of the partnership, is bound to shew that it was accepted or indorsed with the concurrence of the other parties. *Leverson v. Lane*, 13 C. B., N. S. 278; 31 L. J., C. P. 10; 9 Jur., N. S. 670; 7 L. T. 326; 11 W. R. 74.

**Pleadings in Actions against.**—In an action against two as acceptors of a bill drawn on them, C. pleaded that he and the other defendant were partners, and as such had accepted bills for partnership purposes; that the other defendant accepted the bill in question in the name of the co-partnership, in fraud of him, C., and not for the partnership, but for his own private purposes, and without the consent of C., and that there never was any consideration of value received by C. for the acceptance or the payment thereof; and that the plaintiff, at the times of drawing and accepting the bill, had notice of all the premises:—Held, that, as the plea alleged notice to the plaintiff at the very time when the bill was accepted, the implied authority of his co-partner to bind C. by the acceptance did not exist as to the particular bill, and that the plea contained no confession of the acceptance in fact, and was therefore bad as an argumentative traverse of the acceptance by C. alleged in the declaration. *Jones v. Corbett*, 2 Q. B. 828; 2 G. & D. 308; 6 Jur. 778.

A plea by one of the three partners sued upon a bill that it was accepted in violation of the terms of the partnership deed, and for a private debt of one of the partners, amounts to an argumentative denial of the acceptance. *Grant v. Enthoven*, 1 Ex. 382; 17 L. J., Ex. 70.

## IV. FOREIGN BILLS AND NOTES.

**Drawn in Sets.**—An indorsee of a foreign bill, drawn in sets, cannot maintain an action for the other sets against an intermediate indorser who has them not. *Pinard v. Klockmann*, 3 B. & S. 388; 32 L. J., Q. B. 82; 9 Jur., N. S. 599; 7 L. T. 625; 11 W. R. 260.

A foreign bill was made in four parts by A., and was indorsed by the payee to B., who indorsed to the defendants, who indorsed to C., who indorsed to the plaintiff. The first of the four parts only came into the possession of the plaintiff, and he having lost that part brought an action against the defendants for not delivering over the other part. Only the first part had ever come into the possession of the defendants, nor were they able to obtain possession of the others:—Held, that no action would lie against them, as there was no obligation upon them to hand the other parts to the plaintiff. *Id.*

By an agreement under seal, the defendant agreed to pay the plaintiff a sum of money by instalments, and the plaintiff agreed to deliver up to the defendant certain bills of exchange mentioned in a schedule, provided that if the plaintiff should not, before the last instalment became due, deliver to the defendant the bills mentioned, the payment should be postponed until their delivery. The bills were foreign bills drawn on the defendant in sets of three:—Held, that the plaintiff did not perform his contract by delivering to the defendant one part of each of the bills so drawn. *Kearney v. West Granada Gold and Silver Mining Company*, 1 H. & N. 412; 26 L. J., Ex. 15.

A drawee (who was also payee) of a foreign bill drawn in three parts, accepted and indorsed one part to a creditor, to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part for value to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him:—Held, that the holder of the part secondly accepted was entitled to recover on the bill against the acceptor. *Holdsworth v. Hunter*, 10 B. & C. 449; 5 M. & R. 393.

Held, also, that the acceptor would have been liable on the part secondly accepted, even if the first part had been indorsed and circulated unconditionally. *Id.*

**Suing on.**—A holder may recover in an English court on a bill drawn in France on a French stamp, though, in consequence of its not being in the form required by the French code, he had failed in an action which he had brought on it in France. *Wynne v. Jackson*, 2 Russ. 351.

As by the law of France an indorsement in blank does not transfer any property in a bill, the holder of a bill drawn in that country, and indorsed there in blank, cannot recover against the acceptor in the courts of this country. *Trimbe v. Vignier*, 1 Bing. N. C. 151; 4 M. & Scott, 695; 6 C. & P. 25.

A bill payable in France, though drawn in England, is a foreign bill, and notice of dishonour according to the French law is sufficient. *Hirschfeld v. Smith*, 1 L. R., C. P. 340; 35 L. J., C. P. 177; 12 Jur., N. L. 523.

A merchant resident in Norway, and not a

British subject, drew in Norway his bill at four months on E. in this country, and after indorsing it to the order of D., sent it by post to D. in London, who indorsed it to the plaintiff in London:—Held, that there was not a cause of action which arose in this country, nor a breach of a contract made within it, and that therefore the plaintiff could not sue the foreign merchant in this country on the bill under 15 & 16 Vict. c. 76, ss. 18, 19. *Sichel v. Borch*, 2 H. & C. 954; 33 L. J., Ex. 179.

If the remitter of a foreign bill receives credit from the drawer till foreign post day, and the payee gives the remitter full consideration, but the remitter does not pay the drawer, the payee may maintain his action against the drawer, although the drawer has never received any consideration. *Munroe v. Bordier*, 8 C. B. 862; 19 L. J., C. P. 133.

H. W. & Co., American merchants, were indebted to P. & Co., of Paris, and C. & Co., of London, and being pressed for payment by P. & Co., remitted funds to C. & Co., which paid and overpaid them, with a direction to remit the balance to P. & Co. in Paris. In order so to do, C. & Co. bought in London, in the ordinary course of business, a bill on Paris, drawn by M. & Co. to the order of C. & Co., to be remitted at once to Paris, but to be paid for by C. & Co. on the next foreign post day. The bill was so remitted, but before the next foreign post day, C. & Co. failed, and thereupon M. & Co. refused to pay the bill. P. & Co. were afterwards paid by H., W. & Co. in full. In an action by P. & Co., on behalf of H., W. & Co., against M. & Co., on the bill:—Held, that P. & Co. were entitled to recover; for if the action was to be considered personally theirs, they were holders for value of the bill; and if not theirs, but really the action of H., W. & Co., C. & Co. were only correspondents of H., W. & Co. to remit the bill, and not their agents to pledge their credit for the price of the bill. *Poirier v. Morris*, 2 El. & Bl. 89; 22 L. J., Q. B. 313; 17 Jur. 1116.

A bill drawn, accepted and payable in England, was indorsed in France according to English law, but not according to the law of France. The drawer, who was the indorser, and the indorsee were, when the bill was made and indorsed, subjects of France, resident and domiciled there:—Held, that the contract of the acceptor must be governed by the law of England, and therefore the indorsee could maintain an action in England against the acceptor. *Lebel v. Tucker*, 3 L. R., Q. B. 77; 37 L. J., Q. B. 46; 17 L. T. 244; 16 W. R. 338; 8 B. & S. 830.

But a bill was drawn in France upon and accepted in London, and indorsed in France, but not so as to convey to the indorsee according to the French law any property in or right to sue upon the bill there in his own name:—Held, that the acceptor was not liable to an action in this country at the suit of the indorsee. *Bradlaugh v. De Rin*, 3 L. R., C. P. 538; 37 L. J., C. P. 318; 18 L. T. 904; 16 W. R. 1128.

**Notes.**—A foreign note is transferable in England by an indorsement, by virtue of 3 & 4 Ann. c. 9. *Bentley v. Northouse*, M. & M. 66; *S. P. Miln v. Graham*, 1 B. & C. 192; 2 D. & R. 293; *Splitgerber v. Kohn*, 1 Stark. 125.

A note payable to the bearer, made in England, is transferable by delivery in a foreign country.

*De la Chaumette v. Bank of England*, 2 B. & Ad. 385.

**Stamping.**]—*See ante*, II.

## V. ALTERATION OF.

### 1. WHEN CONSIDERED AS ISSUED.

**So as to require fresh Stamp.**]—Before it is negotiated, an instrument altered from a note to a bill is valid without a fresh stamp. *Webber v. Maddocks*, 3 Camp. 1.

In a joint and several note by three, after two had signed, the third, before he signed, caused the words "on account of club held at Mr. Daniel Duffell's," to be introduced "after value received:"—Held, that as the note was not complete until the third signed it, the alteration did not render a fresh stamp necessary. *Wright v. Inshaw or Kinshaw*, 1 D. N. S. 802; 6 Jur. 857. *See Aude v. Dixon*, 6 Ex. 869; 20 L. J., Ex. 295.

One having made and signed a promissory note handed it to a third person, the payee being present; but before it was given to the payee, it was altered by the consent of all parties:—Held, that this giving it to the third person was not an issuing of it, and that it did not require a new stamp. *Sherrington v. Jermyn*, 3 C. & P. 374.

An alteration of a bill or note, so as to make a new stamp necessary, is not material, until it is in the hands of some one who is entitled to claim payment, even though it is accepted and indorsed. *Downes v. Richardson*, 5 B. & A. 674; 1 D. & R. 332.

**Accommodation Acceptances.**]—An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law. *Id.*

An accommodation bill, payable to the drawer's own order, cannot be altered after acceptance and an attempt to negotiate it, though before it is actually negotiated. *Calvert v. Roberts*, 3 Camp. 343.

If accommodation acceptances are exchanged, after an alteration in the date, made with the consent of all parties, but without a fresh stamp, it is sufficient to render the bills invalid. *Cardwell v. Martin*, 9 East, 190; 1 Camp. 79, 180.

An accommodation bill altered in its date before negotiation, with the consent of the parties, does not require a new stamp; and therefore, if it is in the hands of a bona fide holder for a valuable consideration, the acceptor, who has assented to such alteration before the bill became due, cannot avail himself of such an objection. *Downes v. Richardson*, 1 D. & R. 332; 5 B. & A. 674.

### 2. WHEN MATERIAL.

**Generally.**]—To make a bill or note void, the alteration must be in a material part, as in the sum or date. *Trapp v. Spearman*, 3 Esp. 57.

But the insertion of words in a bill which do not affect the responsibility of the parties will not vitiate it. *Marson v. Petit*, 1 Camp. 82, n.

The addition to a note of words which cannot prejudice any person does not destroy its validity. *Aldous v. Cornwall*, 3 L. R., Q. B. 573; 37 L. J., Q. B. 201; 9 B. & S. 607.

The words "on demand" were added to a note

without the knowledge of the maker, after it had been delivered to the payee:—Held, that the maker was not discharged from his obligation to pay it, as the words only added what the law would have supplied or intended. *Id.*

Where the words "or order" have been added by the drawer subsequently to his indorsement; it neither vitiates the bill nor makes a new stamp necessary. *Kershaw v. Cox*, 2 Esp. 246.

**Rectifying Form of Instrument.**]—A bill of exchange was intended to be drawn by the defendant, and given to the plaintiff in renewal of a former bill, but by mistake the name of the plaintiff appeared as drawer. To an action on the bill, the defendant pleaded that the name of the plaintiff appeared as the drawer thereof. The plaintiff filed a replication stating that the plaintiff's name was inserted in the bill by mistake; and the defendant joined issue upon this replication. Before trial the plaintiff instituted a suit in equity to rectify the bill by striking out her name. A demurrer by the defendant to her bill of complaint was overruled. *Druff v. Parker*, 5 L. R., Eq. 131; 37 L. J., Ch. 241; 18 L. T., 46; 16 W. R. 557.

**As to Place where Payable.**]—In an action by payee against acceptor, it appeared that the bill had originally been accepted, payable at his own house in King's-road, Chelsea; but six weeks after the delivery of the bill to the plaintiff, the acceptor, at the request of the plaintiff, altered the description, by making it payable "at Bland's, Great Surrey-street, Blackfriars:"—Held, that this alteration was immaterial. *Walter v. Cubley*, 2 C. & M. 151; 4 Tyr. 87.

So, an alteration by the payee, by making the bill payable at a particular place, after acceptance and whilst it remained in his hands, is immaterial. *Jacobs v. Hart*, 6 M. & S. 142; 2 Stark. 45; *S. P.*, *Stevens v. Lloyd*, M. & M. 292.

A bill having been accepted generally, the drawer added the words, "payable at Mr. B.'s, Chiswell-street," without the consent or knowledge of the acceptor:—Held, a material alteration, and that it discharged the acceptor. *Cowie v. Halsall*, 4 B. & A. 197; 3 Stark. 36.

So also since the 1 & 2 Geo. 4, c. 78. *Mackintosh v. Haydon*, R. & M. 362; *S. P.*, *Desbrouse v. Wetherby*, 1 M. & Rob. 438; 6 C. & P. 758; *Taylor v. Mosley*, *Id.* 437; *Calvert v. Baker*, 4 M. & W. 417; 7 D. P. C. 17.

So where a bill was altered without the privity of the acceptor after it was in circulation, by the addition to the acceptance in the common form of the words "payable at the Bull Inn, Aldgate," and afterwards indorsed to the plaintiff for value, who took it bona fide and without knowledge of the alteration:—Held, a material alteration, which discharged the acceptor. *Burchfield v. Moore*, 3 El. & Bl. 683; 2 C. L. R. 1308; 22 L. J., Q. B. 261; 18 Jur. 727.

The giving an acceptance in blank on a stamped piece of paper to a person for a valuable consideration, it being arranged that he should fill it up with a sum agreed upon covered by the stamp, conveys no authority to him except to draw a bill on it with a general acceptance; and his inserting a particular place of payment before the signature of the acceptor is equivalent to a material alteration, and vitiates the accept-

ance. *Hanbury v. Lowett*, 18 L. T. 366; 16 W. R. 795.

**Amount.**—A bill was drawn in Paris for cent vingt-quatre livres sterling et deux pence upon, and was accepted by B. in London, for 122l. 0s. 2d., and returned without altering the words in the body of the bill. When produced at the trial, the word "quatre" had a line drawn through it, and it was altered to make it conformable to the acceptance:—Held, that the alteration did not vacate the bill, inasmuch as it appeared to have been made with the consent of the acceptor, and in accordance with the original intention of the parties. *Hamelin v. Bruck*, 9 Q. B. 306; 15 L. J., Q. B. 343; 10 Jur. 1094.

The law of France requires indorsements on bills to be special and to state a date and a consideration. The holder of a bill payable in France and indorsed in blank, turned the blank into special indorsements, by inserting the requisite words above each name on the back of the bill. He also, by writing on the face of the bill, professed to fix the rate of exchange at which the bill was payable:—Held, such a material alteration of the rights and liabilities of the parties to the contract as avoided the bill in the hands of the holder. *Hirschfeld v. Smith*, 1 L. R., C. P. 340; 35 L. J., C. P. 177; 12 Jur., N. S. 523; 1 H. & R. 284.

**As to Interest.**—A note was payable six months after date, "with lawful interest." After it had been signed, without the assent of the maker, but with the assent of the holder, there were added in the corner of the note, the words "interest at six per cent. per annum:—Held, that this addition materially altered the contract, and that the holder could not recover on the note against the maker. *Warrington v. Early*, 2 El. & Bl. 763; 23 L. J., Ex. 47; 18 Jur. 42.

**As to Parties.**—Where the bill was originally addressed "Messrs. J. C. & Co.," but the words "and Co." were obliterated, and the word "and" inserted, so that the address was "Messrs. J. & C.," and it did not appear when the alteration was made:—Held immaterial, though made after acceptance, as it made no difference in the liability of the parties. *Farquhar v. Southey*, M. & M. 14; 2 C. & P. 497.

If an accommodation bill is drawn payable to "bearer," and after acceptance the words "or order" are added, the bill is not thereby vitiated, and it may be sued upon without any fresh stamp. *Attwood v. Griffin*, 2 C. & P. 368; R. & M. 425.

On the day before an acceptance became due, the name of the acceptor was erased, and a renewed bill was indorsed on the back, but no new stamp was affixed:—Held, that the jury could not look at the indorsement for the purpose of ascertaining whether the acceptance was struck out with the drawer's assent. *Sweeting v. Halse*, 4 M. & R. 287; 9 B. & C. 365.

To a declaration on a bill accepted payable to the order of L., and by him indorsed to the defendant, and by the defendant to the plaintiff, a plea that the bill was, after the indorsement by the defendant, materially altered without his consent by the insertion of S.'s name as an indorsee prior to the defendant's indorsement, was bad, as the alteration did not vary the nature of

the instrument, but was a mere correction of a mistake which gave the instrument the effect which it was intended to have. *London and Provincial Bank v. Roberts*, 22 W. R. 402.

Action against A. on a joint and several note made by A., B. and C. Plea, that the note, at the time when it was first made was made by B. and A. only, and that, after it was made by B. and A., and after the note was completely issued and negotiated, that is to say, by B. and A., the plaintiff altered it in a material part by causing C. to sign it as a joint and several maker, and that this was not in correction of any mistake, nor to further any intention of the parties existing when the note was first made by A., or first issued and negotiated. At the trial, it appeared that B., being indebted to the plaintiff, agreed to get two sureties, A. and C., to join her in a joint and several note to the plaintiff. B. and A. signed the note together, and gave it to the plaintiff. The evidence tended to shew that, when A. signed it, the plaintiff and B. both intended that C. should afterwards sign, but that A. was not informed of this. A. had the verdict. On a rule for a new trial:—Held, that the addition of C.'s name was a material alteration, and if made after the note was issued, would avoid it. But the court, without deciding whether the note was in point of law issued, supposing the plaintiff and B. did not suppose it complete, though A. did, granted a new trial, with leave to amend the plea, that the question might be raised distinctly. *Gardner v. Walsh*, 5 El. & Bl. 83; 24 L. J., Q. B. 285; 1 Jur., N. S. 828.

An additional signature to a note, placed there some years after the date of the note, which was payable on demand is not an alteration rendering the note void, but an addition in the nature of an indorsement, although on the face of the note. *Yates, Ex parte*, 2 De G. & J. 191; 27 L. J., Bk. 9; 4 Jur., N. S. 649.

**Date and Time of Payment.**—The alteration of a bill by the drawee, after it has been drawn and indorsed, and before it is accepted, postponing the time of payment, vitiates the bill. *Outhwaite v. Luntley*, 4 Camp. 179.

So, an alteration of the date, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration. *Master v. Miller*, 4 T. R. 320. Affirmed in the Exchequer Chamber, 2 H. Bl. 141; 1 Anst. 225; 5 T. R. 637.

A bill which, after delivery by the drawer to the payee, is post-dated by the son of the payee, at the acceptor's request, without any communication with the drawer, is void. *Walter v. Hastings*, 2 Chit. 121; 1 Stark. 215; 4 Camp. 223.

If, upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered, he vacates the bill as against the drawers and indorsers; but if the holder acquiesces in such alteration and acceptance, it is a good bill as between the holder and acceptor. *Paton v. Winter*, 1 Taunt. 420.

In an action by indorsee against acceptor, where after the acceptance the word "date" had been inserted in the place of "sight," in which form it had originally been drawn:—Held, that the acceptor being thereby discharged, the plaintiff could not recover at all; for, as the acceptor was liable only by virtue of the instrument, that

being vitiated, his liability was at an end. *Long v. Moore*, 3 Esp. 155, n.

Where a bill was dated by mistake, in January, 1822, instead of January, 1823, and the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, corrected the mistake, by altering the figure 2 into a 3, without their knowledge or consent:—Held, that such alteration did not vacate the bill. *Brutt v. Picard*, R. & M. 37.

A bill at three months drawn by A., and accepted by B., for A.'s accommodation, was indorsed and sent by post by A. to C. for value. C. returned the bill, insisting upon having one at two months instead. A. thereupon altered the bill by making it payable at two instead of three months, and again sent it to C. There was no evidence that B. knew of the alteration at the time, but there was evidence to shew that he subsequently assented to its being treated as a two months' bill:—Held, that the bill was well declared on as a two months' bill, and that it was not avoided by the alteration. *Tarleton v. Shingler*, 7 C. B. 812.

An alteration in the date of a bill of exchange, payable at a specified period after date, is a material alteration; and where the bill is declared upon with its altered date, the defence is available to the acceptor under a traverse of the acceptance. *Hirschman v. Budd*, 8 L. R., Ex. 171; 42 L. J., Ex. 113; 28 L. T. 602; 21 W. R. 582.

**Erasure of Number.**—In an action against the Bank of England for the non-payment of notes payable to bearer which had been regularly issued by the bank, it appeared that the notes had been bona fide purchased by the plaintiff for value, but that before the plaintiff took them the notes had been altered by erasing the numbers upon them, and substituting others, with the object of preventing the notes from being traced, as payment had been stopped and a notice issued specifying their numbers:—Held, that although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated, so that the plaintiff could not recover in his action on them against the bank. *Suffell v. Bank of England*, 9 Q. B. D. 555; 51 L. J., Q. B. 401; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500—C. A.

**Number and Date.**—A Bank of England note, which had been materially altered in number and date, was paid to the plaintiffs' bank for value by the defendant, both parties believing the note to be good. The plaintiffs paid away the note, which was afterwards presented at the Bank of England, where the alteration was perceived and payment was refused. The note was returned to the plaintiffs as a bad one, and, after a fortnight spent in tracing the note to the defendant, the plaintiffs demanded payment of it from him, and on the 21st of July, 1882, sued him for the amount. On the 18th of August, 1882, the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), received the royal assent. By s. 64, where a bill or acceptance is materially altered, without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made the alteration, and subsequent indorsers. Provided that where a bill has been materially altered, but the alteration is "not apparent," and the bill is in the

hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. By s. 89 the provisions of this act relating to bills of exchange apply, "with the necessary modifications," to promissory notes:—Held, that the doctrine as to notice of infirmity in bills and notes was inapplicable to a forged Bank of England note, and that the delay in giving notice of the alteration to the defendant was no ground of defence; that before the Bills of Exchange Act, 1882, the Bank of England was not liable on the altered note (*Suffell v. Bank of England*, 9 Q. B. D. 555), which was therefore worthless; that s. 64 was not retrospective, and that even if it were so, the "necessary modifications" referred to in s. 89 would exclude Bank of England notes altogether from the operation of s. 64, and that even if the proviso of s. 64 would otherwise have affected the altered bank note, the alteration was "apparent," as the Bank of England could at once discern and point out to the holder of the note that it had been materially altered, although the alteration was not obvious to everybody; and, consequently, that the plaintiffs, having received from the defendant a worthless note on which no one could be sued, were entitled to recover in the action for money had and received. *Leeds Bank v. Walker*, 11 Q. B. D. 84; 52 L. J., Q. B. 590; 47 J. P. 502.

— **So as to require fresh Stamp.**—An alteration in the date of a bill, with the assent of the acceptor, before its negotiation by the drawer, is not such a reissuing of the bill as to render a new stamp necessary. *Leykarriff v. Ashford*, 12 Moore, 281.

Where the date has been altered after the bill is due, but before it is negotiated, it is invalid without a fresh stamp. *Bowman v. Nicholl*, 5 T. R. 537; 1 Esp. 81.

A bill drawn on the first of August, at two months, by A. on B., payable to the order of the drawer, and accepted and re-delivered by B., as a security for a debt, and kept by A. for twenty days, cannot be altered in its legal effect by bringing forward the date to the 21st, without a new stamp, though by the consent of the acceptor, and before indorsement and delivery to a third person; the alteration not being made to correct a mistake in the original form of the bill, which was drawn conformably to the original intention of the parties, and available in that form. *Bathe v. Taylor*, 15 East, 412. And see three following cases, and *Cole v. Parkin*, 72 East, 471.

**In Pursuance of the Intention of the Parties—Original.**—Where a note made by the defendant was altered by him after delivery of it to the plaintiff, by the insertion of the words "or order," and it appeared that the alteration was in pursuance of the original intention of the parties:—Held, that it did not make a new stamp necessary. *Byrom v. Thompson*, 3 P. & D. 71; 11 A. & E. 31; 3 Jur. 1121.

— **Subsequent.**—A note for 100*l.*, payable to the plaintiff or order, and originally expressed to be for value received generally, being altered the next day, upon the suggestion of one of the parties, by the addition of the words "for the goodwill of the lease and trade of Mr. K., de-

ceased," requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill v. Williams*, 10 East, 431.

A note to pay 250*l.*, and 3*l.* per cent. interest, was, after several years, altered, by consent of the parties, to 2½ per cent. :—Held, that it was thereby made void. *Sutton v. Toomer*, 7 B. & C. 416; 1 M. & R. 125.

Where a joint note, signed by the directors of a company, was afterwards altered by the secretary into a joint and several note, without the knowledge or authority of the directors, of whom the defendant was one, and in answer to a letter from the holders, informing the defendant of the dishonour of the joint and separate note of himself and the other directors who were parties to it, he said that their letter should have his earliest attention :—Held, that this did not amount to an assent to the alteration of the note by the defendant, and that he was not bound thereby. *Perring v. Hone*, 12 Moore, 135; 4 Bing. 28.

**By Erasure of Names.**—Where a drawer of a bill, accepted payable at B. & Co.'s, after keeping it three or four years, indorsed it to the plaintiff, erasing the name of B. & Co., and substituting E. & Co., without the knowledge of the acceptor, B. & Co. having failed since the acceptance :—Held, that the plaintiff could not recover against the acceptor. *Tidmarsh v. Grover*, 1 M. & S. 735.

The holder of two joint and several notes of A. & B., one of which only is due, receives from A. a sum exceeding the amount of the note which is due, and exceeding A.'s moiety of the two sums for which he is liable on both notes, and gives up the note which is due, and erases A.'s name from the other note :—A. is discharged, and thereby B. also. *Nicholson v. Revill*, 6 N. & M. 192; 4 A. & E. 675; 1 H. & W. 756.

In an action by payee against maker of a joint and several note, he cannot, under a plea that he did not make the note, avail himself of the defence that he signed it as a surety, on the understanding that six others should also sign as sureties, and that the name of one of them who had so signed was removed from the note after it was made. *Mason v. Bradley*, 1 D. & L. 380; 11 M. & W. 590; 12 L. J., Ex. 425; 7 Jur. 496.

### 3. OTHER MATTERS RELATING TO.

**Bill rendered Void by—Original Debt—How Affected.**—Where the buyer of goods paid for them by his own acceptance, and after the bill had been accepted the seller altered the date of it, and thereby vitiated it :—Held, that by so doing he did not preclude himself from suing for the original debt; and consequently that he might recover for the goods sold. *Atkinson v. Hawdon*, 4 N. & M. 409; 2 A. & E. 628; 1 H. & W. 77.

Where a note had been altered without having a new stamp, it was held evidence of the terms on which the money had been originally lent. *Sutton v. Toomer*, 7 B. & C. 416; 1 M. & R. 125.

The holder of a bill for 18*l.*, which had been dishonoured, agreed to take 8*l.* in cash and another bill for 10*l.* from the drawer. The drawer accordingly drew another bill upon the same acceptor for that amount; while in the hands of the drawer, the acceptor, without the knowledge

of the drawer, altered the date and vitiated the bill :—Held, that the latter bill being a nullity, the first was not discharged, and that the drawer was liable upon it. *Stoman v. Cox*, 1 C., M. & R. 471; 5 Tyr. 174.

**How Plead.**—Action by indorsee against acceptor; a plea, that before the bill became due, and whilst it was in full force and effect, the date of it was altered by the drawer, whereby it became void, is bad, because it does not allege the alteration to have been made after acceptance. *Langton v. Lazarus*, 5 M. & W. 629.

In an action by indorsee against acceptor of a bill (not stated to be payable at any particular place), it is a good defence under a plea that the defendant did not accept the bill declared on, that, after he had accepted it generally, it was altered without his knowledge, by the addition of a memorandum making it payable at a banker's. *Culvert v. Baker*, 4 M. & W. 417; 7 D. P. C. 17; 1 H. & H. 404; 2 Jur. 1020.

Semble, that this decision can only be supported where the alteration in the instrument declared on is of such a nature as to constitute a substantial variance from the declaration, or shew that the document has not been properly stamped. *Mason v. Bradley*, *supra*.

An alteration in a bill, which does not render a new stamp necessary, cannot be given in evidence under non acceptit; but the fact must be specially pleaded. *Parry v. Nicholson*, 2 D. & L. 640; 13 M. & W. 778; 14 L. J., Ex. 119.

Where a plaintiff declares on an altered bill, the defendant, on a plea denying the acceptance, may shew a material alteration since he accepted it. *Cock v. Corwell*, 2 C., M. & R. 291; 4 D. P. C. 187; 1 Gale, 177; 5 Tyr. 1077.

To a declaration on a note, dated 15th of April, 1845, the defendants pleaded, that at the time the note was signed by them they promised to pay the sum therein mentioned, without specifying any time for payment; that after the note was made and issued and was complete and delivered to the plaintiff, the note was, by consent of the defendants, but without being restamped, altered by the plaintiff in a material part by making the same payable on or before the 15th of April, 1845. Replication, that, before and at the time of making and issuing and completing the note, and before the alteration was made, it was meant and intended by the plaintiff and the defendants, that the notes should be payable on the 15th of April, 1845, but by mistake the note was made and issued and complete without specifying any time for payment; and that the alteration was made for the purpose and with the intent of correcting the mistake. Rejoinder, that, *before and at the time of making the note*, it was not meant and intended that the note should be payable on the 15th of April, 1845 :—Held, that the rejoinder was bad, for putting in issue the intention of the parties before as well as at the time of making the note. *Bradley v. Bardsley*, 3 D. & L. 476; 14 M. & W. 873; 15 L. J., Ex. 115.

Held, also, that the plea was bad, for not shewing that the alteration was made under circumstances which rendered the note invalid unless restamped. *Id.*

To an action on a note the defendant pleaded, that, before making the note, M. drew his bill, dated the 11th April, 1840, and directed it to S., requiring him to pay to his order 200*l.*, three months after date; that S., at the request of

M., accepted the bill for his accommodation, and that the defendant subsequently indorsed the bill also for the accommodation of M.; that afterwards, the date of the bill was altered to another date, namely, the 21st April, 1840, without the knowledge or consent of the defendant, and that he remained ignorant of the alteration until the making of the note; that, after the alteration, the bill was paid to the plaintiff, who held it until it became payable; that, on the 22nd August, 1840, the plaintiff applied to the defendant for payment of the amount as indorser; and the defendant, believing that he was liable to pay, and the bill was in the same state as when he had indorsed it, and being ignorant of the alterations, agreed, in consideration of his supposed liability on the bill and for no other consideration whatever, to make and deliver note, and that the defendant made and delivered the note under the mistaken belief that he was liable to pay the bill, and that he never had any other consideration for the note:—Held, a good defence to the action, and that the defendant was not bound to negative his means of knowledge of the facts relieving him from his liability on the bill. *Bell v. Gardiner*, 1 D., N. S. 683; 4 Scott, N. R. 621; 4 M. & G. 11.

**Evidence as to.]**—In an action by payee against maker, the note, on being produced, appeared to have been altered; the words "or order," having been substituted for "or other." An attesting witness, who had prepared the note, stated that he could not say whether the alteration was in his handwriting or not, but that he ought to have drawn the note originally with the words "or order;" the defendant had paid two years' interest on the note:—Held, that this was reasonable evidence from which it might be inferred that the alteration had taken place with his consent. *Cariss v. Tattersall*, 2 M. & G. 890; 3 Scott, N. R. 257.

Upon an issue of non acceptavit the bill when produced appeared to have been altered in its date:—Held, that it was incumbent on the plaintiff to give some evidence of the circumstances under which this alteration took place. *Clifford v. Parker*, 2 M. & G. 909; 3 Scott, N. R. 233.

Where, after a bill has been accepted, and before it is delivered to the drawer, an alteration is made by a third party in the date, it is for the jury to say, judging from all the circumstances, whether such third party made the alteration with the acceptor's consent, or as his agent; and in either case the acceptor will be liable. *Whitfield v. Collingwood*, 1 C. & K. 325.

Where the defence is that the bill has been altered, the defendant cannot go into evidence to shew that other bills have been likewise altered. *Thompson v. Moseley*, 5 C. & P. 501.

On the day before an acceptance became due, the name of the acceptor was erased, and a renewed bill was indorsed on the back, but no new stamp was affixed:—Held, that the jury could not look at the indorsement for the purpose of ascertaining whether the acceptance was struck out with the drawer's assent. *Sweeting v. Halse*, 4 M. & R. 287; 9 B. & C. 365.

— **Onus probandi.]**—Where a party sues on an instrument which, on the face of it, appears to have been altered, it is for him to shew that

the alteration has not been improperly made. *Henman v. Dickenson*, 5 Bing. 183; 2 M. & P. 289.

If a bill has been altered or obliterated in any material part, and the alteration is such that it may, by possibility, have been made after the bill was completed, the plaintiff ought to be non-suited, unless he gives some evidence to shew that the alteration or obliteration was made before the bill was completed. In the absence of such evidence in such a case, it ought not to be left to the jury to say, upon a mere inspection of the bill, whether the alteration was made before the bill was completed. *Knight v. Clements*, 8 A. & E. 215; 3 N. & P. 375; 1 W., W. & H. 280; 2 Jur. 395; *S. P., Bishop v. Chambre*, 3 C. & P. 55; M. & M. 116.

In an action by indorsee against indorser, the pleas denied the indorsements, the presentment at maturity, and notice of dishonour, and alleged the want of consideration. At the trial the bill appeared on the face of it to have been altered from the 15th to the 10th of December:—Held, that, under the circumstances, the plaintiff was not bound to explain the alteration of the bill, because the making of the bill was admitted on the record. *Sibley v. Fisher*, 2 N. & P. 430; 7 A. & E. 444; W., W. & D. 711; 1 Jur. 866.

## VI. CHEQUES.

### 1. GENERALLY.

**Stamping.]**—The capital of a benefit building society was divided into shares. When the members wished to draw out any amount standing to their credit in respect of their shares, a form of draft was forwarded to them by the accountant of the society. This form contained a request on demand to pay to bearer the sum withdrawn. These drafts were signed by the members, and afterwards paid by the society:—Held, liable to stamp duty, not being within the exemption contained in the 6 & 7 Will. 4, c. 32, s. 4, and 10 Geo. 4, c. 56, s. 37. *Att.-Gen. v. Gilpin*, 6 L. R., Ex. 193; 40 L. J., Ex. 134; 19 W. R. 1027.

**Not an Assignment.]**—A cheque is not an equitable assignment of the drawer's balance at his bankers. *Hopkinson v. Forster*, 19 L. R., Eq. 74; 23 W. R. 301.

A cheque is not an assignment by the drawer to the payee of a debt or a chose in action within the meaning of the Judicature Act, 1873, s. 25, subs. 6. *Schroeder v. Central Bank of London*, 34 L. T. 735; 24 W. R. 710.

Therefore the payee of a cheque has no right of action for its dishonour against the banker on whom it is drawn. *Id.*

**Place of Issue.]**—A cheque was sufficiently dated to satisfy the exemption clause in 9 Geo. 4, c. 49, s. 15, if it bore date, "Dorchester Old Bank," and there was in fact a bank so called in the town of Dorchester, and there was no proof that the cheque was drawn elsewhere than at Dorchester. *Strickland v. Mansfield*, 8 Q. B. 675; 10 Jur. 287.

A cheque was drawn in the following form:—"Oct. 12, 1847. Messrs. Knapp & Co., bankers, Abingdon, Pay to Messrs. Hicks, or bearer, 117l. 17s. Thomas Sharps:"—Held, that the place



where the same was issued did not sufficiently appear thereon to satisfy the exemption in 9 Geo. 4, c. 49, s. 15. and therefore that the instrument was inadmissible in evidence without a stamp. *Bopart v. Hicks*, 3 Ex. 1; 18 L. J., Ex. 33; 12 Jur. 923.

A cheque drawn by a committee of a railway company was not dated as drawn at any place, but was headed with the name of the railway:—Held, that this did not indicate any place so as to satisfy the terms of the clause exempting cheques from duty; but that the cheque was void. *Ward (Lord) v. Oxford Railway Company*, 2 De G., Mac. & G. 750; 22 L. J., Ch. 905.

**Title of Holder.**—The holder without indorsement of a draft payable to order, though taken by him *bonâ fide*, and for value, has no better title than the person from whom he took it; and such holder is affected by fraud, of which he has notice before he obtains the formal indorsement. *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161; 8 L. T. 317; 11 W. R. 648.

The plaintiff having lost a cheque five days after it bore date, which was taken by the defendants for value, but under such circumstances as ought to have excited their suspicion:—Held, that the plaintiff might have maintained an action for money had and received against them for the amount of it, though he gave no evidence of how he lost it, or how it got out of his possession. *Down v. Halling*, 6 D. & R. 455; 4 B. & C. 330; 2 C. & P. 11.

A tradesman, having in the course of business received a cheque, which had been stolen from the payee, and given the difference to a stranger, who presented it in payment of an article purchased, brought an action against the drawer for the amount:—Held, in the absence of fraud and negligence on his part, that the action was maintainable. *Lee v. Newson*, D. & R. N. P. C. 50.

**Overdue Cheque.**—A cheque, overdue, stands on the same footing as a bill or note put into circulation after its date has expired, and the holder must shew title in his immediate payer before he can retain the proceeds. *Down v. Halling*, 6 D. & R. 455; 4 B. & C. 330; 2 C. & P. 11.

The plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker, amounting to 1,330*l.* Six days after the date of the cheques, the defendants, acting *bonâ fide*, gave cash for them to a third person (who had not given value for them), presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money:—Held, that the cheques could not be treated as bills overdue, and therefore taken by the defendants at their peril, but that the real question was, whether they had acted *bonâ fide* and with due caution. *Rothschild v. Corney*, 9 B. & C. 388; 4 M. & R. 411; Danson & Lloyd, 325.

Quære, whether one who takes an overdue cheque takes it subject to the equities, as in the case of an overdue bill of exchange. *Serrell v. Derbyshire, &c. Railway Company*, 9 C. B. 811. See also *London and County Banking Company v. Groome*, post, col. 1636.

**Negotiability.**—A cheque payable to bearer is negotiable, and the holder may sue an indorser thereon. *Keene v. Beard*, 8 C. B., N. S. 372;

29 L. J., C. P. 287; 6 Jur., N. S. 1248; 2 L. T. 240; 8 W. R. 469.

**Delivery.**—A defendant, wanting money, desired T., a discount agent, to procure him 160*l.* on discount. T. asked for security, and the defendant gave his cheque for 160*l.* payable to T., or bearer, saying that T. must get him the money by "hook or by crook." T. then said he would see a friend, and try to get the defendant the money, and he afterwards obtained the money from the plaintiff, handed him the cheque, paid over the money to the defendant, and at the same time received 15*l.* from the defendant for discount, of which he kept 7*l.*, and paid 8*l.* to the plaintiff. The defendant afterwards requested time for payment of the cheque, and T. without referring to the plaintiff, gave time. The defendant, requiring still further delay, wrote to T., "Tell your friend I want his money till Christmas, and am willing to pay for the accommodation. Let me know what he will do for me." During these transactions T. did not mention any lender by name to the defendant. In an action on the cheque:—Held, that a jury was warranted in finding a delivery of the cheque by the defendant to the plaintiff. *Samuel v. Green*, 10 Q. B. 262; 16 L. J., Q. B. 239; 11 Jur. 607.

The mere circumstance of a cheque being made payable to a person, and his receipt of the money, is not evidence that the drawer gave it to him. *Lloyd v. Sandilands*, Gow, 13.

Where the drawers of a cheque issued it nine months after it bore date, upon a consideration which afterwards failed:—Held, that, as between them and the persons to whom they delivered it, they could not be permitted to object to this circumstance in an action brought by a subsequent holder for a valuable consideration and without notice. *Boehm v. Sterling*, 7 T. R. 423; 2 Esp. 575.

**Consideration.**—Action by the holders against the drawer of a cheque. Plea, that he made the draft for the accommodation of C., and that there never was any consideration for it, or for its transfer by C. to the plaintiffs. The plaintiffs were trustees of a bank, and they employed R. as their agent to manage one branch of the concern. C., in whose favour the cheque was drawn, had an account with the branch, which was considerably overdrawn. It was the practice of the bank to send round an inspector to all their banks once every quarter, to examine their agents' accounts; and in order to prevent its being discovered that C. was in debt to the bank, R. was in the habit of taking cheques from C. before the quarter-day approached, which he placed to his credit on the account, but upon an express undertaking that they were not to be presented, but returned to C. after the quarter-day was past. The cheque had been obtained from the defendant for this purpose by C., R. being aware of it, in consideration of a counter-cheque from C. for the same amount:—Held, that neither of the averments in the plea was sustained, and that the plaintiffs were entitled to recover. *Bosanquet v. Corser*, 8 M. & W. 142; 9 C. & P. 664; 5 Jur. 369.

Where a party, by means of a false pretence or a promise or condition which he does not fulfil, procures another party to give him a cheque or note or an acceptance in favour of a third person,

to whom he pays it, and who receives it *bonâ fide* for value, the giver remains liable on the cheque, note or acceptance; because his acceptance imports value and liability *primâ facie*, and he can only relieve himself from his promise to pay the holder by shewing that he is not a holder for value, or that he received the instrument with notice or not *bonâ fide*. *Watson v. Russell*, 3 B. & S. 34; 31 L. J., Q. B. 304; 9 Jur., N. S. 249; affirmed on appeal, 11 L. T. 641; 13 W. R. 231—Ex. Ch.

## 2. CROSSING.

**With Name of Banker.**—Crossing a cheque payable to bearer with the name of a banker, whether made by the drawer or the bearer, does not affect the negotiability of the cheque. *Carlton v. Ireland*, 5 El. & Bl. 765; 25 L. J., Q. B. 113; 2 Jur., N. S. 39; *S. P., Bellamy v. Marjoribanks*, 7 Ex. 389; 21 L. J., Ex. 70; 16 Jur. 106.

An individual who receives a crossed cheque *bonâ fide* and gives value for it, is entitled to retain the amount received through his bankers from the bankers on whom it is drawn. *Id.*

The use and object of crossing a cheque is as a protection and safeguard to the owner of the cheque, by securing payment to a banker, in order that it may be easily traced to whose use the money was received. *Id.*

A crossed cheque within 19 & 20 Vict. c. 25, was a cheque that had a crossing on it at the time of presentment, and therefore the banker on whom the cheque was drawn, and to whom it was presented with the crossing obliterated, was justified in paying it to the holder, though he was not a banker. *Simmons v. Taylor*, 4 C. B., N. S. 463; 27 L. J., C. P. 248; 4 Jur., N. S. 412—Ex. Ch.

**In Blank.**—A cheque crossed in blank, being given in payment of a bill of exchange, was duly paid by the holder into his bankers, who, two days afterwards, presented it for payment, when it was returned dishonoured:—Held, in an action on the bill, that the plea alleging that the cheque had not been presented within a reasonable time could not be sustained, as the crossing of the cheque was a direction to the holder to pay it only through a banker, and he (the holder) had done all that was required of him to comply with that request, by paying it into his bankers within a reasonable time, and could not be held responsible for any delay that afterwards took place. *Stringfield v. Lanczari*, 16 L. T. 361.

**Exemption of Banker from Liability.—39 & 40 Vict. c. 81.**—By s. 12 of the Crossed Cheques Acts, 1876 (39 & 40 Vict. c. 81), it is enacted, "a person taking a cheque crossed generally or specially bearing in either case the words 'not negotiable,' shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. But a banker, who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment:—"Held, that the cheque mentioned in the latter part of that section is not limited to the cheque described in the former part as one bearing upon it the words "not ne-

gotiable;" and that, therefore, a banker, who in good faith and without negligence in due course of collection receives payment for a customer of a cheque crossed generally, but having a forged indorsement, is protected by such 12th section from liability to the true owner of the cheque for having placed the amount of such payment to the credit of his customer, notwithstanding such cheque has not the words "not negotiable" upon it. *Mathiesson v. London and County Banking Company*, 5 C. P. D. 7; 48 L. J., C. P. 529; 41 L. T. 35; 27 W. R. 838.

Before this enactment, the payee of a cheque drawn on the Union Bank of London, payable to him or his order, indorsed his name on it and crossed it with two lines, and the name of his bankers, the London and County Bank. The cheque was stolen, and ultimately came into the hands of a *bonâ fide* holder for value, who paid it into his bankers, the London and Westminster Bank. They presented it to the Union Bank, who notwithstanding the crossing paid the amount. In an action by the payee to recover the amount from the Union Bank:—Held, that he was not entitled to recover for the breach of the duty imposed upon the Union Bank of London by 21 & 22 Vict. c. 79, s. 2, that provision not being directly for the protection of payees; nor for conversion of the cheque, since the statutes had not affected the negotiability of crossed cheques, and that both the property and possession had therefore passed to the *bonâ fide* holder for value. *Smith v. Union Bank of London*, 1 Q. B. D. 31; 45 L. J., Q. B. 149; 33 L. T. 557; 24 W. R. 194—C. A. See new Act of 1876 (39 & 40 Vict. c. 81).

## 3. PAYMENT.

**Provisional or Conclusive.**—The branch bank of the Bank of England at Newcastle discounted a bill of exchange drawn by P., who was a customer of the branch bank, upon H. & Co., and accepted by them payable at the bank of L. & Co., also bankers at Newcastle. According to the practice prevailing among bankers at Newcastle, the branch bank, on the morning when the bill became due, took it to L. & Co., who marked it for payment, and gave a credit note, indicating that it with other moneys was in order for payment and would be paid. About 2 P.M. on the same day, a clerk of the branch bank, in accordance with the practice, took all the cheques which had been received, drawn on L. & Co., together with the credit note, to the bank of L. & Co. The credit note was admitted into the total amount, and a cheque upon the branch bank was in accordance with the practice handed by L. & Co. to the clerk for the amount of the balance due to the branch bank. At 3 P.M. the banks at Newcastle close to the public, but it is the practice for the bankers who keep accounts with the branch bank to attend at such bank, before it finally closes for the day at 4 P.M., for the purpose of having the day's accounts investigated, and of rectifying any mistakes or errors which may have arisen in the course of the day, and finding and striking the final balances between them. When the bank of L. & Co. closed at 3 o'clock it was ascertained that H. & Co. had stopped payment, and that their balance was not sufficient to meet the bill. Notice was at once and before 4 P.M. given to the branch bank that the bill had been paid in

error, and they were requested to take it back. Before such notice was received, the account of L. & Co. had been debited with the amount in the accounts of the branch bank:—Held, that it not being shewn that the giving the cheque was provisional only, and subject to rectification upon going over the accounts later in the day, such giving the cheque by L. & Co. amounted to payment of the bill to the branch of the Bank of England, and that P. was entitled to have credit with them for the amount of the bill. *Pollard v. Bank of England*, 6 L. R., Q. B. 623; 40 L. J., Q. B. 233; 25 L. T. 415; 19 W. R. 1168.

**Title to Goods.**—The right of property does not pass upon a sale of goods paid for by the purchaser's cheque—subsequently dishonoured—if the purchaser had not, at the time of drawing and giving the cheque, reasonable grounds for believing that there were funds to meet it as an instrument payable the instant after it was drawn. *Loughnan v. Barry*, 5 Ir. R., C. L. 538.

When cattle were sold and paid for by the purchaser's cheque, which was subsequently dishonoured:—Held, in an action by the vendor for conversion, and for money had and received, that the proper question for the jury was—not whether the purchaser had reasonable grounds for believing, and did in fact believe, that the cheque would be honoured—but whether, at the time the cheque was drawn, he had reasonable grounds for believing that there were funds to meet it. *Id.*

On a sale of goods for ready money, if the purchaser gives in payment his cheque which he then knows he has not funds in the bank to meet, this amounts to a false representation of a material fact, which vitiates the sale and entitles the seller to rescind the contract, even though the purchaser at the time believed, and had reasonable ground for believing, that the cheque would be paid. *Loughnan v. Barry*, 6 Ir. R., C. L. 457.

**Indorsement by Agent per proc.**—An indorsement of a cheque payable to order, purporting to be by the agent of the person to whose order the cheque is payable, is within 16 & 17 Vict. c. 59, s. 19, affording protection to bankers, a sufficient authority to the banker to pay the amount of such cheque, though the person who indorsed the cheque had no authority to indorse. *Charles v. Blackwell*, 2 C. P. D. 151; 46 L. J., C. P. 368; 36 L. T. 195; 25 W. R. 472.—C. A. Affirming the judgment of the Common Pleas Division, 1 C. P. D. 548; 45 L. J., C. P. 542; 35 L. T. 162; 24 W. R. 737.

S. K., an agent of S. & Co., having authority to sell goods for them and to receive payment by cash or cheque, but not having authority to indorse cheques, received from the defendants, in payment for goods supplied, a cheque on their bankers, drawn payable to S. & Co., or order. S. K. indorsed it "S. & Co., per S. K. agent," received the money from the bankers, and misappropriated part of it. The bankers returned the cheque to the defendants, and the amount was allowed in account by the defendants:—Held, that such payment by the bankers was within the protection of 16 & 17 Vict. c. 59, s. 19; and that S. & Co. could not maintain an action against the defendants, either for the price of the goods or for the cheque. *Id.*

**When Statute of Limitations begins to run.**—

The plaintiff having agreed to lend the defendant a sum of money, gave him a cheque for the amount, which the defendant paid into his bankers, receiving credit for it. The cheque was not paid by the plaintiff's bankers till some days later. In an action for the money so lent:—Held, that the Statute of Limitations only ran from the time of the payment of the cheque by the plaintiff's bankers. *Garden v. Bruce*, 3 L. R., C. P., 300; 37 L. J., C. P. 112; 18 L. T. 544; 16 W. R. 366.

**Payable so many Days after Sight—Writ issued before Time elapsed.**—A creditor to whom a draft on a banker, payable at so many days after sight, is sent in payment of a debt, such order being accepted by the banker, commits an abuse of the process of the court if he issues a writ for the debt before the expiration of the days, at the same time retaining the draft. *Stuart v. Curce*, 5 C. B., N. S. 737; 28 L. J., C. P. 193; 5 Jur., N. S. 650.

**Banker giving up Bills for Cheque—Negligence.**—A banker in London receiving bills from his correspondents in the country to whom they had been indorsed, to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a cheque upon a banker for the amount, although it turns out that such cheque is dishonoured. *Russell v. Hankey*, 6 T. R. 12.

**Taken without Inquiry subject to Equities.**—T. C. undertook to discount bills for J. R. H., and in return for the bills gave cheques to J. R. H., upon the understanding that they were not to be presented until there were funds in T. C.'s bank to meet them. Part of these bills were subsequently handed back by T. C.'s bankers, and security was given by T. C. and J. R. H. to cover the whole amount of them. J. R. H. had meanwhile deposited the cheques with his brother G. W. H. as security for money advanced. On T. C.'s bankruptcy G. W. H. sought to prove for the full amount of the cheques. The cheques had been presented and dishonoured:—Held, that G. W. H. having taken the cheques without proper inquiry, took them subject to all the equities attaching to them, and could not prove in respect of them. *Hughes, Ex parte, Cobb, In re*, 43 L. T. 577.

**Paying in to Customer's Account.**—When a customer pays to his bankers a cheque drawn upon them by another customer, he must, in order to make them liable at all events, demand payment, or request that the amount may be placed to his credit. *Boyd v. Emmerson*, 4 N. & M. 99; 2 A. & E. 184.

An assent, on the part of the banker, to such a demand or request, would raise an implied promise to pay or give credit for the amount. *Id.*

When a customer pays into his bankers, in the ordinary way, a cheque drawn upon them by another of their customers, the bankers are entitled to the same time for ascertaining whether the cheque will be paid, and giving notice of dishonour (in case it is resolved by them not to pay the cheque) as in the case where a cheque is drawn upon other bankers. *Id.*

A. & B. are respectively customers of C., a banker. A. goes to C.'s bank at a quarter before

one on Monday, and gives C.'s managing clerk directions as to the payment of a bill, and, whilst the clerk is making a memorandum of those directions, lays on the counter a cheque drawn by B. on C., and says, "Place this to my account" or "credit." No intimation as to whether the cheque would or would not be paid was given to the clerk. The clerk did not debit B. with the amount or place it to A.'s credit, or cancel the cheque. B. having overdrawn his account, inquiries were made on Tuesday, the result of which was that C. resolved not to pay the cheque. The cheque, with notice of dishonour, was sent A., at his residence, by seven o'clock P.M. on Tuesday:—Held, sufficient notice of dishonour. *Ib.*

— **Of Cheque to Bankers—Holders for Value.**—When a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, and the bankers carry the amount to his credit accordingly, they become immediately holders of the cheque for value, even though the customer's account is not overdrawn. *Richdale, Ex parte, Palmer, In re*, 19 Ch. D. 409; 51 L. J., Ch. 462; 46 L. T. 116; 30 W. R. 262—C. A.

**Altering Signature by Drawer after Payment.**—A drawer of a cheque, after it had been paid and returned to him cancelled by the bank, darkened the signature, so as to give it the appearance of a forgery. He then took it to the bank, and represented it to be a forgery. He also stated that it had been forged by the plaintiff. The bank thereupon gave the plaintiff into custody:—Held, that a plea of justification setting out these facts did not constitute a defence to an action for false imprisonment: that to support the plea the commission of a felony must be shewn; that the alteration of his own cheque by the drawer, although a cheat on the bank, was not a forgery, and that therefore no felony had been committed. *Brittain v. Bank of London*, 3 F. & F. 465; 8 L. T. 382; 11 W. R. 569.

**Proof of Payment—What is.**—The steward of a manor appointed C. his deputy to admit a person to a copyhold of the manor which he had purchased; and C. also acted as his solicitor in the purchase. Ten days after admittance the purchaser gave C. a cheque for a sum made up of the lord's fine, the steward's fees, and C.'s professional charges, and this cheque was, at C.'s request, crossed with the name of C.'s bankers. On presentment the cheque was paid by the purchaser's bankers to C.'s bankers, but they retained the money to balance his overdrawn account. In an action by the lord against the purchaser for the fine:—Held, that there was evidence to support a plea of payment, and that payment by the crossed cheque was a mode of payment which discharged the purchaser as soon as the cheque was cashed. *Bridges v. Garrett*, 5 L. R., C. P. 451; 39 L. J., C. P. 251; 22 L. T. 448; 18 W. R. 815—Ex. Ch.

Under the Railways Clauses Act, 1863, s. 12, where a railway forms a junction with another railway, the company with whose railway the junction is made is empowered to erect such signals and conveniences incident to the junction as may be necessary for the prevention of danger to or interference with the traffic at or

near the junction; and the expenses of erecting and maintaining such signals and conveniences are at the end of each half-year to be repaid by the company making the junction. To prove payment, the plaintiff's secretary stated that he, on the 25th of February, sent to the persons who did the work a cheque for the amount of their bill, and got from them by return of post (on the 26th) a receipt, and the cashier of the latter stated that he received the cheque at 9 A.M. on the 26th as payment, and sent a receipt:—Held (Bovill, C. J., dissentiente), that the receipt was admissible, with the other facts, to prove payment on the morning of the 26th of February (the action having been brought on that day), without shewing that the cheque was honoured. *Carmarthen and Cardigan Railway Company v. Manchester and Milford Railway Company*, 8 L. R., C. P. 685; 42 L. J., C. P. 262.

In an action by assignees, proof that a cheque for a certain sum in the defendant's favour was drawn by the bankrupts upon their bankers, and that the amount was placed by their bankers to the defendant's credit, is no evidence to go to the jury of a loan of money to the defendants by the bankrupts. *Graham v. Cox*, 2 C. & K. 702.

A defendant having money of the plaintiff's in his hands, drew on his banker in favour of the plaintiff a cheque, which was paid to the plaintiff at the bank:—Held, evidence of payment, without proof that the plaintiff had received the cheque from the defendant. *Mumford v. Harper*, 16 M. & W. 825; 16 L. J., Ex. 182.

In proof of a new petitioning creditor's debt under 6 Geo. 4, c. 16, s. 18, the plaintiff produced cancelled cheques drawn by the bankrupt upon L. & Co., and proved by a clerk, who spoke from his recollection, that, at the time of these cheques being drawn, the bankrupt's account with L. & Co. was greatly overdrawn:—Held, that the cheques were *prima facie* evidence of payment of the debt due from L. & Co. to the bankrupt, and not of a loan to him, and were, therefore, insufficient to prove the petitioning creditor's debt. *Fletcher v. Manning*, 12 M. & W. 571; 13 L. J., Ex. 150.

To prove a payment it is enough to put in a cheque shewn to have been in circulation. *Thompson v. Pitman*, 1 F. & F. 339.

**Revival of Debt—When Payment Stopped.**—When a cheque has been given in satisfaction of a debt, but payment of the draft has been stopped before it has been cashed, the debt and the position of the parties are just the same as though such cheque had never been given, and the debt revives and is capable of being attached under a garnishee order. *Cohen v. Hale*, 3 Q. B. D. 371; 47 L. J., Q. B. 496; 39 L. T. 35; 26 W. R. 680.

#### 4. CASHING OVER THE COUNTER.

**When Property Passes by.**—C. presented, on behalf of his employer, a cheque at a banking house. The cashier counted out the amount in notes, gold and silver, and placed it on the counter. C. took it, and counted it, and was in the act of counting it a second time, when the cashier (having discovered that the drawer's account was overdrawn) demanded the money back, and upon C.'s refusal, detained him, and took it from him by force:—Held, that the property in the notes and money had passed

from the bankers to the bearer of the cheque, and that the payment was complete and could not be revoked. (*Chambers v. Miller*, 13 C. B., N. S. 125; 32 L. J., C. P. 30; 9 Jur., N. S. 626; 7 L. T. 856; 11 W. R. 236; & C., a' nisi prius, 3 F. & F. 202.)

**Refusal to Cash—Forgery.**—[Detinue for a cheque, plea, that the defendant received the cheque from the plaintiff to present to and collect it from the bank on which it was drawn; that he presented it, but payment was refused by the manager, who kept the cheque, alleging that the name of the drawer was forged:—Held, a good defence, for if the cheque was forged the detention was rightful, and if genuine the defendant lost control over it by no wrongful act, and the plaintiff's remedy was against the bank. *Brown v. Livingstone*, 8 U. C. L. J. 124.]

**Where Bank has several Branches.**—[A banking company carried on business by means of branches at various places, amongst others, at G. and B. The company was one, but each branch kept separate accounts, had separate customers, and in all respects transacted business like a separate bank. A holder of a cheque drawn on the G. branch, by a person who kept an account there, got cash for it at the B. branch. The cheque was without laches forwarded by the B. branch to the G. branch. When it was cashed, the balance in the G. branch to the credit of the drawer exceeded the amount of the cheque; but when it arrived at G., that balance had been paid away, and the cheque was dishonoured; the company having sued the holder of the cheque, to whom the amount had been so paid, for money had and received, on the ground of failure of consideration:—Held, that the company was entitled to recover, as the B. branch could not be considered as honouring the cheque, or as purchasing it, but as taking it from the holder on his credit, as the company might have done a cheque drawn on any other bank, the circumstance that the banks at G. and B. were branches of the same company being for this purpose immaterial. *Woodland v. Fear*, 7 El. & Bl. 519; 26 L. J., Q. B. 202; 3 Jur., N. S. 587; & P., *Brown v. London and North Western Railway Company*, 4 B. & S. 330, 337.]

##### 5. DATE OF.

**Post-dating.**—[A draft payable to order is not rendered void by being post-dated; the provisions of 55 Geo. 3, c. 184, s. 13, and 21 & 22 Vict. c. 20, being applicable only to drafts payable to bearer. *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161; 8 L. T. 317; 11 W. R. 648.]

A cheque drawn payable to A. or bearer, and post-dated, was indorsed to a party, who took it without notice of its having been post-dated:—Held, that he was entitled to recover thereon. *Austin v. Bunyard*, 34 L. J., Q. B. 217; 11 Jur., N. S. 874; 12 L. T. 452; 13 W. R. 773.]

A post-dated cheque given and received, with the intention that it should be held over and not presented for payment until the day on which it was dated, is not distinguishable from a bill of exchange, and therefore, in the absence of express authority, one partner of a firm of attorneys cannot bind his co-partner by drawing a post-dated cheque in the name of the firm. *Forster*

*v. Mackreth*, 2 L. R., Ex. 163; 36 L. J., Ex. 94; 16 L. T. 23; 15 W. R. 747.]

A stamped cheque, payable to bearer, but post-dated, is admissible in an action brought, after the date of the cheque, by the holder, although he took with knowledge of the post-dating, since, under the Stamp Act, 1870, the test of admissibility is whether the instrument appears, when tendered in evidence, to be sufficiently stamped. *Gatty v. Fry*, 2 Ex. D. 265; 46 L. J., Ex. 605; 36 L. T. 182; 25 W. R. 305.]

Before the Stamp Act, 1870, there was nothing in the statutes to invalidate a post-dated cheque payable to order on demand; and in determining what is the requisite stamp to make such an instrument admissible in evidence the instrument alone is to be looked at. And, therefore, a post-dated cheque payable to order is available in the hands of a person who takes it with knowledge that it was post-dated; and is admissible in evidence with only a penny stamp. *Bull v. O'Sullivan*, 6 L. R., Q. B. 209; 40 L. J., Q. B. 141; 24 L. T. 130.]

**Custom of the City of London as to.**—[It is a custom of bankers in the city of London not to pay a cheque marked "post-dated":—Held, that this custom is part of the contract between a London banker and his customers, and therefore a customer could not maintain an action against his banker for refusing payment of a cheque so marked. *Emanuel v. Roberts*, 9 B. & S. 121; 17 L. T. 646.]

A post-dated cheque payable to order is not illegal. *Id.*

**Need not be specially Pleaded.**—[The post-dating of a cheque need not be specially pleaded. *Field v. Woods*, 2 N. & P. 117; W., W. & D. 482; 7 A. & E. 114; 6 D. P. C. 23; 8 C. & P. 52; 1 Jur. 496.]

**Question for Judge.**—[It was for the judge to determine, as a collateral issue, whether it was post-dated or not. *Dunford v. Curlewis*, 1 F. & F. 702.]

**Payable at future Date.**—[M., being in Spain, by his agent in London, purchased bills of L., a London merchant. The purchase was made on the 11th of February, 1873, and the bills were to be paid for on the 14th of February, which was the next foreign post day after the sale. On the 13th of February, L.'s bankers having pressed him to reduce his balance, he handed to them a document directing M. to pay to the bankers, or bearer, the price of the bills. Such document was dated the day after that on which it was delivered, and was stamped with a penny stamp. On the 14th of February, M.'s agent drew a cheque on M.'s bankers for the price of the bills, payable to L. or bearer, and handed it to L.'s bankers, and received in exchange the document of the 14th of February. L. subsequently failed, and the bills were dishonoured. In an action by L.'s bankers against M. on the cheque:—Held, that the document of the 13th of February was a valid document, and was not void under the Stamp Act, 33 & 34 Vict. c. 97, as being a bill of exchange payable at a future date, and wanting a sufficient stamp. *Miss v. Currie*, 1 App. Cas. 534; 45 L. J., Q. B. 852; 35 L. T. 414; 24 W. R. 1049—H. L.]

Held, also, that the surrender of such docu-

ment was a good consideration for the cheque, and that the bankers were entitled to recover on it. *Id.*

**Alteration of.]**—A person intrusted with a cheque by the payee to pay into a bank absconded with it, and after altering the date from the 2nd of March to the 26th of March, passed it to the plaintiff for value. The cheque was not paid, and the plaintiff, who had not been guilty of any negligence in taking the cheque, sued the drawer:—Held, that the alteration was material, and invalidated the cheque; and that the circumstances that the plaintiff had not been guilty of negligence in taking it was immaterial. *Vance v. Louthier*, 1 Ex. D. 176; 45 L. J., Ex. 200; 34 L. T. 286; 24 W. R. 372.

#### 6. PRESENTMENT FOR PAYMENT.

**Must be made with due Diligence.]**—A cheque should be presented with due diligence to the bankers on whom drawn; but a banker in London who receives a cheque by the general post, is not bound to present it for payment until the following day. *Ricksford v. Ridge*, 2 Camp. 537.

The holder of a cheque is bound to present it for payment on the day following that on which he receives it; but if he pays it to his bankers before the time at which the bankers, by presenting it at the clearing-house, might obtain payment, the drawer is not discharged by their omitting so to present it, although, according to the custom of London, it may be imperative upon the bankers, as between them and their customers, so to present it. *Boddington v. Schlenker*, 1 N. & M. 541; 4 B. & Ad. 752.

The not presenting a draft upon the same day on which it is received is not laches. *Medcalf v. Hall*, 3 Dougl. 113.

The holder of a cheque is, in general, bound to present it for payment not later than the day following that on which he receives it, whether the presentment is made by himself or through his bankers. *Alexander v. Burchfield*, 7 M. & G. 1061; 3 Scott, N. R. 555; 4 B. & M. 75.

But the time for presentment may be extended by the assent of the drawees, express or implied. *Id.*

The plaintiffs sold horses to the defendant on the 10th of March, 1840, and in payment the defendant gave a cheque on his bankers, which the plaintiffs crossed to their own bankers, and paid in to them on the 11th of the same month. The defendant's bankers did not use the clearing-house in Lombard-street, and accordingly the plaintiffs' bankers presented that cheque to the defendant's bankers on the 12th, whereas, otherwise, they would have presented it at the clearing-house on the evening of the 11th. The defendant's bankers had stopped payment on the 12th:—Held, that the bankers of the plaintiffs had acted in strict accordance with the rules of mercantile law; but that the plaintiffs themselves had been guilty of laches in not paying the cheque to their bankers on the 10th, if they received it within banking hours. *Id.*

The holder of a cheque ought to present it for payment within a reasonable time, and it is a question for the jury, on an issue of due presentment, whether this rule has been complied with. *Serle v. Norton*, 2 M. & Rob. 401.

Where a cheque drawn on a country banker,  
VOL. I.

dated 19th March, was not presented until 6th April, and no cause was assigned for the delay, but the drawer had not sustained loss by the non-presentment at an earlier period, the drawer was held liable to be sued on the cheque. *Id.*

C., the payee of a cheque drawn on Monday, the 4th June, on a bank at Falmouth, paid it on Tuesday, the 5th, to the credit of his account in a bank at Truro, which was about ten miles from Falmouth. On Tuesday, the 5th, the Truro bank, having no agent at Falmouth, sent the cheque to B. & Co., their London agents, who received it on Wednesday, the 6th, and handed it through the clearing-house to the London agents of the Falmouth bank; they forwarded it to the Falmouth bank, who received it on Thursday, the 7th, and debited the drawer's account with the amount and cancelled the cheque, and by post of the same day wrote to their London agents to pay it on their account. On the morning of that day their London agents stopped payment, and the London agents of the Truro bank wrote to the Falmouth bank requesting them to return the cheque or pay it. On Friday, the 8th, the Falmouth bank wrote, refusing to do either, and on the following day stopped payment. On Saturday, the 9th, the Truro bank gave C. notice of dishonour:—Held, that the Truro bank was entitled to debit C. with the amount of the cheque, inasmuch as, first, they were not bound to send the cheque direct to the Falmouth bank, and therefore it was presented in due time; and, secondly, notice of dishonour was given to C. in due time. *Prideaux v. Criddle*, 4 L. R., Q. B. 455; 38 L. J., Q. B. 232; 20 L. T. 695; 10 B. & S. 515.

**Of Country Cheques.]**—When a cheque, drawn upon one country bank, is paid by the holder into his account with another country bank, situate at a distance from the former, there is no legal obligation on the latter to send off the cheque to the former by the first post. *Hare v. Henty*, 10 C. B., N. S. 65; 30 L. J., C. P. 302; 7 Jur., N. S. 523; 4 L. T. 363; 9 W. R. 738.

Where country banks have not adopted the system of the country banks' clearing-house in London, the course with respect to presentment of cheques paid in to the accounts of customers is this—the bank, into which the cheque drawn on another country bank is paid, is not bound to send it off for presentment until the next day after that on which the banker receives it; he may send it to an agent resident in the town on which it is drawn; this agent, receiving it on the same day, would not be bound to present it at the bank on which it is drawn before the next day after that on which he receives it. *Id.*

This is the general rule in all cases, both as between parties to the cheque, and as between banker and customer, unless, from the particular circumstances, a contract or duty can be inferred, on the part of the banker, either to present earlier, or postpone the presentment later. *Id.*

A., a banker at Worthing, received from B., a customer, a cheque drawn upon C., a banker, at Lewes (distant about eighteen miles from Worthing), on the morning of Friday, the 8th of July, and sent it that evening by post to his London correspondent D., for presentment through "the country clearing-house," recently established, but in pretty general use among the country bankers. D.'s clerk handed the cheque at the clearing-house on the morning of Saturday, the

[illegible]

**Effect of Delay.]**—Where the drawees of a cheque continue solvent, and have effects of the drawer in their hands, the holder does not lose his right of action against the drawer by any delay in presenting the cheque for payment. *Robinson v. Hauckford*, 9 Q. B. 52; 15 L. J., Q. B. 377; 10 Jur. 964.

As between the drawer of a cheque and the holder, no time, within six years, is unreasonable for presentment to the banker for payment, unless some loss to the drawer is occasioned by the delay. *Laws v. Rand*, 3 C. B., N. S. 442; 27 L. J., C. P. 76; 4 Jur., N. S. 74.

**Cheque payable at two places.]**—The holder of a banker's note, payable at two places, has a right to present it at either, and if payment is refused at one, there is no laches if it is proved, that, if payment had been demanded at the other, which was more convenient, the note would have been paid. *Beeching v. Gower*, Holt, 313.

**Forwarding by Post.]**—Forwarding a cheque by post may be a good presentment. *Bailey v. Bodenham*, 16 C. B., N. S. 288; 33 L. J., C. P. 252; 10 Jur., N. S. 821; 10 L. T. 422; 12 W. R. 865.

**Custom of London—Presentment dispensed with.]**—By the practice of the London bankers, if one banker, who holds a cheque drawn on another banker, presents it after four o'clock, if it is not then paid, but a mark is put on it to shew that the drawee has assets, and that it will be paid; cheques so marked have a priority, and are exchanged or paid next day at noon at the clearing-house:—Held, that a cheque presented after four, and so marked, and carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking house of the drawee. *Robson v. Bennett*, 2 Taunt. 388.

Such a marking under this practice amounts to an acceptance, payable next day at the clearing-house. *Ib.*

A person receiving a cheque is equally justified in lodging it with his own banker to obtain payment, as he would be in paying it away in the course of trade. *Ib.*

**Proof of.]**—The plaintiff sued the defendant in the Mayor's court, London, as drawer of two cheques upon the Huddersfield branch of the Midland Banking Company. In answer to a rule for a prohibition, it was sworn that the cheques were drawn and indorsed by the payee to the plaintiff in London; that the drawer had no effects in the hands of the Midland Banking Company, and that he had long since had notice from the bank that cheques drawn by him would not be paid unless previously provided for:—Held, that, there being no obligation on the plaintiff to prove presentment and dishonour, there was no ground for a prohibition. *Wirth v. Austin*, 10 L. R., C. P. 689; 32 L. T. 669.

#### 7. HONOURING.

**Of Directors of Public Companies.]**—Bankers who have funds of a company (formed under the Companies Act, 1862) in their hands may

(acting bonâ fide) lawfully honour the cheques of the directors of the company, signed according to a form sent by them to the bankers, without being bound previously to inquire whether the persons assuming to sign as directors have been duly appointed to that office, in conformity with the provisions of the memorandum and articles of association of the company. *Mahony v. East Holyford Mining Company*, 7 L. R., H. L. 869; 33 L. T. 383; 9 Ir. R., C. L. 306.

**Duty of Bankers.]**—The banker of a public registered company is not bound to inquire whether the persons drawing cheques, as directors, against the company's banking account, were legally appointed directors, or authorized to draw cheques, if there was nothing on the face of the transactions calculated to excite suspicion, or inconsistent with the company's articles of association. *East Holyford Mining Company v. National Bank*, 5 Ir. R., C. L. 508. Affirmed *supra*—H. L.

A banker is bound by law to pay a cheque drawn by a customer within a reasonable time, after the banker has received sufficient funds belonging to the customer; and the latter may maintain an action of tort against the banker, for refusing payment of a cheque under such circumstances, although he has not thereby sustained any actual damage. *Marzetti v. Williams*, 1 B. & Ad. 415.

**Cheque of Executor.]**—In order to hold a banker justified in refusing to pay a cheque of his customer, the customer being an executor, and drawing a cheque as executor, there must be a misapplication of the money intended by the executor so as to constitute a breach of trust, and the banker must be cognizant of that intention. *Gray v. Johnston*, 3 L. R., H. L. 1; 16 W. R. 842.

The existence of a personal benefit to the banker, designed or stipulated for, as a consequence of the payment, would be strong evidence that the banker was privy to the breach of trust. *Ib.*

Bankers had acted as such to J., who carried on business with his son-in-law under the style of J. & M., but whose accounts with them were kept in his own name alone, and were unsettled at his death. He left a will, bequeathing all his property to the use of his wife for life, and after her death to be divided among their children as she might think fit; part of the property consisted of life policies which were put into the hands of the bankers, together with the probate of J.'s will, and they received the amount of the policies, made up their accounts, and, after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner under the style of J. & M., and a new account was opened with the bankers in the name of the new firm, and she, as executrix, drew a cheque for the amount stated to be due to her, and paid it into the bankers to be credited to the firm of J. & M., and it was so credited and paid out, with other money, on account of cheques drawn by the new firm:—Held, that these circumstances were not, in themselves, sufficient to shew that a breach of trust had been committed, and that the bankers knew of the intention to commit it,



so as to render them liable to replace the money.  
*Id.*

**Guarantee that Cheque will be Honoured—Liability of Guarantor.]**—If a cheque drawn upon any person is sent by another to know if it is good, before he will receive it, and such person says it will be honoured, as he is indebted to the drawer of it; though the cheque turns out to be void, as being post-dated, the holder may, nevertheless, recover, on the ground of the sum due to the drawer of the cheque being so appropriated. *Arden v. Rourney*, 5 Esp. 254.

**Notice of Dishonour.]**—In an action by the holder against the drawer of a dishonoured cheque, notice of dishonour is excused by want of effects at the time when the drawer would reasonably expect the cheque to be presented for payment, provided the drawer had no reasonable expectation that it would be paid. The want of effects which will excuse notice of dishonour need not be a want of any effects; it is sufficient if there are no effects sufficient for the payment of the cheque. *Carew v. Duckworth*, 4 L. R., Ex. 313; 38 L. J., Ex. 149; 20 L. T. 882; 17 W. R. 927.

A holder of a cheque is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it: he does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of dishonour to those only against whom he seeks a remedy. *Rickford v. Ridge*, 2 Camp. 537.

Want of notice of the dishonour of a cheque is sufficiently excused, *prima facie*, by alleging that the banker had no effects of the drawer, and had received no consideration for payment of the cheque, and that the drawer had sustained no damage by reason of his having no notice of dishonour. *Kemble v. Mills*, 2 Scott, N. R. 121; 1 M. & G. 757; 9 D. P. C. 446; 1 Drink. 22.

C., the payee of a cheque drawn on Monday, the 4th June, on a bank at Falmouth, paid it on Tuesday, the 5th, to the credit of his account in a bank at Truro, which was about ten miles from Falmouth. On Tuesday, the 5th, the Truro bank, having no agent at Falmouth, sent the cheque to B. & Co., their London agents, who received it on Wednesday, the 6th, and handed it through the clearing-house to the London agents of the Falmouth bank; they forwarded it to the Falmouth bank, who received it on Thursday, the 7th, and debited the drawer's account with the amount and cancelled the cheque, and by post of the same day wrote to their London agents to pay it on their account. On the morning of that day their London agents stopped payment, and the London agents of the Truro bank wrote to the Falmouth bank requesting them to return the cheque or pay it. On Friday, the 8th, the Falmouth bank wrote, refusing to do either, and on the following day stopped payment. On Saturday, the 9th, the Truro bank gave C. notice of dishonour:—Held, that the Truro bank was entitled to debit C. with the amount of the cheque, inasmuch as, first, they were not bound to send the cheque direct to the Falmouth bank, and therefore it was presented in due time; and secondly, notice of dishonour was given to C. in due time. *Pri-*

*deaux v. Criddle*, 4 L. R., Q. B. 455; 38 L. J., Q. B. 232; 20 L. T. 695; 10 B. & S. 515.

**Damages recoverable—Proof of.]**—In an action by a trader against his banker for dishonouring his cheques, having funds to meet them, substantial damages may be recovered, without proof of any actual damage. *Rolin v. Steward*, 14 C. B. 595; 2 C. L. R. 959; 23 L. J., C. P. 148; 18 Jur. 536.

**Evidence—As to Mode of Business between Banker and Customer.]**—Bankers took up acceptances of a customer for 1,900*l.*, drawn against and attached to bills of lading of a consignment of rum, on receiving an undertaking from the customer's brokers to pay over to them 1,900*l.* out of the produce of the sale. The bankers debited the customer with the 1,900*l.* in his pass book. Before the sale of the rum, 200*l.* having been paid into the bank to his credit, he drew a cheque for the amount, which the bankers dishonoured. Before the advance, the customer had received a general notice not to overdraw his account. In an action for not honouring the cheque, evidence being given that the bankers, on previous similar transactions, had not treated the advances as brought into account, and that it was not the usage of bankers to do so:—Held, that it was properly left to the jury to say whether, in the absence of formal notice to the customer, the previous course of dealing did not continue to exist. *Cumming v. Shand*, 5 H. & N. 95; 29 L. J., Ex. 129.

**—As to Bank having sufficient Funds in hand to meet Cheque.]**—A bank agreed with the plaintiffs that they would cash their cheques and discount their bills in consideration of keeping a balance of 100*l.* at the bank. On a Saturday morning the balance was slightly below the 100*l.*, but in the course of the day the plaintiffs paid in a cheque for 150*l.*, this, however, was after the walking clerk had gone to the clearing-house. On the Monday morning, before the walking clerk had returned from the clearing-house, a cheque drawn by the plaintiffs for 17*l.* 10*s.* was presented for payment by the person in whose favour it had been drawn, but was returned to him indorsed, "effects not cleared." Somewhere about this time, but whether before or after the cheque was presented was not proved, one of the plaintiffs came to the bank and called for the pass-book of the firm, and saw an entry crediting them with 150*l.* (cash):—Held, in an action against the bank for not cashing the cheque, that these facts shewed some evidence to go to the jury that the bank was in possession of funds, and therefore that a nonsuit ought to be set aside and the case sent back for trial. *Bransby v. East London Bank*, 14 L. T. 463; 14 W. R. 652.

#### 8. LOST OR DESTROYED.

**Will not support Promise to give New Cheque.]**—The non-payment and probable loss of a cheque on his bankers, which A. had signed and delivered to B., is not a consideration to support a promise by A. to give a new cheque for the same amount to C., to whom it was alleged that B. had sent the lost cheque. *Johns v. Mason*, 9 Hare 29; 20 L. J., Ch. 305; 15 Jur. 390.

**Remedies of Loser.**—A. paid to the credit of his account with a banking company a cheque drawn by B. The cheque was lost, and B. having refused to give another, leave was given to the official manager of the banking company to file a claim to compel him to do so, on being indemnified. *Rhodes v. Morse*, 14 Jur. 800.

A cheque of the accountant-general was alleged to have been accidentally destroyed. The court, though not satisfied with the evidence of its destruction, directed the issue of a new cheque, on the ground that the other cheque, being more than a year old, would not be paid, if presented. *Taylor v. Scriven*, 1 Beav. 571.

—**Owner guilty of Negligence.**—Negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it. *Arnold v. Cheque Bank*; *Arnold v. City Bank*, 1 C. P. D. 578; 45 L. J., C. P. 562; 34 L. T. 729; 24 W. R. 759.

Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party or to the general public. *Id.*

The plaintiffs, merchants at New York, desiring to transmit 1,000*l.* to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount drawn by S. & Co. on Smith, Payne, & Co., London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them, which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of W. & Co., and procured the defendants, bankers, in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose cheques the money was almost immediately drawn out. In an action for money had and received, the defendants, in order to shew that the negligence of the plaintiffs in the custody and transmission of the draft afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was an usual and an almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action:—Held, that the plaintiffs' right to the draft, and to sue for its proceeds in the hands of the defendants as money received to their use, was not affected by the felonious act of Hecht; and that the evidence tendered was properly rejected. *Id.*

#### 9. GIFT OF.

**Must be Complete.**—A father, on his return from a journey, placed a cheque for 900*l.* in the hands of his infant son, nine months old, and said to his mother and nurse, "I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it. Never mind if he tears it, it is his own, and he may do what he likes

with it." He then locked up the cheque in an iron safe, and died suddenly a few days afterwards. The father, at the date of the transaction, was contemplating an alteration of his will, so as to give 1,000*l.* to the infant, who was otherwise unprovided for:—Held, that there was neither a perfect gift to, nor a valid declaration of trust in favour of, the infant. *Jones v. Lock*, 35 L. J., Ch. 117; 11 Jur., N. S. 913; 14 W. R. 149.

A cheque was given by A. to B., and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the cheque not having been paid:—Held, a complete gift, inter vivos, of the amount of the cheque. *Bromley v. Brunton*, 6 L. R., Eq. 275; 37 L. J., Ch. 902; 18 L. T. 628; 16 W. R. 1006.

**Invalid within Statute of Mortmain.**—A lady gave a cheque for 5,000*l.* to the surgeon who attended her, to be laid out in the erection, establishment, and support of a hospital. The money was invested by the surgeon in consols in the name of himself and another as trustees, and both immediately afterwards executed a deed of trust declaring the objects of the gift. The declaration of trust was not made known to the donor, who died a few days after its execution:—Held, that the object of the gift did not exclude the acquisition of land; and that the donor, having died within twelve months after the execution of the deed, the gift was invalid under 9 Geo. 2, c. 36. *Hawkins v. Allen*, 10 L. R., Eq. 246; 40 L. J., Ch. 23; 23 L. T. 465; 18 W. R. 748.

**Belonging to Wife's separate Estate.**—A wife received a banker's draft for the amount of a legacy given to her separate use. She gave the draft to her husband, who paid it into his current account, and on the same day placed it upon a deposit account in his own name, and then shewed his wife the deposit note. He died very shortly after. The widow gave evidence that she never intended to give up the control of this money:—Held, that the executors of the husband must pay her this sum. *Green v. Carill*, 4 Ch. D. 882; 46 L. J., Ch. 477.

**To Trustee—Cestui que trust not sufficiently ascertained.**—A lady drew a cheque for 500*l.* upon her son-in-law (who was not a banker, but who had moneys of hers in his hands), in favour of her daughter Jane, his wife. Afterwards she told him to hold the money in trust for Jane during her life, and afterwards for the children of Jane. The lady died shortly afterwards, and the money was claimed on behalf of the wife and children:—Held, that the objects of the gift were not sufficiently ascertained, and that the 500*l.* must be treated as assets of the deceased. *Hughes v. Stubbs*, 11 Jur., N. S. 913; 13 L. T. 492; *S. P.*, *Roberts v. Roberts*, 11 Jur., N. S. 992.

**As a Donatio Mortis Causa.**—See WILL.

#### 10. WHEN FORGED.

**As to Amount.**—Where a cheque was so carelessly drawn as to be easily altered by the holder to a larger sum, so that the bankers, when they paid it, could not distinguish the alteration:—Held, that the loss must fall on the drawer, as it

was caused by his negligence. *Young v. Grote*, 4 Bing. 253; 12 Moore, 484. See *Swan, Ex parte*, 7 C. B., N. S. 400; *S. C.*, 7 H. & N. 603; and on appeal, 2 H. & C. 175.

A customer drew upon his banker a cheque for 3*l.*, and paid it away. The amount of the cheque was altered by the holder to 200*l.*, in such a manner that no one, in the ordinary course of business, could have observed it, and presented, and the 200*l.* paid by the banker:—Held, that the banker was liable to the customer for the difference between the amount of the genuine and the altered cheque. *Hall v. Fuller*, 8 D. & R. 464; 5 B. & C. 750.

In an action by the payee against the makers of a cheque, in which they pleaded that they did not make the cheque, their signatures were admitted, but it was opened for them that they were directors of a company, of which the payee was secretary, who kept blank cheques, with their signatures to them, in a book, and that the cheque in question was one filled up by the payee without authority. The judge intimated that this was a forgery, even though the wholsom which the cheque was drawn for was due to the payee. *Flower v. Shaw*, 2 C. & K. 703.

So filling in a blank cheque with a larger sum than that authorized by the drawer, is a forgery. *Reg. v. Wilson*, 1 Den. C. C. 284; 2 C. & K. 527; 17 L. J., M. C. 82.

**Form and Amount.]**—If trustees under a paving act sign cheques drawn by the clerk of the person who is clerk of the trust, those cheques being drawn so as to be alterable from small sums to larger, the trustees cannot charge the clerk to the trust with negligence if they are altered, it being their duty not to sign cheques drawn in such a manner; nor can they charge him with his clerk's misconduct, which would have been prevented had the trustees done their duty in the way in which the clerk to the trust had fair reason to expect they would. *Whitmore v. Wilks*, 3 C. & P. 364.

**As to Signature.]**—A declaration alleged that A. drew a cheque upon a banking company, requiring the bank to pay to S. and K., or their order, 190*l.* 17*s.* 7*d.*, the bank having at the time funds of A. to meet it; that L. forged the signature of S. and K. as an indorsement on the back of the cheque, and presented it for payment to the bank; that the forged document was manifestly not in the handwriting of S. and K. or either of them, and was manifestly in the handwriting of L.; and that the respective handwritings of S. and K. and L. were well known to the servants and agents of the bank at their office when it was presented for payment; that the bank wrongfully cashed the cheque, and paid A.'s money to the amount of 190*l.* 17*s.* 7*d.* to L.; and which was so paid to L. by the gross negligence of the bank:—Held, that as the allegations shewed that the instrument was a draft for money payable to order, within 16 & 17 Vict. c. 59, s. 19, and that it purported to have been indorsed by S. & K., accordingly the bank was protected by that statute, and the action was not maintainable. *Hare v. Copland*, 13 Ir. C. L. R. 426.

Payment of a forged draft is no payment as between the person paying and the person whose name is forged. *Orr v. Union Bank of Scotland*, 1 Macq. H. L. Cas. 513; 2 C. L. R. 1566.

**Cheque signed in Fictitious Name.]**—The prisoner, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the prisoner, had no account, and gave it to the prosecutor as his own cheque drawn in his own name. At the time he drew the cheque the prisoner knew that it would be, as in fact it was, dishonoured. The prosecutor received the cheque in the belief that it was drawn in the prisoner's own name:—Held, by Cockburn, C. J., Lush, J., Huddleston, B., Lindley and Hawkins, J.J., that the prisoner was not guilty of the offence of forgery. The resolution in *Dwan's case* (1 Lea. C. C. 59): "In all forgeries the instrument supposed to be forged must be a false instrument in itself; and if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person," followed and approved. *Reg. v. Martin*, 5 Q. B. D. 34; 49 L. J., M. C. 11; 41 L. T. 531; 28 W. R. 232; 44 J. P. 74; 14 Cox, C. C. 375.

**Of Indorsement—Negligence of Bankers.]**—The plaintiff drew a cheque on his bankers, M. & Co., payable to order, crossed it London and County Bank, and sent it for value to the payee, from whom it was stolen and his indorsement forged. It was ultimately passed to the defendant, who took it *bonâ fide* in ignorance of the forgery. The defendant gave it to his country bankers, and their London agents, the London and Joint Stock Bank, presented and received payment for it from M. & Co., who either did not perceive or disregarded the crossing London and County Bank. On hearing it was paid, the defendant gave value for it to a customer. Meanwhile the plaintiff, at the payee's request, had sent him a second cheque for the same amount, which also was paid by M. & Co., and the plaintiff's account was debited with both cheques. The plaintiff having brought an action for the amount of the first cheque, for money had and received by the defendant, the jury found that all the parties concerned, except the defendant, namely, the plaintiff, M. & Co., and the payee, had been guilty of negligence with regard to the payment of the first cheque:—Held, that the first cheque had been paid by M. & Co., improperly, and without authority, because they had paid it to the wrong bankers, and that the plaintiff could maintain this action against the defendant who had acquired no title to the cheque. *Bobbett v. Pinkett*, 1 Ex. D. 368; 35 L. J., Ex. 555; 34 L. T. 851; 24 W. R. 711.

**Conversion of Stolen Cheque with Forged Indorsement—Negligence no Defence.]**—To a statement of claim alleging that a cheque payable to the order of the plaintiffs was stolen from them, and the indorsement of their name forged upon it, and that it subsequently came into the possession of the defendant, who converted it to his own use, the defendant pleaded that the plaintiffs knowingly employed as clerk a man who had been convicted of embezzlement, and was a notorious thief; that the clerk was allowed access to the rooms where the plaintiffs' letters and cheques were kept, and was empowered and

permitted to receive and open the said letters and cheques, and to witness the mode in which the plaintiffs indorsed their cheques; that the clerk was frequently paid his wages by the duly-indorsed cheques of the plaintiffs, and sometimes employed by the plaintiffs to indorse cheques payable to their order; that the cheque in question was taken or stolen by the clerk, who thereupon forged the indorsement, and then procured one E., who had no notice of the forgery and theft, to cash the cheque; that the defendant received the same, with other cheques from E., without notice of the forgery and theft, and in the ordinary course of business gave full value therefor; that, by their carelessness and wilful neglect in dealing with their letters and cheques, the plaintiffs did not discover the forgery and theft for a considerable time; and after such discovery did not take any steps to prevent the negotiation of the cheque, and by such carelessness and neglect caused the defendant to become a bona fide holder for value of the cheque without notice of the forgery and theft:—Held, on demurrer, that the plea was bad. *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J., C. P. 713—C. A.

**Protection of Banker paying Cheque purporting to be duly indorsed does not extend to third person.]**—Though the banker on whom a cheque is drawn which is payable to order, is protected by 16 & 17 Vict. c. 59, s. 19, from proving it to be indorsed by the person to whose order it is made payable, if it purports to be so indorsed, yet a third person who cashes such cheque is not so protected, and if the indorsement of the name of the payee to whose order it was made payable is a forgery, such third person will be liable to refund to the drawer the money which he received on the cheque when it was honoured by the banker on whom it was drawn. *Ogden v. Benas*, 9 L. R., C. P. 513; 43 L. J., C. P. 259; 30 L. T. 683; 22 W. R. 805.

**Fraud—Pleas of.]**—To a declaration on a cheque the defendant pleaded that he was induced to sign the cheque by the fraud of the plaintiff:—Held, that the plea imported an allegation that the defendant, on discovering the fraud, disaffirmed the contract, and that the defendant was not entitled to a verdict on a traverse of the plea, it appearing that he had not disaffirmed the contract. *Daves v. Harness*, 10 L. R., C. P. 166; 44 L. J., C. P. 194; 32 L. T. 159; 23 W. R. 398.

**Production of, for Comparison of Hand-writing.]**—The court will not order the production of cheques alleged by the defendant to be forgeries for the sake of comparing the hand-writing with a document, about the genuineness of which the parties are at issue. *Wilson v. Thornbury*, 17 L. R., Eq. 517; 43 L. J., Ch. 356; 22 W. R. 509.

## 11. ACTIONS ON.

**Suing Banker for.]**—The holder of a cheque cannot sue the banker for refusing payment, in the absence of proof that it was accepted by the banker, or charged against the drawer. *National Bank of the Republic v. Millard*, 7 Canada, L. J., N. S. 44—Supreme Court, U. S.

A cheque is not an assignment by the drawer

to the payee of a debt or a chose in action within the meaning of the Judicature Act, 1873, s. 25, sub-s. 6. *Schroeder v. Central Bank of London*, 34 L. T. 735; 24 W. R. 710.

Therefore the payee of a cheque has no right of action for its dishonour against the banker on whom it is drawn. *Id.*

**By Bearer.]**—The bearer of a cheque is the person entitled to the money, and he may transfer it to any other person, and whoever has possession of it, as bearer, is entitled to maintain an action on it. *Ancona v. Marks*, 7 H. & N. 696.

**By Holder against Maker.]**—An action of debt will lie against the maker of a cheque, by the payee to whom the maker has delivered it. *Simpkins v. Potheary*, 5 Ex. 253; 1 L. M. & P. 249; 19 L. J., Ex. 242; 14 Jur. 464.

**Venue.]**—In an action upon a cheque, the venue could not be changed upon the common affidavit. *Webb v. Inwards*, 5 C. B. 483.

**Summary Proceedings.]**—Summary proceedings under 18 & 19 Vict. c. 67, may be taken on a cheque. *Eyre v. Waller*, 5 H. & N. 460; 29 L. J., Ex. 246; 6 Jur., N. S. 512; 2 L. T. 253; 8 W. R. 450. *S. P., Rochford v. Daniel*, 1 F. & F. 602.

**Against Executor on Cheque drawn by Testator.]**—The plea of non assumpsit is admissible in an action against an executor on a cheque drawn by his testator. *Rollston v. Dixon*, 2 D. & L. 892; 14 L. J., Ex. 304.

**Production of, when Admitted on the Pleadings.]**—In an action on a cheque, plea that it was given for money lost in gaming and issue thereon:—Held, that the plea admitting giving the cheque, it was not necessary to produce it in the plaintiff's case, nor for the purpose of aiding that of the defendant's case, notice to produce not having been given. *Read v. Gamble*, 10 A. & E. 597, n.

## VII. TRANSFER AND INDORSEMENT.

### 1. BY INDORSEMENT.

#### a. Generally.

**What amounts to.]**—The writing of his name by an indorser on the face of a bill is a good indorsement. *Young v. Glover*, 3 Jur., N. S. 637.

If a note, payable to the order of A., is backed by B. with his name, at the request of A., and then she places her name on the back under B.'s, but afterwards erases her name, and places it above B.'s, this is not such an indorsement of the note by B. to A. as makes him liable as indorser to her. *Lecan v. Kirkman*, 6 Jur. N. S. 17.

A defendant, intending to become surety to the plaintiffs for money to be advanced by them to B., wrote his name on the back of a blank bill stamp; after which B. wrote his name across it as acceptor, and then handed it to the plaintiffs, who filled it up as a bill of exchange payable to their own order:—Held, that although the defendant could not be sued as indorser, he was nevertheless liable as drawer of a bill payable to bearer, or according to the tenor and effect thereof, of a bill payable to the plaintiffs' order.

*Matthews v. Blossome*, 33 L. J., Q. B. 209; 10 Jur., N. S. 998; 10 L. T. 415; 12 W. R. 795.

In order to constitute a valid indorsement of a bill as against the indorser, there must be a writing of the name of the holder, and a manual delivery by him of the bill with the intention, not only to pass the property in it, but to guarantee the payment if the acceptor makes default; and evidence of facts shewing the absence of this intention is admissible under a traverse of the indorsement. *Denton v. Peters*, 5 L. R., Q. B. 475; 23 L. T. 281.

**Of French Bills.**—On the trial of an action by the indorsee against the acceptor of a bill, it was proved that the indorsement was made in France in blank, and there was evidence by a French advocate that an indorsement in blank operated only as a procuration, and left the title in the bill to the party so indorsing, but it was agreed that the whole of the Code de Commerce should be considered as in evidence:—Held, that according to the true construction of that code, the person to whom a bill is indorsed in blank is entitled to sue in France in his own name, subject, however, to any defence which could be made against his immediate indorser, and that therefore the indorsement, though made in France and in blank, and operating only as a procuration, did not alone prevent the plaintiff from suing the acceptor in this country. *Bradlaugh v. De Rin*, 5 L. R., C. P. 473; 39 L. J., C. P. 254; 22 L. T. 623; 18 W. R. 931—Ex. Ch.

**By Partners without Authority.**—A party who had had professional transactions with A. and B., who were attorneys in partnership, accepted a bill of exchange drawn in their joint names, for the accommodation of B. alone, who, without the knowledge or concurrence of A., indorsed it in the name of the partnership firm, for a valuable consideration, to one who, upon its being dishonoured by the acceptor, sued her for the amount. Upon a plea denying the indorsement by A. and B.:—Held, that the facts established such plea. *Garland v. Jacomb*, 26 L. T. 849.

A partner has no implied authority to bind his firm by issuing acceptances in blank. *Hogarth v. Latham*, 3 Q. B. D. 643; 47 L. J., Q. B. 339; 39 L. T. 75; 26 W. R. 388—C. A.

F., of the firm of L. & Co., gave an acceptance purporting to be made by the firm, with a blank for the name of the drawer. C. gave it to H. for value. H. filled up the bill, putting the name of his firm, H. & Co., as drawers, and indorsed it to himself, knowing when he did so that F. had no authority to accept the bill:—Held, that L. & Co. were not liable on the bill at the suit of H. *Id.*

Semble, that a bonâ fide holder for value to whom the bill had come in a perfect state would have been entitled to sue. *Id.*

**Right of Holder who is prior Indorser of Bill to Sue intermediate Indorser—Circuity of Action.**—The plaintiffs having supplied goods to E., drew two bills of exchange upon him for the price. E. accepted the bills, and the plaintiffs indorsed them to the defendant, who, in pursuance of a verbal agreement to become surety for E., in respect of the price of the goods, re-indorsed them to the plaintiffs, who, as indorsees

of the bills, sued the defendant:—Held, that the plaintiffs could set up the verbal agreement to shew that the defendant could not have sued them as prior indorsers, and that as no circuity of action would result, the plaintiffs were entitled to maintain their action. *Wilkinson v. Unwin*, 7 Q. B. D. 636; 50 L. J., Q. B. 338; 46 L. T. 123; 29 W. R. 458—C. A.

**In Pencil.**—An indorsement written on a note with a blacklead pencil, instead of ink, is a writing in law, and gives the indorsee a right to recover upon the note. *Geary v. Physic*, 7 D. & R. 653; 5 B. & C. 234.

**Forged Indorsement, Ratification of.**—The defendant's name was forged, by one Jones, to a joint and several note for 20*l.*, dated the 7th of November, 1869, and purporting to be made in favour of the plaintiff, by the defendant and Jones. While the note was current the defendant signed the following memorandum, in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority:—"I hold myself responsible for a bill dated the 7th of November, 1869, for 20*l.*, bearing my signature and Richard Jones', in favour of Mr. Brook." At the trial of an action against the defendant on the note, the judge ruled that this memorandum was a ratification, and directed the jury that the only question for them was, whether the defendant signed it. It being admitted that he did, a verdict was entered for the plaintiff:—Held (per Kelly, C. B., Channell and Pigott, BB., Martin, B., dissentiente), a misdirection:—Per Kelly, C. B., Channell and Pigott, BB., that the memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void and incapable of ratification; but that it was, in fact, an agreement by the defendant to treat the note as his own in consideration that the plaintiff would forbear to prosecute Jones, and was therefore void as founded on an illegal consideration. *Brook v. Hook*, 6 L. R. Ex. 89; 40 L. J., Ex. 50; 24 L. T. 34; 19 W. R. 508.

**When Authority to Indorse will be inferred.**—A bill drawn, payable to A., or order, is not transferable without the indorsement of the payee, and an authority from him to whom he delivers the bill, to indorse it in his name, is not to be inferred from the mere act of delivery. *Harrop v. Fisher*, 10 C. B., N. S. 196; 30 L. J., C. P. 283; 7 Jur., N. S. 1058; 9 W. R. 667.

The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no instance consists exclusively in the writing popularly called an indorsement which is necessary to the existence of the contract, but arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which the delivery was made and accepted, as evidenced by the words either spoken or written by the parties, and the circumstances, such as the usage of the place, and the course of dealing between the parties under which the delivery takes place. *Castrique v. Buttigieg*, 10 Moore, P. C. C. 94.

B. acted as agent in Malta for A., for the purpose of buying and remitting to him in England bills on England, on account of money received by B. in Malta. In the course of his agency he

purchased bills in Malta, and indorsed them to A. without any reservation in the indorsement as to his liability:—Held, that in the absence of special circumstances shewing that any liability was intended by the general mercantile law which must be taken to be in force in Malta, that B. was not liable to A. upon the bills being dishonoured. *Ib.*

A. & B. carried on business in partnership. The firm being indebted to C., A. (who acted as C.'s agent), with the concurrence of B., indorsed a bill in the name of the firm, and placed it amongst the securities which he held for C., but no communication of the fact was made to C.:—Held, a good indorsement by A. & B. to C. *Lysaght v. Bryant*, 9 C. B. 46; 19 L. J., C. P. 160.

**Contract arising from Transfer or Indorsement.**—The contract which a person transferring for value the property in a bill makes with the transferee, is that he warrants that the bill, having been accepted, shall, on being presented at the time it becomes due, be paid; that is, he engages as surety for the due performance by the acceptor of the obligations which the latter takes upon himself by the acceptance. *Rouquette v. Overmann*, 10 L. R., Q. B. 525; 44 L. J., Q. B. 221; 33 L. T. 333.

The liability of the transferor, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be the obligations of the surety. *Ib.* See next case.

A bill was drawn and indorsed in England upon French subjects resident in Paris, and was accepted by them in Paris. The bill on the face of it was payable on the 5th October, 1870; before that date the Emperor of the French, in consequence of the war with Germany, enlarged the time for the payment and protesting of current bills of exchange for one month; and the time was afterwards enlarged from time to time by the Government of France for the time being. By these enlargements of time the bill did not become payable till the 5th of September, 1871. On that day the bill was presented to the acceptors and payment refused; and it was duly protested, and due notice of dishonour given to all the parties:—Held, that the indorsers were liable on the bill at the suit of their indorsee for value. *Ib.*

**Governed by Lex Loci Contractus.**—The rights and liabilities of the indorser and indorsee of a bill depend upon the law of the place where the contract of indorsement is made. *Horne v. Rouquette*, 3 Q. B. D. 514; 39 L. T. 219; 26 W. R. 894—C. A. See preceding case.

On the trial of an action by the indorsee against the acceptor of a bill, it was proved that the indorsement was made in France in blank, and there was evidence by a French advocate that an indorsement in blank operated only as a procuration, and left the title in the bill to the party so indorsing, but it was agreed that the whole of the Code de Commerce should be considered as in evidence:—Held, that according to the true construction of that code, the person to whom a bill is indorsed in blank is entitled to sue in France in his own name, subject, however, to any defence which could be made against his immediate indorser, and that therefore the indorsement, though made in France and in

blank, and operating only as a procuration, did not alone prevent the plaintiff from suing the acceptor in this country. *Bradlaugh v. De Rin*, 5 L. R., C. P. 473; 39 L. J., C. P. 254; 22 L. T. 623; 18 W. R. 931—Ex. Ch.

**Indorsement, Effect of—Surety entitled to Benefit of Securities.**—The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship. *Duncan, Fox, & Company v. North and South Wales Bank*, 6 App. Cas. 1; 50 L. J., Ch. 355; 43 L. T. 706; 29 W. R. 763.

S. C. R., one of the partners of S. R. & Sons, in December, 1874, deposited with the N. & S. W. Bank the title deeds of two of his own freehold properties, and signed a memorandum acknowledging them to be deposited as securities for what the N. & S. W. Bank might advance to the firm in the way of discounts. In November, 1875, D. & Co. sold to R. & Sons a cargo of corn to be paid for in cash. Cash was paid only for part. R. & Sons offered a bill of exchange for the rest, which was declined. D. & Co. were customers of the N. & S. W. Bank. R. & Sons said if D. & Co. would inquire of those bankers they would find it would be all right with the R. bills. The bank manager refused to discount the bill without the indorsement of D. & Co., but said that he believed D. & Co. would incur no more than a nominal liability by putting their names on the bill. D. & Co. thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, R. & Sons stopped payment. The bill became due in February, and was dishonoured. D. & Co., who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on R. & Sons' bills, brought an action against the N. & S. W. Bank to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be sureties to the bankers for what was due upon the bill:—Held, that D. & Co. were sureties on the bill, and that as such they were entitled to the benefit of these securities. *Ib.*

**Re-indorsement to Original Payee.**—A. having declared on a note against B., made by C. to A., and by him indorsed to B., and by him again indorsed to A., and having obtained a verdict, the judgment was arrested. *Bishop v. Hayward*, 4 T. R. 470.

**Action by Indorsee—Pleading—Claim.**—The allegation of the indorsement of a bill, in an action by indorsee against acceptor, does not necessarily mean such an indorsement as will give a right of action against the indorser, but only such an indorsement as gives the plaintiff a title to the bill. *Smith v. Johnson*, 3 H. & N. 222; 27 L. J., Ex. 363.

Where, therefore, the drawers of a bill indorsed it to a registered company, and the officer of the company delivered the bill to the plaintiff for value, bearing the indorsement of two directors

of the company "per procuration:"—Held, in an action by the plaintiff against the acceptor, that whether or not the indorsement was such as to give a right of action by the plaintiff against the company, there was such an indorsement as entitled the plaintiff to a verdict on a traverse of the allegation of the indorsement of the bill by the company to the plaintiff. *Id.*

Action by indorsees against indorser of a bill drawn by W. & Co. on H., indorsed by W. & Co. to the defendant, and by him to the plaintiffs. Plea, that W. & Co. are the plaintiffs, that they are the drawers, and the persons to whose order it was payable, and the persons who indorsed to the defendant, and who are liable to him as such indorsers in event of payment of the bill by him. Replication, that, at the time of the drawing, H. was indebted to the plaintiffs in the amount of the bill, and thereupon it was agreed between the plaintiffs and H., that in consideration that H. would procure the defendant to indorse and become surety as indorsee to the plaintiffs they would give time to H. for payment of the debt; that the parties, in pursuance of this agreement, drew and indorsed the bill, and the defendant, for the accommodation of H., indorsed it to the plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs; that H. delivered the bill so indorsed to the plaintiffs, and the plaintiffs gave time to H.; and that no part of the debt had been paid to them:—Held, first, that the facts disclosed in the replication shewed a sufficient title in the plaintiffs to sue the defendant on his indorsement to them, notwithstanding their previous indorsement to him. *Wilders v. Stevens*, 15 M. & W. 208; 15 L. J., Ex. 108.

Held, secondly, that the replication shewed a sufficient consideration for the defendant's promise to pay the plaintiffs the amount of the bill. *Id.*

Held, thirdly, that it was not a departure from the declaration. *Id.*

— **When Replication a Departure from Declaration.**—Declaration on a note payable to the order of M., indorsed by M. to the defendant, and by him to the plaintiff. Plea, that M., the payee and the indorser to the defendant, is the same person as the plaintiff. Replication, that the maker was indebted to the plaintiff, and that it was thereupon agreed between them, that in consideration that the plaintiff would give time for payment of the debt, the maker would make it, and would procure the defendant to indorse it, by way of guarantee, to which the defendant agreed; and that the plaintiff gave time to the maker, and in pursuance of the agreement, and without consideration or value whatever in that behalf, and for the purpose and in order that the defendant might, in pursuance of the agreement, indorse the note to the plaintiff, first indorsed the same to the defendant:—Held, that the replication was not a departure from the declaration. *Morris v. Walker*, 15 Q. B. 589; 19 L. J., Q. B. 401; 14 Jur. 851.

A count stated that S. made his bill, and directed it to Mrs. W., and thereby required her to pay to his order 10*l.*, and that S. indorsed the bill to the defendant, who indorsed to the plaintiff. The defendant pleaded that S. was the plaintiff, and that he and no other person was the drawer, and the person to whose order the same was payable, and the person who indorsed the same to the defendant, and was liable to the

defendant as such indorser, in the event of payment of the bill by the defendant. Replication, that the defendant indorsed to the plaintiff for the accommodation of Mrs. W., and in order to secure a debt of 10*l.* due from her to the plaintiff, which debt was still unpaid; that there never was consideration or value for the indorsement by the plaintiff to the defendant, but that the bill was so indorsed by the defendant to the plaintiff for the purpose of the defendant becoming surety, as such indorser, for the payment of the debt due from Mrs. W.:—Held, that the replication was not a departure. *Smith v. Marsack*, 6 C. B. 486; 6 D. & L. 363; 18 L. J., C. P. 65; 12 Jur. 1050.

#### b. In Blank.

##### Effect of subsequent Indorsement by Indorser.]

—Where the payee of a bill indorses it in blank, and delivers it to B., and B. writes above A.'s indorsement, "pay the contents to C.," B. is not liable to C. as an indorser of the bill. *Vincent v. Horlock*, 1 Camp. 442.

But, after an indorsement by the payee in blank, no subsequent indorsee can restrain its negotiability by a special indorsement. *Smith v. Clarke*, Peake, 225; 1 Esp. 180. And see *Peacock v. Rhodes*, 2 Dougl. 611; *Sigourney v. Lloyd*, 8 B. & C. 622.

A bill, having been indorsed in blank, was afterwards indorsed by the defendant specially to Barber & Walker & Co. The plaintiffs, who carried on business under the firms of Barber & Walker & Co., and The Eastwood Company, indorsed the bill by the name of The Eastwood Company. The bill was duly presented, but payment refused for want of an indorsement by Barber & Walker & Co.:—Held, that the bill having been indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement; and that the presentment was such as to render the defendant liable on his indorsement. *Walker v. McDonald*, 2 Ex. 527; 17 L. J., Ex. 377.

**Conversion to Special.**—A person may convert a blank indorsement into a special indorsement in his own favour. *Clark v. Piggott*, 1 Salk. 126; 12 Mod. 193. See *Hirschfeld v. Smith*, 1 L. R., C. P. 353, per Erie, C. J.

**Transferred by Indorsee—Position of Transferee.**—Where a bill is indorsed in blank, and is transferred by the indorsee by delivery only, without any fresh indorsement, the transferee takes as against the acceptor any title which the intermediate indorsee possessed. *Fairclough v. Pacia*, 9 Ex. 690; 2 C. L. R. 1099; 23 L. J., Ex. 215.

A bill accepted on the terms of the sale and return of goods, a portion of which only had been sold, was indorsed by the drawer for a valuable consideration before it became due to B. & Co. After it became due B. & Co. transferred it to the plaintiff by delivery; and at the time of the transfer the name of the firm of B. & Co. was erased from the back of the bill:—Held, that the transfer by delivery from B. & Co. passed their title in the bill to the plaintiff; and that the agreement between the drawer and the acceptor was no answer to an action on the bill. *Id.*

If a bill indorsed in blank is parted with by the holder as upon payment for the acceptor, but taken by the person taking it with the intention of becoming holder, the latter is not the less, for

the misunderstanding, holder, as against all except the prior holder. *Lyon v. Maxwell*, 18 L. T. 28; 16 W. R. 437.

**Pledgings.**—To a declaration on a bill, the defendant pleaded, that he indorsed and delivered it in blank to C. for the special purpose of getting it discounted for him; and that the plaintiff, jointly with W., discounted it; and that C., in consideration of such discounting, delivered it to the plaintiff and W. jointly, and not to the plaintiff solely or apart from W., and that there was no consideration for the indorsement to the plaintiff solely:—Held bad, for not shewing that the plaintiff had no right to sue alone upon the bill. *Wood v. Connop*, 5 Q. B. 292; D. & M. 223; 13 L. J., Q. B. 57; 8 Jur. 174.

A declaration that the defendant made his bill and directed it to B., and required him to pay to the defendant's order, and indorsed the bill to the plaintiffs. The bill was drawn by F., and indorsed by the defendant in blank, and having been delivered by the defendant to F., was by him taken to a bank, of which the plaintiffs were the managers, where it was received by them in renewal of another bill discounted by them, and drawn and indorsed by the same parties:—Held, first, that proof of the defendant being the indorser of the bill did not support the averment that he was the maker. *Burmester v. Hogarth*, 11 M. & W. 97; 12 L. J., Ex. 178.

Held, secondly, assuming that an indorser might be treated as a drawer, still the indorsement, being in blank, was equivalent to drawing a new bill payable to bearer, and therefore the bill was misdescribed. *Ib.*

### c. Conditional or Restrictive.

**Generally.**—Quære, whether a negotiable bill can by any words of restriction be rendered not negotiable. *Eddie v. East India Company*, 1 W. Bl. 295; 2 Burr. 1216.

A bill payable to A. or order, and indorsed personally to B., may be afterwards indorsed by B. to another. *Ib.*

A bill payable to order, and become negotiable, may be indorsed over, without the word "order" to the indorsement. *Ib.*

**What is Restrictive.**—A bill being drawn by A. on B., payable to C. or order, and indorsed by C. in these words—"the within must be credited to D., value in account," D. being indebted to B., and the bill being sent to B., and accepted by him; and he having given D. notice that he had received it, and placed it to C.'s account, this is such a special indorsement as restrains the negotiability of the bill. And if afterwards a forged indorsement, purporting to be by D., to pay to E. or order, is written upon it, and the bill is discounted, the person discounting it shall stand to the loss. *Archer v. Bank of England*, 2 Dougl. 637. And see *Robertson v. Kensington*, 4 Taunt. 30.

But where a bill was indorsed by the drawer in this form, "pay the contents to A., being part of the consideration in a deed of assignment, executed by A. to the indorser and others," it is not a limited indorsement. *Potts v. Reed*, 6 Esp. 57. And see *Haussoüillier v. Hartsinck*, 7 T. R. 733.

"Pay to A. or his order for my use," is a restrictive indorsement; and the indorsee of A.

must hold the proceeds to the use of the restrictive indorser. *Sigourney v. Lloyd*, 8 B. & C. 622; 3 M. & R. 58; *S. C.*, *Lloyd v. Sigourney*, 3 M. & P. 229; 3 Y. & J. 220; 5 Bing. 525.

An indorsement thus, "Pay J. S. or order, value in account with H. C. D.," is not a restrictive indorsement. *Buckley v. Jackson*, 3 L. R., Ex. 135; 18 L. T. 886.

**Effect of.**—The drawer and payee of a bill, after it became due, indorsed it to B., on condition that he would take up bills discounted by the payee: B. did not take them up, but transferred the bill to C.:—Held, that he might recover against the acceptor. *Wright v. Hay*, 2 Stark. 398.

A special indorsement does not transfer property in bills of exchange till delivery. *Rez v. Lambton*, 5 Price, 428.

A bill drawn by M. under the name of M. & Co., upon and accepted by J. & Co., payable six months after sight to the order of M., and by M. indorsed to B., and by B. indorsed to C., "Value in account with the Oriental Bank," and by C. indorsed to S. Action by S., as indorsee, against M. as drawer, upon the bill being dishonoured: Demurrer, that the indorsement preceding that to S. was restrictive:—Held, that there was nothing upon the indorsement by B. to preclude C., the restricted indorsee, from making an assignment of the bill, so as to give the subsequent indorsee a right of action for the benefit of the restraining indorser or cestui que trust, as the case might be. *Murrow v. Stuart*, 8 Moore, P. C. C. 267.

Bills were drawn on the 12th May, by a house in Lisbon on a house in London, payable thirty days after sight, and indorsed to A. in London. A. indorsed them, without any qualification, to B. at Paris; B., without presenting them for acceptance, put them in circulation, and on the 22nd August, they were presented at Lisbon for acceptance, and dishonoured. In an action by B. against A.:—Held, that A. was bound by his unqualified indorsement, and could not offer evidence to shew that he was acting merely as B.'s agent. *Goupy v. Harden*, 2 Marsh. 454; 7 Taunt. 159; Holt, 342.

Where the plaintiffs drew a bill on S., which he accepted, and they indorsed it to the defendant, who re-indorsed it to the plaintiffs, in pursuance of an agreement (without consideration) that he should do so, as a security for the payment of it by the acceptor, and for the purpose of rendering the bill more negotiable: on demurrer to a declaration against the defendant upon the bill, in the usual form, containing an averment, that, at the time of the drawing of the bill, and of the indorsement by the defendant to the plaintiffs, it had been agreed between them that the name of the defendant should be indorsed on the bill as a security to the plaintiffs for the due payment thereof by the acceptor, and that the bill was so indorsed by the defendant under such agreement, and for such purpose only; and that the plaintiffs took and received the bill in satisfaction of such debt of the acceptor, upon the faith that the defendant would indorse the same as such security, and that the indorsement by the plaintiffs was made without any consideration, and for the purpose only of procuring the indorsement of the defendant, and making the bill negotiable, and an averment that the bill was presented to the



acceptor, and that he refused to pay it; that notice of such refusal was given to the defendant, and he thereby became liable to pay, and being so liable, promised accordingly:—Held, that the declaration was bad, as, if the action was founded on the bill, the plaintiffs could only recover according to the custom of merchants; and that, by such custom, they, as indorsers and drawers, would be liable to pay its amount to the defendant; and that, if the action could be considered as founded on the special contract, it could not be maintained, as there was no consideration for the defendant's indorsement. *Britten v. Webb*, 3 D. & R. 650; 2 B. & C. 483.

A bill was indorsed by the payee to the Manchester and Liverpool District Banking Company, who indorsed it, and added to their indorsement the following memorandum:—"In need, S. P. & Co." After several other indorsements, the bill was indorsed in blank to the bank of Liverpool, who indorsed it in blank to the plaintiff, who indorsed it specially—"Pay Messrs. Terney & Farley or order," who indorsed it in blank by writing thereon—"Thomas Terney & Farley." After passing through several other hands, the bill when due was duly presented at S. & Co., London, bankers, where it was made payable by the acceptance, and was dishonoured, the answer being "no advice." On the same day it was presented at S. P. & Co.'s, London, bankers, where it was by the memorandum to be paid in case of need. S. P. & Co. refused to pay it, solely on the ground of the irregularity of Terney & Farley's indorsement. The custom of London bankers was admitted to be to refuse all bills, even their own acceptances, where there is a letter wrong in any indorsement. The bill was returned with due notice to the plaintiff, who gave due notice of dishonour to the Liverpool bank. At the Liverpool bank the irregularity was pointed out to the plaintiff, who, by their recommendation, sent the bill to Terney & Farley, who lived in Ireland, to rectify the mistake, and the bill, with the proper indorsement on it, was then sent up to London, and again presented at S. P. & Co.'s, who then refused to pay it as being out of time:—Held, that the bank of Liverpool was liable to the plaintiff on the bill. *Leonard v. Wilson*, 2 C. & M. 589; 4 Tyr. 415.

**Sans Recours.**—The meaning and purpose of an indorsement without recourse examined and adjudged. *Dumont v. Williamson*, 2 U. C. L. J., N. S. 219; 17 L. T. 71—Supreme Court of Cincinnati. See *Lewis v. McKee*, 2 L. R., Ex. 37.

When a note is sold in the market, the vendor and vendee being upon equal terms, having each the same knowledge of the parties to the instrument, and there is no concealment or misrepresentation by the vendor, who indorses it "without recourse," he is not liable to the vendee, if the name of one of the parties is forged. *Id.*

He is not liable on any supposed contract growing out of his indorsement, as it is but a transfer of the note, without the usual guarantee; nor can he be held liable at all unless fraud, concealment, or misrepresentation is proved, or the note is given in payment of a prior indebtedness. *Id.*

**Upon Payment supra Protest.**—A person who takes up a bill supra protest for the benefit of a particular party to the bill, succeeds to the title of the person from whom, not for whom, he

receives it, and has all the title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over. *Swan, Ex parte*, 6 L. R. Eq. 344; 18 L. T. 230; 16 W. R. 560.

**Evidence—To Qualify Right to Indorse.**—Indorsee against acceptors. Declaration, that the bills were indorsed to the treasurer of the Treasury Royal of Portugal, and that C., being treasurer, indorsed the bills to the plaintiff. Plea: that the treasurer, at the time when he indorsed was not such treasurer as was designated or intended by the prior indorsements, but was minister of another and hostile government, and had no title to indorse the bills; and that O. and J., being bankers at P., entered into an agreement with D. M., King of Portugal, and his government, for negotiating and raising a loan; that they procured the bills to be drawn for the purpose of remitting it, and indorsed them to the order of the treasurer of the Royal Treasury of Portugal, thereby intending to make them payable to the order of such person as should be treasurer of the Royal Treasury of Portugal, as the minister of D. M., and not of any person appointed by a government adverse to that of D. M.; that the bills were sent to and duly received by C., being treasurer of the Royal Treasury of Portugal, as minister of D. M.; that D. P. subverted the government of D. M., whereupon C. ceased to exercise the functions of treasurer; that D. P. took forcible possession of the bills; and that C., fraudulently and in collusion with D. P., indorsed them:—Held, that, inasmuch as C. was treasurer of the Royal Treasury of Portugal at the time of the indorsement by O. and J., he acquired the legal title to them; that there was nothing in the form of the indorsement which could be construed to re-vest the title in O. and J., or restrain C. from indorsing over, in case he ceased to hold the office; and that parol evidence was inadmissible to defeat his title or qualify his right to indorse. *Soarez v. Glyn*, 8 Q. B. 24; 14 L. J., Q. B. 313; 9 Jur. 881—Ex. Ch.

**As to Qualification of Indorsement.**—In an action by indorsee against acceptor, he, under a traverse of the indorsement, may prove that the drawer wrote his name on the bill and delivered it to the plaintiff, upon condition of other bills being given up to the drawer, and that the condition had not been complied with. *Bill v. Ingestre (Lord)*, 12 Q. B. 317; 19 L. J., Q. B. 71.

**Bill given in consideration of Promise which is not fulfilled.**—If A., by means of a false pretence, or a promise or condition which he does not fulfil, procures B. to give him a note, cheque or an acceptance in favour of C., to whom he pays it, and who receives it bona fide for value, B. remains liable on his acceptance, and can only relieve himself from his promise to pay C. by shewing that C. is not holder for value, or that he received the instrument with notice, or not bona fide. *Watson v. Russell*, 3 B. & S. 34; 31 L. J., Q. B. 304; 9 Jur., N. S. 249. Affirmed on appeal, 34 L. J., Q. B. 93; 11 L. T. 641; 13 W. R. 231—Ex. Ch.

#### d. Striking out Indorsement.

Where a drawer of a bill payable to his own

order, and indorsed by him to T., and by T. to B. upon the bill being dishonoured, paid the amount to B., who struck out his own and T.'s indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff:—Held, that the plaintiff might recover against the acceptor. *Callow v. Lawrence*, 3 M. & Scott, 95; *S. P.*, *Hubbard v. Jackson*, 4 Bing. 390; 1 M. & P. 11; 3 C. & P. 134.

An indorsement on a bill, not stated in the declaration, may be struck out after the bill has been read in evidence, and after an objection has been made on account of the variance. *Mayer v. Jadis*, 1 M. & Rob. 247.

### e. Proof of Indorsement.

**Generally.**—Action by indorsee against acceptor, averring an indorsement by drawer to M., and by M. to the plaintiff. Plea, traversing the indorsement. The jury found that the drawer wrote his name on the bill and handed it to M., that M. might get it discounted, which was not done; and that the plaintiff received it from M. when overdue, and without consideration:—Held, that there was no indorsement by the drawer to M., and that the acceptor was entitled to have the verdict entered for him on the issue as to that indorsement, the plaintiff not being a *bonâ fide* holder. *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J., Q. B. 1; 15 Jur. 218.

Semble, per Lord Campbell, C. J., that if the plaintiff had been a *bonâ fide* holder before maturity, the acceptor would have been precluded, as against him, from requiring further proof of a prior indorsement than the proof of handwriting; and that on this supposition the issue as to M.'s indorsement ought to have been found for the plaintiff. *Id.*

Action by indorsee against acceptor. Pleas denying the indorsement, and alleging fraud, and that the plaintiff gave no consideration for the bill. On the trial, he rested his case on proof of the handwriting of the indorser. The defendant gave evidence to support the other pleas, which it failed to do, but supported the plea denying the indorsement:—Held, that the plaintiff was not entitled to give other evidence to confirm his *primâ facie* case. *Jacobs v. Turlinton*, 11 Q. B. 421; 17 L. J., Q. B. 194; 12 Jur. 517.

A plea denying the indorsement puts in issue not only the fact of the signature, but also a delivery with intent to transfer the bill. *Marston v. Allen*, 1 D., N. S. 442; 8 M. & W. 494.

In an action against acceptor of a bill indorsed by A., the drawer and payee, to B., B. to C., and C. to the plaintiff, who appears to be a *bonâ fide* holder, the acceptor, under a plea that A. did not indorse to B., cannot offer evidence that A. delivered the bill to B. for a specific purpose, and not to be negotiated, and that B. fraudulently negotiated it. *Hayes v. Caulfield*, 5 Q. B. 81.

**As to Date.**—Where an indorsement of a bill bore no date:—Held, that it was properly left to the jury to determine, from the circumstances attending the transfer of the bill, the time at which the indorsement was made. *Anderson v. Weston*, 6 Bing. N. C. 296; 4 Jur. 105.

**Indorsement by Procuration.**—The acceptance of a bill admits merely the drawing, but not the

indorsement of the drawer. Therefore, if a bill is drawn and indorsed by procuration, in an action by the indorsee against the acceptor, the indorsement by procuration must be proved, if traversed. *Robinson v. Yarrow*, 1 Moore, 150; 7 Taunt. 455. And see *Macferson v. Thoytes*, Peake, 20.

A declaration by indorsee against acceptor averred that the bill had been indorsed to certain persons trading under the firm of H. & F.; and that they had indorsed the bill by procuration of D. to C., from whom the plaintiff derived title: it appeared that the firm of H. & F. had ceased to exist for ten years prior to the indorsement, but that a new firm of H. & Co. had been established; and that D., one of the members, was in the habit of indorsing bills by procuration in the name of H. & F., but that all other transactions were carried on in the name of H. & Co. only:—Held, that as between an innocent indorsee and the acceptor there was sufficient evidence to satisfy the allegation in the declaration. *Williamson v. Johnson*, 2 D. & R. 231; 1 B. & C. 146.

**By Showing that Indorser is same person as Drawer.**—In an action against acceptor of a bill, purporting to be drawn and indorsed by A., proof that it was indorsed by the same person who drew it is sufficient, though that person is shown not to be A. *Smith v. Moneypenny*, 2 M. & Rob. 317.

### Pleading—Defence—Denial of Indorsement.]

—To an action against acceptor of a bill indorsed by drawer to the plaintiff, he pleaded that he accepted it on account of a debt due from him to the drawer; that the drawer indorsed it in blank, and delivered it to the plaintiff as agent for R., for the purpose that the plaintiff should deliver it to R. in payment of a debt due from the drawer to R.; that the plaintiff gave no consideration for it, and wrongfully retained it, in breach of his duty as R.'s agent; that R. claimed to be entitled, and dissented from the plaintiff's suing:—Held, that the plea amounted to a constructive denial of the indorsement to the plaintiff, and was good after verdict. *Adams v. Jones*, 4 P. & D. 174; 12 A. & E. 455.

To an action on a bill drawn by the governor and company of copper miners, and indorsed to the plaintiff, and accepted by the defendant, he pleaded that the governor and company of copper miners was a body corporate, that the bill was made by the corporate name and style, and that it was indorsed by writing and signing, and not under the common seal of the body, nor by any person having authority to do so:—Held, on special demurrer, a bad plea, as amounting to an argumentative denial of the indorsement. *Halifax v. Lyle*, 6 D. & L. 424; 3 Ex. 446. See *Howard v. Oakes*, 6 D. & L. 231; 3 Ex. 136.

### 2. BY DELIVERY.

**Generally.**—A party cannot sue on a bill in which he has no interest, and of which he has no possession. *Emmett v. Tottenham*, 8 Ex. 884; 22 L. J., Ex. 281; 17 Jur. 509.

**To Agent.**—An action is maintainable by a person as the holder of a negotiable instrument,

notwithstanding he has no real interest in it, and never was the actual holder. If it has been indorsed and delivered to some person professing to act as his agent, although without his knowledge, and he subsequently adopts the acts of the assumed agent, that is sufficient title, although such adoption is after action brought in his name, and without his knowledge. *Ancova v. Marks*, 7 H. & N. 686; 31 L. J., Ex. 163; 8 Jur., N. S. 516; 5 L. T. 753; 10 W. R. 251.

A., the holder of three negotiable instruments, to which the defendant was a party, indorsed them to the plaintiff and delivered them to G. and T., a firm of attorneys, with instructions to sue the defendant on them in the name of the plaintiff, which G. and T., assuming to act for the plaintiff, accordingly did. The plaintiff knew nothing of these proceedings until after action, when he adopted and ratified them:—Held, that the action was well brought in the plaintiff's name. *Ib.*

If in an action on a bill given for goods sold, it is proved that the bill was fetched away by the plaintiff's servant from the house of a third person after the commencement of the action, and only a short time before the trial, such evidence will not make it necessary for the plaintiff to prove that he, at the time of action, was the holder of the bill, and entitled to sue upon it. *Burden v. Halton*, 4 Bing. 454; 1 M. & P. 223; 3 C. & P. 174.

Where a bill is indorsed in blank, it is competent to the holder to hand it over to a third person to sue upon it on his behalf. *Law v. Parnell*, 7 C. B., N. S. 282; 29 L. J., C. P. 17; 6 Jur., N. S. 172; 1 L. T. 32; 8 W. R. 6.

A manager of an association established under 7 & 8 Vict. c. 110, and also carrying on the business of a deposit and discount bank *bonâ fide*, received from a customer a bill indorsed in blank:—Held, that it was competent to him to sue upon it in his own name only, without the indorsement of the bank, although he was a partner and shareholder in the concern; it being a part of his duty as manager to keep possession of, and to realize the securities which came to his hands in that character. *Ib.*

A member of a money club having obtained from it a loan, gave two sureties a note for the amount and interest, and expenses, payable to the order of the then treasurer. He having ceased to be treasurer, indorsed the note in blank, and delivered it to the attorney of the club in the presence of another member, who forthwith instructed the attorney to sue in his name upon it. The action was brought against him and the sureties. They pleaded a denial of the indorsement, payment, and an equitable plea of set-off. The plaintiff had a verdict for the amount of the note:—Held, that there was evidence of an indorsement, and that the question of partnership was not admissible under these pleas. *Jenkins v. Tongue*, 29 L. J., Ex. 147.

**By Letter.]**—The rules of the French post office permit a person who has posted a letter to recover it at any time before it is despatched from the office where it is posted, on complying with certain forms. Therefore, where a letter containing bills of exchange, indorsed to the person to whom the letter was addressed, was posted in a French post office:—Held, that the property in the bills did not pass to the indorsee till the letter had left the office where it was

posted. *Cote, Ex parte, Devez, In re*, 9 L. R. Ch. 27; 43 L. J., Bk. 19; 29 L. T. 598; 22 W. R. 39.

**Presumption as to who is Holder.]**—In an action on a bill by drawer against acceptor, in order to rebut the presumption arising from the plaintiff's possession of the bill, that he was the holder, the defendant offered in evidence a draft of a declaration delivered in 1829, in an action on a bill of the same date and amount, and drawn and accepted by the same parties, in which action the plaintiff and another sued as assignees of a bankrupt:—Held, insufficient to call upon the plaintiff to shew how he became possessed of the bill in his individual character. *Dabbs v. Humphrey*, 4 M. & Scott, 285; 10 Bing. 446.

**Testamentary Gift.]**—The payee of certain promissory notes, who was upwards of seventy-nine years of age, brought them to his nephew B., saying, "I give you these notes," adding that B. should have them at his death, but that the latter would like to be master of them as long as he lived. The notes not being indorsed were then indorsed by the payee in the presence of one witness in the following way: "I bequeath — pay the within contents to B. or his order at my death." Six months afterwards the testator died, and in a suit to administer his estate:—Held, that B. had no right to the notes or the moneys thereby secured; the evidence shewing that the transaction amounted to no more than an attempted testamentary gift, which failed. *Patterson, In re, Mitchell v. Smith*, 4 De G., J. & S. 422.

**Gift or Loan.]**—W., the uncle of H.'s wife, declined to accede to a request made by G., a friend of H., that he would lend H. 1,000*l.* towards the payment of certain election expenses, but stated to G. that he would give H. 500*l.* and deduct that amount from a legacy which he intended to leave H.'s family. He accordingly sent H. a cheque for 500*l.* H. acknowledged the receipt of this by letter, saying, that he would repay it. H. afterwards gave to W. a promissory note for the 500*l.* with interest at 1*l.* per cent. W. died, and a suit was instituted to restrain proceedings at law which W.'s executors had taken against H. upon his promissory note. He deposed that the promissory note had been given at his own suggestion, and only for the purpose of securing to W. the interest during his life; but one of W.'s executors stated, that W. had told him he would have to get in the debt:—Held, upon the evidence, that although the 500*l.* was in the first instance intended by W. as a gift, it was accepted by H. only as a loan, and was subsequently so treated by both parties in giving and taking the promissory note. It requires the assent of the minds of both parties to the making of a gift as well as to the making of a contract. And in this case the transaction being open to the parties at the time of the promissory note being given, to make it either a loan or a gift, the giving of the note was conclusive evidence that both parties treated it as a loan. *Hill v. Wilson*, 8 L. R., Ch. 888; 42 L. J., Ch. 817; 29 L. T. 238; 21 W. R. 757.

**Without Indorsement.**—One who receives a bill unindorsed (though for value) acquires no better title under it than the person from whom he receives it himself has. *Whistler v. Foster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161; 8 L. T. 317; 11 W. R. 648.

Where, therefore, A. had fraudulently obtained a bill (or cheque payable to order) from B., and handed it to C. in satisfaction of a bona fide debt, but without indorsing it:—Held, that C. could not acquire a legal title to sue upon the instrument, by obtaining A.'s indorsement after he had received notice of the fraud. *Ib.*

A declaration stating that A. drew his bill on the defendant, who accepted the same, and that A. indorsed it to B., who delivered it to the plaintiffs, is bad, for the bill, being payable to order, required an indorsement before a third party could be entitled to sue, and bare delivery would not give such right. *Cunliffe v. Whitehead*, 3 Bing. N. C. 829; 5 Scott, 31; 6 D. P. C. 63; 3 Hodges, 182.

A bill payable to the order of the drawer, and by him delivered to the plaintiff, cannot be treated as a note drawn in favour of the plaintiff; but an indorsement must be averred as well as a delivery. *Prevot v. Abbott*, 5 Taunt. 786.

A note payable on demand with interest, drawn by A. in favour of B. as a security for a debt, was by him indorsed to C. for the same purpose; after the indorsement, it passed backwards and forwards between B. & C. several times; and previously to its being ultimately deposited with C. he received an intimation from B. not to negotiate it, as he should want it when he settled accounts with A.:—Held, that C. could not, after a settlement of accounts between A. and B., without a delivery of the note, recover on it against A. *Roberts v. Eden*, 1 B. & P. 398.

S. drew a bill on the defendant (which the latter accepted for the accommodation of the former), and indorsed it to the plaintiff as his agent, in which character the plaintiff paid it away on account of the drawer, for wine contracted to be purchased for him. Subsequently, the wine contract being rescinded, the holder of the bill refused to give it up until he had been paid 150*l.*, which he alleged to be due to him from the drawer. The plaintiff engaged to pay it, received the bill, and sued the defendant as the acceptor:—Held, that he was not entitled to recover, although it was insisted that he had a lien on it to the amount he had promised to pay to the holder on its being delivered up to him. *Hallett v. Davis*, 1 M. & P. 79.

### 3. DISCOUNTING OR DEPOSITING.

**Discounting.**—There is a distinction between the discount and deposit of bills, depending not on the mere fact of indorsement, but the intention to make an absolute transfer, giving full power to go against all parties on the bills, or merely to enable the person with whom they are deposited to receive the amount from the other parties. *Two good, Ex parte*, 19 Ves. 229.

A bill remitted, indorsed merely to enable the person receiving it to raise money to meet future advances, is while retained a mere deposit applicable to the demands of the remitter, subject to the right under the indorsement of constituting a third person a creditor, by negotiating it. *Ib.*

**Evidence as to.**—The burden being cast upon a defendant, sued as indorser, when the indorsement has been *prima facie* proved, of showing that the delivery to the plaintiff was not with the intention of constituting an indorsement, but simply by way of deposit or security, he does not show this merely by proving that the bill was given by drawer and acceptor to the plaintiff, as security to the plaintiff for a loan of the amount or discount, half of which loan the defendant, by arrangement with the plaintiff, was to advance to him; even although the plaintiff so far admitted the arrangement as to claim only the moiety of the amount of the bill, such an arrangement not being inconsistent with an absolute indorsement nor necessarily tending to disprove it. *Attenborough v. Clarke*, 27 L. J., Ex. 138.

**Discounting.**—A mere discount of a bill, without the indorsement of the party who receives the money, does not give the holder of the bill any claim against such party. *Roberts, Ex parte*, 2 Cox 171.

If a defendant, having promised to pay over to the plaintiff the amount of a bill delivered to him to get discounted, pays it away in discharge of a debt of his own; he is liable to the plaintiff as having discounted the bill. *Oughton v. West*, 2 Stark. 321.

A person receiving a bill to get it discounted, has no authority to deal with it otherwise than for discount, and a deposit of it along with other bills, with a bill broker as a security for advances, the broker having notice that it was delivered for discount, is beyond the scope of the authority, and passes no property. *Herachfeld v. Brown*, 3 F. & F. 219.

A drawer of a bill which had been accepted wrote his name across the back of the bill and delivered it to A. to get discounted; who, instead, while the bill was running, deposited it with B. as security for money advanced to himself, without fraud on the part of B.:—Held, that this was a valid indorsement by the drawer to B. *Palmer or Barber v. Richards*, 2 L., M. & P. 1; 5 Ex. 63; 20 L. J., Ex. 135; 15 Jur. 41.

If the holder of a bill receives from the drawer a second bill to get discounted, in order to provide for the first, there is a sufficient transfer to him of the second to enable him to retain the proceeds. *Walsh v. Tyler*, 2 Stark. 288.

Where a party discounts bills with a banker, and receives in part of the discount other bills, not indorsed by the banker, which bills turn out to be bad, the banker is not liable. *Fyddell v. Clark*, 1 Esp. 447.

### 4. TO WHAT EXTENT NEGOTIABLE.

**Till Discharged.**—A bill is negotiable ad infinitum until it has been paid by or discharged on behalf of the acceptor. *Callow v. Lawrence*, 3 M. & S. 95.

A bill or note cannot be indorsed or negotiated after it has been once paid, if such indorsement or negotiation would make any of the parties liable who would otherwise be discharged. *Beck v. Robley*, 1 H. Bl. 89, n. See *Bartrum v. Caddy*, 1 P. & D. 207; 9 A. & E. 275; 1 W., W. & H. 724.

The drawer of a bill payable to his own order after settling with the acceptor, and giving him a receipt in full of all demands, cannot, afterwards,

by indorsing the bill, give a title against the acceptor. *Thorogood v. Clarke*, 2 Stark. 251.

Nothing will discharge either drawer or acceptor but payment according to the law merchant, i.e., payment when due or payment for the purpose of discharging and satisfying the bill. *Attenborough v. Mackenzie*, 25 L. J., Ex. 244.

Therefore, if the acceptor discounts a bill for the drawer, and then re-transfers it, the latter will be liable upon it to a bona fide holder; and the transfer to the acceptor upon discount will operate as an indorsement, although at the time the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor; nor will the payment of the amount less the discount be deemed a payment of the bill by the acceptor. *Ib.*

**When Paid before Due.**—The drawer of a bill, before it became due, agreed with the acceptor, that on his giving a mortgage security for the amount, he, the drawer, should deliver up to him the bill as discharged and fully satisfied. The acceptor accordingly executed the mortgage, and received back the bill, uncanceled:—Held, that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value before it became due. *Morley v. Culverwell*, 7 M. & W. 174; 1 H. & W. 13; 4 Jur. 1163.

— **By Drawer in Default of Acceptor.**—If a bill is paid and afterwards indorsed before it becomes due, it is a valid instrument in the hands of a bona fide indorsee. *Burbridge v. Manners*, 3 Camp. 194.

A bill which has been paid by the drawer in default of payment by the acceptor, may afterwards be re-issued by the drawer, and the acceptor will be still liable to pay it. *Hubbard v. Jackson*, 1 M. & P. 11; 4 Bing. 390; 3 C. & P. 134.

**Consideration for Transfer, how far necessary.]**

—A., the drawer of a bill, gave it to B., unindorsed, to present it for payment. B. did so, and got it noted. Afterwards A. indorsed the bill, and gave it to B. to obtain payment:—Held, that this indorsement was sufficient to enable B. to recover in an action against the acceptor, notwithstanding A. said, upon the trial, that B. was indebted to him, and that he did not give him any authority to bring the action. *Adams v. Oakes*, 6 C. & P. 70.

The right of action upon a bill, accepted for value, may be transferred by indorsement without value, as by way of gift. *Heydon v. Thompson*, 3 N. & M. 319; 1 A. & E. 210.

**Bill Insufficiently Stamped.**—The defendant, the indorsee of a note, which was not negotiable by reason of its not being payable to order, indorsed it to the plaintiff in payment for goods; the plaintiff neglected to present the note when it became due, and it remained unpaid:—Held, that the plaintiff could, notwithstanding, recover the price of the goods sold from the defendant, as the note not being originally negotiable, the plaintiff had not been guilty of laches in not presenting it, and the transfer did not amount to a new making, for want of a stamp. *Plimley v. Westley*, 2 Bing. N. C. 249; 2 Scott, 423; 1

*Hodges*, 824. See *Gwinnett v. Herbert*, 5 A. & E. 436; 2 H. & W. 194.

The payee of a bill indorsed it specially to the plaintiff, and immediately after the special indorsement the defendant indorsed the bill, and then the plaintiff indorsed it:—Held, that the defendant's indorsement was an equivalent to a new drawing by the defendant, and that he was liable to be sued upon the bill by the plaintiff:—Held, also, that a fresh stamp was not necessary. *Penny v. Innes*, 1 C., M. & R. 439; 5 Tyr. 107.

**Transfer without Authority.**—A bill was drawn by A., and accepted by B., for the purpose of being discounted, and having the proceeds applied in the payment of other bills accepted by B., but the other bills, before they became due, were paid by B., who directed A. to hold the first-mentioned bill for his (B.'s) use, and not to part with it without his authority; A., however, for his own purposes, indorsed it to C. for a valuable consideration, having first informed the latter that it belonged to B., and that he (A.) had no authority to part with it:—Held, that the property in the bill was in B., the acceptor, and that he might maintain trover for the bill against C. *Evans v. Kymer*, 1 B. & Ad. 528.

**Acceptor Discounting Bill—Rights against Drawer.**—If an acceptor of a bill discounts it, he may re-issue it so as to charge the drawer. *Attenborough v. Mackenzie*, 25 L. J., Ex. 244.

5. WHEN ISSUED IN BLANK.

**As to Name of Payee.**—A bill drawn and issued in blank for the name of the payee, may be filled up by a bona fide holder, with his own name, and it will bind the drawer. *Crutchley v. Clarence*, 2 M. & S. 90.

If he can shew that he came regularly to the possession of it. *Crutchley v. Mann*, 2 Marsh. 29; 5 Taunt. 529.

If a bona fide holder of a bill, accepted, payable to — or order, inserts his own name as payee, and indorses the same, the bill may be declared on in that form. *Attwood v. Griffin*, R. & M. 425; 2 C. & P. 368.

**As to Amount.**—An indorsement written on a blank note, will afterwards bind the indorser for any sum and time of payment, which the person to whom he intrusts the note chooses to insert in it. *Russel v. Langstaffe*, 2 Dougl. 514; S. P. *Edie v. East India Company*, 2 Burr. 1216; 1 W. Bl. 297.

6. ACCOMMODATION BILLS.

Where a note payable on demand has been indorsed for the accommodation of the maker, in order to be deposited with his creditor, to secure a debt due, if the maker of the note pays the debt, and the bill is re-delivered to him, it is no longer negotiable. *Bartrum v. Cuddy*, 1 P. & D. 207; 9 A. & E. 275; 1 W., W. & H. 724.

It is a good defence to an action by indorsee against acceptor of a bill, that it was accepted for the accommodation of the drawer, without consideration, and that it was indorsed over by the drawer after it had been paid by him at its maturity. *Parr v. Jewell*, 16 C. B. 684—Ex. Ch.

An indorsee for value of an accommodation bill, without notice that it is one of that description, may, notwithstanding notice subsequently acquired, release the drawer without releasing the acceptor. *Graham, Ex parte*, 5 De G., Mac. & G. 356.

The holder of bills, accepted for the accommodation of the drawer, after they had become due, entered into an agreement with the drawer, that, in consideration of his giving to him a freehold mortgage for these bills and other debts, he would deliver up the bills to be cancelled, and give up his claim on all parties. The mortgage security was given accordingly. At the time of the agreement the holder knew that the acceptances were accommodation acceptances. In an action by the holder against the acceptor:—Held, that he was discharged and had a defence on equitable grounds. *Ewin v. Lancaster*, 6 B. & S. 571.

The knowledge of a director that bills indorsed for value to his company were bills which had been accepted for the accommodation of the drawer, the director not having been concerned on behalf of his company in the transaction in which the bills were indorsed to them, does not affect the company with notice of the fact of their being accommodation bills. *Peruvian Railways Company v. Thames and Mersey Marine Insurance Company*, 2 L. R., Ch. 617; 36 L. J., Ch. 864; 15 W. R. 1002.

#### 7. RETIRING FROM CIRCULATION.

The word "retire," in reference to a bill, is susceptible of various meanings according as it is applied to various circumstances; if the acceptor retires the bill at maturity he takes it entirely from circulation, and it is in effect paid; but if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold it with the same remedies as he would have had if he had been called upon in due course and had paid the amount to his immediate indorsee, and this latter is the ordinary meaning of the word "retire." *Elsam v. Denny*, 15 C. B. 87; 23 L. J., C. P. 190; 18 Jur. 981.

#### 8. AFTER MATURITY.

##### **Equities affecting Transfer of Overdue Bills.]**

—P. having money at his banking account belonging to O. purchased with it, and other money of his own standing to the same account, some overdue bills. Very shortly afterwards he sold them at an advanced price to a company, of which he was the sole director, and he paid himself the price out of the assets of the company:—Held, first, that the company was not affected by constructive notice of the fraud committed by P. *European Bank, In re, Oriental Commercial Bank, Ex parte*, 5 L. R., Ch. 358; 39 L. J., Ch. 588; 22 L. T. 422; 18 W. R. 474.

Held, secondly, that the company acquired no title to the bills, so far as purchased by the moneys belonging to O., as the equity of O. attached to the bills. *Id.*

Held, also, that the payment for the bills must be taken as made rateably out of the moneys of P. and O. *Id.*

By the general rule, any person receiving a negotiable instrument after it is due is deemed to have taken it upon the credit of the person from

whom he receives it, and subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it. *Taylor v. Mayther*, 3 T. R. 83, n.

An indorsee of an overdue note is liable in an action against the maker to all equities arising out of the note transaction itself, but not to a set-off in respect of a debt due from the indorser to the maker of the note arising out of collateral matters. *Burrough v. Moss*, 10 B. & C. 559; 5 M. & R. 296.

An indorsee of an overdue bill or note takes it subject to all the equities arising out of the bill or note transaction itself, but not subject to any collateral claim existing between the earlier parties to it. Therefore, to an action by an indorsee of an overdue note against the payee, a distinct debt due to the payee from a former indorsee cannot be set off, although the indorsee had notice of such set-off at the time of the indorsement to him. *Whitehead v. Walker*, 10 M. & W. 696; 12 L. J., Ex. 24; 7 Jur. 330.

Where it appeared by parol evidence that the holder had paid the balance remaining due on a bill to a previous holder after maturity, not on the account of the acceptor or drawer, but in order to acquire an interest in the bill as purchaser:—Held, that it might be indorsed, so as to give the indorsee all the rights which the previous holder had before the indorsement, and such indorsee might therefore recover from the drawer the balance unpaid by him. *Graves v. Key*, 3 B. & Ad. 313.

The indorsee or transferee for value of a bill after dishonour has a right to recover against the acceptor, whether the bill was given for value or not, unless there is an equity attached to the bill itself, amounting to a discharge of it; and the right of set-off is not an equity which attaches to the bill. *Suan, Ex parte*, 6 L. R., Eq. 344; 18 L. T. 230; 16 W. R. 560.

So, if the holder of a note, made without consideration, himself gave a full consideration for it, yet if he took it after it was due from an indorser who had given none, he cannot sue upon it. *Tinson v. Francois*, 1 Camp. 19.

**Note Payable on Demand.]**—But a note, payable on demand, cannot be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest had been paid on it for several years before such indorsement. *Brooks v. Mitchell*, 9 M. & W. 15.

**Accommodation Bill.]**—Where an acceptor of an accommodation bill was sued by an indorsee, five years after the bill had become due, and no notice of dishonour had been given to any parties to the bill:—Held, that as the plaintiff did not call the party for whose accommodation the bill was given, the jury might fairly presume that the bill, when it became due, was in the hands of the party for whose accommodation it was given, and indorsed afterwards. *Bounsall v. Harrison*, 1 M. & W. 611; 2 Gale, 113.

It is not, of itself, a defence to an action by the indorsee of a bill, to plead that it was accepted for the accommodation of the drawer without consideration, and was indorsed over after it became due. *Charles v. Marsden*, 1 Taunt. 224.

Even if that fact appears to have been known to the plaintiff. *Smith v. Knox*, 3 Esp. 46.

**Assignment of overdue Bills, which is subject to special Agreement.]**—The holder in America of two bills of the same tenor, having transmitted them to his agents here to present them for acceptance, and receive the money when due, and pay over a part of it to the plaintiff, while the bill so remained in his agents' hands, agreed with the defendant, the indorser (who had lent his indorsement on each to the drawer, from whom the holder received them), that upon payment of one of the bills he should be exonerated from both. In the meantime, the bills having been presented for acceptance by the agents, were dishonoured; and after the dishonour, the agents, not knowing of such agreement between their principal and the indorser, assigned one of the dishonoured bills to the plaintiff, who was informed of the dishonour, and who received it liable to all its infirmities, but without notice of such agreement:—Held, that the bill so received by the plaintiff was bound by the agreement; and that the defendant, having afterwards taken up and discharged the other bill, which had remained in the hands of the same agents, was discharged from both. *Crossley v. Ham*, 13 East, 498.

On making a bill it was agreed between the drawer and the acceptor that the latter should deposit with the drawer some canvas as a collateral security for the payment of the bill, with power to the drawer to sell the canvas and apply the proceeds in the discharge of the bill if it was not paid at maturity:—Held, that this agreement created an equity attaching to the bill in the hands of a party to whom the bill was indorsed when it was overdue; and that as the drawer after the indorsement had sold the canvas and retained the proceeds, the indorsee was debarred from recovering on the bill for so much as the canvas realized on the sale. *Holmes v. Kidd*, 3 H. & N. 891; 28 L. J., Ex. 112; 5 Jur., N. S. 295; 33 L. T., O. S. 207; 7 W. R. 108—Ex. Ch.

The right of an indorsee of an overdue bill to sue the acceptor is not defeated by the existence of a debt due from the drawer to the acceptor and notice by the latter to the drawer, before indorsement, of his election to set off the amount against the bill; nor is the indorsee of such overdue bill affected by the existence of a right of set-off as between the acceptor and the drawer, although the bill was indorsed without value, and for the purpose of defeating such set-off. *Oulds v. Harrison*, 10 Ex. 572; 3 C. L. R. 353; 24 L. J., Ex. 66.

**Declaration—What a variance.]**—In an action by indorsee of a bill, if the declaration states the indorsement to have been made before the bill became due, and it appears to have been made after the bill was due, this is not a material variance. *Young v. Wright*, 1 Camp. 139.

**Plea—That Notes were Overdue when Indorsed.]**—To an action by indorsees against maker of several notes, one of which was payable at three months' date, and the others on demand, he pleaded that before the indorsement of any of them to the plaintiffs, and whilst L. (who indorsed to them) was holder, L. was indebted to the defendant and to D. as executors, in a sum exceeding the amount of the

notes, for money lent by their testator, in which sum the defendant was beneficially interested as residuary legatee; and that, before the indorsement of the notes to the plaintiffs, and while L. was holder, it was agreed between him and the defendant, and D., that the amount of the notes should be set off, and allowed to him out of the moneys due from him to them, and that the defendant and L. should mutually be discharged from that amount; and that they remained in the possession of L. until he indorsed them to the plaintiffs, without the consent or fault of the defendant, and L. indorsed them to the plaintiffs, and the plaintiffs took them after they had been so satisfied:—Held, that the plea was bad, for not shewing distinctly that the notes were overdue when indorsed by L. to the plaintiffs. *Cripps v. Davis*, 12 M. & W. 159; 13 L. J., Ex. 217.

**Evidence of Payment.]**—Where a note has been indorsed to the plaintiff after it became due, who sues the maker upon it, the latter is entitled to go into evidence to shew that the note was paid as between him and the original payee from whom the plaintiff received it. *Brown v. Davies*, 3 T. R. 80. But see *Hubbard v. Jackson*, 4 Bing. 390; 1 M. & P. 11; 3 C. & P. 134.

#### 9. WITH NOTICE OF PENDENCY OF ACTION.

The position laid down in some books, that the holder of a bill of exchange who has brought an action on it cannot transfer it to another indorsee for value so as to enable him to sue, if the indorsee had notice of the pendency of the former action, is not sustainable. *Deuters v. Townsend*, 5 B. & S. 613; 33 L. J., Q. B. 301; 10 Jur., N. S. 1072; 10 L. T. 602; 12 W. R. 1002.

An indorsee, without notice that a prior action is depending thereon, may, notwithstanding the pendency of such action, commence an action against the same defendant. *Columbies v. Slim*, 2 Chit. 637.

#### 10. AFTER DEATH OR BANKRUPTCY OF PARTIES.

**After Death.]**—A. indorsed a note, but did not deliver it. After his death, his executor delivered the note to the plaintiff:—Held, that he had no title to sue on the note. *Bromage v. Lloyd*, 1 Ex. 32; 5 D. & L. 123; 16 L. J., Ex. 257.

The indorsee of a bill, payable sixty-five days after date, which was issued by the drawer, and indorsed by the payee, who died before the day when it bore date, may make title through such indorsement to recover on the bill against the drawer. *Pasmore v. North*, 13 East, 517.

A note payable to A. or his order may be indorsed by his administratrix. *Raulinson v. Stone*, 3 Wils. 1.

**Indorsement by Agent to Principal, after Death of Principal.]**—Where an agent, having money in his hands belonging to his principal, bought a bill with it, which he indorsed specially to the latter, who was dead at the time of the indorsement, but of which circumstance the agent was ignorant:—Held, that the property in the bill passed to the administrator of the principal;

and, consequently, that he might sue on it in his own character as such. *Murray v. East India Company*, 5 B. & A. 204.

**After Bankruptcy.**—In an action by indorsee against acceptor, he cannot defend himself on the ground of the drawer's bankruptcy at the time of such indorsement. *Arden v. Watkins*, 8 East, 322.

In an action by a bonâ fide indorsee against acceptor, he is estopped from pleading that the drawer and first indorser was an uncertificated bankrupt when the acceptance was given. *Braithwaite v. Gardiner*, 8 Q. B. 473; 15 L. J., Q. B. 187; 10 Jur. 591; *S. P.*, *Pitt v. Chappelow*, 8 M. & W. 616; *Drayton v. Dale*, 2 B. & C. 293; 3 D. & R. 534.

In an action by a holder of a note, indorsed generally by the payee, to a plea that the payee indorsed it after he became bankrupt, the plaintiff replied, that he bonâ fide took and received the note before the payee became bankrupt, and not by way of fraudulent preference. The payee indorsed the note in blank before he became bankrupt, to a person who delivered it after the bankruptcy to the plaintiff:—Held, that the defendant was entitled to the verdict. *Green v. Steer*, 1 G. & D. 499; 1 Q. B. 707.

A note, drawn for the accommodation of A., was transferred by him to B. and C., without indorsement, for valuable consideration, and afterwards he became bankrupt, and died intestate:—Held, that B. and C. might recover against the drawer, the note having been indorsed, several years after it was due, by B. to B. and C., B. having for that purpose procured letters of administration to the effects of A. *Watkins v. Maule*, 2 J. & W. 243.

There is no difference between an indorsement of a note by the party and one of his personal representatives. *Id.*

A bill was delivered by the defendant to two partners, and after the bankruptcy of one, indorsed by the other to the plaintiff:—Held, that no interest could pass to the assignees, and a verdict was taken for the plaintiff, with liberty to the defendant to move the point whether a party, without knowledge of a trust, can acquire an interest beyond that of the trustee. *Ramsbottom v. Cator*, 1 Stark. 228.

#### 11. OF STOLEN, LOST, OR FRAUDULENTLY OBTAINED BILLS.

**In hands of bonâ fide holder for value.**—Where a bill which has been lost or fraudulently obtained subsequently comes into the hands of a holder for value, such holder is entitled to recover, unless he took the bill under such circumstances as shew mala fides on his part. *Goodman v. Harcey*, 6 N. & M. 372; 4 A. & E. 870.

A party taking a negotiable instrument bonâ fide, and for full value, is entitled to recover on it, though it has been stolen, and he took it negligently. *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33.

A. drew a bill on the plaintiff, and induced him to accept it, by sending with it a forged bill of lading. A. then indorsed the bill to the defendant, for value, without notice of the forgery. The plaintiff filed a bill in equity against the indorsee to restrain him from suing him, and prayed that the bill might be delivered up to

be cancelled:—Held, that the fraud practised on the acceptor was no defence against the indorsee for value. *Thiedemann v. Goldschmidt*, 1 De G., F. & J. 4; 1 L. T. 50; 8 W. R. 14.

Fraud being a good defence to an action on a bill of exchange, there is no ground for seeking relief in equity. *Id.*

When the indorsement of a bill is obtained by a fraudulent misrepresentation as to the actual character of the document—as, e.g., that it is not a bill, but a guarantee—and the indorser signs his name under that belief and without any negligence, his signature is not binding. *Foster v. Mackinnon*, 4 L. R., C. P. 704; 38 L. J., C. P. 310; 20 L. T. 887; 17 W. R. 1105.

In an action by a bonâ fide holder for value of a bill against the indorser, the judge directed the jury that if his signature was obtained upon a fraudulent representation that the instrument was a guarantee, and he signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing, he was entitled to the verdict:—Held, a right direction. *Id.*

To an action by indorsee of a bill drawn by K. and accepted by the defendant, he pleaded that K. was a trader in Ireland accustomed to consign goods to him by carrier, as his commission agent at Liverpool, and that the usual course of business was as follows:—K., on consigning goods from time to time, took a receipt bill of lading for the goods signed by the carrier, and obtained advances of money from the plaintiff, on indorsing to him the bill of lading, and also a bill of exchange, drawn by K. upon the defendant for the amount of such goods; the plaintiff then remitted the bill of exchange to the defendant for acceptance and also the bill of lading indorsed by himself, and thereupon the defendant, on the faith of the bill of lading, and in consideration of such security on the goods, was accustomed to accept such bill of exchange; that, at the time of drawing and indorsing by K. to the plaintiff of the bill of exchange, K. indorsed to the plaintiff a bill of lading, the carrier's signature to which was forged, well knowing the same to be forged, and on the faith thereof obtained the usual advance, to wit, the amount of the bill of exchange; that the defendant, on the remittance to him by the plaintiff of the forged bill of lading, indorsed by him, and of the bill of exchange, accepted the latter at his request, without notice, and so the consideration for his acceptance wholly failed:—Held, that as the plaintiff was an indorsee of the bill for value, and it was not averred that he obtained the acceptance by any fraudulent representation, or that he knew the bill of lading to be forged, the failure of consideration between K. and the defendant was no defence. *Robinson v. Reynolds*, 1 G. & D. 526; 2 Q. B. 196—Ex. Ch.

**Who are bonâ fide holders.**—The plaintiff, being drawer and payee of a bill of exchange, handed it to H. to get it discounted. H. offered it for that purpose to the defendant, stating that it was not his, but the plaintiff's bill. The defendant refused to discount it unless indorsed by H. H. said that he had no interest in it, but to facilitate its being cashed he would indorse it; he did indorse it, upon which the defendant took the bill, paid H. only a part of its amount and got it discounted by G.



The plaintiff was obliged to take it up at its maturity, and sued the defendant on it for the balance unpaid to H. A verdict for the defendant was set aside as against the evidence, and a new trial was awarded to try the question, whether the plaintiff was the real owner of the bill at the time it was indorsed, and not whether or not he had at that time been represented to be so by H. *Bastable v. Poole*, 1 C., M. & R. 411; 5 Tyr. 111.

A. made a note payable to the defendant, who indorsed it for A.'s accommodation, and gave it to B. to get discounted. The latter, in company with C., applied to his bankers (the plaintiffs) to discount it, who requested him to leave it with them to consider of it. They afterwards declined to discount it, and sent it back to B. by the hands of C., who, however, without B.'s authority, subsequently indorsed it, among many other bills, to the same bankers, and then refused to pay B. the proceeds, alleging that there was a balance due to him, on bill transactions, from B. It appeared that on one occasion B. had told the plaintiffs that he had the bill merely for discount:—Held, notwithstanding, that they had acted with due caution under all the circumstances, and were entitled to recover, as it was fair to infer that the plaintiffs believed C. to have had full authority to indorse the bill to them. *Cunliffe v. Booth*, 3 Bing. N. C. 821; 5 Scott, 17.

W. fraudulently obtained possession of acceptances of B., and he got them discounted and carried to his account by a banking company, to which he was greatly indebted, and of which he was a director and local manager:—Held, under the circumstances, that the bank had notice, and could not be considered bonâ fide holders. *Carew, In re*, 31 Beav. 39.

In trover for a bill, it appeared that the defendants, who were bankers, had discounted bills for A., who sent the bill in question by his clerk to inquire whether they would discount it and to inform them of an agreement between him and B. with respect to the title. The bankers subsequently placed this bill to the credit of A. At the trial neither side having called the clerk to prove that he delivered the message:—Held, that as the presumption was that the defendants were bonâ fide holders of the bill for value, and also that they acted honestly, it could not be presumed that the clerk had delivered the message, and that therefore the defendants were entitled to the bill. *Middleton v. Barned*, 4 Ex. 241.

A plaintiff having, without inquiry, and at a heavy discount, taken a bill drawn by a partner in fraud of the firm, from a person who had taken it from the fraudulent drawer with knowledge of the fraud, the bill having upon it a name which made it perfectly good:—Held, that these facts were evidence on which the jury might presume that the plaintiff took the bill malâ fide. *Dailey v. De Fries*, 11 W. R. 376.

A bill was drawn in favour of a married woman, and sent by her trustees in a letter to her. Her husband surreptitiously obtained possession of the bill, and signed her name to it without her knowledge or concurrence, and having indorsed and discounted it through P., who also indorsed it, he absconded. The wife, before the bill became due, discovered the fraud, and gave notice to the acceptors, who refused to pay at maturity. The discounters recovered

against P., who sued the acceptors. The wife filed a bill to restrain this action, and prayed that the acceptors might be ordered to pay the money to her on her separate receipt. Romilly, M. R., decided that no right could be gained under the forged signature; that the payee being a married woman affected the party taking the bill with notice that it was the separate property of the wife; that the holder had a right to retain it, though he must not sue upon it, and that the acceptors must pay the money to the married woman. Upon appeal, held, that P. was a bonâ fide holder for value, and, as such, legally entitled to the bill; that the court would not interfere to defeat his title; and that no blame was attributable to him for not making inquiries other than of the husband as to the wife's signature. *Dawson v. Prince*, 2 De G. & J. 41; 27 L. J., Ch. 169; 4 Jur., N. S. 497.

**Under Suspicious Circumstances.**—A person who takes a bill under circumstances calculated to excite suspicion, and, having the means of knowledge, wilfully abstains from making any inquiries, must be considered a holder with notice of the fraud, if any exists. *Jones v. Gordon*, 2 App. Cas. 616; 37 L. T. 477; 26 W. R. 172.

S. drew bills on G. to the amount of 1,727*l.*, which he accepted. S. and G. were both at the time insolvent and contemplating bankruptcy, and each was aware of the other's position. J. purchased these bills for 200*l.*, knowing at the time that G. was embarrassed, but making no further inquiries. On the bankruptcy of G. he claimed to prove for the full amount:—Held, that his proof should be restricted to the 200*l.* actually paid. *Id.*

Though since the repeal of the usury laws, the fact of taking a bill at considerable undervalue is not, of itself, sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting bonâ fide, in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him. *Id.*

A person who accepts a bill on the faith of a consignment, which he knows to be impeached for fraud, is in no better position than a person who becomes a holder for value of a bill which he knows to be impeached for fraud. *Dresser v. Hoare*, 7 H. L. Cas. 750; 2 Jur., N. S. 1151.

**Non-Inquiry as to.**—Where a money changer changed a bank note which had been stolen, and the jury found that he gave full value for it, and took it bonâ fide, not having knowledge at the time that it had been stolen, but that he had the means of knowledge if he had taken care of certain notices delivered to him:—Held, that he was entitled to recover. *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33.

**Taken after Inquiry.**—The holder of a bill, who without any express notice of any circumstance of suspicion, took the bill, not in the ordinary course of business, and, not relying on the security, required evidence of title in the drawer to negotiate the bill which deceived him, has only his remedy against the drawer personally who deceived him, and he can have

no better title on the bill than the drawer had. *Hatch v. Searles*, 2 Sm. & G. 147; 33 L. J., Ch. 467; *S. C.*, affirmed on appeal, 24 L. J., Ch. 22.

**Plea that Bill was obtained by Fraud.**—A. employed B. to make for him a steel gun, for which he was to pay by two bills. B. delivered a gun with a defect in it, which A. might have seen on examination, and which would have justified him in refusing to receive it. Without examining the gun, he accepted and delivered to B. the bills of exchange. Afterwards B., in a letter to A., stated that the gun was of the best metal all through, and had no weak points that B. was aware of. The gun was tried, and at first answered well, but after repeated trials, burst in consequence of the defect in it. B. having sued A. on one of the bills he pleaded that he was induced to accept the bill by the fraud of B.:—Held, that there was no evidence for the jury in support of the plea. *Horsfall v. Thomas*, 1 H. & C. 90; 8 Jur., N. S. 721.

To a note payable to the order of A. and indorsed by A. to B., and by B. to the plaintiff, the maker pleaded that the note was obtained from him by D., and others in collusion with him, by fraud; and that there was no consideration for the indorsement by A. to B.; and that the plaintiff had notice of the fraud:—Held, bad, there being nothing to impeach A.'s title to the note. *Masters v. Iderson*, 8 C. B. 100; 18 L. J., C. P. 348.

A plea that the consideration for the note was the forbearance to prosecute the maker's son upon a charge of felony; not averring that a felony had been committed, or affecting A., the payee, with notice of the alleged illegality of the consideration, is bad. *Id.*

To an action by indorsee against drawer, he pleaded that a bill similar to the one sued on, and purporting to be accepted by him, was shewn to him by the plaintiff's agent, who was then informed by the defendant that the acceptance was a forgery; but at the agent's request, and without having received any consideration for so doing, the defendant wrote his name as drawee under the forged acceptance; and that subsequently, at the request of the plaintiff's agent, he signed and indorsed over to him the bill which was sued on, and received back the spurious bill; and that, save as aforesaid, he did not receive any consideration for making or indorsing the bill sued on:—Held, that the plea was not an answer, it being consistent with the plea that the plaintiff was the holder of the bill for value. *McKenna v. Dowdall*, 8 Ir. C. L. R. 70.

**Evidence as to Notice of Fraud.**—The fact of the knowledge by the solicitor of a bona fide holder, but who has not acted for him in the particular matter, that a bill had been fraudulently accepted, is no evidence that the holder had notice of the fraud at the time of the indorsement. *Eyre v. McDowell*, 14 Ir. C. L. R. 314.

## VIII. ACCEPTANCE.

### 1. PRESENTMENT.

**Necessity of.**—If a buyer pays for goods by a bill, which the drawee refuses to accept, and afterwards desires it may be again presented, and it will be honoured, the holder is not bound

again to present it, nor to return the bill. *Hickling v. Hardey*, 1 Moore, 61; 7 Taunt. 312.

A note by which a person promises to pay, ten days after sight, 250*l.*, and 3*l.* per cent. interest, up to the day of acceptance, need not be left for acceptance, the word "acceptance" meaning sight. *Sutton v. Toomer*, 7 B. & C. 416; 1 M. & R. 125.

**Foreign Bill.**—But a foreign bill, payable after sight, must be presented for acceptance. *Mullick v. Radakissen*, 9 Moore, P. C. C. 46; 2 C. L. R. 1664.

**Manner of.**—The demand for acceptance must be clearly and unequivocally made and refused before an action will lie against the drawer. *Cheek v. Roper*, 5 Esp. 175.

It is not sufficient to produce a witness who went to a place described as the drawee's house, and was there told by a person unknown to the witness that he would not accept the bill. *Id.*

It is the regular and usual course of business in commercial transactions to deliver out a bill, left for acceptance, to any person who mentions the amount, and describes any private mark upon it; and if the clerk of the party leaving it, by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out. *Morrison v. Buchanan*, 6 C. & P. 18.

**Duty of Agent.**—The object of the transmission of a bill from principal to agent being to obtain the acceptance and payment of the bill, or, if not accepted, to guard the rights of the principal against the drawer, the duty of the agent must be measured by these considerations, and the agent ought not to press unduly for acceptance, provided he obtains acceptance or refusal within the time which will preserve the rights of the principal against the drawer. *Bank of Van Diemen's Land v. Bank of Victoria*, 3 L. R., P. C. 526; 40 L. J., P. C. 28; 19 W. R. 857.

In an action for negligence by a principal against an agent, it appeared that the principal transmitted to the agent a bill for acceptance. The bill was received on a Friday at 1 p.m., and was left with the drawees at 2 p.m., the same day. On Saturday, at 11.30 a.m., the agent called for the bill and as business closed at 12 noon on Saturday, was directed by the drawees to call on Monday. The agent called on Monday and was directed to call on Tuesday. When the agent called on Tuesday the acceptance which had been made on Saturday had been cancelled. The jury found a verdict for the principal but with nominal damages:—Held, that there was no such negligence by the agent as to entitle the principal to substantial damages. *Id.*

**Time of.**—The holder of an inland bill, payable after sight, is not bound instantly to transmit the bill for acceptance: he may put it into circulation; or though he does not circulate it, he may take a reasonable time to present it for acceptance. *Fry v. Hill*, 7 Taunt. 397.

A delay to present, until the fourth day, a bill

on London, given within twenty miles thereof, is not unreasonable. *Id.*

If a bill drawn by a banker in the country on a banker in town, in favour of A., payable after sight, is indorsed by A. to the defendant, who indorses it to the plaintiff seven days after the date of the bill, and the plaintiff delays presenting it for acceptance for four days, it will be left to the jury to say whether the plaintiff has been guilty of unreasonable delay; and in considering this the jury may infer, from the defendant himself having kept the bill so long unaccepted, that it is not the course of business to present such bills for acceptance immediately after the party receives them. *Shute v. Robins*, 3 C. & P. 80; *M. & M.* 133.

A party need not present for acceptance on the very day on which he receives a bill. *Id.*

A bill was drawn in duplicate on the 12th August, at Carbonear, in Newfoundland, payable ninety days after sight, on S. & Co., in England, for the freight of a voyage from Liverpool to Carbonear. The bill was not presented for acceptance to S. & Co. until the 16th November. Carbonear was twenty miles from St. John's, with a daily communication between those places; and from St. John's there was a post-office packet three times a week to England, the average voyage being about eighteen days:—Held, that the jury properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay. *Straker v. Graham*, 4 M. & W. 721.

— **In case of Foreign Bill.**—There is no fixed time when a bill, drawn payable at sight, or a certain time after, should be presented to the drawee, but it must be presented within a reasonable time. *Muilman v. D'Equino*, 2 H. Bl. 565. And see *Darbyshire v. Parker*, 6 East, 3; 2 Smith, 195.

The purchaser of a foreign bill, payable at a certain time after sight, which is publicly offered for negotiation, is not bound to send it by the earliest opportunity to the place of its destination. *Id.*

A foreign bill payable after sight, must be presented for acceptance; and although there is no limited time defined by statute for presentment, and no usage of trade to fix the time, yet such bill must be presented within a reasonable time. *Mullick v. Radakissen*, 9 Moore, P. C. C. 46; 2 C. L. R. 1664.

What constitutes a reasonable time is a mixed question of law and fact for the determination of the court and the jury. *Id.*

A bill was drawn in Calcutta, in February, 1848, by L. R. & Co. on D. & Co., at Hong Kong, payable sixty days after sight, and indorsed to M. or order. M. in consequence of the depressed state of the money market at Calcutta, and the unsaleableness of bills on China at that time at Calcutta, kept the bill for five months and nine days, and then sold it to M. R., who did not present it for acceptance at Hong Kong till the 24th October in that year, when D. & Co. refused to accept it:—Held, first, that the presentation of the bill for acceptance was not made within a reasonable time, and that the drawers were discharged. *Id.*

Held, secondly, that the want of presentment was not excused by reason of the drawers continuing solvent from the date of the bill to the

presenting, or that no actual damage was caused to them by the delay. *Id.*

Bills were drawn on the 12th May, by a house in London, on a house in Lisbon, payable thirty days after sight, and indorsed to A. in London. A. indorsed them, without any qualification, to B. at Paris. B., without presenting them for acceptance, put them in circulation, and on the 22nd August they were presented at Lisbon for acceptance and dishonoured. In an action by B. against A.:—Held, that B. was justified in circulating the bills, and that it was in the option of the holder to present them for acceptance whenever he pleased. *Goupy v. Harden*, 2 Marsh. 454; 7 Taunt. 159; Holt, 342.

In an action by a holder against the drawer of a bill, addressed to the drawee at Rio de Janeiro, payable at sixty days after sight, it appeared that the holder purchased it in the market, and kept it in his own hands nearly five months before he re-sold it, the rate of exchange having fallen after he had bought it. Before the bill was presented to the drawee at Rio, he had become insolvent:—Held, that the jury was properly directed to consider whether, looking at the situation and interests of both the drawer and holder, there had been unreasonable delay on the part of the holder in forwarding the bill for acceptance, or putting it in circulation; although it was contended that the correct question for the jury was, whether due diligence in forwarding or circulating the bill had been used by the holder, with reference to the interests of the drawer. *Mellish v. Rawdon*, 2 M. & Scott, 570; 9 Bing. 416.

## 2. PROTEST AND NOTICE OF REFUSAL.

**Notice of Non-Acceptance.**—A. draws a bill at thirty days' sight on A.; the drawer is not entitled to notice of non-acceptance. *Roach v. Ostler*, 1 M. & R. 120.

**Protest for Non-Acceptance—Proof of.**—In an action against the drawer of a foreign bill, a protest for non-acceptance must be proved. *Gale v. Walsh*, 5 T. R. 239.

A protest for non-acceptance of a foreign bill is not necessary to be proved in an action by the indorsee against the drawer, if he had no effects, or probability of any effects, in the hands of the drawee, at the time; and it does not appear that there was any fluctuating balance of assets between them unascertained at the time, which might then have afforded probable ground of belief to the drawer that his bill would be honoured. *Legge v. Thorpe*, 12 East, 171; 2 Camp. 310.

It seems that proof of a protest for non-acceptance of a foreign bill is necessary to enable the payee to recover against the drawer, and that the want of it is not supplied by proof of a notice for non-acceptance, and a subsequent protest for non-payment. But, at any rate, the holder is bound to give notice to the drawer of the non-acceptance. *Orr v. Maginnis*, 7 East, 359; 3 Smith, 328.

It is sufficient in an action against a drawer on non-acceptance, to prove a presentment to the drawee for acceptance, without shewing that the bill was protested for non-acceptance, or that the drawer had notice of its dishonour. *Hickling v. Hardey*, 1 Moore, 61; 7 Taunt. 312.

So, of a bill payable after date. *Philpott v. Bryant*, 1 M. & P. 754; 4 Bing. 717; 3 C. & P. 244.

Where a foreign bill payable after sight is refused acceptance, and an action is brought, in order to charge the drawer, proof of the noting of the bill alone for non-acceptance is not sufficient, without proving that it was also protested for non-acceptance, though there is a subsequent protest for non-payment. *Rogers v. Stephens*, 2 T. R. 713.

S. & Co., owners of a ship, of which H. was captain, despatched the latter to Miramichi with instructions to purchase a cargo of timber, and draw upon them for the amount. He proceeded to Miramichi accordingly, and there purchased some timber for L. for 154l. 11s. 11d., and drew a bill upon S. & Co. for the amount, at sixty days' sight, in favour of the seller or his order. The bill was dated the 4th September, 1826; and on the 21st November it was duly presented for acceptance, and protested for non-acceptance. The plaintiff was in Liverpool, with the ship under his command, from October, 1826, until April, 1827. It was not proved that the plaintiff received any notice of the dishonour of the bill, either from the then holder, or from the defendant, who had got the cargo. In 1832, the plaintiff was arrested upon this bill at Miramichi, and paid it in order to release himself from the arrest. In an action by the plaintiff against the defendant for not paying the bill, for not accepting it, and for not indemnifying the plaintiff from all loss sustained by him from having drawn the bill:—Held, first, that the defendant could not insist on the want of proof of notice to the plaintiff of the dishonour of the bill as a defence to the action; secondly, that a promise to indemnify was the promise which the law would in this case imply; and as there was no damnification till 1832, the Statute of Limitations did not apply. *Huntley v. Sanderson*, 1 C. & M. 467; 3 Tyr. 469.

### 3. WHAT IS AN ACCEPTANCE.

**In Writing.**—In an action against an acceptor, it need not be averred in the declaration that the acceptance was in writing. *Charlie v. Belshov*, 4 M. & P. 275; 6 Bing. 529.

**Unsigned.**—An unsigned acceptance written on the face of a bill is not made invalid by 1 & 2 Geo. 4, c. 78, s. 2; but it is a question for the jury whether it was intended to operate in its present form, or to be subsequently completed by signature. *Dufaur v. Oxenden*, 1 M. & Rob. 90.

**Writing Name of Drawee across the face of Bill.**—Since 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act, 1856), s. 6, simply writing the name of the drawee across the face of a bill does not constitute a valid acceptance; there must also be upon the face of the bill some word or words indicating an intention on the part of the drawee to be bound by it as acceptor. *Hindlaugh v. Blakey*, 3 C. P. D. 136; 47 L. J., C. P. 345; 38 L. T. 221; 26 W. R. 480.

Thereupon by 41 Vict. c. 13 (the Bills of Exchange Act, 1878), an Act to declare the law relating to the acceptance of bills of exchange, after reciting that by the Mercantile Law Amendment Act, 1856, it is enacted that "*no acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill,*

*or if there be more than one part of such bill on one of the said parts, and signed by the acceptor or some person duly authorized by him,*" and after reciting that doubts had arisen as to the true effect and intention of the said enactment, and as to whether the signature of the drawee alone can constitute a sufficient acceptance of the bill so as to satisfy the requirements of the said statute, and it is expedient that the meaning of the said enactment should be further declared, it is therefore enacted by s. 1, that "*an acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statute by reason only that such acceptance consists merely of the signature of the drawee written on such bill.*"

### Indorsement by way of collateral Obligation.]

—Sect. 11 of the Mercantile Law Amendment (Scotland) Act, 1856, is in the same terms with s. 6 of the corresponding English act, and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorised by him." On the 2nd of March, 1878, in *Hindlaugh v. Blakey* (3 C. P. D. 136), it was held, that an acceptance by the drawee was null by reason of there being no writing except the signature. On the 16th of April, 1878, the Bills of Exchange Act was passed, which, after reciting the above quoted section of the Mercantile Law Amendment Act, and that "it is expedient that the meaning of the said enactment should be further declared," provides, "that an acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill." A. procured from B. an advance of 1,000l. on a bill of exchange at twelve months for C. and D., his two sons. B. signed the bill as drawer, and addressing it to C. and D., handed it to A., who forwarded it to C. and D. They signed it as acceptors, and sent it back to A., who wrote his own name across the back, and gave it to B. He then forwarded the amount to C. and D. Subsequently C. and D. became bankrupt, and were unable to pay the amount of the bill. A. and B. being both dead, there was no exact evidence why A. put his name on the bill. C. and D. had previous to the date of the bill obtained money from B. on their own security. The trustees of B. claimed from A.'s representative the amount of the bill on the ground that A. indorsed the bill as "joint obligant" with C. and D., "and as co-acceptor with them for payment of its contents:"—Held, first (affirming the decision of the court below, although not upon the same grounds), that A.'s representative was not liable, because A. was not an acceptor within the meaning of 19 & 20 Vict. c. 60, s. 11, or otherwise, in any true and proper sense of the word; and, secondly, that his liability, as insisted upon by B.'s trustees, could only be established by proof of a special contract to be answerable to the drawer for the acceptors, which contract, being different from that which the law merchant would infer from his mere signature as it appeared on the back of the bill, could only be proved by a writing properly signed under, in Scotland, the 6th section of 19 & 20 Vict. c. 60; and in England the 29 Car. 2, c. 3, s. 4, which writing was here

absent. *Steele v. McKinlay*, 5 App. Cas. 754; 43 L. T. 358; 29 W. R. 17—H. L. (Sc.).

Per Lord Watson:—The character in which A. did become a party to the bill was both in fact and law that of an indorser; and in determining his legal position, the fact that his indorsement was written before the bill was delivered to the drawer, and the money advanced by him, was quite immaterial. *Ib.*

The doctrine deduced from *Don v. Watt* (26 May, 1812, F. C. vol. xvi. 647) and *Watters* (7 March, 1818, F. C. vol. xix. 489), by Professor Bell in his Commentaries, vol. i. (7th ed.), p. 425, that in Scotland a signature as an acceptor by a person not a drawee "is held to import a joint undertaking as acceptor of the bill or maker of the note" not approved of: see Lord Watson's opinion. *Ib.*

*Matthews v. Blorsome*, 1864 (33 L. J., Q. B. 209), doubted as sound law. *Ib.*

*Macdonald v. Union Bank of Scotland* (Court Sess. Cas. 3rd Series, vol. ii. p. 963) approved. *Ib.*

**Effect of Statute passed to meet erroneous Decision.**—Held, also, that the Act of 1878 was in effect a declaration by the legislature that the decision in the case of *Hindlaugh v. Blakey* was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish Act between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessarily to displace the whole construction of the English statute on which that decision was founded. *Ib.*

**By Letter.**—A merchant abroad, on the 21st of August, 1840, drew upon his London correspondents a bill for 225*l.* at eighteen days' date, payable to the plaintiff. They refused to accept the bill, and, on its being presented for payment on the 11th of September, refused to pay it. On the 13th, the drawer died in insolvent circumstances. On the 15th, the defendants, not being aware of his death or insolvency, wrote to him a letter containing this passage: "Respecting your drafts on us, we have to advise, that we have paid, and are prepared to pay, the following:" mentioning the one in question. In a postscript they added, "We have just been informed that the holders of the bill for 225*l.* had returned it to you. This they had no right to do, as we have already explained to you; they were bound to keep it till the following post day. The bill, we are almost sure, was presented again on Saturday last; therefore we cannot conceive how it can have been sent back before this day. You ought to require proof that this bill had been returned by Friday's mail, otherwise the charge made thereon cannot be demanded of you:"—Held, that the letter contained an absolute promise to pay, which amounted to a valid acceptance of the bill, and that the effect of the letter was not destroyed or altered by the postscript. *Billing v. Devaux*, 3 M. & G. 565; 4 Scott, N. R. 176; 5 Jur. 1182.

A. having ordered goods of B. & C., a commercial house at Genoa, directed them to draw a bill for the amount upon a banking company in England, of which A. was a customer. A. having given notice of the drawing of this bill to the company, they wrote a letter to A. promising to

accept it. The next day, however, the promise was countermanded in a second letter from the company, and by which A. was informed that they would not accept the bill, to which A. assented. After this, A. shewed the letter containing the promise to accept to C., a partner in the house of B. & C. resident in England, but suppressed the fact of his having received the second communication. In an action upon this bill by B. & C., as drawers, against the company, as acceptors:—Held, that the first letter to A. operated as an acceptance, and enured to the benefit of the drawers, and could not, therefore, be affected by what subsequently passed between the company and A. *Grant v. Hunt*, 1 C. B. 44; 14 L. J., C. P. 106; 9 Jur. 228.

A., in consideration of having commissioned B. to receive certain African bills payable to him, drew a bill upon B. for the amount payable to his own order; B. acknowledged by letter the receipt of the list of the African bills, and assured A. that the bill would meet with due honour from him:—Held, that this was an acceptance by B. *Clarke v. Cock*, 4 East, 57.

**By Acknowledgment.**—The defendant's agent in Africa delivered to the plaintiff an instrument in the form of a foreign bill payable at sight. The bill was not addressed to any one, but across it the defendant's agent wrote the word "accepted," and the defendant's name and address. The plaintiff presented the bill to the defendant, and requested its payment, when he denied that he owed the amount, but admitted the signature to be that of his agent. The plaintiff then said, "As you acknowledge the signature, you had better pay the bill." The defendant replied, "I'll pay the bill, but I cannot pay it now; I'll give you a bill at three months." The plaintiff then said, "There is something suspicious about it; it is almost a forgery; you had better pay it at once." The defendant replied, "I'll pay the bill; I cannot pay it now, but I will give my note or bill for it at three months."—Held (assuming the instrument to be a bill), that there was no evidence of an acceptance of it. *Reynolds v. Peto*, 11 Ex. 418—Ex. Ch.; S. C., in court below, 9 Ex. 410; 2 C. L. R. 491; 23 L. J., Ex. 98; 18 Jur. 472.

**Keeping Bill.**—Where an acceptance was refused by the defendant, but it remained afterwards for a considerable space of time in his hands, and was ultimately destroyed by him:—Held, that he was not thereby liable as acceptor of the bill. *Jenne v. Ward*, 1 B. & A. 653; 2 Stark. 326; *S. P.*, *Mason v. Barff*, 2 B. & A. 26.

**Direction in blank.**—A bill directed in blank may be accepted by anybody, and be a good bill: but if addressed to a particular person, it cannot be accepted by any other person, except for honour. *Davis v. Clarke*, 1 C. & K. 177; 6 Q. B. 16; 13 L. J., Q. B. 305; 8 Jur. 688.

Semble, that an instrument drawn in the form of a bill, but without the name of a drawee, is void as a bill of exchange. *Peto v. Reynolds*, 2 C. L. R. 491; 9 Ex. 410; 23 L. J., Ex. 98; 18 Jur. 472.

**Acceptance in blank.**—An acceptance in blank is sufficient to charge an acceptor, when the bill is afterwards drawn in pursuance of his authority. The 1 & 2 Geo. 4, c. 78, s. 2, does not

affect such an acceptance. *Leslie v. Hastings*, 1 M. & Rob. 119.

In an action by indorsee against acceptor, it is no objection that the acceptance actually took place before the drawer's name was signed. *Molloy v. Delves*, 7 Bing. 428; 5 M. & P. 275; 4 C. & P. 492.

A., having signed his name to a blank paper duly stamped, and delivered it to B. for the purpose of drawing a bill in such a manner as B. should think fit, B. drew a bill payable to a fictitious payee or order, and indorsed it over for a valuable consideration to C., who was ignorant of the transaction between A. and the indorser:—Held, that C. might maintain an action against A. as the drawer of a bill payable to bearer. *Collis v. Emmett*, 1 H. Bl. 313.

An instrument, drawn in the form of a bill, payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared upon by the indorsee, as a note made by the drawer, and indorsed by the drawee. *Armfield v. Allport*, 27 L. J., Ex. 42.

A document in the form of a bill of exchange, but accepted with the drawer's name in blank, does not exist as a bill until the drawer's name is inserted, and even then does not create a debt against the parties to it until value has been given for it. *Hayward, Ex parte, Jones, Ex parte*, 6 L. R., Ch. 546; 40 L. J., Bk. 49; 24 L. T. 782; 19 W. R. 833.

The acceptance of a firm was written across such a document. The firm afterwards made an assignment for the benefit of creditors. After the assignment, and when the document had become to all appearance a complete bill by the insertion of a drawer's name, it passed into the hands of holders for value:—Held, that it did not create a debt capable of supporting an adjudication of bankruptcy against the acceptors. *Ib.*

— **Authority to fill up.**—When a bill is accepted and handed over for value, but at the time of acceptance there is no drawer's name on it, any bona fide holder for value is entitled to insert his own name as drawer and to sue the acceptor for the amount of the bill. *Harvey v. Cane*, 34 L. T. 64; 24 W. R. 400.

C. sent a bill to the defendant with a blank space for the drawer's name. The defendant accepted the bill, and returned it to C., to whom he afterwards wrote, "If you make use of the bill do not forget to retire it." Before the bill became due C. transferred it to the plaintiff for value. The plaintiff inserted his own name as drawer, and sued the defendant:—Held, that he had authority to insert his own name as drawer, and could recover. *Ib.*

F., of the firm of L. & Co., gave acceptance purporting to be made by the firm, with a blank for the name of the drawer. C. gave it to H. for value. H. filled up the bill, putting the name of his firm, H. & Co., as drawers, and indorsed it to himself, knowing when he did so that F. had no authority to accept the bill:—Held, that L. & Co. were not liable on the bill at the suit of H. *Hogarth v. Latham*, 3 Q. B. D. 643; 47 L. J., Q. B. 339; 39 L. T. 75; 26 W. R. 388.

Eleanor Scard sued as administratrix of T. Williams on a bill accepted by the defendant. The bill had a blank space left for the drawer's name, and came into possession of Eleanor Scard as administratrix, after it was overdue. She

inserted her own name as drawer:—Held, that she was entitled to insert her name as drawer and sue on the bill as administratrix. *Scard v. Jackson*, 34 L. T. 65, n.

B. gave A. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to B. in the same state in which he received it. B. put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without B.'s authority, and an action was brought on it by an indorsee for value:—Held, that B. was not liable on the bill. Per Bramwell, L. J., on the ground that there was no estoppel between the parties, which prevented B. from setting up the true facts, and if B. had been guilty of negligence it was not the proximate or effective cause of the fraud. Per Brett, L. J., on the ground that after the return of the blank acceptance by H., B. had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used. *Bazendale v. Bennett*, 3 Q. B. D. 525; 47 L. J., C. P. 624; 26 W. R. 899—C. A.

A person, by giving another a blank acceptance, makes him, as to third parties, his general agent to fill up the bill to the extent the stamp will cover, and he is bound by his acceptance in the hands of an innocent holder for value. *Montague v. Perkins*, 22 L. J., C. P. 187; 17 Jur. 577.

Therefore, to an action by indorsee for value without notice against acceptor, it is no defence that the acceptance was given in blank to the drawer, and that the bill was not filled up and issued until an unreasonable time (twelve years) after. *Ib.*

Where value is given for a blank acceptance, the authority to fill it up, being coupled with an interest, is not revoked by death; but where there is no such interest, the authority to fill up and negotiate is terminated by the death of the acceptor. *Hatch v. Searles*, 2 Sm. & G. 147; 23 L. J., Ch. 467. Affirmed, on appeal, 24 L. J., Ch. 22.

Giving a blank acceptance is only prima facie evidence of an authority to the person to whom it is given to fill up the bill for the amount to which the stamp extends; and where a holder of a bill takes it with notice of a circumstance of suspicion, he can be in no better situation than the drawer or indorser, who had given no value for the bill. *Ib.*

A. gave a blank acceptance on a bill-stamp, and a person who was quite unknown to the acceptor afterwards wrote his name as drawer and indorser, and it was subsequently filled up as a bill for 500l.:—Held, that it did not lie in the mouth of the acceptor to say that such drawing and indorsing of the bill were irregular. *Schultz v. Astley*, 2 Bing. N. C. 544; 2 Scott, 815; 1 Hodges, 542; 7 C. & P. 99.

The person to whom an acceptance in blank had been given for valuable consideration, filled it up as a bill of exchange, but added, before the acceptor's signature, words making the acceptance payable at a particular place:—Held, that no authority had been conferred by the giver of the acceptance in blank, to draw such a bill, and that at any rate as between the immediate parties the acceptance was not binding. *Hanbury v. Lovett*, 18 L. T. 366; 16 W. R. 795.

— **Must be filled up within a reasonable**

**Time.**—A., being in execution for a debt, signed a blank note in July, 1846, and delivered it to the attorney for the execution creditor, and was thereupon released. In 1851 he became bankrupt, and obtained his certificate on the 12th of May. On the 20th of October, 1852, the note was filled up, and made payable at one month after date and indorsed to B. To an action upon the note, A. pleaded that he did not make the note, and his certificate under the bankruptcy. The jury found that the note had been filled up within a reasonable time:—Held, that B. was liable, and that the certificate afforded no defence. *Temple v. Pullen*, 8 Ex. 389; 22 L. J., Ex. 151.

—**Ante-dated.**—The authority given by a blank acceptance to fill it up for the amount which the stamp will cover, is not lost merely because the drawer, by mistake, antedates the instrument a whole year, even although it is payable some time after date. *Armfield v. Allport*, 27 L. J., Ex. 42.

**Evidence of.**—A blank acceptance is not in itself evidence of an authority to a party to whom it is given to borrow the amount on the credit and behalf of the acceptor. *King v. Forbes (Viscountess)*, 3 F. & F. 41.

**Operation of Act of Acceptance.**—An acceptor cannot, in an action against him by an indorsee, dispute the handwriting of the drawer, and, if he does so by plea, the plaintiff may reply the acceptance by way of estoppel. *Sanderson v. Collman*, 4 M. & G. 209; 4 Scott, N. R. 638.

An acceptor of a bill payable to the order of the drawer cannot deny the authority of the drawer to draw or to indorse such bill. *Halifax v. Lye*, 6 D. & L. 424; 3 Ex. 446; 18 L. J., Ex. 197.

Action by an executor of B. upon a bill purporting to be drawn by A., and accepted by the defendant, and indorsed by A. to B. A., who was possessed of goods, being the stock-in-trade upon his premises, died intestate, and indebted to the defendant and other persons; and it was arranged between B. and the defendant, who were two of his next of kin, that the defendant should take possession of the goods, and accept a bill for their value, purporting to be drawn and indorsed by A. The goods were accordingly delivered to the defendant, and the bill declared upon was drawn and indorsed to the plaintiff by procuration in the name of A., and accepted by the defendant:—Held, that the defendant could not be allowed to set up as a defence to the action that the bill was not indorsed by A. *Ashpitel v. Bryan*, 5 B. & S. 723; 33 L. J., Q. B. 328—Ex. Ch.

**General Acceptance.**—A bill drawn payable to the plaintiff's order in London, and accepted payable there, is a general acceptance. *Fayle v. Bird*, 6 B. & C. 531; 9 D. & R. 639; 2 C. & P. 303.

An acceptance in this form: "payable at Messrs. Cunliffe & Co.'s, bankers, London," is a general acceptance, since 1 & 2 Geo. 4, c. 78; it is therefore a frivolous demurrer to a declaration by indorsee against acceptor of such a bill that it was not alleged to have been presented for payment at the bankers mentioned in the acceptance. *Skellon v. Halstead*, 2 D., N. S. 961; 5 Q. B. 86; D. & M. 616; 13 L. J., Q. B. 177; 6 Jur. 69—Ex. Ch.

In an action against acceptor of a bill, accepted "payable at Messrs. W. & Co.'s bankers, London," the count alleged the acceptance in the precise words, and a presentment at the place mentioned:—Held, no variance, though such acceptance is, by 1 & 2 Geo. 4, c. 78, a general and not a qualified acceptance. *Blake v. Bowman or Beaumont*, 4 Scott, N. R. 617; 1 D., N. S. 697; 4 M. & G. 7.

**Special Acceptance.**—If a bill is accepted payable at a particular place, "and not elsewhere," it is a special acceptance within 1 & 2 Geo. 4, c. 78, s. 1. *Higgins or Siggers v. Nicholls*, 7 D. P. C. 551; 1 W., W. & H. 582; 3 Jur. 340. The word "only" is not necessary to make it special. *Id.*

**Of Bills drawn against Bills of Lading.**—A party accepted bills to meet goods consigned to him. The acceptances were made payable "on delivery of the bills of lading." The bills of lading remained, with the bills of exchange, in the possession of the bank who had discounted the latter for the drawers:—Held, on the bankruptcy of the acceptor, that the goods were part of his estate which the bank held as security for their debt, and therefore that the bank could only prove for the amount due on the bills of exchange after deducting the value of the goods. *Brett, Ex parte, Howe, In re*, 6 L. R. Ch. 838; 40 L. J., Bk. 54; 25 L. T. 252; 19 W. R. 1101.

A bill drawn upon the plaintiff by his correspondent abroad against a bill of lading, was sent through bankers, for presentation and collection. The bank presented the bill to the plaintiff with this memorandum: "The bank holds bill of lading and policy for 251 bales of cotton, per William Cummings." The plaintiff accepted the bill without asking to see the bill of lading, and afterwards retired it before it was due, paid the money, and received the bill of lading, which proved to be a forgery. Upon a bill against the bank to recover back the money so paid upon the bill of exchange:—Held, that the memorandum did not amount to a guarantee by the bank that the so-called bill of lading was genuine; and that the plaintiff had no equity to recover back the money. *Leather v. Simpson*, 11 L. R. Eq. 398; 40 L. J., Ch. 177; 24 L. T. 286; 19 W. R. 431.

Corn merchants in California agreed to send cargoes of wheat to a miller in England, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:—Held, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the Eng-

lish bank had no priority. *Gilbert v. Guignon*, 8 L. R., Ch. 16; 21 W. R. 281.

A bank presented a bill of exchange to the drawees for their acceptance, accompanied by a ticket representing that the bank held bills of lading to cover it. The drawees thereupon accepted the bill, relying on the statement that the bank held bills of lading which both parties thought to be genuine. The bills of lading had been forged by the drawer of the bill of exchange:—Held, that the drawees were not entitled to demand from the bank genuine bills of lading before paying the amount of the bill of exchange. *Baxter v. Chapman*, 29 L. T. 642.

See also cases under SHIPPING.

**For Honour of Drawer.**—An acceptor *supra* protest for the honour of the drawer, is, like the drawer himself, estopped from denying that the bill is a valid bill, and consequently, it is not competent to him to set up as a defence to an action against him by an indorsee, that the payee is a fictitious person, and that he was ignorant of that fact at the time of his acceptance of the bill. *Phillips v. Im Thurn*, 18 C. B., N. S. 694; 11 Jur., N. S. 489; 12 L. T. 457; 13 W. R. 750.

A person, calling himself P., presented to S., in England, a Spanish bill, professing to be drawn by C. of Lima, on S., payable to the order of R., and indorsed by R. & P. S., having stopped payment, sent to the plaintiff the bill and a letter telling him that no doubt the defendant would intervene for the honour of C., and that with his signature he would perhaps not object to discount the bill; the plaintiff sent the bill and letter to the defendant, who accepted for honour of C., and on the faith thereof the plaintiff discounted the bill. The bill turned out to be a forgery on C., who had not drawn it, and did not know any such persons as R. or P.:—Held, that, as the bill was discounted by the plaintiff on the faith of the defendant's acceptance, he was entitled to recover against him. *Phillips v. Im Thurn*, 1 L. R., C. P. 463; 35 L. J., C. P. 220; 14 L. T. 406; 14 W. R. 653.

#### 4. CONDITIONAL OR QUALIFIED.

**Conditional Acceptance.**—A conditional acceptance of a bill is good. *Julian v. Sholrooke*, 2 Wils. 9.

A conditional acceptance is as effectual as an absolute one, if the condition is complied with. *Miln v. Prest*, Holt, 181; 4 Camp. 393.

Whether an acceptance is conditional or absolute is a question of law. *Sproat v. Matthews*, 1 T. R. 182.

If A. accepts a bill payable on a condition to be performed by B., the performance of this condition by C. will not support an action by the holder of the bill against A. *Suan v. Cox*, 1 Marsh. 176. And see *Harrison v. Hannel*, 1 Marsh. 349; 5 Taunt. 780.

A bill, drawn 28th November, 1836, payable forty-two months after date, was accepted thus: "Accepted on the condition of its being renewed until November 28th, 1844, without interest, payable by me, at Messrs. Williams and Deacon's, bankers, London:—"—Held, in an action by an indorsee against acceptor, that this was a good acceptance, and that the bill was properly declared on as accepted, payable on 28th November, 1844. *Russell v. Phillips*, 14 Q. B. 891; 19 L. J., Q. B. 297; 14 Jur. 806.

An acceptance must be to pay in money; and an acceptance to pay by another bill is no acceptance. *Ib.*

A bill accepted "payable on giving up bill of lading for 76 bags of cloverseed per Amazon, at the London and Westminster Bank, Borough Branch," is a conditional acceptance to this extent, that the holders are only entitled to receive the amount on delivering over to the acceptor the bill of lading, but they are not bound to present the bill on the precise day on which it becomes due. *Smith v. Vertue*, 9 C. B., N. S. 214; 30 L. J., C. P. 56; 7 Jur., N. S. 395; 3 L. T. 583; 9 W. R. 146.

**— Payable at Particular Place.**—On the presentment for acceptance of certain bills, the drawee said that he would have accepted them if he had funds (meaning the funds on account of which the bills were drawn); that he had not been able to obtain those funds from France; but that when he did obtain them he would pay the bills:—Held, that this amounted to a conditional acceptance of the bills; and that the defendant, having subsequently become possessed of the funds, was bound to pay the bills. *Mendizabal v. Machado*, 3 M. & Scott, 841; 6 C. & P. 218.

Before the 1 & 2 Geo. 4, c. 78, s. 1, if a person to whom a bill was directed generally, accepted it payable at a particular place, the holder need not have received such a qualified acceptance, but might resort to the drawer as for non-acceptance. *Gannon v. Schmoll*, 5 Taunt. 344; 1 Marsh. 80.

Because it amounted to a contract to pay at that particular place and nowhere else, and narrowed the general liability of the acceptor. *Ib.*

**Condition annexed by Payee.**—If the payee of a bill annexes a condition to his indorsement, the drawee, who afterwards accepts it, is bound by that condition; and if it is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor. *Robertson v. Kensington*, 4 Taunt. 30. And see *Prevot v. Abbott*, 5 Taunt. 786.

**Holder may insist on Bill being Accepted as Drawn.**—The holder of a bill may insist upon the drawee accepting it generally in the very words in which it is drawn, or may protest it for non-acceptance. *Boehm v. Garcias*, 1 Camp. 425, n. And see 7 East, 387.

**Part Acceptance.**—A part acceptance is good. *Julian v. Sholrooke*, 2 Wils. 9.

#### 5. PAYMENT BY BANKERS.

The acceptance of a bill payable at the acceptor's bankers is tantamount to an order to the banker to pay the bill to any person who, according to the law merchant, can give a valid discharge for it, and not merely to the lawful holder; and the banker may debit his customer with such payment. *Roberts v. Tucker*, 16 Q. B. 500; 20 L. J., Q. B. 270; 15 Jur. 987—Ex. Ch.

But a banker cannot debit his customer with the payment made to one who claims through a forged indorsement of a bill, and so cannot give a valid discharge for the bill, unless there are



circumstances amounting to a direction from the customer to the banker to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from shewing it to be forged. *Id.*

#### 6. CONTRACTS AND UNDERTAKINGS TO ACCEPT.

**What sufficient to maintain Action upon.]**—Von S. & Co., merchants at Buenos Ayres, entered into a contract with the defendants, merchants in London, to carry on joint exchange operations, the substance of which was, that Von S. & Co. should periodically draw bills on the defendants at ninety days' sight, to be accepted by them, and sell the bills at Buenos Ayres, keeping the defendants out of cash advance, by periodically remitting to them other bills to the same amount on other firms; the profit and loss of these operations to be shared between them. Accordingly Von S. & Co. drew bills in that name on the defendants, and the plaintiffs became purchasers of the bills. Von S. & Co. having become bankrupt, the plaintiffs, as holders of the bills, proved against the estate, and received 40% per cent. on the amount. In an action against the defendants for refusing to accept the bills:—Held, first, that they were not liable as drawers of the bills, as there was no express or implied authority in Von S. & Co. to sign that name as including the defendants. *Nicholson v. Ricketts*, 2 El. & El. 497; 29 L. J., Q. B. 55; 6 Jur., N. S. 422; 8 W. R. 211.

Held, secondly, that the plaintiffs could not recover against the defendants for money had and received, as the consideration had not wholly failed. *Id.*

A broker was employed by Von S. & Co. at Buenos Ayres to procure purchasers of the bills; the plaintiffs bought them, on the broker's assurance "that the bills were all in order, he having seen the defendants' letter of credit to Von S. & Co., in virtue of which the bills were drawn:—" Held, that this amounted to no more than a statement that the transaction was regular, and that the bills would probably be accepted, and not to a contract that the bills should be accepted. *Id.*

An agent and manager of the business of a London firm, who resided in Sweden, gave to a merchant there about to draw bills on that firm an assurance that the bills would be accepted; whereon bills of lading of cargoes of timber were transmitted to the London firm, and bills were drawn against them:—Held, that this assurance, though thus made and acted on, was not, as between the London firm and the foreign merchants, to be treated as equivalent to an acceptance of the bills, so as to vest in the London firm legal rights from the time of such assurance given. *Hoare v. Dresser*, 7 H. L. Cas. 290; 28 L. J., Ch. 611; 5 Jur., N. S. 371; 33 L. T., O. S. 63; 7 W. R. 374.

By a letter of credit, merchants in London agreed to accept at ninety days' sight the drafts of a merchant at Demerara, on receiving invoices, bills of lading, &c., of certain colonial produce to be remitted; and added, that "on receiving these documents, and no irregularity appearing, they would accept his drafts at the usual date, to the extent of 30,000." In pursuance of this agreement, two several cargoes

were remitted in different ships, and shortly afterwards the consignor drew a bill at six months' sight upon the credit of the cargoes remitted, and in the bill directed the same "to be charged to account as advised," without specifying to the account of which cargo it was to be placed, and the consignees refused to accept:—Held, that they were liable upon their agreement in damages for not accepting. *Laing v. Barclay*, 2 D. & R. 530; 1 B. & C. 398; 3 Stark. 38.

A bill being presented by the indorsee to the drawee for acceptance, the latter on accepting it said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands, which would be paid, he would take all risks:—Held, that this conversation, together with the bill accepted by the drawee, did not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill accepted, on a count for money had and received. *Whitwell v. Bennett*, 3 B. & P. 559. And see *Bishop v. Rowe*, 3 M. & S. 362.

**On Unfulfilled Condition.]**—An agreement to accept a bill on certain conditions, is discharged if the conditions are not complied with. *Mason v. Hunt*, 1 Dougl. 297.

**Non-existing Bill.]**—A promise to accept a non-existing foreign bill did not amount to an acceptance; there must be a bill in existence which could be accepted. *Bank of Ireland v. Archer*, 11 M. & W. 383; 12 L. J., Ex. 353; 7 Jur. 379.

**By Three Persons—Bill Drawn on One only—Rights of Holder.]**—Where three persons undertake to accept bills for a particular concern, and the drawer draws bills on account of one of them only, which he accepts in the name of the three, a bonâ fide holder who received it from the drawer cannot recover against the other two. *Williams v. Thomas*, 6 Esp. 18. But see *Ridley v. Taylor*, 13 East, 182.

#### 7. PROOF OF.

**Production of Bill.]**—The bare production of a bill, with formal proof of the writing to the acceptance, is primâ facie evidence that the bill was accepted during its currency, and within a reasonable time of the date it bears, such being the regular and usual course of business. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J., C. P. 69; 16 Jur. 1087.

In an action against acceptor, a notice given by his attorney to the plaintiff to produce all papers relating to a bill described as the bill in question, and said to be "accepted by the defendant," is primâ facie evidence of his acceptance. *Hott v. Squire*, R. & M. 282.

What is a reasonable time depends on the relative places of abode of the parties to the bill. *Id.*

**Date of Acceptance.]**—The date of the acceptance of a bill payable after sight, over the defendant's acceptance, although in a different handwriting, will be presumed to have been written by his authority. *Glossop v. Jacob*, 4 Camp. 227; 1 Stark. 60.

**Evidence that Drawee has Effects of Drawer**

in his Hands.]—The acceptance of the drawee is *prima facie* evidence of his having effects of the drawer in his hands. *Vere v. Lewis*, 3 T. R. 182.

For every bill implies a command to the drawee to pay, and his acceptance is not only an admission of money or effects in his hands sufficient to pay, but is an undertaking by the acceptor, as well with respect to the drawer as the payee, to pay the bill. *Parminster v. Symons*, 2 Bro. P. C. 43; 1 Wils. 185.

**Where the Acceptors are Partners.]**—Where the acceptors of a bill are partners, and one partner accepts for the firm, his admission of his acceptance, although not evidence of the partnership against the others who appear and defend, will be good evidence of his acceptance as against the whole aggregate body. *Hodgkyn v. Wingerhoed*, 2 Phil. Evid. 26.

**Bill properly drawn.]**—In an action against the drawers of a bill drawn by a firm upon one partner, if it is proved that the bill was accepted by the drawee, this is evidence of its having been regularly drawn. *Porthouse v. Parker*, 1 Camp. 82.

**Evidence inadmissible to shew Drawing or Indorsement a Forgery.]**—When a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the name and signature of a person as drawer and indorser, the acceptor cannot, as against a *bona fide* indorsee for value, adduce evidence to shew that either the drawing or indorsement is a forgery. *London and South Western Bank v. Wentworth*, 5 Ex. D. 96; 49 L. J., Ex. 657; 42 L. T. 188; 28 W. R. 516.

**Handwriting.]**—In an action against acceptor, the only proof of his handwriting was that by a banker's clerk, who stated that, two years ago, he saw a person calling himself by the acceptor's name sign a book; that he had never seen him since, but that he thought the handwriting was the same, and had since seen cheques bearing the same signature:—Held, that this was evidence to go to the jury. *Warren v. Anderson*, 8 Scott, 384.

In an action against an acceptor, no evidence being given in whose hand the acceptance was written:—Held, that the circumstance of the bill having been paid by the drawer, and the amount of it, obtained on discount by the acceptor's wife, having been applied by her in discharge of his debts, was not sufficient to prove that he had sanctioned the acceptance. *Goldstone v. Tovey*, 6 Bing., N. C. 98; 8 Scott, 394.

In an action on a bill against the acceptor, there was a plea traversing the acceptance. No evidence was offered by the plaintiff on this point, but the bill and a letter were produced at the trial in accordance with a notice by the defendant to produce, in which notice the bill was described as the bill accepted by the defendant, and the letter as being a letter of the defendant's:—Held, that as the jury had an opportunity of comparing the handwriting if they had thought it necessary, there was some evidence of the defendant's handwriting. *Scard v. Jackson*, 24 W. R. 159.

In an action on a bill against acceptor, to which he pleaded non acceptavit, the following

document, signed by his attorney: "I hereby admit that the acceptance to the bill on which this action is brought is in the handwriting of the defendant," is sufficient evidence to go to the jury of his acceptance, without the production of the bill itself. *Chaplin v. Lery*, 9 Ex. 531; 3 C. L. R. 556; 23 L. J., Ex. 117.

Where, in an action against A., B. & C., on a note, the handwriting of A. & B. was proved, but the only evidence against C. was a signature bearing his name to a joint retainer by him and A. & B., on which the attorney had acted in defending the action, without, however, having seen C., or having any other means of knowing his handwriting:—Held, insufficient. *Drew v. Prior*, 5 M. & G. 264; 12 L. J., C. P. 144.

**Identity.]**—In an action against acceptor, it is not necessary, if his handwriting has been proved, to give evidence of his identity. *Roden v. Ryde*, 4 Q. B. 626; 12 L. J., Q. B. 276; 7 Jur. 554; *S. P.*, *Sewell v. Williams*, 7 Jur. 554.

In an action by indorsee against maker, he pleaded that he did not make the note. There was an attesting witness, who, on being called at the trial, stated that he saw the signature [Hugh Jones] to the note written by a party whose occupation and residence he described, that he had no communication with him since, and that this was a common name in the neighbourhood where the note was made:—Held, that there was no evidence to go to the jury of the identity of the defendant with the maker of the note. *Jones v. Jones*, 9 M. & W. 75.

In an action on a bill directed to "Charles Bamer Crawford, East India House," and accepted, "C. B. Crawford," a witness, stated, that the acceptance was in the handwriting of C. B. Crawford, and that he was formerly in the India House; but the witness could not tell whether that person was the defendant:—Held, that the evidence was sufficient, without proof of identity. *Greenshields v. Crawford*, 1 D., N. S. 439; 9 M. & W. 439; 6 Jur. 303.

## 8. REVOCATION AND CANCELLATION.

**Generally.]**—An acceptor may cancel his acceptance before he returns the bill. *Cox v. Troy*, 1 D. & R. 38; 5 B. & A. 474. But see *Thornton v. Dick*, 4 Esp. 270.

But where a bill was left for acceptance, and accepted, but the acceptance was afterwards cut off, and the bill returned in that mutilated state:—Held, that the acceptance being once made, it could not be revoked, and that the acceptor was still bound. *Trimmer v. Oddie*, Bayl. Bills, 161.

If an acceptance is so cancelled, and the bill noted for non-acceptance, the holder cannot afterwards sue upon it as an acceptance. *Ben-tinck v. Dorrien*, 6 East, 199; 2 Smith, 387.

The acceptance of a bill, though revocable at any time before delivery, is, if unrevoked, complete as soon as written on the bill, and the contract is made in that place where the bill is accepted, not where it is issued. *Wilde v. Sheridan*, 21 L. J., Q. B. 260; 16 Jur. 426; *S. C.*, nom. *Reg. v. Birch*, 1 B. C. C. 56.

**Bill torn into two pieces—Rights of bona fide Holder.]**—A bill was torn into two pieces, and thrown away by the acceptor *animo destruendi*; the pieces of paper were picked up and fastened

annulling it as a bill, or of transmitting it through the post:—Held, that the acceptor was liable to an indorser for value, and without notice. *Ingham v. Primrose*, 7 C. B., N. S. 82; 26 L. J., C. P. 294; 5 Jur., N. S. 710.

**By mistake.]**—A bill having been accepted, payable at Ladbroke's, with a direction in writing on it, "in case of need to apply at Boldero's," and having been dishonoured when due at Ladbroke's, and thereupon brought to Boldero, who, thinking that it had been made payable at his house, under that mistake cancelled the acceptance, but presently, observing the mistake, wrote under it, "cancelled by mistake," and signed his initials to it, yet nevertheless paid the bill for the honour of the plaintiff, whose indorsement was on it:—Held, that the plaintiff, on proof of such cancellation by mistake, might recover upon the bill against prior indorsers. *Raper v. Birchbeck*, 15 East, 17.

A defendant, in discharge of a debt to the plaintiff, indorsed bills to him, which had been drawn and indorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here; the plaintiff indorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them, "cancelled by mistake," and the bills were not, however, paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling, they would otherwise have honoured them. A re-acceptance was obtained from the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them, regularly protested, to the defendant, who applied to the prior indorsers for payment, but they refused. The defendant, who resided abroad, cited the drawers, the intermediate indorsers, and the plaintiff before the Tribunal of Commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted him by the holders, with whom the plaintiff was identified, and, consequently, that the other parties to the bills were discharged:—Held, that the French courts had mistaken the law of England as to the effect of the cancellation, and, therefore, that the defendant was still liable at the plaintiff's suit for the debt in respect of which the bills were given, notwithstanding the decree. *Novelli v. Rossi*, 2 B. & Ad. 757.

A. was holder of a foreign bill, drawn upon B.

himself to be insolvent, ordered C. not to pay the bill; whereupon C. wrote thereon, "Cancelled by mistake, orders not to pay," and the bill was returned in this state to D. at the clearing-house before the settling hour. It is the usage in the trade in London so to cancel bills intended to be paid, and where a cancellation has occurred through mistake to indicate the same by writing on the bill:—Held, that no legal liability was cast upon C., from which a promise could be inferred that he would pay the bill, or return it, without having cancelled or destroyed the acceptance. *Warwick v. Rogers*, 5 M. & G. 340; 6 Scott, N. H. 1; 13 L. J., C. P. 113.

That the duty cast upon C. was no more than to take due care of the bill, and if he did not choose to pay it to return it uncanceled, unless it had been cancelled by mistake, and in that case to indicate the same by writing on the bill. *Id.*

That C. did use due care to prevent the acceptance from being defaced. *Id.*

That the acceptance was an acceptance defaced and cancelled in point of fact, but that it was an acceptance cancelled by mistake. *Id.*

**By Letter.]**—S., a merchant at Trieste, in November, 1841, drew upon D. & Co. merchants at Liverpool, several bills in two parts, and requested them to accept and send them to Glyn & Co., their London bankers, and directed that the bills were to be held by them at the disposition of the holders of the seconds. The seconds were negotiated at Trieste, and were addressed at the foot to D. & Co., payable in London, the firsts with Glyn & Co. D. & Co. wrote across the bills a memorandum of acceptance, and transmitted them to Glyn & Co., to be held at the disposition of the holders of the seconds; and by letters, of the 3rd and 8th December, informed S. of what they had done. At the time the firsts were so remitted to D. & Co. S. had sent seconds to F. & Co. at Paris to be discounted, but they declined to discount them; and the seconds were returned to S. on the 8th and 13th December, and were then cancelled by him. On the 4th December, S. wrote to Glyn & Co. requesting them to hand to D. & Co. all the firsts so drawn by him upon them, and handed to Glyn & Co. as before mentioned. He also wrote to D. & Co. to request them to instruct Glyn & Co. to return all the firsts which remained in their hands. On 7th December, S. wrote to D. & Co. that he had annulled the previous instructions to Glyn & Co., and he requested D. & Co. to replace the firsts in the hands of Glyn & Co., to be held as before. On 15th December, Glyn & Co. remitted the bills to D. & Co., pursuant to the letter of the 4th; and D. & Co. on the 16th cancelled the acceptances. On 18th December, D. & Co., after the receipt of the letter of 7th December, wrote as follows:—"As we stated on 16th, the firsts of your drafts, which Glyn & Co. returned to us, were immediately can-

derived from a valuable consideration, the indorsee having no knowledge of the correspondence, except that S. represented to them that the firsts had been accepted:—Held, in an action by the holder against D. & Co. on these alleged seconds, that their acceptances had been cancelled by the letter on 4th December being acted upon according to the intention of the drawer, and that the subsequent indorsements of the new seconds to the holder conferred no right against D. & Co. *Ralli v. Demastous*, 6 Ex. 483; 20 L. J., Ex. 278.

**By Parol.]**—The holder of a bill may discharge the acceptor by parol, but for this purpose, the words must amount to an absolute renunciation or waiver of all claim upon him in respect of the bill. *Whalley v. Tricker*, 1 Camp. 35.

A liability on a bill may be discharged by parol, whether between immediate or intermediate parties, and the same rule applies to notes. *Foster v. Dawber*, 6 Ex. 839; 20 L. J., Ex. 385.

**Plea of.]**—Action on a bill drawn by W. upon and accepted by the defendant, payable to the order of W., and by him indorsed to the plaintiff. A plea, that after the defendant accepted the bill, and before it became due, and before it was indorsed to the plaintiff, W. waived the acceptance, and exonerated and discharged the defendant from the payment, and that no person ever gave or received any consideration for the indorsement, and another plea was in the same terms, except that it concluded with an averment that the bill was indorsed to the plaintiff after it became due, are respectively bad for not shewing that W. was the holder of the bill at the time of the alleged waiver by him. *Harmer v. Steele* (in error), 4 Ex. 1; 19 L. J., Ex. 34—Ex. Ch.; S. C. (in court below), 14 M. & W. 831; 3 D. & L. 508; 15 L. J., Ex. 217, affirmed.

It is no objection to the negotiability of a bill, that during its currency it has become the property of one of its acceptors. *Ib.*

But where the liability to sue on a bill, and the right to receive payment, concur in one of three joint acceptors at the time when the bill becomes due, that will operate as a payment and performance of the contract of acceptance as to all the acceptors, so as to prevent any action afterwards being brought upon that contract. *Ib.*

## IX. PRESENTMENT FOR PAYMENT.

### 1. NECESSITY FOR.

**Acceptor without Effects in his Hands.]**—Although, on the day before a bill becomes due, the holder applies to the drawee, who informs him that he has no effects of the drawer's in his hands, but that they will probably be supplied before the next day, and on that day the drawer informs him that he will endeavour to provide effects, and will call upon him again, it does not supersede the necessity of a presentment on that day. *Pridmore v. Collier*, 2 Stark. 57.

Presentment to the acceptor is not excused as between the drawer's indorsee, and the indorsee of such indorsee, by the mere fact that the drawer had not, at the time when the presentment should have been made, any effects in the hands

of. A bill drawn by W. C. upon J. C. was accepted by the latter payable at the plaintiffs' bank, and the bill was subsequently indorsed by W. C. to the plaintiffs, and on the day when it became due there were no assets of J. C.'s in the bank:—Held, in an action by the indorsees against the indorser, that it was not necessary to shew a presentment of the bill to the acceptor. *Bailey v. Porter*, 14 M. & W. 44; 14 L. J., Ex. 244.

**—Accommodation Bill.]**—Want of effects in the hands of the acceptor excuses the indorsee of an accommodation bill from presenting it for payment, as well as from giving notice of dishonour to the drawer. *Terry v. Parker*, 1 N. & P. 752; 6 A. & E. 502; W., W. & D. 303.

**To Agent in absence of Acceptor.]**—If the drawee goes abroad, leaving an agent in England, with power to accept bills, a bill so accepted must, when due, be presented to the agent for payment, if the drawee continues absent. *Philips v. Astling*, 2 Taunt. 206.

**Acceptance for Honour.]**—An acceptance for honour is conditional only, and therefore presentment for payment must be made to the drawee at maturity; even in the case of a bill payable after sight. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394.

The acceptors of a foreign bill, who, after presentment to the drawee for acceptance, and refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsers, are not liable on such acceptance, unless there has been a presentment of the bill to the drawee for payment, and a protest for non-payment. *Hoare v. Casenove*, 16 East, 391.

**In Case of Guarantors.]**—Where a person, not party to a bill, guarantees the payment by the acceptor, he is not entitled to require proof of the presentment. *Hutchcock v. Humphrey*, 5 M. & G. 559; 6 Scott, N. R. 540.

So where a party guarantees the payment of a note, if it is not duly honoured and paid by the maker according to its tenor and effect, he is liable on his guarantee if the note is not paid by the maker when due, without any presentment to him for that purpose. *Walton v. Mascall*, 18 M. & W. 462; 3 D. & L. 410.

Where a holder of a bill duly presents it for payment at the place named in a special acceptance on the bill when indorsed to him, but which turns out to be a forgery, a previous party to the bill is not bound by such presentment, unless it is shewn that the acceptance was on the bill when indorsed by him. There is no presumption as against him that such was the case. *Wotton v. Hodd*, 2 C. L. R. 848; 18 Jur. 630.

After a bill, to which a forged special acceptance had been added, had been duly presented for payment at the place named in the acceptance, and dishonoured, the defendant, who had drawn and indorsed the bill, admitted that the signatures were his:—Held, no admission of his liability, or of the sufficiency as against him of the presentment. *Ib.*

**Note Payable a Month after Demand.]**—On a

note payable a month after demand, a presentment for demand is unnecessary. *Dodd v. Gill*, 3 F. & F. 261.

## 2. WHEN.

**Within Reasonable Time.]**—The law with regard to time for the presentation of a note, payable on demand, requires that the presentation for payment should be made within a reasonable time—that is, a period reasonable with reference to the circumstances connected with each particular case. *Chartered Mercantile Bank of India, London and China v. Dickson*, 3 L. R., P. C. 574.

Where, therefore, a note, dated the 16th of February, 1864, and indorsed, though made payable on demand, but the payment of which was not contemplated by the makers at any immediate or specific date, was not presented to the payee for payment until the 14th of December in the same year—Held, that as the note was meant to be, to a greater or less extent, a continuing security, the delay in presentation was not unreasonable, and the holders of the note were entitled to recover. *Id*:

**Allowance of Three Days' Grace.]**—Three days' grace are allowed on inland and foreign notes, as well as on bills. *Brown v. Harraden*, 4 T. R. 148. And see *Ward v. Honeywood*, 1 Dougl. 61.

Three days' grace are allowed on a note payable to A., without adding, "or to his order," "or to bearer." *Smith v. Kendall*, 6 T. R. 123; 1 Esp. 231.

A presentment for payment on the day before the bill becomes due, allowing days of grace, is premature. *Wiffen v. Roberts*, 1 Esp. 261.

The three days' grace allowed by the custom of merchants is allowable on bills drawn and payable in Scotland, the limitation of an action on such a bill therefore only begins to run from the third or last day of grace. *Ferguson v. Douglas*, 6 Bro. P. C. 276.

The maker of a note payable by instalments is entitled to days of grace upon the falling due of each instalment. *Oridge v. Sherborne*, 11 M. & W. 374.

It would seem that days of grace are allowed on bills payable at sight, see *Dixon v. Nuttall*, 1 C., M. & R. 307; 6 C. & P. 320; *Janson v. Thomas*, 3 Dougl. 421; Bayley on Bills, 79.

**By Acceptor for Honour after refusal of Acceptance and Protest of Bill payable at sight.]**—A bill payable after sight, having been refused acceptance and protested, was accepted eight days after by a person for the honour of the drawer; when at maturity, according to that acceptance, it was presented for payment to the drawee and the acceptor for honour:—Held, these presentments for payment were made at a proper time. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394.

**Payable so many days after sight.]**—A bill, payable sixty days after sight, becomes due sixty days after acceptance, or after protest for non-acceptance. *Campbell v. French (in error)*, 6 T. R. 200; 2 H. Bl. 163.

**Notice.]**—A holder is entitled to know on the very day on which the bill becomes due whether

it is to be paid or dishonoured. *Cocks v. Masterman*, 4 M. & R. 676; 9 B. & C. 902.

Therefore, where the bankers of the drawee pay the amount to the holder on the day the bill becomes due, and on the following day discover the acceptance to be a forgery, and give the holder notice of the fact, they cannot recover back the amount from the holder. *Id*.

To an action for goods the defendant pleaded that he transferred to the plaintiff notes by L. & Co., which he accepted on account of the debt, and that he did not, within a reasonable time, present them. Replication, that on the day before the transfer, and without the plaintiff's knowledge, L. & Co. became and were bankrupts, and that they continued such bankrupts, and unable to pay the notes; that before a reasonable time for presentment, the plaintiff discovered the bankruptcy, and that within a reasonable time after such discovery he gave the defendant notice of the premises, and offered to return the notes. Rejoinder, that the plaintiff did not give the notice till after the expiration of a reasonable time for presenting the notes for payment:—Held, that the plaintiff was only bound to give such notice within a reasonable time after he acquired the knowledge, and not necessarily before the expiration of the time for presentment. *Robson v. Oliver*, 10 Q. B. 704; 16 L. J., Q. B. 437; 11 Jur. 1056.

In the time for the presentment of a bill, the day of presentment is exclusive. *Lester v. Garland*, 15 Ves. 254.

**What constitutes Laches.]**—Where A. in Yorkshire, on the 26th December, received a bill payable in London, which became due on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his bankers at Lincoln, who duly forwarded it to London for presentment, and the bill was dishonoured:—Held, that by keeping it in his hands until the 29th, he was guilty of laches. *Anderton v. Beck*, 16 East, 248.

A bill drawn on Leghorn was not presented in due time, owing to the political state of the country at that time, which rendered it impossible to present it:—Held, that it being afterwards presented for payment with due diligence, and refused for want of presentation at the time when it was due, the holder might recover against the antecedent parties. *Patience v. Twonley*, 2 Smith, 223.

Where a bill payable on demand is taken in payment for goods, it is not necessary to present it the same day on which it is received. *Appleton v. Sweetapple*, 3 Dougl. 137; Bayl. Bills, 192.

**Within what Hours.]**—A presentment of a bill at a counting-house (where it is made payable) between six and seven o'clock in the evening, is sufficient. *Morgan v. Davison*, 1 Stark. 114.

Or at eight in the evening, at the house of a merchant in London. *Barclay v. Bailey*, 2 Camp. 527.

Or at the same hour, at the office of an attorney, and that in the month of February. *Triggs v. Newnham*, 10 Moore, 249; 1 C. & P. 631.

A presentment of a bill for payment at a house in London, where it is made payable, at eight o'clock in the evening of the day when it be-

comes due, is sufficient to charge the drawer, although at that time the house was shut up, and no person there to pay the bill. *Wilkins v. Jadis*, 2 B. & Ad. 188; 1 M. & Rob. 41.

**Within Banking Hours.**—The holder of a bill accepted, payable at a banker's, impliedly agrees to present it for payment within the usual banking hours. *Parker v. Gordon*, 7 East, 385; 3 Smith, 358; 6 Esp. 41; *S. P., Jamieson v. Swinton*, 2 Taunt. 224; 2 Camp. 373. See also cases under BANK AND BANKER.

**After Banking Hours.**—But presentment of a bill after the usual hours is sufficient, provided there is somebody at the place, who sees the bill, or gives an answer; otherwise it will not be sufficient. *Henry v. Lee*, 2 Chit. 124. See also *Bynner v. Russell*, 7 Moore, 267; 1 Bing. 23; *Hill v. Heap*, D. & R., N. P. C. 57.

So, a presentment at the banking-house where payable, after banking hours, is sufficient, if a person is stationed at the banking-house, and returns for answer, no orders. *Garnett v. Woodcock*, 6 M. & S. 44; 1 Stark. 475.

A banker is not bound to pay after banking hours a bill which is accepted payable at his house. The presentment in the evening by the notary's clerk is not a presentment for payment. *Whitaker v. Bank of England*, 6 C. & P. 700; 1 C., M. & R. 744; 5 Tyr. 268; 1 Gale, 54.

A presentment at a banking-house after banking hours, when the house is shut, is not sufficient to charge the drawer; and no inference is to be drawn from the circumstance of the bill being presented by a notary, that it had been before presented within banking hours. *Elford v. Teed*, 1 M. & S. 28.

Where a bill was drawn and accepted for the accommodation of the indorser, which was not duly presented for payment when due, by reason that the bill having been accepted, payable at a banking-house, was not presented till after banking hours, when the answer given to the holder was "no effects;" and the indorser applied to the indorsee, after declaration, for further time to make payment of the bill; which declaration alleged the fact, that the bill was duly presented for payment:—Held, that it was evidence of a waiver of the objection, with notice of the fact, of which he had the means of informing himself. *Hopley v. Dufresne*, 15 East, 275.

### 3. TO WHOM AND WHERE.

#### a. Bills of Exchange.

**What Sufficient—Generally.**—A bill was presented for payment at the door of the house where the drawee was described as living, to a lodger who was coming from the passage of the house into the street. The drawee had removed to another residence, known to the occupier of the house, but not to the lodger; and it was not shewn that he had left funds for payment:—Held, that the presentment was sufficient to maintain the affirmative of an issue raised on the due presentment of the bill in an action against an indorser. *Buston or Buckstone v. Jones*, 1 M. & G. 83; 1 Scott, N. R. 19.

If a bill is accepted, payable at a particular place, and the acceptor dies before it becomes due, it is sufficient, in an action against the drawer, to prove presentment at the specified place; and it

VOL. I.

is not necessary to shew presentment at the house of the deceased's representative. *Philpott v. Bryant*, 1 M. & P. 754; 4 Bing. 717; 3 C. & P. 244.

Presentment of a bill payable at Messrs. A. B. & Co., who are bankers in London, to their clerks at the clearing-house, is sufficient. *Reynolds v. Chettle*, 2 Camp. 596; *S. P., Robson v. Bennett*, 2 Taunt. 388.

**To Drawer's Order in London.**—An acceptance of a bill drawn payable to the drawer's order in London, is a general acceptance; and a special presentment need not be alleged or proved. *Faile v. Bird*, 6 B. & C. 531; 9 D. & R. 639; 2 C. & P. 303.

Nor need proof of presentment for payment in London, or of excuse for non-presentment in London, be given. *Selby v. Eden*, 3 Bing. 611; 11 Moore, 511.

Where a bill, drawn with the words, "pay to my order in London," in the body of the bill, and directed to the drawees payable in London, was accepted at J. L. & Co., bankers in London:—Held, that a presentment at J. L. & Co.'s was necessary to charge the drawer, although by the statute such an acceptance is general; and that the circumstance of the drawer having negotiated it after such acceptance made no difference. *Gibbs v. Mather*, 2 C. & J. 254; 2 Tyr. 189; 8 Bing. 214; 1 M. & Scott, 387—Ex. Ch.

**At particular Bank.**—An indorsee declared against acceptor, alleging the bill to be "payable at Messrs. C. & Co.'s, bankers, London," and omitting to aver presentment at that place:—Held, that presentment at the particular place was unnecessary, and need not be averred. *Halstead v. Skelton*, 5 Q. B. 86; D. & M. 665; 2 D., N. S. 961; 13 L. J., Q. B. 177; 7 Jur. 680—Ex. Ch.

#### **Presentation at Place mentioned in Address instead of at Place named in Acceptance.**

—A bill was drawn by G. on H., H.'s name in the address being followed by the mention of a particular place; he accepted the bill payable at another place named in the acceptance, not adding "only," nor "not otherwise or elsewhere." G. indorsed to the defendant, who indorsed to the plaintiff, who, at maturity, presented the bill at the place named in the address, but not at the place named in the acceptance:—Held, that he could not sue the defendant on the bill, the presentment being insufficient, 1 & 2 Geo. 4, c. 78, putting an end to the necessity of presentment at the place named in the acceptance as against the acceptor only. *Saul v. Jones*, 1 El. & El. 59; 28 L. J., Q. B. 37; 5 Jur., N. S. 220; 7 W. R. 47.

**Sufficiency of Pleading.**—In a declaration on a bill payable by the acceptor at the house of S. P. & S., an averment of presentment at the house of S. P. & S. is sufficient, without averring a presentment to the acceptor, or to S. P. & S. *Hawkey v. Borwick*, 4 Bing. 135; 12 Moore, 478.

Where an acceptor accepts, payable at a banker's, it is not necessary, since 1 & 2 Geo. 4, c. 78, in an action against the drawer, to allege that the bill was presented to the acceptor in person, if there is an averment that it was duly presented at the banker's. *De Bergareche v. Pullin*, 3 Bing. 476; 11 Moore, 350.

Where a bill is drawn payable to the order of

3 I

the drawer, at a particular place, semble, that a declaration against the drawer or indorser alleging a presentment generally, is sufficient after verdict. *Lyon v. Holt*, 5 M. & W. 250; 2 H. & H. 41.

In an action against an indorser, though it is necessary to prove a presentment at the place pointed out by the acceptance, it is not necessary to allege in the declaration that the bill was accepted at that place; though, if such special acceptance is stated, there must be a corresponding allegation of presentment. *Parker v. Ade*, 1 D. P. C. 643; *S. C.*, nom. *Parker v. Edge*, 1 C. & M. 429; *S. C.*, nom. *Parke v. Edge*, 3 Tyr. 364.

In an action by indorsee against drawer of a bill payable in London, the venue being laid in London, an allegation of presentment is a sufficient allegation of a presentment in London. *Boydell v. Harkness*, 3 C. B. 168; 4 D. & L. 179; 15 L. J., C. P. 233.

In an action by an indorsee against drawer of a bill accepted by T. & G. at a London bankers', the declaration did not state the acceptance at all, but stated that it was presented to T. & G. for payment, and that they refused to pay. The proof was, presentment of the bill at maturity at the clearing-house to the clerk of the London bankers' named in the acceptance:—Held, that, as the declaration did not state the acceptance, the place fixed by the acceptors was sufficiently proved, and that the London bankers were agents for that purpose to the acceptors. *Harris v. Packer*, 3 Tyr. 370, n.

**Evidence as to.]**—In an action on a bill, drawn upon "P. P., No. 6, Budge Row," and accepted by him, an averment that the bill, when due, was presented and shewn to P. P. for payment, is supported by proof that the holder went to 6, Budge Row, to present it, but found the house shut up, and no one there. *Hine v. Allely*, 4 B. & Ad. 624; 1 N. & M. 433.

Where a bill is addressed to a drawee at his residence, and is accepted by him, payable at a bank, in an action against an indorser, presentment at the bank must be proved; and the want of such presentment is not excused by there being no effects of the acceptor in the bank. *Saul v. Jones*, 1 El. & Bl. 59; 28 L. J., Q. B. 37; 5 Jur., N. S. 220; 7 W. R. 47.

**What a Variance.]**—In an action by indorsee against drawer, the declaration stated the bill to have been accepted payable at a banker's in London, and averred a presentment to the acceptor there:—Held, no variance, though by 1 & 2 Geo. 4, c. 78, such acceptance is general only. *Wilmott v. Williams*, 8 Scott, N. R. 713; 7 M. & G. 1017; 14 L. J., C. P. 33; 8 Jur. 987.

Held, also, that the averment was proved by shewing a presentment at the particular place, without shewing that the acceptor was there. *Ib.*

#### b. Promissory Notes.

**Place mentioned in Memorandum outside Body of Note.]**—A memorandum at the foot, or in the margin, of a note indicating a particular place of payment, forms no part of the contract, though shewn to be contemporaneous with the note itself. *Williams v. Waring*, 5 M. & R. 9; 10 B. & C. 2; *S. P.*, *Exon v. Russell*, 4 M. & S. 506; *Price v. Mitchell*, 4 Camp. 200.

**At Place named in Note itself.]**—A note, promising to pay on demand at a particular place, must be presented, and a demand of payment made at that place, unless the makers discharge the holder from the presentment and demand; and the presentment and demand must be alleged unless a discharge is shewn. *Bowes v. Howe (in error)*, 5 Taunt. 30.

But if the makers (who had become insolvent) shut up and abandoned their shop, that is evidence of a declaration to all the world of their refusal to pay their notes there. *Howe v. Bowes*, 16 East, 112.

If a note is payable at a particular house, a demand of payment at that house is a demand on the maker. *Saunderson v. Judge*, 2 H. Bl. 509.

A. makes a note payable to B. or order, with a memorandum upon it that it will be paid at the house of C., who is A.'s banker; in the course of business the note is indorsed to C.; in an action by C. against the indorser, it is not necessary to prove an actual demand on A. *Ib.*

A note, described in the body of it as "payable on the last day of October. At A. B.'s," must be presented at the place named; and the latter words are not to be treated as a mere memorandum, because separated from the former by a full point. *Vander Donckt v. Thellusson*, 8 C. B. 812; 19 L. J., C. P. 12; *S. P.*, *Emblin v. Dartnell*, 12 M. & W. 830; 1 D. & L. 1010; 13 L. J., Ex. 255.

If a particular house is mentioned in the body of a note, a presentment there is necessary even to charge the maker. *Sanderson v. Bowes*, 14 East, 500; *S. P.*, *Roche v. Campbell*, 3 Camp. 247.

**At either of two Places.]**—If a country banker's note is payable both in the country and in town, and the holder only presents it in London, it is no defence that he might, with more convenience, have presented it in the country, where it would have been paid. *Beeching v. Gower*, Holt, 313.

**What Constitutes a Note payable at a particular Place.]**—A note in the following form—

"Three months after date, I promise to pay to my own order the sum of 65*l*. J. A. B."

"Payable at Messrs. W. & P.'s."

Indorsed "J. A. B.,"

is not a note payable at a particular place. *Masters v. Baretto*, 8 C. B. 433; 2 C. & K. 715; 19 L. J., C. P. 50; 13 Jur. 1124.

The words "payable at Messrs. A. B.," written beneath the body of a note, constitute a memorandum only, and do not form part of the contract, so as to render presentment at the place mentioned necessary. *Ib.*

A note payable to the order of the maker, and by him indorsed in blank, may be treated as a note payable to bearer, and notwithstanding there is a memorandum at the foot of the note indicating a particular place of payment. *Ib.*

**Payable at Sight.]**—An action is not maintainable on the following note:—"I promise to pay to D. or bearer, on demand, 16*l*. at sight;" without a presentment at sight. *Dixon v. Nottall*, 1 C. & M. & R. 307; 6 C. & P. 320; 4 Tyr. 1013.

A note was in the following form:—"I promise to pay, three months after sight, D. W., or order, 400*l*., with interest:—"Held, that a presentment



of a note for payment of the interest was "at sight." *Way v. Bassett*, 5 Hare, 55; 15 L. J., Ch. 1; 10 Jur. 89.

**Sufficiency of Pleading.**—A declaration stated that the defendant made his note, and thereby promised to pay to the plaintiff, "by the name and addition of Miss Jessie Hope, at 10, Duncan-street, Edinburgh," 200*l*. That the plaintiff was always ready and willing to receive the sum according to the tenor and effect of the note; of which the defendant had notice. Breach, non-payment:—Held, a note payable at a particular place, and that the declaration was bad for want of an averment of presentment at that place. *Spindler v. Grellett*, 1 Ex. 384; 5 D. & L. 191; 17 L. J., Ex. 6.

In a declaration against drawer and acceptor of a bill accepted for honour, it is necessary to aver that presentment for payment was made to the drawee. *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394-403.

Action on a note by payee against the executrix of the maker. Declaration averring the note was payable at a particular place, an excuse for non-presentment there, as there were no assets, is insufficient. *Quinn v. Fitzgerald*, 1 Ir. C. L. R. 552.

In an action by payee against maker of a note payable at "No. 11, Old Slip," the declaration stated that when the note became due the plaintiff was ready and willing in due manner to present the note at No. 11, Old Slip, for payment, and then and there to demand of the defendant, and demanded payment accordingly; but he was then absent from and not to be found there, and had clandestinely departed and absconded thence, without leaving or having left any effects or any means or provision there for the payment of the note; and the defendant did not pay the note when it became due:—Held, that the declaration failed to disclose a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shewn for the omission. *Sands v. Clarke*, 8 C. B. 751; 19 L. J., C. P. 84; 14 Jur. 352.

**Evidence as to.**—A presentment of a note payable at G., at a banker's at G., the maker being absent from G. when the note became due, is sufficient evidence of a presentment to the maker at G., as alleged in the declaration. *Hardy v. Woodroffe*, 2 Stark. 319.

In an action against maker of a note, when the fact of presentment is traversed, it is competent to the plaintiff to prove the presentment by an admission of the defendant that the money was due, and that he would pay it by instalments, as such admission is *prima facie* evidence that all the requisites for rendering the defendant liable on the note have been complied with. *Crown v. Worthen*, 5 M. & W. 5; 2 H. & H. 12; 3 Jur. 290.

## X. NOTICE OF DISHONOUR.

### 1. NECESSITY FOR.

#### a. No Effects.

**Of Drawer in Hands of Drawee.**—Notice of dishonour need not be given to the drawer, when he had no effects in the hands of the drawee, either at the time of drawing the bill, or when it

became due. *Bickerdike v. Bollman*, 1 T. R. 405; *S. P.*; *Clegge v. Cotton*, 3 B. & P. 239.

If the drawer has no effects in the hands of the drawee, though the indorser has, the former is not entitled to notice. *Walwyn v. St. Quintin*, 1 B. & P. 652; 2 Esp. 515.

An indorser who has given no consideration for a bill, and knows that the drawer has no effects in the hands of the drawee, is not entitled to notice of non-payment. *Sisson v. Tomlinson*, 1 Selw. N. P. 346.

It is no excuse for not giving notice to the indorsee of a bill that the acceptor had no effects. *Wilkes v. Jacks*, Peake, 202.

Nor that there was an understanding between the drawee and drawer, that the latter should provide for the bill. *Staples v. Okines*, 1 Esp. 332; *S. P.*, *Nicholson v. Gouthit*, 2 H. Bl. 609.

**When Drawer has reasonable Expectation that Bill will be Honoured.**—If the drawer has no effects in the hands of the drawee, and no reasonable grounds to expect that the bill will be honoured, he is not entitled to notice. *Legge v. Thorpe*, 12 East, 171; 2 Camp. 310; *S. P.*, *France v. Lucy*, R. & M. 341.

But it is otherwise if the drawer has reasonable expectation of having assets in the hands of the drawee, as by having shipped goods on his own account, which were on their way to the drawee, but without the bill of lading or invoice. *Rucker v. Hiller*, 16 East, 43; 3 Camp. 217; *S. P.*, *Robbins v. Gibson*, 3 Camp. 334; 1 M. & S. 188.

A drawer, who has no effects in the hands of the drawee, except that he has supplied him with goods upon credit, which credit does not expire until long after the bill would become due, is not discharged by want of notice of the dishonour. *Claridge v. Dalton*, 4 M. & S. 226.

Nor is the indorser of a note, when there are no effects in the maker's hands. *Corney v. Mendez da Costa*, 1 Esp. 302.

Where the drawer had no effects in the hands of the acceptor, from the time of drawing until the bill became due; but, previously to the delivery of the bill, had given some acceptances of his, upon which the acceptor had raised money, part of which acceptances had been returned dishonoured, and others were outstanding:—Held, that the drawer was entitled to notice of its dishonour by the acceptor. *Spooner v. Gardiner*, R. & M. 84.

**Where Drawer has some Effects in Hands of Drawee.**—And if the drawer has any effects in the hands of the drawee, at any time between the drawing the bill and its becoming due, he is entitled to notice. *Hammond v. Dufrene*, 3 Camp. 145.

If the drawer, at the time of presentment, has effects, but is indebted to the drawee to a larger amount, and they, without his privity, have appropriated the effects in their hands to the satisfaction of the debt, he is entitled to notice. *Blackham v. Doren*, 2 Camp. 503.

**Where Drawer has suffered no Injury.**—To a statement of defence, in action against an indorser of a bill, setting up the absence of notice of dishonour, the plaintiff replied that neither at the time when the bill was drawn, nor afterwards, nor when it became due and on present-





**On Bankruptcy of Acceptor.]**—Bankruptcy of the acceptor does not dispense with notice to the drawer. *Boulthée v. Stubbs*, 18 Ves. 21.

**—Of Drawer.]**—The holder of a bill, falling due and being dishonoured after the bankruptcy of the drawer, is bound to use due diligence in giving notice to the bankrupt or his assignees of the dishonour. *Johnson, Ex parte*, 3 Deac. & Chit. 438; 1 Mont. & Ayr. 622.

Where indorsers had full knowledge of the bankruptcy of the drawer, and of the insolvency of the acceptor, before and at the time when the bill became due; and, within a day after notice might (but for a mistake of the holders) in due course have reached them from the holders, communicated such their knowledge to the bankers in Liverpool, with whom they had before discounted the bill, and who had transmitted it to the holders in London:—Held, that it did not dispense with such holders giving notice of the dishonour in due time to the indorsers. *Esdale v. Sowerby*, 11 East, 114.

A drawer of a bill became bankrupt, and absconded before it was due, but his house remained open, in the possession of the messenger under a commission issued against him, for some time after the bill became due, and before that time the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer, or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer:—Held, that the drawer was discharged. *Rhode, Ex parte*, 1 Mont. & Mac. 431; *S. C.*, *Rhode v. Proctor*, 6 D. & R. 510; 4 B. & C. 517.

Notice of a dishonoured bill to a bankrupt, as drawer, before the choice of assignees, is good. *Moline, Ex parte*, 19 Ves. 216.

A., the agent in America of B. in England, drew a bill upon him, and indorsed it to C., also residing in America, who indorsed it over. Before the bill became due, A., having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned, C. undertaking to restore the same whenever it should appear that he was exonerated from the bill: acceptance and payment of the bill were refused, but no notice was given to A.:—Held, that A. was discharged. *Clegg v. Cotton*, 3 B. & P. 239.

**To Guarantor.]**—A party who guarantees the payment of a bill or note, if not paid at maturity by the acceptor or maker, is not entitled to notice of dishonour. *Walton v. Mascall*, 13 M. & W. 72; 2 D. & L. 470; *S. P.*, *Hitchcock v. Humfrey*, 5 M. & G. 559; 6 Scott, N. R. 540.

Upon a guarantee of the price of goods, to be paid for by a bill, due notice of the non-payment of the bill must be given both to the drawer and person who guarantees, unless both drawer and acceptor are bankrupts when the bill becomes due. *Philips v. Astling*, 2 Taunt. 206.

W., a broker, sold twenty bags of wool for H. to C., to be paid for by a bill accepted by the latter; and offered to his employer, for an allowance of one per cent., to guarantee half the amount: H. confirmed the sale, and informed

him, W., that if he could not procure from C. acceptances of approved houses, they would take his guarantee on the terms proposed: the wool was delivered without the intervention of the broker, and the acceptance of the vendees taken for the amount, payable at a banker's; before the bill was at maturity, the vendees became insolvent, and the vendors resorted to the broker upon his guarantee:—Held, that the latter was liable on such guarantee, though the bill had not been presented for payment, and though there was no proof that it would not have been paid if presented, and supposing it to have been presented and dishonoured, he would not have been entitled to notice of non-payment. *Holborrow v. Wilkins*, 2 D. & R. 59; 1 B. & C. 10.

**Bill or Note specially Payable.]**—In an action against the drawer of a bill, payable at a particular place, it is no defence that no notice of the dishonour has been given to the acceptor. *Edwards v. Dick*, 4 B. & A. 212.

The acceptor of a bill, having made it payable at Messrs. C. & Co.'s, and not having sufficient effects in their hands to pay the bill when it became due, is not entitled to notice of its dishonour, and it is doubtful, whether, in the case of such an acceptance, any notice whatever is necessary. *Smith v. Thatcher*, 4 B. & A. 200.

And afterwards held, that in an action against the acceptor, on a bill payable at a banker's, it is not necessary to prove notice of non-payment to him. *Treacher v. Hinton*, 4 B. & A. 413.

So, upon a note payable at a banking-house, it is not necessary to prove that the banker had notice of its dishonour. *Pearse v. Pemberthy*, 3 Camp. 261.

**Ignorance of Place of Residence.]**—Ignorance of the place of residence of the drawer is a sufficient answer to an objection arising out of the want of notice of dishonour provided due diligence is used to discover his place of residence. *Browning v. Kinnear*, Gow, 81. And see *Williams v. Germaine*, 7 B. & C. 469; 1 M. & R. 394.

Whether the holder has used due diligence to find out the place of residence is a question of fact to be left to the jury. *Bateman v. Joseph*, 12 East, 433; 2 Camp. 468.

It is not enough to shew that the holder, being ignorant of the drawer's residence, made inquiries upon the subject at the place where the bill was payable. *Beveridge v. Burgis*, 3 Camp. 262.

But where the ignorance of residence arises from the drawer having, a few days before the bill was due, stated to the holder that he had no regular place of abode, and that he would call and see if the bill was paid by the acceptor, he is not entitled to notice. *Phipson v. Kneller*, 4 Camp. 285; 1 Stark. 116.

If notice of dishonour sent to the drawer arrives too late through misdirection, it is for the jury to say whether the holder used due diligence to find the drawer's address. *Siggers v. Brown*, 1 M. & Rob. 520.

An indorsee not knowing the indorser's address, employed his attorney to discover it and give notice of dishonour. The attorney discovered the address one day, consulted his client the second, and gave notice the third:—Held, a valid notice. *Firth v. Thrush*, 2 M. & R. 359; 8 B. & C. 387.

An indorsee, ignorant of the drawer's address, and so unable to give him notice of dishonour, is

bound to make inquiry for the address promptly on the bill being dishonoured, if he means to hold the drawer liable. *Chapcott v. Carlewis*, 2 M. & Rob. 484.

At the trial of an action by indorsee against drawer, he traversed the notice of dishonour; the bill was not produced, but it appeared that it was drawn on the 16th of May, payable at three months; that on the 22nd August it came to the plaintiff's hands in due course, from London, and not knowing the drawer's address he wrote for it to another indorsee, and on the day he received an answer sent a notice of dishonour to the drawer:—Held, sufficient evidence to warrant the jury in finding for the plaintiff. *Dixon v. Johnson*, 1 Jur., N. S. 70.

When notice of dishonour reaches the drawer of a bill too late, having first, by mistake, been sent to a wrong person, and such mistake arose from the indistinctness of the drawer's writing on the bill, he is not discharged. *Hewitt v. Thompson*, 1 M. & Rob. 541.

**Absence from Residence.**—The holder of an overdue bill went during business hours to the counting-house of the drawer, for the purpose of giving notice of dishonour, and, finding the counting-house shut, he knocked at the door, and no one answering he came away without leaving any notice:—Held, that these facts did not support an allegation of due notice, but were equivalent to a dispensation with notice, and ought to have been so pleaded. *Allen v. Edmundson*, 2 Ex. 719; 2 C. & K. 547; 17 L. J., Ex. 291.

**Knowledge that Bill will be Dishonoured.**—Knowledge of the probability, however strong, that a bill will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. *Cawnt v. Thompson*, 7 C. B. 400; 6 D. & L. 621; 18 L. J., C. P. 125; 13 Jur. 495.

But knowledge that the bill has been dishonoured, where the drawer is himself the party who is to pay the bill (as executor of the acceptor), does amount to notice. *Ib.*

**Notice that Bill has been Destroyed.**—The drawer who before it becomes due receives notice that it was accidentally destroyed, and is called upon to give another in its stead according to 9 & 10 Will. 3, c. 17, s. 3, is nevertheless entitled to notice, though the drawee was insolvent. *Thackray v. Blackett*, 3 Camp. 164.

**Several Bills in the Hands of same Owner.**—If there are several bills in the hands of the same owner, becoming due on different days, the drawer is entitled to notice as to each, though the drawee was only indebted to him to an amount less than any one of the bills. *Ib.*

**Bill drawn by Firm on one Partner.**—Where a bill is drawn by a firm upon one of the partners, who accepts it, notice to the drawers is unnecessary. *Porthouse v. Parker*, 1 Camp. 82. And see *Jacaud v. French*, 12 East, 317.

**Where Instrument is Imperfect.**—A vendee of goods gave in payment an instrument purporting to be a bill, but it was written on a paper which had not affixed to it a sufficient stamp. It was not paid by the acceptor, but the vendor (the indorsee of the bill) did not give any notice of dishonour to the vendee, who was the indorser:—Held, that the instrument being of no value for want of a sufficient stamp, notice of dishonour

was unnecessary. *Cundy v. Marriott*, 1 B. & Ad. 696. See *Pimley v. Westley*, 2 Bing. N. C. 249; 2 Scott, 423; 1 Hodges, 324.

**Drawers and Acceptors having same Bankers.**—Persons who were bankers both for drawers and acceptor, and had received the bill from the drawers, and given credit for it in an account current between them, before the bill became due received directions from the acceptor to stop the payment of it at the place of payment, and did so accordingly:—Held, that they were not bound to give notice of this circumstance to the drawers, but upon non-payment of the bill might look to the drawers, notwithstanding they had not given such notice; and that they were not bound to apply the money of the acceptor in their hands in discharge of the bill; but if the drawers had become bankrupt, it would have constituted an item in the account between them and the bankers. *Crosse v. Smith*, 1 M. & S. 545.

## 2. BY AND TO WHOM.

**By Agent.**—The holder may take advantage of a notice of dishonour given by any party who is himself liable to be sued on the bill, and would on paying it be entitled to reimbursement; provided such notice is given in sufficient time to maintain the action if that party was suing on the bill. *Harrison v. Ruscoe*, 15 M. & W. 231; 15 L. J., Ex. 110; 10 Jur. 142.

A notice of dishonour given by an agent need not state on whose behalf it is given; and if the agent through mistake states it to be given on behalf of a wrong party, this will not avoid the notice, but only place the party giving it in the same situation with respect to him to whom it was given as if the representation relative to the person giving the notice was true. *Ib.*

A bill was placed in the hands of an agent for the purpose of receiving payment:—Held, that he was sufficiently authorized to give notice of dishonour on behalf of the holder. *Rouse v. Tipper*, 13 C. B. 249; 22 L. J., C. P. 135; 17 Jur. 440.

**To Agent.**—Semble, that if a man makes another his agent for the purpose of indorsing the bill, he also makes him his agent for the purpose of receiving notice of dishonour, and that a notice given to him will be good. *Firth v. Thrush*, 2 M. & R. 359; 8 B. & C. 387.

A foreign bill, which had been protested against the acceptor, was taken by the notary's clerk, with the notary's ticket attached to it, shewing a charge for acting and protesting, to the drawer's place of business, and there presented to the drawer's clerk for payment. The drawer's clerk took it into his hand, said the drawer was out and had left no orders; thereupon the notary's clerk left the usual notice that the bill lay at his office for payment. In an action on the bill against the drawer:—Held, that sufficient notice of dishonour had been given to the drawer. *Viale v. Michael*, 30 L. T. 453.

**To Indorsers.**—Indorsers of a bill are entitled to have actual notice of dishonour by drawer and acceptor. *Leeds Banking Company, In re, Prange, Ex parte*, 1 L. R., Eq. 1; 35 L. J., Ch. 33; 11 Jur., N. S. 920; 13 L. T. 314; 14 W. R. 43.

One who without consideration, but without fraud, indorses a bill in which both the holder and acceptor are fictitious persons, is entitled to

notice of dishonour. *Leach v. Hewitt*, 4 Taunt. 731.

**To Indorsees.]**—The holder of a bill may, in an action against the drawer, avail himself of a notice of dishonour, given in due time by any party to the bill, who at the time of giving such notice was under liability to him. *Lysaght v. Bryant*, 9 C. B. 46; 19 L. J., C. P. 160; 2 C. & K. 1016; *S. P., Chapman v. Keane*, 3 A. & E. 193; 4 N. & M. 607.

A bill was indorsed to a branch of the National Provincial Bank of England, at Portmadoc, who sent it to the Pwllheli branch of the same bank, who indorsed it to the head establishment in London:—Held, that each of the branch banks was to be considered independent indorsees, and each entitled to notice of dishonour. *Clode v. Bayley*, 12 M. & W. 51; 13 L. J., Ex. 17; 7 Jur. 1092.

**To Drawer who has become Bankrupt.]**—It is sufficient for the holder of a dishonoured bill to give notice of dishonour to the drawer himself, even though before the dishonour he has been adjudicated a bankrupt, and a trustee of his property has been appointed. *Baker, Ex parte, Bellman, In re*, 4 Ch. D. 795; 46 L. J., Bk. 60; 36 L. T. 339; 25 W. R. 454—C. A.

**To Partner.]**—Where a drawer is one of the partners of a firm by which it is accepted, the notice which any one of the partners of the firm receives of its dishonour, is notice sufficient to bind the partner who is the drawer. *Hills v. Thorowgood*, 2 H. & W. 102; *S. P., Porthouse v. Parker*, 1 Camp. 82.

**To Person not a Party to Bill.]**—A person who is a stranger to the transaction by not being a party to a bill or note, is not entitled to notice of dishonour. *Swinyard v. Bowles*, 5 M. & S. 62; *S. P., Warrington v. Furber*, 8 East, 242; 6 Esp. 89.

A., residing at New York, having ordered goods of B., residing at Birmingham, sent to B., on account of the goods, a bill drawn by C., in New York, upon D., in London, payable to the order of B., but not indorsed by A. B., through his bankers, presented the bill for acceptance to D., who refused to accept, but no notice of the non-acceptance was given until the day of payment, when the bill was presented for payment, and dishonoured. C., the drawer, became bankrupt before the bill reached B.'s hands, and never had any funds in the hands of D., the drawee, to meet the bill. In an action by B. against his bankers for neglecting to give notice of the non-acceptance:—Held, that A., not having indorsed the bill, was not entitled to notice of dishonour, and remained liable to B. for the amount of the goods; that C., the drawer, never having had any funds in the hands of D., the drawee, was likewise not entitled to notice; and therefore, that B. could not recover the full amount of the bill, but only such damages as he had sustained by being delayed in pursuit of his remedy against the drawer. *Van Wart v. Woolley*, 5 D. & R. 374; 3 B. & C. 439; R. & M. 4.

**To Surety.]**—One who has indorsed a bill as surety is entitled to notice of its dishonour although given for the purpose of raising funds for a company in which he (as well as the holder

of it) is a shareholder. *Maltass v. Siddle*, 6 C. B., N. S. 494; 28 L. J., C. P. 257; 5 Jur., N. S. 1169; 33 L. T., O. S. 124; 7 W. R. 449.

### 3. SUFFICIENCY OF NOTICE.

**Generally.]**—A notice of dishonour should at least inform the party, either by express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount. *Solarte v. Palmer*, 5 M. & P. 475; 7 Bing. 530; 1 Tyr. 371; 1 C. & J. 417—Ex. Ch.; *S. C.*, 1 Bing. N. C. 194; 1 Scott, 1, in H. L.

Therefore, where the attorney of the holder of a bill, the day after it had been dishonoured, sent a letter to the indorser, stating that a bill for 683*l.*, drawn by J. K. upon D., J. & Co., bearing the indorsement of the person to whom the letter was addressed, had been put into the hands of the attorney by the holder, with directions to take legal measures for the recovery thereof, unless immediately paid to the attorney:—Held, not to be a sufficient notice of the dishonour, to enable the holder to recover against the indorser in an action upon the bill. *Ib.*

A notice of dishonour should shew directly, or by necessary implication, first, that the bill has been presented; secondly, that it has not been paid; and thirdly, that the party to whom the notice is given is looked to for payment. *East v. Smith*, 2 B. C. Rep. 23; 4 D. & L. 744; 16 L. J. Q. B. 292; 11 Jur. 412.

After the bill has in fact been dishonoured, a notice of dishonour given by a party to the bill in terms unequivocally asserting the dishonour, is valid, although the party giving the notice had no certain knowledge of the fact of dishonour. *Jennings v. Roberts*, 4 El. & Bl. 615; 24 L. J., C. P. 102; 1 Jur., N. S. 401.

Holders of a bill, having presented it for payment to the acceptor without effect, gave notice of the dishonour to the drawers, who lived at a distance, but informed them at the same time, that, having reason to believe that a friend of the acceptor's would take it up in a few days, they would, in order to save expense, hold the bill till the latter end of the week, unless they heard from the drawers to the contrary:—Held, that such notice gave the holders a remedy upon the bill against the drawers, though no further notice of non-payment was given to them at the end of the week. *Forster v. Jurdison*, 16 East, 105.

**Form of.]**—The holder of a bill, on the day after it became due, called at the office of J., the drawer, and on being told that he was engaged, wrote on a scrap of paper, and sent in to him the following notice: "B.'s acceptance to J., 500*l.*, due 12th January, is unpaid; payment to Roberts & Co. is requested before four o'clock:—Held, that the notice was sufficient. *Paul v. Joel*, 4 H. & N. 355; 28 L. J., Ex. 143; 5 Jur., N. S. 603; 32 L. T., O. S. 336; 7 W. R. 287—Ex. Ch.

In an action by an indorsee against an indorser of a note, the following letter from the plaintiff to the defendant is an insufficient notice:—"This is to inform you that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense, and the money I must pay immediately. My son will be in London on Friday morning." *Messenger v. Southey*, 1 M. & G. 76; 8 D. P. C. 594; 1 Scott, N. R. 180.

A notice of dishonour of a note in the following words:—"Sir, I am desired by Mr. H. to give you notice that a promissory note, dated August the 10th, 1835, made by S. T. for 99l. 18s., payable to your order two months after date, became due yesterday, and has been returned unpaid; and I have to request that you will please remit the amount thereof, with 1s. 6d. noting, free of postage, by return of post," is sufficient. *Hedger v. Stevenson*, 2 M. & W. 799; M. & H. 176; 1 Jur. 989.

The following is a sufficient notice to the drawer:—"Your bill drawn on T. T., and accepted by him, is this day returned with charges, to which we request your immediate attention." *Grugon v. Smith*, 2 N. & P. 303; 6 A. & E. 499; W., W. & D. 516.

"The note for 200l., drawn by H. H., dated the 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore request you will let me have the amount forthwith," is not sufficient notice. *Boulton v. Welch*, 3 Bing. N. C. 688; 4 Scott, 425; 3 Hodges, 77; 1 Jur. 263.

Noticé by holder to indorser of the dishonour of a bill by acceptor in these terms:—"Messrs. H. are surprised to hear that Messrs. G.'s bill was returned to the holder unpaid," followed by a visit from the indorser to the holder on the same day, in which he expressed his regret, and promised that he would write to the other parties, by whom, or by himself, the bill should be paid, is sufficient to render him liable. *Houlditch v. Cauty*, 4 Bing. N. C. 411; 6 Scott, 209; 1 Arn. 162.

Notices of dishonour in the following words:—"This is to give you notice, that a bill drawn by you, and accepted by Josiah Bateman, for 47l. 18s. 9d., due July 19th, 1835, is unpaid, and lies due at Mr. Furze's, 65, Fleet Street." "A bill for 29l. 17s. 3d., drawn by Ward on Hunt, due yesterday, is unpaid; and I am sorry to say, the person at whose house it is made payable don't speak very favourably of the acceptor's punctuality. I should like to see you upon it to-day." "William Howard's acceptance for 21l. 4s. 4d., due on Saturday, is unpaid; he has promised to pay it in a week or ten days. I shall be glad to see you upon it as early as possible;" are insufficient. *Furze v. Sharwood*, 2 G. & D. 116; 2 Q. B. 388; 6 Jur. 554.

But a notice as follows:—"I hereby give you notice, that a bill of exchange for 50l. at three months after date, by A. upon and accepted by B., and indorsed by you, lies at &c., dishonoured," is sufficient, without any further intimation that the plaintiff looked to the defendant for payment. *King v. Bickley*, 2 Q. B. 419; 6 Jur. 582.

No notice as follows:—"Your draft upon C. for 50l., due 3rd March, is returned to us unpaid, and if not taken up this day, proceedings will be taken against you for the recovery thereof," is sufficient. *Robson v. Curlewis*, 2 Q. B. 421; 3 G. & D. 69; Car. & M. 378.

The following letter from indorsee to indorser is a good notice:—"We beg to inform you that your indorsement of J. O.'s acceptance of 40l., due the 17th June, 1842, remains due, with interest and expenses, as also other bills, and to which we request your immediate attention. B. & Co." *Bailey v. Porter*, 14 M. & W. 44; 14 L. J., Ex. 244.

So, "We beg to acquaint you with the non-

payment of W. M.'s acceptance to J. W.'s draft of 29th December last, at four months, 50l., amounting with expenses to 50l. 5s. 1d., which remit us in course of post without fail, or pay to Messrs. E." *Everard v. Watson*, 1 El. & Bl. 801; 22 L. J., Q. B. 222; 17 Jur. 762.

It is sufficient notice of dishonour to the indorser of a note if a person acting for the holder informs him that the note has been presented and dishonoured, though he does not add that the indorser will be looked to for payment, and though at the time of such notice he inquires of the indorser where the maker resides. *Chard v. For*, 14 Q. B. 200; 13 Jur. 960.

A notice of dishonour given by the holder of a bill need not inform the party addressed that the holder looks to him for payment. *Furze v. Sharwood*, 2 G. & D. 116; 2 Q. B. 388; 6 Jur. 554; *S. P.*, *Miers v. Brown*, 11 M. & W. 372; 12 L. J., Ex. 290.

But it must inform him that the bill has been presented to the acceptor. *Id.*

**Mere Demand of Money.**—It is not sufficient for the letter merely to demand the money of the drawer, and leave him to infer from that circumstance that the bill has been dishonoured. *Hartley v. Case*, 6 D. & R. 505; 4 B. & C. 339; 1 C. & P. 555.

**Presentment of Bill not Mentioned.**—A notice that a bill "has been dishonoured" is sufficient, although it does not state that the bill has been presented. *Stocken v. Collins*, 9 C. & P. 653.

The words "returned," "dishonoured," and "come back with notarial charges," imply that a bill has been presented and refused payment. *Strange v. Price*, 2 P. & D. 278; 10 A. & E. 125; 3 Jur. 361.

**Unsigned.**—The following notice was sent to a drawer:—"5th January, 1847. I am the holder of a bill drawn by you on L. Mendelssohn for 98l. 15s., which became due yesterday, and is unpaid; and I have to state, that, unless the same is paid to me immediately, I shall take proceedings against you without delay for the amount." At the foot was added, "noting, 5s." There was no signature to the notice, but the person who delivered it informed the drawer from whom it came:—"Held, that this notice conveyed sufficient intimation to the drawer that the bill had been presented and dishonoured, and that the holder looked to him for payment." *Armstrong v. Christiani*, 5 C. B. 687; 17 L. J., C. P. 181.

A bank being indorsee of a bill, a notice of dishonour, headed with the name of the bank, is sufficient, though it has no signature at the foot. *Mazwell v. Brain*, 10 Jur., N. S. 777; 10 L. T. 301; 12 W. R. 688.

**Not Shewing on whose Behalf.**—A bill, indorsed in blank, was left by the indorsee at the office of R., an attorney, to be presented by him. On being presented by R. it was dishonoured. R. wrote to the drawer on the following day, describing the bill, and stating that it was dishonoured, and subscribed his name and residence to the letter:—"Held, a sufficient notice of dishonour, though he did not state on whose behalf he applied, or where the bill was lying." *Woodthorpe v. Lawes*, 2 M. & W. 109; 2 Gale, 193.

that the bill has not been paid. It is sufficient if the fact is stated in such terms that men of business may reasonably infer that it has not been paid. *Bain v. Gregory*, 14 L. T. 601; 14 W. R. 845.

**Foreign Bill—Protest not Mentioned.]**—Though a foreign bill must be presented by a notary public and protested, to render the drawer liable, notice to the drawer that the bill has been "duly presented for payment and dishonoured," is sufficient without specific notice of protest. *Lowenthal, Ex parte, Lowenthal, In re*, 9 L. R. Ch. 591; 43 L. J., Bk. 83; 30 L. T. 668.

**Bill dishonoured Abroad.]**—When an English bill is dishonoured abroad, it is not always necessary to give the notice of dishonour required by the law of England; the notice of dishonour is such notice as can be reasonably required. *Hirachfield v. Smith*, 1 L. R., C. P. 340; 35 L. J., C. P. 177; 12 Jur. N. S. 523; 14 L. T. 886; 14 W. R. 435; 1 H. & R. 284.

A bill was drawn in England payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and was indorsed by the drawer in blank and delivered to the defendant in England, and by him indorsed in blank and delivered to the plaintiff in England, who indorsed and delivered it to B. in France, where it was duly presented and dishonoured:—Held, that, in an action on the bill in England, against an indorser indorsing in England, notice of dishonour good according to the law of France was due notice of dishonour according to the law of England. *Id.*

**Misdescription of Instrument.]**—A notice of dishonour is not vitiated by a misdescription of the bill which could not mislead the party receiving the notice in respect of the bill intended. *Bromage v. Vaughan*, 9 Q. B. 608; 16 L. J., Q. B. 10; 10 Jur. 982.

Therefore, a notice to the drawer describing the bill correctly as to date, amount and parties, but stating it to be payable at the London and Westminster Bank, whereas it was made payable at the London Joint Stock Bank, and there was no evidence that the drawer had been in fact misled thereby, is sufficient. *Id.*

In an action by first indorsee against drawer, in order to prove notice of dishonour, a letter from the plaintiff to the defendant stating the fact, but erroneously describing the defendant as acceptor and the acceptor as drawer, is a sufficient notice. *Mellersh v. Rippen*, 7 Ex. 578; 21 L. J., Ex. 222; 16 Jur. 366.

A bill having been dishonoured, a person from the holder went in due time to the residence of the drawer, and there left his own card and address, indorsed "Bill for 30*l.*, drawn by S. on W., dishonoured, lies due as on the other side." The bill was not lying there, but at the residence of the holder, who had other bill transactions with the drawer:—Held, a sufficient notice. *Howlands v. Springett*, 14 M. & W. 7; 14 L. J., Ex. 227; 9 Jur. 358.

A bill having been drawn upon A. was accepted by him, and was afterwards indorsed by the drawer to the plaintiffs, who indorsed it to the Birmingham and Midland Counties Bank.

the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer:—"Dear Sir,—To my surprise I have received an intimation from the Birmingham and Midland Counties Bank, that your draft on A. is dishonoured, and I have requested them to proceed on the same:—"Held, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to shew its uncertainty. *Shelton v. Brattkucite*, 7 M. & W. 436; 5 Jur. 28.

To prove notice of dishonour of a bill for 53*l.*, dated 19th of Dec., 1842, evidence was given that a letter was sent to the defendant asking payment of 53*l.* 6*s.* 6*d.*, "due on your dishonoured note dated 19th of Dec. last."—Held, sufficient, although the instrument dishonoured was a bill, and not a note, and was for 53*l.*, and not for 53*l.* 6*s.* 6*d.*, unless it appeared that there was some other instrument to which the notice could apply; and the proof of the existence of such other instrument lay on the defendant. *Stokman v. Parr*, 1 C. & K. 41; 11 M. & W. 809; 12 L. J., Ex. 415; 7 Jur. 886.

When in a notice the name of the acceptor was wrongly stated, but the notice was correct in other respects:—Held, that it was a question for the jury whether the defendant was thereby deceived, and that being found in the negative, that the verdict should be entered for the plaintiff. *Harpman v. Child*, 1 F. & F. 652.

#### 4. WHERE GIVEN.

**Bill indorsed Abroad—Notice given at Indorser's Residence in England.]**—Where a bill is indorsed abroad, yet if the usual residence of the indorser is in England, and his absence only temporary, notice of the non-payment of the bill given at his usual place of residence is sufficient. *Cromwell v. Hyson*, 2 Esp. 511.

**By Letter addressed "London" when Bill similarly Dated.]**—Where a party drew a bill, dating it generally "London," on a party also resident in London, whose address was stated in the bill:—Held, that proof that a letter, containing notice of dishonour, was put into the post-office, addressed to the drawer at "London," was evidence to go to the jury that he had due notice of dishonour. *Clarke v. Sharpe*, 3 M. & W. 166; 1 H. & H. 35.

A bill was drawn dated "London," but not otherwise giving the address of the drawer. It was directed to and accepted by "Captain Barron, 27, Savile Row." In an action by an indorsee against the drawer on an issue denying notice of dishonour, the plaintiff proved that he put a letter into the post addressed to the drawer "London." The drawer gave evidence that he had not received the letter, that he was a clerk in the Admiralty and lived at Chelsea, and that this might have been ascertained by inquiry of the acceptor, who was his brother. No such inquiry had ever been made.—Held, that the fact that the holder had sent a letter to the defendant addressed as he had dated the bill was evidence on which a jury would be warranted in finding that due diligence had been used to give notice of dishonour, though no inquiry had been made of the acceptor. *Burmeister v. Barron*, 17 Q. B. 828; 21 L. J., Q. B. 135; 16 Jur. 314.

**To Counting-house.]**—Sending a verbal notice of dishonour to a merchant's counting-house is sufficient; and if no person is there in the ordinary hours of business, it is not necessary to leave or send a written one. *Goldsmith v. Bland*, Bayl. Bills, 224.

A notice given at the counting-house of a merchant or manufacturer, between the hours of six and seven in the evening, is not too late. *Bancroft v. Hall*, Holt, 476.

Notice to the drawers by sending to their counting-house, during the hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. *Crosse v. Smith*, 1 M. & S. 545.

**To House where Defendant Lodged.]**—A copy of a letter, containing notice of dishonour of a bill, delivered at the house in which the defendant lodged, is sufficient notice. *Stedman v. Gooch*, 1 Esp. 4.

— **By Letter imperfectly Addressed.]**—A holder of a bill having asked the acceptor on the last of the days of grace if he was going to pay the bill, was told by him that the drawer would pay it, and that he had not a shilling. The holder did not formally present the bill to the acceptor, but sent on the same day, by post, a notice to the drawer that the bill was not paid, which notice was addressed to the drawer at "Edwards-street, Hampstead-road;" he had a lodging at 28, Edwards-street, but the notice never reached him. The bill was dated from "London" only:—Held, that there was no impediment to the action, either for a want of a sufficient presentment for payment or a sufficient notice of dishonour. *Renwick v. Tighe*, 8 W. R. 391.

**At Banking-house where Bill made Payable.]**—Presentation at the banking-house where a bill was made payable "in case of need" by the indorsers, is not notice of dishonour to the indorsers. *Leeds Banking Company, In re, Prange, Ex parte*, 1 L. R. Eq. 1; 35 L. J., Ch. 33; 11 Jur., N. S. 920; 13 L. T. 314; 14 W. R. 43.

**At Place which Defendant has held out as his Place of Business.]**—A bill for the amount of goods supplied to a company by the plaintiff was accepted by the manager for the company, and indorsed by two directors as sureties. The company soon after became embarrassed, and was in the course of being wound up when the bill became due. The bill was dishonoured, and notice of dishonour was sent to the defendant, one of the indorsers, addressed to the office of the company, which did not reach him in due time. The plaintiff made inquiries as to his address, but not at the office of the company. The jury found that he had done all that he reasonably could do for the purpose of finding out the address of the defendant:—Held, that the notice of dishonour was sufficient, as the defendant must be taken to have held out the office of the company as his place of business for that transaction. *Berridge v. Fitzgerald*, 4 L. R., Q. B. 639; 38 L. J., Q. B., 335; 10 B. & S. 668.

## 5. TRANSMISSION BY POST.

### **Inland Bills.—When Postage actually Proved.]**

—Notice of dishonour is sufficiently given by proving that a letter was regularly put into the post, informing the party of the fact. *Kufh v. Weston*, 3 Esp. 54.

And putting a letter in the post-office to the indorser in proper time, informing him that the maker had not paid a note when due, is sufficient evidence of notice to the indorser. *Saunderson v. Judge*, 2 H. Bl. 509.

In an action by indorsee against drawer, it is enough to shew, to the satisfaction of the jury, that the letter containing the notice of dishonour was posted in such time as that, by the due and usual course of the post, it would be delivered on the proper day. *Stocken v. Collin*, 7 M. & W. 515; 9 C. & P. 653.

The post-office mark is not conclusive of the time when a letter is posted. *Id.*

In an action against indorser, issue was joined as to notice of dishonour. A letter containing the notice was put into the post on the day on which the action was commenced, and by the routine of the post-office would reach the defendant between four and five o'clock in the afternoon of that day. No further evidence was given as to the time of notice. The offices of the court were open only till five in the afternoon of the day in question:—Held, that the plaintiff must fail, it lying on him to shew that the right of action was complete before the suit was commenced. *Castrique v. Bernabo*, 6 Q. B. 498; 14 L. J., Q. B. 3; 9 Jur. 130.

A notice of dishonour posted by the holder on the day on which he is bound to give such notice is good, although by the mistake at the post-office it is not delivered to the party entitled to such notice until some time afterwards. *Woodcock v. Houldsworth*, 16 M. & W. 124; 16 L. J., Ex. 49; *S. P.*, *Dobree v. Eastwood*, 3 C. & P. 250.

Where notice of dishonour by the acceptor in London was sent by the post to the holder in Manchester, where the letter was delivered out between eight and nine in the morning, and the post went out for Liverpool, where the drawer lived, between twelve and one, and the holder did not send notice to the drawer by the post either of the same day or the next, but sent it in a letter by a private person on the latter day, who did not deliver it to the drawer till two hours after the post delivery, and only about one hour before the post left Liverpool for London:—Held, that at all events the holder had made the bill his own by his laches, and that he should have written by the post of the next day after notice received by him. *Darbishire v. Parker*, 6 East, 3; 1 Smith, 195.

— **Mistake of Postmaster.]**—Where a postmaster agrees to deliver letters in a particular mode, and by mistake omits to deliver one for two days, which contains a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonour in time, by sending a special messenger for that purpose, though he might be too late to do so by post. *Hordern v. Dalton*, 1 C. & P. 181.

### **—When Postage cannot be directly Proved.]**

—But it is not sufficient *prima facie* evidence of a letter being sent by the post, that it was

written by a merchant in his counting-house, and put upon a table for the purpose of being carried thence to the post-office, and that, by the course of business in the counting-house, all letters deposited on this table were carried to the post-office by a porter. *Hetherington v. Kemp*, 4 Camp. 193. And see *Toovy v. Williams*, M. & M. 123.

But if the porter had been called, and he had said that although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, that might have done; but mere general evidence of the course of business in the counting-house is not sufficient. *Ib.*

The plaintiff's clerk proved that the letter giving notice of the dishonour of a bill was copied by him on the Monday into a book kept for that purpose; and said, that by the course of business at their house, all letters copied into that book were sent to the post-office in the evening of the day on which they were so copied, but that he himself did not carry the letter in question to the post, it being the duty of one of the other clerks to do so:—Held, not sufficient evidence that the letter was sent. *Hawkes v. Salter*, 4 Bing. 715; 1 M. & P. 750.

**Foreign Bills.**—It is sufficient if notice of a bill drawn in England on a person in the East Indies, being dishonoured, is sent to England by the first direct and regular mode of conveyance, whether it is by an English or a foreign ship; the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship, not destined to this country. *Mulman v. D'Eugino*, 2 H. Bl. 565.

#### 6. WITHIN WHAT TIME.

**What is a Reasonable Time.**—What will be deemed a reasonable time for notice of dishonour, must depend upon the circumstances of the case, and is a question of law arising out of the facts. *Tindal v. Brown*, 1 T. R. 167; 2 T. R. 186.

Although it was at one time doubtful whether the question of reasonable notice was not a question of fact to be submitted to the jury under all the circumstances of the case. *Hilton v. Shepherd*, 6 East, 14, n.; *S. P., Hopes v. Alder*, 6 East, 16.

The general rule as to what will be a reasonable notice seems to be, that, with respect to persons living in the same town, the notice must be given by the next day. *Darbishire v. Parker*, 6 East, 3; 1 Smith, 195; *S. P., Smith v. Mullett*, 2 Camp. 208.

And with regard to persons living at different places, that a party, in order to avoid laches, must give notice by the next post—which does not mean the next possible post, but the next post at which it would be reasonably practicable to give notice. *Williams v. Smith*, 2 B. & A. 496.

A bill indorsed in blank, and deposited by the holder with his bankers, became due on Saturday, and was presented for payment about two o'clock on that day; payment being refused, the bill was noted and again presented between nine and ten in the evening by a notary: on Monday the bankers informed the holder that the bill was dishonoured, who on Tuesday about noon gave notice to the indorser; the holder lived at

Knightsbridge, and the indorser in Tottenham-court Road:—Held, that this notice was sufficient to entitle the holder to recover against the indorser. *Hoyes v. Birks*, 3 B. & P. 599.

Notice of non-payment given by an indorsee, living in Holborn, to an indorser living at Islington, by nine on the night of the day following the day on which the indorsee knew it, is reasonable notice. *Jameson v. Swinton*, 2 Taunt. 224; 2 Camp. 373.

The holder of a bill received due notice of dishonour, and wrote a letter the same day to the indorser, stating the fact, but the letter was not received till the following day:—Held, a sufficient notice to the indorser. *Poole v. Dicus*, 1 Scott, 600; 1 Hodges, 162.

Indorsee of a note, the day after it had been dishonoured, wrote to the payee and indorser, who lived in the same city, a letter containing a notice of dishonour, which letter was put into the twopenny post before 8 P.M. on that day, but was not delivered till the day after, of which it bore the postmark 8 A.M.:—Held, that the notice was not in time. *Edmonds v. Cates*, 2 Jur. 183.

Upon a bill being dishonoured, A. paid the same for the honour of one of the indorsees, resident abroad, and communicated with him in due course of post, before giving notice of dishonour to the drawer. In an action by A. against the drawer:—Held, that the notice of dishonour was given in time. *Goodhall v. Polhill*, 1 C. B. 233; 14 L. J., C. P. 146; 9 Jur. 554.

A bill drawn by the defendant was indorsed by him to S. & Co., who carried on business in partnership at Smethwick, four miles from Birmingham, by them to the Birmingham and Midland Counties Bank, and by them to W. It became due on the 17th August, and was dishonoured. On the 18th, W. returned it to the bank at Birmingham, who received it on the 19th. S. had previously given directions at the bank that all communications for his firm should be made to him at Tremadoc, in Carnarvonshire (in which neighbourhood he was engaged in mining concerns). The bank accordingly, on the 20th August, sent notice of dishonour by post to S. at Tremadoc, which he received there on the 21st, and by the post of the 22nd he sent notice to the defendant:—Held, that the notice to S. & Co., and therefore that to the defendant, was duly given. *Shelton v. Braithwaite*, 8 M. & W. 252.

The holder, in order to charge an earlier party to a bill by notice of dishonour from himself, must send him the notice as promptly as if to his own immediate indorser. *Rowe v. Tipper*, 22 L. J., C. P. 135; 17 Jur. 440; 13 C. B. 249.

A bill indorsed by A. to B., and by B. to C., became due on Saturday, November 15th, and was presented, and dishonoured. C. gave notice of dishonour to B. on Monday, the 17th, and to A. on the following day; B. having given no notice. In an action by C. against A.:—Held, that the notice was too late. *Ib.*

The law that one clear day is to be allowed for each step in communications between parties in dealing with bills, cannot be extended, so as to allow any further time for communications between an agent and his principal in reference to any step. *Leeds Banking Company, In re, Prange, Ex parte*, 1 L. R., Eq. 1; 35 L. J., Ch. 33; 11 Jur., N. S. 920; 13 L. T. 314; 14 W. R. 43.

The holders of a bill, through their agents in



London, presented it at the bank at which it was made payable by the acceptor; and it being dishonoured, they further presented it at the bank at which it had been indorsed payable, "in case of need," by indorsers of the bill; there also it was dishonoured. The agents, on the same day, sent the bill by post to the holders in Liverpool, who, on the day but one following, sent it to the indorsers:—Held, that no sufficient notice of dishonour was given in the first instance, and that the actual notice was a day too late. *Ib.*

A party receiving notice of dishonour need not give notice to the person above him till the next post after the day on which he himself receives the notice, although he might easily give it that day, and there is no post the day following. *Grill v. Jeremy*, M. & M. 61.

A bill due on the 4th was presented for payment that day by the payees' bankers. On the 5th it was returned dishonoured to the payees, who, in the course of the 6th, sent a letter to the drawer by the twopenny post:—Held, that this was sufficient notice. *Scott v. Lifford*, 9 East, 347; 1 Camp. 246.

It is sufficient if the letter conveying the notice is proved to have been put into a receiving-house at such an hour, that, according to the course of the post, it would be delivered on the day in which the party was entitled to notice. *Hilton v. Fairclough*, 2 Camp. 633.

But it is not sufficient where the party received notice on the 20th, and gave notice by letter put into the post on the evening of the 21st, but so late that it was not delivered until the morning of the 22nd. *Smith v. Mullett*, 2 Camp. 208.

A bill was presented for payment at a banking-house in London, where it was made payable on the 25th, when it was dishonoured; but, under a doubt whether the presentment was not made too early on that day, it was again presented shortly before five o'clock on the 26th, and again dishonoured; it was returned to the indorser in London, on that day, and notice sent of the dishonour by the post of the 27th, into the country, where the indorser lived:—Held, that this was due diligence and due notice of the dishonour. *Langdale v. Trimmer*, 15 East, 291.

A bill drawn on and accepted by W. and indorsed to S., and by S. indorsed to the plaintiff, was presented to the acceptor for payment at maturity and dishonoured. All the parties to the bill lived in London. The morning after its dishonour the plaintiff, who did not know where the drawer lived, applied to S. for information on the point. S. was from home, but at half-past five in the afternoon, the plaintiff went to him again, and having obtained the address of the drawer, posted his notice of dishonour the same evening, but not till after six o'clock. The consequence was that it was not received that night, as it would have been in the ordinary course of post if posted before six o'clock. In an action by the plaintiff against the drawer, the jury found that he had exercised a reasonable amount of diligence in giving notice of dishonour:—Held, that although it was not given in sufficient time to reach the drawer on the day after the bill had been dishonoured, it was not, under the circumstances, too late. *Gladwell v. Turner*, 5 L. R., Ex. 59; 39 L. J., Ex. 31; 21 L. T. 674; 18 W. R. 317.

**Sunday intervening.**—B., the plaintiff's agent at Sunderland, having occasion to remit money

to the plaintiff, paid the amount into the defendant's bank at Sunderland, and received a bill indorsed by the defendant, which he, B., indorsed and transmitted to the plaintiff. The bill fell due on Saturday, October 31st, and was dishonoured. On that day the plaintiff wrote to B. a letter, which B. received on the Monday, containing the following:—"I have also to apprise you that the draft for 33l. 14s., due the 1st November [Sunday], has been duly presented this day and returned dishonoured, probably it may be up on Monday; it is drawn on P. & Co.; it will be proper to advise the drawers in case the acceptors do not remit." On the Wednesday following B. gave notice to the defendant of the dishonour:—Held, too late. *Miers v. Brown*, 11 M. & W. 372; 12 L. J., Ex. 290.

Where a bill was dishonoured on Saturday, in a place where the post went out at half-past nine in the morning:—Held, that it was sufficient notice to send a letter by the following Tuesday morning's post. *Hawkes v. Salter*, 4 Bing. 715; 1 M. & P. 760.

A bill was presented and dishonoured on the 3rd; on the 4th a letter was written to the plaintiff, informing him of it, which he received on the 6th, being Sunday, and on the Tuesday evening sent notice by the post to the defendant:—Held, that the plaintiff was not bound to open the letter till the Monday morning, and that therefore he had given the defendant notice by the next day's post. *Wright v. Shawcross*, 2 B. & A. 501, n.

**In the Case of Country Banker.**—A country banker has an entire day, after receiving notice of the dishonour of a bill payable in London, to transmit the same to his customer, so that notice by the next day's post, though it is not the next post, will be time enough; therefore, where a bill was dishonoured on the 14th, and notice sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th (being Sunday), and they on the next day sent notice by the post to the indorsee, but not before twelve at noon, at which time the post set out for the place where the indorsee resided:—Held, that this notice was within time. *Bray v. Hadwen*, 5 M. & S. 68.

**Where there are numerous Indorsers.**—Where a bill passed through the hands of five persons, all of whom lived in London or the neighbourhood, and the bill when due being dishonoured, the holder gave notice on the same day to the fifth indorser, and he on the next day to the fourth, and so in succession to the first; the court was of opinion that due diligence had been used. *Hilton v. Shepherd*, 6 East, 14, n.

If there are several indorsers, and the last indorsee and holder resorts in the first instance to the first of such indorsers, he is not entitled to as many days as there are indorsers to give notice of dishonour in, but must give it within the same time as he would have been obliged to do it in, if he had resorted at first to his own immediate indorser. *Dobree v. Eastwood*, 3 C. & P. 250.

It is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsees, unless it is shewn that each indorser gave notice within a day after receiving it. *Marsh v. Marcell*, 2 Camp. 210, n.

**What an Excuse for Delay.**—A bill of ex-

change drawn in England and payable in Spain, was indorsed in England by the defendant to the plaintiff, who indorsed it to M., residing in Spain. Acceptance having been refused, a delay of twelve days occurred before M. wrote to inform the plaintiff of the dishonour. On receipt from M. of the notice of dishonour, the plaintiff gave immediate notice to the defendant. No notice of dishonour by non-acceptance is required by the law of Spain:—Held, that the plaintiff was entitled to recover the amount of the bill. *Horne v. Rouquette*, 3 Q. B. D. 514; 39 L. T. 219; 26 W. R. 894—C. A.

— **In Case of Jew neglecting to give Notice on Jewish Festival.**—As the law of merchants respects the religion of different people, a Hebrew indorsee was held not guilty of laches, who neglected to give notice on the regular day, that day being a festival whereon he was forbidden to attend to secular business. *Lindo v. Unsworth*, 2 Camp. 602.

— **Plaintiff not Knowing Parties to Bill.**—The time consumed in making necessary inquiries relative to the parties to a note, is not to be imputed as laches. Thus, where the plaintiff became acquainted with the dishonour on the 5th, and not knowing the parties, notice was not despatched to them till the 16th, the original indorser was still held liable. *Baldwin v. Richardson*, 2 D. & R. 285; 1 B. & C. 245.

#### 7. WAIVER OF.

**Evidence of Acknowledgment of Liability to Pay.**—In an action by indorsee against drawer, a letter of his saying, "You know I meant to call upon you immediately after the 24th, with the money. E. G. (the acceptor) is an old and intimate friend of mine," is sufficient evidence of a waiver of presentment and notice of dishonour. *Mills v. Gibson*, 16 L. J., C. P. 249.

Any acknowledgment by a drawer of his liability to pay, or any promise to pay, the amount, though conditional as to the mode of payment, is evidence to be left to the jury of due notice of dishonour; and, in the case of a foreign bill, of its having been duly protested. *Campbell v. Webster*, 2 C. B. 258; 15 L. J., C. P. 4; 9 Jur. 992.

On the day after a bill became due, the holder's clerk called upon the drawer, and told him that the bill had been duly presented, and that the acceptor "could not pay it;" to which the drawer replied that "he would see the holder about it:"—Held, that it was properly left to the jury to infer from this conversation that the drawer had due notice of the dishonour. *Metcalf v. Richardson*, 11 C. B. 1011.

In an action by a second indorsee against drawer, proof that the first indorsee, who had had notice, had consented to a judge's order for staying proceedings against him on payment of debt and costs, and that the drawer had provided the money to pay the amount under that order, is not such evidence of an admission of liability by him as will dispense with proof of notice of dishonour. *Hobbes v. Staines*, 3 C. & K. 19.

A. drew a bill for 10l. on B., who owed him 20l. The bill was payable on Saturday, the 10th of August. The following Wednesday A. was told by the bankers of C., the holder, that they understood that he, A., had received the money to

take up the bill. He said he should keep the money, as B. still owed him 10l., and that he wished the bankers would sue B. on the bill:—Held, evidence to go to the jury that A. had received due notice of dishonour. *Jackson v. Collins*, 17 L. J., Q. B. 142.

In an action against indorser of a note, payable at twelve months after date, a parol agreement entered into between him and the maker when it was drawn, that it was not to be demanded until estates of the maker had been sold, and that the defendant indorsed such note as a surety only, cannot be received in evidence as a waiver of the notice of its dishonour. *Free v. Hawkins*, 1 Moore, 535.

The drawer, on being applied to for payment, said, "if the acceptor does not pay, I must; but exhaust all your influence with the acceptor first:" the drawer afterwards directed the applicant to raise the money on the lives of himself and the acceptor:—Held, that this admission was not to be taken as conclusive evidence of the drawer having received or waived notice of dishonour. *Hicks v. Beaufort (Duke)*, 4 Bing. N. C. 229; 5 Scott, 598; 1 Arn. 55; 2 Jur. 255.

The day after a bill had been dishonoured at L., and before the fact of the dishonour could be known at Y., the drawer's clerk called at Y. upon the indorser prior to the holder. A conversation took place as to the bill being likely to come back, and the clerk said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to S. on Tuesday, I will pay the money." The indorser did not receive either the bill or notice until some days after the Tuesday, and notice of dishonour was not given to the drawer in due time:—Held, that the promise did not dispense with giving due notice of the dishonour to the drawer. *Pickin v. Graham*, 1 C. & M. 725; 3 Tyr. 923.

The only evidence of a notice of dishonour was a conversation in which the witness said to the drawer, "I think you ought to pay." The drawer said, "I have no other intention, and do not mean to avail myself of the informality of the notice of dishonour:"—Held, to be evidence from which the jury was at liberty to presume due notice of dishonour. *Brownell v. Bonney*, 4 P. & D. 523; 1 Q. B. 39; 5 Jur. 6.

Notice of dishonour by a maker of a note having been omitted to be given to the indorser, if he writes, in answer to an application for payment, pointing out the hopelessness of suing him, as he had nothing but 7s. 6d. a day, and saying, "Had circumstances been different, you may rest assured no application would have been needed," is not evidence of waiver of notice. *Lecann v. Kirkman*, 6 Jur., N. S. 17.

A promise to pay the amount of a dishonoured bill made by the indorser to a person applying to him on behalf of the holder, amounts to, and is evidence of, an admission, on the indorser's part, of notice of dishonour. *Bartholomew v. Hill*, 5 L. T. 756; 10 W. R. 273.

— **Application for Time.**—In an action by indorsee against drawer, a declaration alleged that the bill was duly presented to the acceptor, that it was dishonoured, and that the drawer had notice. He pleaded that the bill was not presented to the acceptor, and that he had no notice of its dishonour. The bill was presented on the day it became due at the house of the acceptor, and the drawer, to whom it was shewn, said that

the acceptor was dead, and that he was his executor, adding a request that it might be allowed to stand over for a few days, and he would see it paid.—Held, that there was sufficient evidence of notice of dishonour to the defendant. *Caunt v. Thompson*, 7 C. B. 400; 6 D. & L. 621; 18 L. J., C. P. 125; 13 Jur. 495.

An application by the drawer on behalf of the acceptor, for time, is evidence from which a jury may infer that he has authorized an arrangement for renewal, dispensing with notice of dishonour, and after dispensation no notice is necessary. *North Staffordshire Loan and Discount Company v. Wythies*, 2 F. & F. 563.

An indorser of an overdue bill, who had not notice of dishonour, on being told that the holders were about to take proceedings against him on the bill, and being asked what he was going to do about it, said that he would pay it if they would give him time; this is evidence of a waiver of notice. *Woods v. Dean*, 3 B. & S. 101; 32 L. J., Q. B. 1; 7 L. T. 561; 11 W. R. 22.

—**To Person not Suing upon Bill.**—If a party who has not had due notice of dishonour thinks fit to acknowledge his liability, though he does so to a party other than the person who sues upon the bill, that acknowledgment is sufficient to enable the latter to maintain an action on the bill. *Raybey v. Gilbert*, 6 H. & N. 536; 30 L. J., Ex. 170; 3 L. T. 752; 9 W. R. 386.

A. indorsed a bill to B., who indorsed the same to C. A. had no notice of dishonour. C. brought an action on the bill against A. and B., who allowed judgment to go by default. B. paid the bill and sued A.:—Held, that A., having acknowledged his liability on the bill by suffering judgment by default in an action by C., could not set up the want of a notice of dishonour as an answer to an action by B. *Id.*

**Where Drawer is Bankrupt.**—Want of notice to a bankrupt drawer of the dishonour of a bill, may be supplied by evidence of his acknowledgment after the act of bankruptcy, that it would not be paid. *Brett v. Levett*, 13 East, 213; 1 Rose, 102.

**Receipt by drawing Money from Acceptor to meet Bill.**—Where the acceptor, a few days before a bill became due, informed the drawer that he should not be able to pay it, and told the drawer he must take it up, and gave him part of the amount to assist him in so doing; and the drawer received the money and promised to take up the bill accordingly:—Held, that in an action by the indorsee against the drawer, the latter might nevertheless set up as a defence that the bill was not duly presented for payment, and that he had not had regular notice of its dishonour. *Baker v. Birch*, 3 Camp. 107; *S. P.*, *Forster v. Jurdison*, 16 East, 105.

**Receipt by Holder of Part Payment and Second Bill.**—Where the holder of a bill, upon its being dishonoured, received part payment, and for the residue another bill, drawn and accepted by persons not parties to the original bill; and afterwards sued the drawer and acceptor upon the original bill:—Held, that it was sufficient for him to prove presentment of the substituted bill to the acceptor for payment, and that

it was dishonoured, without proving that he gave notice of the dishonour to the drawer of the substituted bill. *Bishop v. Rowe*, 3 M. & S. 362.

**Conditional Offer to Pay on Discontinuance of Action.**—A defendant, having been sued by the plaintiff on a bill of exchange, wrote the following letter to him:—"Without prejudice. I never had any notice of dishonour of this bill, but, if the debt will be accepted without costs, I do not want Mr. Holdsworth to be the loser of it, and I would give a cheque." On the receipt of this letter the plaintiff took out a rule to discontinue the action on payment of costs. The costs were accordingly taxed, but before they were paid another action on the bill was brought. At the trial the letter was admitted as evidence of waiver of notice of dishonour, and a verdict was found for the plaintiff. On a motion to set aside the verdict, on the ground that such evidence was improperly received:—Held, that the letter was a conditional offer to pay the bill on the discontinuance of the action and payment of costs, and that, the condition having been accepted and carried out, it became admissible as evidence of such waiver. *Holdsworth v. Dimsdale*, 24 L. T. 360; 19 W. R. 798.

**Bill obtained by Fraud.**—Proof that the drawer knew two days after the maturity of the bill that it was unpaid, and in the hands of a particular indorsee, and objected to pay it on the ground of fraud in the obtaining of it, is evidence to go to a jury that he had received regular notice of dishonour. *Wilkins v. Jadis*, 2 B. & Ad. 188; 1 M. & Rob. 41.

**Mode of Pleading.**—Action on two bills by indorsee against his immediate indorser, averring notice of dishonour: the defendant traversed the notice of dishonour. The plaintiff, in order to support the issue, proved that on the day when the first bill became due, the defendant called upon him and told him that he knew neither of the bills would be paid; that it was no use sending him a twopenny post letter the next day to give him notice, as it was not worth the money, and that he would send the plaintiff money in part payment of the bills on a future day:—Held, that this was not evidence of notice of dishonour, but of a dispensation of it, and that it ought to have been so alleged in the declaration. *Burch v. Legge*, 5 M. & W. 418; 7 D. P. C. 814; 3 Jur. 823.

A count by indorsee against drawer, alleging presentment and dishonour, and due notice thereof to him, is sustained by proof of a subsequent promise by him to pay, notwithstanding it is proved (or admitted) that the due notice of dishonour was not given. And the court will, if necessary, amend the declaration by alleging a waiver of notice. *Killby v. Rochussen*, 18 C. B., N. S. 357.

A promise to pay by a drawer of a bill after its maturity, is evidence either of due notice of dishonour having been given, or of a waiver of notice; and, if necessary, in such case the court will amend the pleadings. *Cordery v. Colvins*, 14 C. B., N. S. 374; 32 L. J., C. P. 210; 9 Jur., N. S. 1200; 8 L. T. 245.

## 8. HOW PROVED.

**By Conversation.**—If a witness verbally tells

the drawer that his bill for 30*l.*, drawn on T., has come back dishonoured, and produces the bill, and points out to the drawer the notary's mark upon it, this is a sufficient notice of dishonour. *Phillips v. Gould*, 8 C. & P. 355.

An indorsee, three months after a bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said that he had not had regular notice, but as the debt was justly due he would pay it:—Held, that the first conversation, being an absolute promise to pay the bill, was, *prima facie*, an admission that the bill had been presented to the acceptor for payment in due time, and had been dishonoured, and that due notice had been given of it to the indorser, and superseded the necessity of other proof to satisfy those averments in the declaration. *Lundie v. Robertson*, 7 East, 231.

A party, sent by the holder of a dishonoured bill, called at the drawer's house the day after it became due, and there saw his wife, and told her that he had brought back the bill that had been dishonoured. She said that she knew nothing about it, but would tell her husband of it when he came home. The party then went away, not leaving any written notice:—Held, sufficient notice of dishonour. *Houego v. Cowne*, 2 M. & W. 348; M. & H. 54.

A defendant, on being asked if he knew of the dishonour of the bill sued upon, replied, "Yes, I have had a very civil letter from Mr. G. (an indorser), and I will call and arrange it;" this is sufficient evidence of due notice of dishonour having been given. *Norris v. Salomonson*, 4 Scott, 257; 3 Hodges, 3; 1 Jur. 55.

In an action by indorsee against drawer, the only evidence of notice of dishonour was a statement made by the drawer in conversation with a witness, in which he said, "I have several good defences to the action; in the first place, the letter (containing notice of dishonour) was not sent to me in time." This statement was left to the jury as evidence of due notice of dishonour:—Held, that the jury was not warranted in presuming that due notice had been given. *Braithwaite v. Coleman*, 4 N. & M. 554; 1 H. & W. 229.

**By Letter.**—A letter written by the drawer to the holder of a bill, six days after the day on which the drawer should have received notice of dishonour, and containing ambiguous expressions respecting the non-payment of the bill, was properly left to the jury as evidence from which they might or might not infer that notice had been given on the proper day. *Booth v. Jacob*, 3 N. & M. 351.

—**Secondary Evidence of.**—The copy of an original letter, giving notice of dishonour, is admissible in evidence, without notice to produce such original letter. *Roberts v. Bradshaw*, 1 Stark. 28.

A duplicate copy of an original letter giving notice of dishonour, is admissible in evidence, without any notice to produce the original letter. *Kine v. Beaumont*, 7 Moore, 112; 3 B. & B. 288.

Secondary evidence may be given of a written notice of the dishonour of a bill, without any notice having been given to produce it. *Swain v. Lewis*, 2 C., M. & R. 261.

Where, in an action by indorsee against drawer, he told a witness he expected to receive

by post a notice of its dishonour, and afterwards gave him a letter he received by post, and requested him to negotiate a renewal of the bill; and the letter, which had found its way to the plaintiff's hands, was not produced at the trial:—Held, that the jury was warranted in finding that no notice of dishonour had been given. *Bell v. Frankis*, 4 M. & G. 446; 5 Scott, N. R. 460.

In an action by indorsee against drawer, proof that he, on the day on which he himself received notice of dishonour from the holder, wrote and sent a letter to the drawer, and proof of notice to produce that letter as containing notice of dishonour, and that the drawer, when applied to by the plaintiff for payment of the bill, objected that it had not been presented to the acceptors in due time, but did not object that he had not had notice of dishonour, are, on default to produce the letter, evidence that it contained a regular notice of dishonour. *Curlewis v. Corfield*, 1 G. & D. 489; 1 Q. B. 814; 6 Jur. 259.

**By Memorandum.**—In an action against indorser, a memorandum in writing, made by his wife, of the receipt of notice of dishonour at the place from which the bill was dated (he himself not having been resident there at the time), is admissible, after the death of the wife, to prove that the husband had due notice of dishonour. *Wharton v. Wright*, 1 C. & K. 585.

**Action by Indorsee—Notice given by Clerk of Indorser.**—In an action by indorsee against drawer, the declaration stated the dishonour of the bill, in the usual form, of which the defendant had notice. Plea, that he had not notice from the plaintiff of the non-payment of the bill. It was proved, that the indorser received notice of the dishonour from the plaintiff, and that the indorser's clerk, and not the plaintiff, gave notice to the defendant:—Held, sufficient. *Newen v. Gill*, 8 C. & P. 367.

#### 9. CONSEQUENCE OF NEGLIGENCE.

**Discharge of Drawer and Indorser.**—Want of due notice of non-acceptance of a bill discharges the drawer and indorser; and if, under ignorance of the circumstances, any indorser should pay, he does not by that act revive the liability of the previous indorser or drawer. *Roscow v. Hardy*, 12 East, 434; 2 Camp. 458.

The indorser of a bill, which had been dishonoured, and which a subsequent indorsee had made his own by laches, paid the bill and immediately gave notice of its dishonour to the defendant, a prior indorser:—Held, that the plaintiff could not recover the amount, although it appeared that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period; for the plaintiff by paying the bill could not place the prior indorsers in a worse situation than they would otherwise have been in. *Turner v. Leech*, 4 B. & A. 451.

If the indorsee of an inland bill, not due, presents it for acceptance, which is refused, and delays giving notice to his indorser, the indorser will be discharged. *Goodal v. Dolley*, 1 T. R. 712.

But where the payee having presented a bill for acceptance, which was refused, indorsed it to the plaintiff for value, without giving notice of

fused acceptance, of which the drawer received due notice.—Held, that the drawer was not discharged from his liability to the indorsee, by the payee's neglect to give notice of the previous dishonour. *O'Keefe v. Dunn*, 1 Marsh. 613; 6 Taunt. 305. And see *Dunn v. O'Keefe* (*in error*), 5 M. & S. 282.

Where a debtor indorsed a bill of which he was the indorsee, over to his creditor by way of collateral security for his debt, and the creditor did not present it at maturity, nor give the debtor notice of its dishonour when presented.—Held, that the creditor could not recover in an action either on his original debt or upon the bill. *Peacock v. Purcell*, 14 C. B., N. S. 728; 32 L. J., C. P. 266; 10 Jur., N. S. 178; 8 L. T. 636; 11 W. R. 834.

A, being in insolvent circumstances, B, undertook to be a security for a debt owing from A. to C. by indorsing a note made by A. payable to B. at the house of D.: the note was accordingly so made and indorsed with the knowledge of all parties; just before it became due, B., being informed that D. had no effects of A. in his hands, desired D. to send the note to him, and said he would pay it, B. having then a fund in his hands for that purpose; it was not presented at D.'s house till three days after it was due.—Held, that C. could not maintain an action against B. on the note, due diligence not having been used in presenting the note, as soon as it was due, to D. for payment, and in giving immediate notice to B. of the non-payment by D.; for B. had a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case. *Nicholson v. Gouthit*, 2 H. Bl. 609.

—**Bankruptcy of Drawer**—The drawer absconded, and was made a bankrupt before the bill was due. His house continued open in the possession of the messenger under the commission after the bill was due. The holder knew of the appointment of the drawer's assignees before the bill was due, before which time the acceptor became bankrupt, and the holder neither gave, nor made any attempt to give, notice of the dishonour, either to the drawer or his assignees.—Held, that he was guilty of laches, and that his claim against the drawer was barred, and consequently, that he had no right to prove the bills under the drawer's commission. *Rhode v. Proctor*, 6 D. & R. 610; 4 B. & C. 517.

and the defendants receiving one-half per cent. for the accommodation. Bills were accepted by the defendants under this arrangement, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due, the defendants' bank stopped, and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying 2½ per cent. commission; they were also obliged to pay to the holders the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expense in telegraphic communication between Liverpool and Alexandria. In an action against the defendants for breach of the contract contained in their letter of credit.—Held, that the plaintiffs were entitled to recover the commission and the notarial and telegraphic expenses. *Percha v. Royal Bank of Liverpool*, 5 L. R., Ex. 92; 39 L. J., Ex. 41; 21 L. T. 830; 18 W. R. 463. And see *General South American Company, In re, infra*.

**Re-Exchange.**—A custom as to allowing a fixed percentage by way of liquidated damages in lieu of exchange, re-exchange, and other charges, when bills are returned from the colonies dishonoured, however valid in law, does not apply in the absence of an agreement, express or implied, to allow re-exchange. *Williams v. Ayers*, 3 App. Cas. 133; 47 L. J., P. C. 1; 37 L. T. 732—P. C.

Where the holders of bills drawn by P. L. & Co. in London on P. L. & Co. in Australia, having no occasion to transfer money from London to Australia, sent them to the latter country, not for the purpose of employing the proceeds there, but of having them remitted to London, the dishonour of such bills does not entitle the holders to recover damages by way of re-exchange. *Ib.*

The right to re-exchange, in the absence of express agreement arises when the holder of a bill who has contracted for the transfer of funds from one country to another has sustained damages by its dishonour through having to obtain funds in the country where the bill was payable. *Ib.*

Re-exchange is the measure of those damages. *Ib.*

The drawer of a bill of exchange in a foreign country accepted in England is entitled, upon

inland bill, unless the party goes for interest and costs. *Boulager v. Talleyrand*, 2 Esp. 550.

After a bill has been protested for non-acceptance, a second protest is gratuitous and unnecessary. *De la Torre v. Barclay*, 1 Stark. 7.

A party to a bill is not liable for money paid to his use by a person who takes up the bill for his honour, unless a formal protest of payment to his honour has been made before payment of the bill, that being the usual custom of merchants. *Vandewall v. Tyrrell*, M. & M. 87. See *Geralopulo v. Wieler*, 10 C. B. 690; 20 L. J., C. P. 105; 15 Jur. 316.

When a person takes up a bill of exchange for the honour of any one whose name is on the bill, he becomes as an indorsee of the bill, and is entitled to all remedies against those whose names are on it. *Mertens v. Winnington*, 1 Esp. 112.

Bill was drawn on C. & Co., at Liverpool, payable to A. in London; the drawee having refused to accept, it was accepted by B. in London, for the honour of the payee, if regularly protested and refused when due:—Held, in an action against the acceptor for honour, that, by the special form of the acceptance, a presentment for payment to the drawee in Liverpool, a refusal by him, and a protest there, were necessary; and therefore that the bill was properly presented for payment there on the day it became due. *Mitchell v. Baring*, 10 B. & C. 4; 4 C. & P. 35; M. & M. 381.

—**Foreign Bills.**—A protest is necessary in the case of the acceptors of a foreign bill for honour. *Hoare v. Cazenove*, 16 East, 391.

In declaring against an indorser of a foreign bill, the omission of the averment of protest is only matter of form, and cannot be taken advantage of upon general demurrer. *Salomons v. Stavelly*, 3 Dougl. 298.

**Sufficiency of.**—Where a bill is paid supra protest for the honour of a party to the bill, it is not necessary that the protest shall have been formally drawn up or extended before the payment, but it is sufficient if the bill has in fact been protested, and a declaration that the payment was for honour made before a notary, and these facts recorded in the notarial registers before the payment was made. *Geralopulo v. Wieler*, 10 C. B. 690; 20 L. J., C. P. 105; 15 Jur. 316.

Seem, if a foreign bill is regularly protested and noted, the protest may be drawn up in form at any time afterwards. *Chaters v. Bell*, 4 Esp. 48. And see Selw. N. P. 379.

**Notice of.**—Notice of protest is not necessary by the English law. *Bonar v. Mitchell*, 5 Ex. 415; 19 L. J., Ex. 302.

In giving notice of non-payment or non-acceptance to the drawer of a foreign bill, resident abroad, it is sufficient to inform him that the bill has been protested, without sending a copy of the protest. *Goodman v. Harvey*, 4 A. & E. 870; 6 N. & M. 372; *S. P.*, *Cromwell v. Hynson*, 2 Esp. 611.

Where a drawer of a foreign bill, at the time of drawing, was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested; but notice of the dishonour only, and not of the protest, was left at the drawer's house:—Held,

sufficient. *Robins v. Gibson*, 1 M. & S. 288; 3 Camp. 334.

In an action by indorsee against payee and indorser of a bill, drawn in England on, and accepted by a French house, both parties being domiciled in England:—Held, that due notice of the dishonour by the acceptor was parcel of the contract; that the bill, being made payable by the acceptor abroad, was a foreign bill, and the *lex loci contractus* must therefore prevail; and that it was sufficient for the indorsee to shew that he had given the indorser such notice of the dishonour and protest as was required by the law of France. *Rothchild v. Currie*, 1 Q. B. 43; 4 P. & D. 737; 5 Jur. 865; *S. P.*, *Hirschfield v. Smith*, 1 L. R., C. P. 340; 35 L. J., C. P. 177; 12 Jur., N. S. 523; 14 L. T. 886; 14 W. R. 455; 1 H. & R. 284.

**Evidence to Prove.**—In an action against the drawer of a foreign bill, a promise of payment by him after the bill was due, is sufficient evidence of a protest for non-payment, and notice of the dishonour of the bill. *Gibbon v. Cuggan*, 2 Camp. 188; *S. P.*, *Hopes v. Alder*, 6 East, 16.

In action against the drawer of a foreign bill, a promise made by him to pay the bill after the drawee refused to accept it, is sufficient evidence to prove the protest and notice of protest, though such promise is subject to a condition which has not been complied with. *Campbell v. Webster*, 2 C. B. 258; 15 L. J., C. P. 4; 9 Jur. 992.

In an action by payee against drawer, the declaration stated that the latter drew it at "St. Helena, to wit at Westminster," and did not aver a protest either for non-acceptance or non-payment: on the production of the bill, it was dated at St. Helena, and not stamped: on an objection that it was inadmissible as an inland bill, for want of such stamp, and that the plaintiff had given no evidence of a protest for non-acceptance or non-payment:—Held, that as there was evidence of a subsequent promise by the defendant to pay the amount of the bill, coupled with a letter written by the attorney, offering terms of payment, it was a waiver of these objections, although such attorney swore that such offer was made without prejudice. *Patterson v. Becher*, 6 Moore, 319.

**Sufficiency of Pleading.**—In an action on a bill by a plaintiff, who had paid it under protest for the honour of one of several indorsers:—Held, sufficient, on special demurrer to a declaration against the drawer, to state that the plaintiff had paid the bill under protest, according to the usage and custom of merchants, without stating that he had paid it to the last indorsee, or that the plaintiff had any title to the bill. *Cox v. Earle*, 3 B. & A. 430.

## XII. LIABILITY OF PARTIES.

### 1. ACCEPTOR OR MAKER.

**Generally—Bills.**—No one can be liable as acceptor but the person to whom the bill is addressed, unless an acceptor for honour. *Polhill v. Walter*, 3 B. & Ad. 114.

If a person other than the drawee writes an acceptance upon the bill in the usual form, he is not liable as an acceptor, but must be sued on his

collateral undertaking. *Jackson v. Hudson*, 2 Camp. 447.

Therefore, where a bill was drawn in the following form: "London, two months after date, pay to my order 157*l.* for value received. F. Jackson. To Mr. J. Irving."—and accepted by Irving, and afterwards specially by Hudson:—Held, that Hudson was not liable as acceptor. *Id.*

The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. *Duncan, Fox & Company v. North and South Wales Bank*, 6 App. Cas. 1; 50 L. J., Ch. 355; 43 L. T. 706; 29 W. R. 763—H. L. (E.).

The acceptor or maker always remains liable, notwithstanding any change in the circumstances of other parties. *Anderson v. Cleveland*, 13 East, 430, n.

The acceptor is liable to the holder, though the latter has given a discharge to a party to the bill which will not discharge one liable prior to himself. *Smith v. Knox*, 3 Esp. 46.

—**Notes.**—The holder of a joint and several note of A. and B. by discharging A. discharges B. also. *Nicholson v. Revill*, 6 N. & M. 192; 4 A. & E. 675; 1 H. & W. 756.

If one of two makers of a joint and several note gives the holder a mortgage to secure the amount, with a covenant to pay it, the other maker is not thereby discharged, for the remedy on the specialty is not co-extensive with the remedy on the note. *Ansell v. Baker*, 15 Q. B. 20.

A firm was holder of a joint and several note made by a father and son. The son assigned all his property to trustees for the benefit of his creditors, who were expressed to be parties, and to be named in a schedule, and the deed purported to contain an absolute release of the debts without any reservation of their rights against sureties. One of the trustees was a partner in the firm, and the deed was executed by him and the other trustees, but not by any other creditor. It was also executed by the son, with the privity and concurrence of the father. Upon its execution as an act of bankruptcy, an adjudication was pronounced against the son:—Held, that even assuming the father to have joined in the note as a surety merely, and the partner to have executed the deed as a creditor, and not merely as a trustee, the father's liability was not discharged. *Harvey, Ex parte*, 4 De G., Mac. & G. 881; 23 L. J., Bk. 26.

**Where Bill has been Paid by Drawer.**—The drawer or indorser of a dishonoured bill becomes entitled, by paying the amount of it to the holder, to an immediate right of action against the acceptor, although the holder continues to retain the bill as security for costs; and the right of such drawer or indorser to sue the acceptor is not affected by the circumstance that the holder, after receiving the amount and before payment of his costs, has charged the acceptor in execution for the amount of the bill and then released him from custody. *Woodward v. Pell*, 4 L. R., Q. B. 55; 38 L. J., Q. B. 30; 19 L. T. 557; 17 W. R. 117.

**Where Acceptance made in Ignorance of Agreement.**—Action by indorsee against ac-

ceptor. Plea, that he and S. carried on business at London under the name of M. & S., and at Rio Janeiro under the name of S. & M.; that the defendant carried on the business of the firm in England, and S. at Rio. That the bill was drawn by S. in the name of the firm of S. & M., for a debt due by S. & M. to the plaintiff, and accepted by defendant in the name of the firm of M. & S. That, after the bill was made and indorsed, and before acceptance, the firm of S. & M. at Rio having become insolvent, the plaintiff and the other creditors of S. & M. entered into an agreement with S. & M. at Rio, by which it was stipulated that the holders of bills drawn by S. & M. on M. & S. should be considered as creditors for cash paid, but the respective dividends should be deposited in a bank at Rio until presentation of protests of their bills not having been paid, but, the payment in London being verified, the sums so deposited should be divided among the creditors, which agreement was in course of being acted upon. That defendant accepted the bill in ignorance of this agreement. That the proceedings were according to the law of Brazil, and constituted, according to that law, a discharge of the debt:—Held, that the plea was bad, as not shewing any sufficient discharge of the London house from accepting the bill or release from paying it. *Hartley v. Manton*, 5 Q. B. 247; D. & M. 410; 13 L. J., Q. B. 61; 8 Jur. 169.

**Acceptance as Agent of an Undisclosed Principal.**—Evidence cannot be admitted to shew that an acceptor of a bill accepted it as agent for an undisclosed principal. *Rayner, Ex parte*, 17 W. R. 64—L. J.

**To what amount Liable.**—An acceptor is liable to the full amount of the bill, as between himself and third persons, but only to the sum for which the acceptance was given as between himself and the drawer. *Darrell v. Williams*, 2 Stark. 166.

Therefore, in an action brought against him, he may shew that he accepted it for value as to part, and as an accommodation as to the rest. *Id.*

And a party who takes a bill from the drawer, and knows that it was an accommodation bill, cannot recover from the acceptor more than the amount of the balance as between him and the drawer. *Jones v. Hibbert*, 2 Stark. 304. And see *Solomon v. Turner*, 1 Stark. 51.

An indorsee of an accommodation bill, who takes it, knowing it to be such, and advances on it but part of the amount, can only recover as much as he really paid; aliter, where the bill has been regularly drawn, on a fair account, in the course of trade; in such case the indorsee may recover the whole. *Wiffen v. Roberts*, 1 Esp. 261.

An indorsee having received part of the contents from the drawer, cannot recover more than the residue from the acceptor. *Bacon v. Searles*, 1 H. Bl. 88. And see *Beck v. Robley*, 1 H. Bl. 89, n.

If a bill is given in consideration of the defendant entering into partnership with the plaintiff, and the treaty is afterwards broken off, the plaintiff is entitled to recover a verdict on the bill to the amount of the damages he has sustained, and not to the full amount of the bill. *Ledger v. Ever*, Peake, 216.

Where an indorser paid part of the amount of



his use. *Prudential v. Farrant*, 6 B. & C. 439; 9 D. & R. 603.

A holder of a bill who has received from the drawer sums of money in part payment of it, is not entitled to prove against the estate of the bankrupt acceptor for the full amount of the bill, but only for what remains due of it after deducting all the sums paid in respect of it by the drawer before the proof is tendered, whether such payments were made before or after the bankruptcy. *Taylor, Ex parte*, 1 De G. & J. 112; 25 L. J., Bk. 58; 3 Jur., N. S. 753.

**Bill Brokers—Custom to make themselves Liable to their Bankers.**—It being proved to be the common and almost invariable practice of bill brokers in the city of London not to indorse each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to the bankers a general guarantee for all bills which they re-discount with them:—Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee. *Bishop, Ex parte, Fos, In re*, 15 Ch. D. 400; 50 L. J., Ch. 18; 43 L. T. 165; 29 W. R. 144—C. A.

**—Right to Prove for Interest on Amount paid under Guarantee.**—Held, also, that the bill brokers are entitled to prove against the estate of the acceptor for interest upon the amount which they have paid under their guarantee. *Petre v. Duncombe* (2 L. M. & P. 107) and *Hitchman v. Stewart* (3 Drew. 271) approved and followed. *Id.*

**Action on Promissory Note payable Three Months after Demand—Indorsement of Payment of Interest Evidence of Demand—Effect of Statute of Limitations.**—In May, 1857, J. R. gave to R. R. a promissory note for payment of 150*l.* three months after demand, no interest being reserved. J. R. died in 1869, and R. R. in 1878. The note was in R. R.'s possession at his death, and he had indorsed upon it receipts in November, 1857, and August, 1858, each for half a year's interest. It appeared that no other interest had ever been paid. J. R.'s estate being administered by the court, R. R.'s executor claimed to prove on the promissory note:—Held (by Hall, V.-C.), the claim must be allowed for 150*l.*, with interest from May, 1858. But held, on appeal, that the admissions by the payee of the payment of interest were evidence of a demand having been made in 1857 so as to make the 150*l.* immediately payable, and that the Statute of Limitations was a bar to the claim. *Rutherford, In re, Brown v. Rutherford*, 14 Ch. D. 697; 49 L. J., Ch. 654; 43 L. T. 105; 29 W.

**—Stale Demand.**—Sembles, that, apart from the Statute of Limitations, the claim ought to have been rejected as a stale demand. *Id.*

**Undertaking to Renew—Liability where Time expired if renewed.**—The defendants accepted a bill payable at four months upon a written undertaking that, if at the maturity of the bill they had not been paid certain money due to them on the return of a certain ship, the drawer would renew the bill. More than four months elapsed after the maturity of the bill, and the said money had not been paid to the defendants, but the bill had not been actually renewed:—Held, that the defendants were liable in an action upon the bill. *Heiron v. Morgan*, 44 L. T. 182.

**Acceptance—Liability of Firm when Name of Individual Member and of Firm same.**—Where a signature is common to an individual and a firm of which the individual is a member, a bona fide holder for value, without notice whose paper it is, of a bill of exchange with such signature attached, has not an option to sue either the individual or the firm. But there is a presumption that the bill was given for the firm and is binding upon it, at least, where the individual carries on no business separate from the business of the firm of which he is a member: this presumption, however, may be rebutted by proof that the bill was signed not in the name of the partnership but of the individual for his private purpose, and it is immaterial that the bona fide holder took the bill as the bill of the proprietors of the business carried on by the partnership whoever they might be, and not merely as the bill of the individual. B. and M. carried on business in partnership. M. was a dormant partner, and B. was the only ostensible partner, the business being carried on in his name alone. B. entered into accommodation transactions for his private purpose, and, without the authority of M., accepted and indorsed bills of exchange in his own name only. B., in becoming party to these bills, did not intend to bind M., but he considered the bills as private transactions and signed them merely on his own behalf. The plaintiffs became bona fide holders for value of the bills signed by B., and took the bills as the bills of the proprietors of the business carried on by the partnership, and not merely as the bills of B. Besides the business of the partnership B. was not engaged in any business:—Held (affirming the judgment of the Common Pleas Division), that the plaintiffs could not hold M. liable upon the bills accepted and indorsed by B. *Yorkshire Banking Company v. Beaton*, 5 C. P. D. 109; 49 L. J., C. P. 390; 42 L. T. 435; 28 W. R. 379—C. A.

**On discharged Bill in hands of innocent Holder.**—The defendant accepted two bills, drawn on him by C., which the latter indorsed and paid into his bankers', who entered the amount as cash to the credit side of C.'s account in their books. The bills having been dishonoured, the bankers entered their amount to the debit side of C.'s account, and shortly afterwards the defendant paid the amount of both bills to C., but did not require them to be delivered up. C.



continued his banking account for three years after the bills became due, and paid in several sums to his credit, sufficient to cover all the items to his debit prior to the date, and including the amount of the bills. C. afterwards became bankrupt, and the bankers proved their debts under his commission without noticing the bills, and a year afterwards sued the defendant as acceptor, having made no previous demand on him in respect of them :—Held, that he was not liable. *Field v. Carr*, 2 M. & P. 46; 5 Bing. 13.

But in an action against the acceptor, an indorsee for value, who had transferred the bill, which was returned to him after it had become due, may recover, although his indorser before the re-transfer, received satisfaction from the drawer. *Buzzard v. Flecknoe*, 1 Stark. 333.

**Discharge by Non-presentment.]**—An acceptor is not discharged by the bill not being presented for payment for three or four years after it becomes due: he is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him. *Farquhar v. Southey*, 2 C. & P. 497; M. & M. 14.

An acceptor of a bill payable at his bankers is not discharged from his liability by the neglect of the holder to present the bill for payment at the time it becomes due, even though the bankers failed before the bill was actually presented, which was not until some weeks after it was due, and the acceptor had always, up to the period of their failure, a balance in their hands sufficient to cover the acceptance. *Turner v. Hayden*, 6 D. & R. 5; 4 B. & C. 1; R. & M. 215; S. P., *Rhodes v. Gent*, 5 B. & A. 244.

Where a bill payable at bankers in London, which, by reason of being mislaid, was not presented for payment, and the acceptor was some months afterwards informed of its being mislaid, he was held not to be discharged, and the drawer might set off the amount in an action brought against him by the acceptor, although the bankers at whose house the bill was payable failed in the interval, and the acceptor had at all times, up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. *Sebag v. Abitbol*, 4 M. & S. 462; 1 Stark. 79.

**On Forged Bills.]**—The acceptor is liable, even though the bill is forged. *Smith v. Chester*, 1 T. R. 654.

The acceptor who pays under a forged indorsement by a person who has found a lost bill is liable to the real payee. *Cheape v. Harley*, 3 T. R. 127.

A bill purported to be drawn by C. & Co., on S., and to be payable to R. S. refused to accept it, the defendant thereupon accepted it for the honour of the drawers, and it was indorsed in the name of R. to the plaintiff, who discounted it. The bill was a forgery, and R., the pretended payee, was a fictitious person :—Held, that the plaintiff was entitled to recover from the defendant the amount of the bill. *Phillips v. Im Thurn*, 1 L. R., C. P. 463; 35 L. J., C. P. 220; 14 L. T. 406; 14 W. R. 653.

A bill of exchange which contained the sum of 14l. in figures in the margin, but no words in the body to denote the amount, was accepted by the defendant and returned to the drawer to be filled in. The drawer fraudulently inserted the words "one hundred and sixty-four" in the body, and altered the marginal figures to that amount

and issued the bill :—Held, that the defendant was liable on the bill to the plaintiff, an innocent holder for value. *Garrard v. Lewis*, 10 Q. B. D. 30; 47 L. T. 408.

The acceptor of a blank acceptance holds out the person to whom it is intrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp. *Id.*

**— Figures, Effect of.]**—The figures in the margin of a bill are merely an index or summary of the contents of the bill. *Id.*

**After Judgment, Arrest, and Discharge in another Action on same Bill.]**—A bill was indorsed to C., who indorsed it in blank. A bank, being the holder of the bill at maturity, commenced actions against the acceptor and C., and signed judgment against the acceptor on the 3rd March. On the 21st March, C. paid the amount due on the bill to the bank, and an order was made to stay proceedings in that action on payment of costs: the costs were taxed, and the amount paid on the 13th April, and the bill was then delivered to C., who being indebted to the plaintiff in a larger amount transferred it to him. On the 29th March the bank charged the acceptor in execution on their judgment, but on the same day discharged him on payment of the costs :—Held, that the plaintiff was entitled to sue him on the bill, notwithstanding his discharge by the bank; that C.'s right of action on the bill was vested on the 21st March, and that the only effect of non-payment of the costs was that the bank had a lien upon the bill for the amount. *Woodward v. Pell*, 4 L. R., Q. B. 55; 38 L. J., Q. B. 30; 19 L. T. 557; 17 W. R. 117; 9 B. & S. 994.

**On Accommodation Bills.]**—Although the holder of a bill had notice when he took it, that the acceptor had only accepted it for the accommodation of the drawer, yet the acceptor is bound to pay it, and nothing can discharge him but payment or a release. *Bank of Ireland v. Beresford*, 6 Dow. 237.

In an action by the indorsee against the acceptor it is competent to the acceptor to shew that the acceptance was for the accommodation of the plaintiff, and that he has received no consideration from the drawer, and that it was agreed that the bill, when due, should be taken up by the plaintiff. *Thompson v. Clubley*, 1 M. & W. 212.

A. & Co., bankers in the country, being pressed by B. & Co., bankers in town, to whom they were indebted, to send up any bills they could procure, transmitted for account an accommodation bill, accepted by D.; when the bill became due, the balance was in favour of B. & Co., but the bills were not withdrawn, and afterwards the balance between the houses turned considerably in favour of A. & Co., and was so when B. & Co. became bankrupts :—Held, that A. & Co. were entitled to recover against the acceptor. *Attwood v. Crowdie*, 1 Stark. 483.

An accommodation note in favour of A. was indorsed to B., with notice of the want of consideration; and upon the insolvency of A., B. accepted a dividend, and covenanted not to sue him :—Held, that, nevertheless, he might sue the maker, although in the event of his recovering the amount from him, A. would again become

The acceptor is not discharged by time given to the drawer. *Raggett v. Azmors*, 4 Taunt. 730; *S. P.*, *Collett v. Haigh*, 3 Camp. 281; *Aarrison v. Cooke*, 3 Camp. 362; *Penton v. Parack*, 5 Taunt. 192; *Price v. Edmunds*, 10 B. & C. 578.

To an action upon a bill by indorsee against acceptor, he, being under terms of pleading issuably, pleaded that the bill was drawn by M. at the request and for the accommodation of the defendant, and without consideration or value whatever, and that the bill was indorsed by M. without consideration or value given by the plaintiff for such indorsement to the defendant, or M., or to any other person whomsoever:—Held, that the plaintiff was entitled to sign judgment. *Hester v. Wilson*, 4 Ex. 489; 7 D. & L. 221, 19 L. J., Ex. 8, *S. P.*, *Sturtevant v. Ferde*, 4 Scott, N. R. 668; 4 M. & G. 101.

To a declaration against acceptor of a bill drawn payable to the drawer's order, indorsed by him to B., and by B. to the plaintiff, a plea that he accepted for the accommodation of the drawer and B. without consideration, and on the terms and conditions that the bill should be negotiated for their accommodation only before the bill became due; and that the bill was indorsed to the plaintiff, and the plaintiff became holder, after it became due, is a bad plea, on motion for judgment non obstante veredicto. *Carruthers v. West*, 11 Q. B. 148; 17 L. J., Q. B. 4, 13 Jur. 79.

A plaintiff accepted a bill for the accommodation of H., who deposited it with the defendant as a security for goods bought of him. H. afterwards paid for the goods; but, he being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and compelled him to pay the amount, with costs:—Held, that the plaintiff might recover from the defendant the amount of the bill on a count for money paid. *Blenden v. Charles*, 5 M. & P. 14.

A person drew and indorsed a bill for the accommodation of the acceptor, which was dishonoured when due, and he subsequently paid the holder a sum of money in discharge of his liability thereon, without having had notice of dishonour, and without any express request from the acceptor:—Held, that he could not recover the amount from the acceptor as money paid to his use. *Steigh v. Steigh*, 5 Ex. 514; 19 L. J., Ex. 348.

Bills were accepted by A. for the accommodation of B., who being one of the executors of C., and having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in B.'s possession, discounted such bills with the moneys belonging to C.'s estate, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box:—Held, that B. could not sever his character of an accommodation holder of the bills from his character of acceptor, so as to enable him and his co-executors to sue as indorsees of the bills for a valuable consideration. — *v. Adams*, 1 Yonge, 117.

An indorsee agreed with the drawer to give up the bills to be cancelled on a mortgage of real estate being executed as security for the amount of the bills. The mortgage was executed, and

without consideration. —Held, that the acceptor was discharged from liability on the bills, and could plead the facts by way of equitable defence to an action by the indorsee against him. *Edwin v. Lancaster*, 13 L. T. 632, 13 W. R. 857.

— **What are.]**—W. drew a bill upon the defendant, to whom he was in the habit of consigning goods for sale; the bill was accepted, but neither party at the time knew the state of the account between them. It afterwards appeared that the balance of the account was considerably in favour of the defendant at the time he accepted the bill:—Held, that nevertheless it was not an accommodation bill. *Bagnall v. Andrews*, 4 M. & P. 839; 7 Bing. 217.

The fact that the name of an acceptor was written across the stamp before the bill was drawn does not reasonably raise an inference that the bill was accepted for the accommodation of the drawer. *Harris v. Sterling*, 9 Ir. R., C. L. 198.

Evidence that the holder of a bill of exchange had notice, shortly before maturity, that it had been accepted for the accommodation of the drawer, is not evidence that he had such notice at the time of discounting the bill. *Id.*

A merchant in Bombay bought of a bank bills on their London branch for 25,000*l.*, giving for them 5,000*l.* in cash and 20,000*l.* in bills on a firm in London, consisting of himself and another person. The bank bills were all indorsed to the firm in London, and were all accepted. The merchant's bills were sent to the London branch of the bank and were accepted by the London firm. The bank was wound up, and the merchant and his partner each became insolvent; the London firm holding at the time of the winding up bills to the amount of 19,000*l.*, and the bank having parted with the bills for 20,000*l.*:—Held, that under the circumstances the bills were not accommodation bills, and that the trustees of the London firm were entitled to prove for the 19,000*l.* in the winding-up. *London, Bombay and Mediterranean Bank, In re, Cama, Ex parte*, 9 L. R., Ch. 686; 49 L. J., Ch. 683; 31 L. T. 234; 22 W. R. 809 (affirming 22 W. R. 471).

Held, also, that the principle as to proving for cross accommodation bills does not apply when the bills are in the hands of third parties. *Id.*

The trustees of the London firm had sent in a previous claim to prove for 5,000*l.*, taking that amount as the balance between the bills for 25,000*l.* and the bills for 20,000*l.*, and not being aware that the bank had parted with the bills for 20,000*l.* At the time of the previous claim the trustees held securities which had since been realised by them:—Held, that notwithstanding the previous claim made by mistake, the trustees might prove for the 19,000*l.*; and that the claim would be considered as made when the previous claim was made, so that the trustees representing the London firm were not bound to give credit for the money received by realising the security. *Id.*

— **When Holder has received part of Money due on Bill.]**—The holder of an accommodation bill who has received part of the money due on the bill from the drawer cannot afterwards, in an action against the acceptor, recover the whole

amount of the bill from him, but must give him credit for the amount already received from the drawer. *Cook v. Lister*, 13 C. B., N. S. 543; 32 L. J., C. P. 121; 9 Jur., N. S. 823; 7 L. T. 712.

— **Holder taking cognovit of drawer.**—If the holder of an accommodation bill takes a cognovit from the drawer for payment by instalments, he does not thereby discharge the acceptor whether at the time of taking it he knew that it was an accommodation bill or not. *Fentum v. Pocock*, 5 Taunt. 192; 1 Marsh. 14.

— **Bill drawn by Partner.**—Where a party accepts bills drawn by one partner on a firm for his private accommodation, upon the understanding that the drawer will provide for the bills when due, no action on the bills lies against the acceptor either by the drawer alone, or by his firm jointly. *Sparrow v. Chisman*, 4 M. & R. 206; 9 B. & C. 241.

— **After abandonment of holder.**—A. accepted a bill for the accommodation of B., which B. delivered to C., his creditor, to provide for a bill about to become due; C., before A.'s bill became due, returned it to B., as useless, in order that it might be forwarded to A., and abandoned all claim upon the bill; C. could not, by subsequently obtaining possession of the bill, acquire a right of action against A. *Cartwright v. Williams*, 2 Stark. 340.

— **Contract of Indemnity on.**—The contract of the drawer of an accommodation bill with the acceptor is to indemnify him against the bill; and if the drawer provides the acceptor with funds to meet the bill, this is, in law, a performance of that contract, and confers on the acceptor a right to retain the money, not merely against any revocation by the drawer, but also against his assignees in the event of his becoming bankrupt before the bill is paid. *Yates v. Hoppe*, 9 C. B. 541; 19 L. J., C. P. 180; 14 Jur. 372.

The right of action of a party accepting an accommodation bill, and paying it before it becomes payable, dates, not from the time of the actual payment, but the time it becomes payable. *Coppin v. Gray*, 1 Y. & C. 205; 11 L. J., Ch. 105.

A. accepted a bill for 25*l.* for the accommodation of F., who was pressed at the time by the defendant, a sheriff's officer, for seven guineas, claimed as being due for possession money. F. was to get the bill discounted by the defendant or elsewhere, and to give A. the surplus above the seven guineas. He deposited it with the defendant as a security for that sum, the defendant knowing the circumstances, and that A. had no value for his acceptance. The defendant indorsed it over and kept the proceeds. The holder sued A., who thereupon paid him the whole amount of the bill.—Held, that A. had no right of action against the defendant as for money paid to his use on a request implied by law; but that his remedy was against F. on an implied contract to indemnify A. for lending him his (A.'s) acceptance. *Asprey v. Levy*, 16 M. & W. 851.

A party who requests another to lend his acceptance, impliedly engages to take up the bill at maturity, and to indemnify the acceptor against the consequences of non-payment. *Rey-*

*nolds v. Doyle*, 1 M. & G. 753; 2 Scott, N. R. 45.

— **Proof of Fact of Accommodation.**—In an action by indorsee against drawer, an issue that the bill was accepted for the accommodation of the drawer is proved by evidence that the bill had been accepted to take up a former acceptance by the same party, given for the accommodation of the drawer, and it is not necessary to plead those facts in extenso. *Thomas v. Fenton*, 5 D. & L. 28; 2 B. C. Rep. 68; 16 L. J., Q. B. 362; 11 Jur. 633.

In an action against acceptor of an accommodation bill, the following memorandum, with reference to the bill:—"I hereby acknowledge that you have for my accommodation accepted a bill of even date herewith for 25*l.*, payable, &c., and I agree to provide for the same when due," is admissible in evidence without a stamp. *Notley v. Webb*, 5 C. B. 834.

In an action by acceptor against drawer of an accommodation bill, on his implied contract of indemnity, the plaintiff, in order to prove that a former bill, in renewal of which the bill in respect of which the action was brought was given, had been made payable at a particular place, called a banker's clerk, who, without producing the bank book, stated that he had ascertained the fact from an entry therein in his own handwriting, but that, independently of that entry, he had no recollection whatever of the fact:—Held, that this was not evidence of such fact. *Beech v. Jones*, 5 C. B. 696.

In an action by drawer against acceptor, a plea that he accepted merely for the drawer's accommodation, and that the drawer did not at any time give any value or consideration for the acceptance, fails, if it appears that, after the bill was accepted (as alleged) for accommodation, the drawer gave a cross acceptance and was obliged to pay the amount, and that the bill accepted was due and unpaid at the time of action brought. *Burdon or Burton v. Benton or Penton*, 9 Q. B. 843; 16 L. J., Q. B. 353; 11 Jur. 713.

— **Payment or Release of.**—Payment by an accommodation drawer of a bill is equivalent to payment by an acceptor; a bill re-issued after such payment is, therefore, in law, a new bill and requires a fresh stamp. *Lazarus v. Chwie*, 3 Q. B. 459; 2 G. & D. 487.

In an action by indorsee against acceptor, he pleaded that he accepted the bill for the drawer's accommodation; that the drawer negotiated it for his own use and paid it at maturity; that it was delivered by the holder to the drawer, who without the consent of the acceptor, and without having it re-stamped, indorsed it to the plaintiff. It appeared on the production of the bill, that the acceptor's name was written on the back, and that there was a memorandum on the face of it denoting the time of its maturity, and it was proved that the bill was delivered by the drawer to the plaintiff after that date:—Held, no evidence to shew that the bill had been negotiated by the drawer, and paid by him at maturity. *Jewell v. Parr*, 13 C. B. 909; 1 C. L. R. 454; 22 L. J., C. P. 253; 17 Jur. 975.

In an action by indorsee against an accommodation acceptor, it is not a good defence to the further maintenance of the action that after action the drawer paid the amount of the bill and interest to the indorsee under a judge's

order in another action by the indorsee against the drawer. *Randall v. Moon*, 12 C. B. 261; 21 L. J., C. P. 226.

It is a good defence to an action by indorsee against acceptor, that the bill was accepted for the drawer's accommodation, without consideration, and that it was indorsed over by the drawer after it had been paid by him at its maturity. *Parr v. Jewell*, 16 C. B. 684—Ex. Ch.

An indorsee, for value of an accommodation bill, without notice that is one of that description, may, notwithstanding notice subsequently acquired, release the drawer, without releasing the acceptor. *Graham, Ex parte, Black, In re*, 5 De G., Mac. & G. 356.

— **Costs of defending Actions, when Recoverable.**—A plaintiff, having accepted a bill for the defendant's accommodation, defended an action by an indorsee, and finally paid the amount, with the costs of the action. The plaintiff brought an action for money paid; the jury was directed, that, if the defendant requested the plaintiff to undertake the defence (as to which there was some evidence, but no express request proved), the costs were recoverable as money paid to the plaintiff's use:—Held, that the direction was right, and the costs recoverable under the count for money paid. *Garrard v. Cottrell*, 10 Q. B. 679.

Declaration, that in consideration that the plaintiff would accept, for the defendant's accommodation, a bill, the defendant promised to indemnify the plaintiff from any loss or damage. Breach, that he did not indemnify the plaintiff from loss or damage, and the plaintiff, as acceptor, was obliged and did pay to the holder the amount of the bill, with interest, and the costs of an action brought on the bill; and the plaintiff also incurred costs and expenses in defending and settling the action. First plea, to the claim in respect of the amount of the bill and interest, a set-off. Second plea, to the costs of the action and the costs and expenses incurred by the plaintiff in defending and settling the action, that these costs were incurred at the request of the defendant, concluding with a set-off:—Held, that he might plead a set-off to so much of the claim as was liquidated, and therefore the first plea which was pleaded to a demand which might be recovered in an action for money paid to the use of the plaintiff, was good; but that the second, which was pleaded to a demand in respect of costs incurred, was bad. *Crampton v. Walker*, 30 L. J., Q. B. 19; 7 Jur., N. S. 43.

**Plea of Tender by.**—A plea of tender after the day of payment of a bill, and before action, is not good, though the defendant avers that he was always ready to pay from the time of the tender, and that the sum tendered was the whole money then due, owing or payable to the plaintiff in respect of the bill, with interest from the time of the default, for the damages sustained by the plaintiff by reason of the non-performance of the promise. *Hume v. Peplow*, 8 East, 168; *S. P., Poole v. Crompton*, 5 D. P. C. 468; 1 Jur. 23; *S. C., nom. Poole v. Tunbridge*, 2 M. & W. 223.

An acceptor cannot plead a tender after the day of payment. *Dobie v. Larkan*, 10 Ex. 776.

Where the maker of a note paid money into the hands of an agent to retire it, and the agent tendered the money to the holder of the note, on

condition of having it delivered up; the note being mislaid, this condition was not complied with; and the agent afterwards became bankrupt with the money in his hands:—Held, that the maker was still responsible on the note. *Dent v. Dunn*, 3 Camp. 296.

## 2. DRAWER OR INDORSER.

**On Non-Acceptance.**—If a person, to whom a bill is directed generally, accepts it payable at a particular place, the holder may resort to the drawer as for non-acceptance. *Gammon v. Schmoll*, 5 Taunt. 344; 1 Marsh. 80.

The acceptance or non-acceptance does not vary the responsibility of an indorser, whose duty it is to pay the bill when due, if the prior parties do not. *Tanner v. Bean*, 6 D. & R. 338; 4 B. & C. 312.

But the indorsee must endeavour to receive the money from the drawer before he can resort to the indorser. *Hull v. Pitfield*, 1 Wils. 47.

An indorser is liable upon a bill which is returned for non-acceptance before the expiration of the time limited for payment. *Ballingall v. Gloster*, 3 East, 481; 4 Esp. 268.

The payee of a bill, having presented it for acceptance, which was refused, without giving notice to the drawer or indorser, indorsed over the bill, and acceptance was again refused to the indorsee:—Held, that he might still recover on the bill against the drawer, notwithstanding the laches of the payee. *O'Keefe v. Dunn*, 6 Taunt. 305; 1 Marsh. 613. And see *Dunn v. O'Keefe (in error)*, 5 M. & S. 282.

In an action against drawer or indorser of a bill dishonoured by non-payment after being accepted, it is unnecessary to state the acceptance in the declaration. *Jones v. Morgan*, 2 Camp. 474.

In an action by indorsee against indorser, the declaration stated that S. drew his bill in favour of the defendant; that the defendant indorsed the bill to the plaintiff, and that the acceptor did not pay it, although it was presented for payment, of which the defendant had notice. The defendant pleaded that, after the indorsement to the plaintiff, and before it became due, the plaintiff, being the holder, indorsed it to some person unknown, who presented it to G. for acceptance; that G. refused to accept it, and that the defendant had no notice of the dishonour for non-acceptance:—Held, that the plea was not bad in omitting to state that the plaintiff was not a bona fide indorsee for value, or before the bill became due, or without knowledge of the dishonour for non-acceptance; the defendant not being bound to make these averments. *Bartlett v. Benson*, 14 M. & W. 733; 3 D. & L. 274; 15 L. J., Ex. 23.

The holder of a bill on non-acceptance, and protest and notice thereon, has an immediate right of action against the drawer, and does not require a fresh right of action on the non-payment of the bill when due. *Whithead v. Walker*, 9 M. & W. 506.

— **When Statute of Limitations begins to run.**—The Statute of Limitations, therefore, runs against him from the former and not from the latter period. *Id.*

**Indorsement as Co-Sureties—Liability of Indorsers to equal Contribution inter se.**—The

or note must in the absence of all evidence to the contrary be determined according to the ordinary principles of the law merchant, whereby a prior indorser must indemnify a subsequent one. But the whole circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it either as makers or indorsers; and reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them. *Macdonald v. Whitfield*, 8 App. Cas. 733; 52 L. J., P. C. 70; 49 L. T. 466—P. C.

Where the directors of a company mutually agreed with each other to become sureties to the bank for the same debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company:—Held, that they were entitled and liable to equal contribution, inter se, and were not liable to indemnify each other successively according to the priority of their indorsements. *Reynolds v. Wheeler* (10 C. B., N. S. 561) approved. *Steele v. McKinlay* (5 App. Cas. 754) distinguished. *Id.*

**Drawer of Foreign Bill.**—The drawer of a foreign bill is liable immediately upon the refusal of the drawee to accept, before the time for payment has expired. *Bright v. Parrier*, Bull., N. P. 269; 3 Burr. 1687; *S. P.*, *Milford v. Mayor*, 1 Dougl. 55.

**On Dishonour.**—The drawer is only bound to pay within a reasonable time after receiving notice of the bill being dishonoured; therefore, where he received notice the day after the bill became due, a tender on the following day was held to be in time. *Walker v. Barnes*, 1 Marsh. 36; 7 Taunt. 240.

**What Law governs.**—If a bill is drawn in one country and payable in another, and is dishonoured, the drawer is liable according to the *lex loci contractus*, and not the law of the country where the bill is made payable. *Allen v. Kemble*, 6 Moore, P. C. C. 314; 13 Jur. 287.

But where a bill is drawn generally, the liabilities of the drawer, acceptor, and indorsers, are governed by the laws of the countries in which the drawing, acceptance, and indorsement respectively take place. *Id.*

Therefore, where A. (resident in Demerara) drew a bill in favour of B. (also resident in Demerara) upon C., resident in Scotland, and C. accepted it, making it payable in London. B. indorsed the bill to D., who afterwards became bankrupt. When C.'s acceptance became due, he

bro  
upo  
(the  
Eng  
cord  
dore  
bill  
A  
dra  
dra  
ind

indorsed in blank, and delivered to the plaintiff in England, and indorsed by him, and delivered to B. in France. The bill was duly presented in France, and dishonoured. A notice of dishonour was given—good by the law of France, but bad by the law of England:—Held, that the notice of dishonour was good, because due notice is such notice as can be reasonably required under the circumstances, and it is reasonable to hold that notice of dishonour, according to the law of the place where the bill is payable, is reasonable notice for the different countries of the different parties to a bill, unless the particular circumstances of the case are exceptional. *Hirckfield v. Smith*, 1 L. R., C. P. 340; 35 L. J., C. P. 177; 12 Jur., N. S. 523; 14 L. T. 886; 14 W. R. 455; 1 H. & R. 284.

**Adoption of Forged Signature by Silence—Estoppel.**—A person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel. The names of A. & B. appeared on a bill as drawers and indorsers to the B. L. Co. The B. L. Co.'s Inverness bank discounted it for C., who signed it as acceptor. They had had no previous dealings with A. or B. Being dishonoured when due, notice to that effect was sent to A. & B., and received late on a Saturday, but they did not communicate with the bank. On the following Monday, being the 14th of April, C. brought to the B. L. Co. a blank bill with A. & B.'s names as drawers and indorsers, apparently in the same handwriting as the previous bill. It was agreed to accept it as a renewal of the previous bill, but for a less amount, the difference being paid in cash by C. Three days before it was due, notice was sent to A. & B., and again when it was dishonoured, and then through the B. L. Co.'s law agent. A fortnight after the first notice the B. L. Co. were informed for the first time that A. & B.'s signatures were forgeries, and they declined to pay the amount in the bill. A. alleged that he called on C. on the 14th of April about the first bill, that C. admitted that he had forged his name, handed him the bill, and solemnly assured him that it had been taken up by cash; and so assured he did not think it necessary to communicate with the bank. He admitted that on that day he drank with C. and borrowed 4l. of him. He denied positively any knowledge of the second bill until he received the bank notices. C. was convicted of the forgery. The B. L. Co. charged A. with pay-

**On Accommodation Bills—At Law.]**—The acceptor of a bill for the accommodation of the drawer is not discharged by time given to the drawer. *Raggett v. Amore*, 4 Taunt. 730; *S. P.*, *Collett v. Haigh*, 3 Camp. 281; *Kerrison v. Cooke*, 3 Camp. 362; *Fentum v. Pocock*, 5 Taunt. 192; *Price v. Edmunds*, 10 B. & C. 578.

Action against maker of a note; plea, that it was a joint and several note, made by the defendant and S., and for his accommodation, and in order that he might get it discounted by the plaintiff; that the defendant had no other value or consideration for making it, and that he made it as a mere surety for S., of which the plaintiff had notice; and that although the note was due in the hands of the plaintiff for six months, yet the defendant had no notice, till the commencement of the action, of its non-payment by S.; and that the plaintiff gave time for payment to S. to the prejudice, and without the knowledge or consent of the defendant—is bad on general demurrer. *Clarke v. Wilson*, 3 M. & W. 208.

Action upon a note, payable one month after date. A plea, that the note was made by the defendant jointly with J.; that the defendant never had or received consideration for the note, but that the same was made by him as surety for J.; that after the note became due it was agreed between the plaintiff and J., without the consent of the defendant, that time should be given to J., and that time was accordingly given to him, without the consent of the defendant—is bad, as it substitutes one contract for another, sets up a different promise and liability from that which appears on the face of the note, and allows consideration with regard to the principal debt. *Smith v. James*, 2 El. & Bl. 50, n.; 22 L. J., Q. B. 267, n.; 17 Jur. 1119, n.; *S. P.*, *Harrison v. Courtauld*, 3 B. & Ad. 36.

In an action by indorsees against the acceptor of a bill, he pleaded as an equitable defence, that he was surety for Messrs. P., the indorsers, and that the indorsees discharged him by giving time to Messrs. P. by a composition deed. According to the terms of the deed, it appeared that, in the event of certain proposals therein mentioned being carried into effect, the indorsees covenanted not to enforce claims against any parties to bills in their hands, who as between themselves and Messrs. P., were not then liable on such bills; but it was provided that the plaintiffs' right against such parties should not be prejudiced in the event of the proposals not being fully carried into effect. The bill was in the plaintiffs' hands when the deed was executed. It was apparent from the terms of the proposals that they knew that the parties to some of the bills in their hands were not liable to Messrs. P., but it was admitted that they had no express notice that the defendant was in that position. The deed remained in full force for two years, when Messrs. P. made default in performing their part of it, and the plaintiffs thereupon brought their action. The jury found that the defendant was, in fact, only an accommodation acceptor, and therefore not liable to Messrs. P.:—Held, that the facts supported the plea, notwithstanding the proviso therein contained, the effect of the deed being to give time to Messrs. P. during the two years which elapsed before they made default, and thus to discharge their sureties from liability. *Bailey v. Edwards*, 4 B. & S. 761; 34 L. J., Q. B. 41; 11 Jur., N. S. 134; 12 W. R. 337.

B. agreed to advance to C. 650*l.* on security of a mortgage deed, and on a note by C., and two sureties for 150*l.*, part thereof, as a collateral security. The note was drawn on the 7th of December, and was payable on demand, with interest at 4*l.* 10*s.* per cent. during forbearance. About the same time the sum of 153*l.* was paid over to C. for his immediate necessities, and on the 22nd the deed was executed by B., C., his wife, and W., as surety. C., by the deed, covenanted to pay 650*l.* on the 22nd June following, with interest at 5*l.* per cent. In an action on the note by B. against the sureties:—Held, that the remedy on the simple contract was not merged in the deed, the two securities not being co-extensive; and that the covenant in the deed, giving time to the principal debtor, did not operate to discharge the sureties to the note. *Boaler v. Mayor*, 11 Jur., N. S. 565; 12 L. T. 457; 13 W. R. 775.

**— In Equity.]**—Indorsees of bills as a security for a floating balance due on the accounts between them and the drawer, had notice that the acceptance was from the drawer; they afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them certain ships, and should, in the meantime, be secured by a policy of assurance:—Held, first, that time was thus given to the principal debtor, and that the surety was released in equity, if not at law also. *Davies v. Stainbank*, 6 De G., Mac. & G. 679.

Held, secondly, that a creditor, who holds a floating guarantee from a surety, cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion. *Id.*

Action by payee against maker of a note. Plea, on equitable grounds, that the note was made by the defendant jointly with H. as the surety only of H., and was delivered to the plaintiff, and accepted by him, upon an express agreement that the defendant should be liable thereon as surety only for H., and that the plaintiff at the time the note was made had knowledge of the same having been so made by him as such surety; and that the plaintiff, without the consent of the defendant, gave H. time for the payment of the note:—Held, that the defendant was entitled to judgment, on the ground that the plea sufficiently stated that the relation of principal and surety existed between the defendant and the principal debtor inter se, and that the plaintiff had knowledge of that fact when the note was made and received by him, and when he gave time to the principal debtor. *Pooley v. Harradine*, 7 El. & Bl. 431; 26 L. J., Q. B. 156; 3 Jur., N. S. 488; 5 W. R. 405.

In an action by payee against maker, a plea, on equitable ground, that the note was the joint and several note of the defendant and T., and was made by the defendant as surety only for T.; that the note was delivered to the plaintiff on the terms that the defendant should be liable as surety only, and was made with notice to and knowledge by the plaintiff that the defendant was surety only; and that afterwards the plaintiff, without the defendant's knowledge or consent, gave time to T., but for which the plaintiff might have obtained payment from T. At the trial it was proved that the plaintiff gave

time to T.; and the jury found that the defendant was surety, as between himself and T., and that the plaintiff knew it, but did not agree, nor did the defendant stipulate that he should be treated by the plaintiff as surety or otherwise than as a maker of the note:—Held, that the defendant's right to relief, in equity, arose from the existence of the relation of surety and principal between the defendant and T., and from the plaintiff's knowledge at the time he took the note; that therefore the fact that the plaintiff had not agreed to treat the defendant as surety did not debar the defendant from such relief. *Greenough v. McClelland*, 2 El. & El. 424; 30 L. J., Q. B. 15; 6 Jur., N. S. 772; 2 L. T. 571; 8 W. R. 612—Ex. Ch.; *S. P., Taylor v. Burgess*, 5 H. & N. 1; 29 L. J., Ex. 7.

In an action on a note payable on demand, the defendant pleaded as an equitable defence, that he signed the note only to secure a debt due from S. (one of the makers) to the plaintiffs, and that they knowing this, without the defendant's consent, for a good consideration, agreed to give S. time for payment of the note, whereby he had been damaged. The only evidence in support of the plea was, that the principal had repeatedly prepaid the plaintiffs a certain sum as interest in order to obtain forbearance for successive periods of three months:—Held, that this evidence was insufficient to sustain the plea. *Rayner v. Fussey*, 28 L. J., Ex. 132.

**Waiver of Laches.**—A letter written by an indorser of a bill who had been applied to for payment, after several days' laches, telling the plaintiff that he would not remit till he had received the bill, and desiring the plaintiff, if he considered the defendant as unsafe, to return the bill to Trevor & Co. (who were prior indorsers on the bill, and also bankers at the defendant's place of residence), was held not to be a waiver of such laches and promise to pay, but that the defendant, on discovering that in law he was discharged, might refuse payment. *Borradaile v. Lowe*, 4 Taunt. 93.

A holder of a bill before it was due having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused, and then immediately returned it to the second indorser, who, not knowing of the laches, took up the bill:—Held, that his ignorance, when he paid the bill, of the laches of the former holder, did not entitle him to recover against the first indorser, who set up such defence. *Roscow v. Hardy*, 12 East, 434; 2 Camp. 458.

### XIII. DEFENCES IN ACTIONS ON.

#### 1. NO ORIGINAL LIABILITY.

##### a. Sufficiency of Consideration.

##### **Given by Widow for Debt due from Husband.]**

—It is a sufficient consideration for a note, payable in twelve months, that it was given by a widow for a debt due by her husband, even though before she took out administration. *Searle v. Waterworth*, 6 D. P. C. 684; 4 M. & W. 9; 1 H. & H. 281; 2 Jur. 745.

And, clearly, in an action against the widow for the amount of the note, she will be liable, unless she shews that there were no assets of her deceased husband. *Id.*

But where, in an action against the widow on

the note, it did not appear on the face of the record that the maker of the note was the wife of the deceased, the Court of Error reversed the judgment, non obstante veredicto, which had been entered on the record. *Nelson v. Searle* (*in error*), 4 M. & W. 795; 1 H. & H. 456; 3 Jur. 290.

**Given by Married Woman for Debt of Husband.]**—A note given by a married woman as a security for advances made to her husband, and which in equity binds her separate estate, is a good consideration for another promissory note given by her after her husband's death for a balance then due, although the former note is barred by the Statute of Limitations. *La Touche v. La Touche*, 3 H. & C. 576; 34 L. J., Ex. 85; 11 Jur., N. S. 271; 11 L. T. 773; 13 W. R. 563.

**Given as Security for Debt of Father.]**—The defendant's father owed the plaintiff money for goods sold; and for the price of these goods the defendant made his note in his own name, and gave it to the plaintiff, who was cognizant of all the facts, and that the defendant had received no consideration for the note:—Held, that the circumstances could not be given in evidence under a plea of accommodation bill, and that there was in this case an original liability on the part of the defendant, and that for a good consideration, viz., family affection. *Cook v. Long*, Car. & M. 510.

**Given for Debt of third Party.]**—A person who gives another a bill, payable at a future day, for the debt of a third party due to that other, cannot, in an action against him on the bill, set up want of consideration as a defence. *Balfour v. Sea Fire Life Assurance Company*, 3 C. B., N. S. 300; 27 L. J., C. P. 17; 3 Jur., N. S. 1304.

**In Favour of Godchild.]**—In a suit, instituted in equity, a note by a testator in renewal of a previous note for which there was no consideration, to secure a sum of money to a godchild, the testator having paid interest on the note:—Held, that the renewed note constituted a debt against the testator's assets in priority to legatees, but not to the prejudice of creditors. *Dawson v. Kearton*, 3 Sm. & G. 186; 2 Jur., N. S. 113; 25 L. J., Ch. 166.

**In Favour of Infant.]**—Where a note, expressed to be for value received, was made in favour of an infant aged nine; and in an action against the executors of the maker, no evidence of consideration being given, the judge told the jury, that the note being for value received, imported that a good consideration existed, and that gratitude to the infant's father, or affection to the child, would suffice:—Held, that although the jury might have presumed that a good consideration was given, yet that those pointed out were insufficient. *Holliday v. Atkinson*, 8 D. & R. 163; 5 B. & C. 501.

—**Necessaries supplied to Infant—Representation as to being of full Age.]**—In an action on foot of promissory notes bearing interest, one of the makers of the notes pleaded infancy. Reply—1st. That the consideration for the notes consisted of money lent for the purpose of being applied, and afterwards, in fact, expended, in



necessaries for such defendant. 2nd. That at the time of the loan, and of the making of the notes, the defendant fraudulently represented himself to be of full age, and therefore induced the plaintiff to advance the money :—Held, on demurrer, that both replies were bad. *Bateman v. Kingston*, 6 L. R., Ir. 328.

**Agreement as to Deposit of Will.**—A. died, leaving a will which contained a bequest of 60*l.* to B. The will (which was assumed to be invalid) being in the hands of B. and C., the heir-at-law, being desirous of obtaining possession of it, it was agreed between them that, upon C. giving a note for 60*l.* payable on demand to B., the will should be deposited, together with the note, with O., to be delivered up to C. on his paying the 60*l.* Subsequently a meeting of all the parties interested in the property took place, and C. induced B. to procure the will from O., for the inspection of his (B.'s) attorney, which she did ; and at this meeting a general settlement took place, upon the footing that the will was not a valid instrument, nothing being then said about the note. The will, however, remained in the hands of C.'s attorney :—Held, that there was a sufficient consideration for the note ; and that B. might maintain an action upon it, although it had never been actually delivered to B. with C.'s authority. *Smith v. Smith*, 13 C. B., N. S. 418 ; 32 L. J., C. P. 149.

**Treaty of Marriage.**—On a treaty of marriage a promissory note was given in consideration of the marriage, which was afterwards solemnized, and an action was subsequently brought by the indorsee against the makers of the note :—Held, that as the marriage, the consideration for the note, could not be undone, it was not competent to the makers to avoid the note upon the ground of fraud practised during the marriage treaty. *Hogan v. Healy*, 11 Ir. R., C. L. 119. Reversing 10 Ir. R., C. L. 6.

**Subsequent Written Agreement without Consideration.**—It is no defence to an action by the administrator of the payee of a note payable on demand, that by a subsequent written agreement the payee agreed that the amount of the note should be paid and entered by quarterly instalments and interest, unless the subsequent agreement is founded on some valid consideration. *McManus v. Bark*, 5 L. R., Ex. 65 ; 39 L. J., Ex. 65 ; 21 L. T. 676.

**Future Services.**—To constitute the rendering of future services by a payee a good consideration for a note, there must be some binding contract for such services. *Hulse v. Hulse*, 17 C. B. 711 ; 25 L. J., C. P. 177.

A., having performed gratuitously services for B., received from him a note, with an understanding that he should accept it not only as a gift for what was paid, but that it should be a remuneration for future services to be rendered as long as B. should require them. A. continued to perform the services until B.'s death, when he sued his executors upon the note :—Held, that as there was no contract binding upon A. to perform future services, there was no consideration for the note. *Id.*

A., having appointed B. his executor, gave him a note, payable on demand, for 100*l.*, in consideration of the trouble he would have in the office of

executor after his death. B. died in A.'s lifetime, not having put the note in suit :—Held, in an action upon it by B.'s executors, that the consideration had totally failed, and the action, therefore, was not maintainable. *Solly v. Bird*, 6 C. & P. 316 ; *S. C.*, nom. *Solly v. Hinde*, 2 C. & M. 516 ; 4 Tyr. 305.

**For future Payment of Money.**—The existence of an agreement by which A. has undertaken, for good consideration, to pay B. a sum of money at a stipulated time, is a good consideration for a promissory note for the same sum given by A. to B., and payable on demand. Upon a dissolution of partnership, an agreement was entered into, which, after reciting that one of the partners had brought 2,000*l.* into the business, provided that the other partner should pay him that sum within three years, with interest at five per cent., in full satisfaction of all his share in the stock, credits, and effects of the partnership, and should indemnify him against the debts of the partnership. Subsequently, a promissory note for the same 2,000*l.*, payable on demand, was given to the retiring partner :—Held, that there was a sufficient consideration for the note. *Stott v. Fairlamb*, 53 L. J., Q. B. 47 ; 49 L. T. 525—C. A. Reversing 52 L. J., Q. B. 420 ; 48 L. T. 574.

**Given by Agent for Debt of Principal.**—Trustees under a local act called on the defendant, who was agent of the owner of certain houses, to pay certain expenses chargeable under the act on the owner. The defendant told the trustees that he was not owner, but that B. was, and that B., and not he, the defendant, was liable. The trustees bona fide believing the defendant to be personally liable, threatened to take proceedings against him to enforce payment ; on which he, notwithstanding he knew that he was not really liable, the trustees consenting to take a less amount than their claim by instalments, gave them notes to meet the instalments. The trustees having sued the defendant on the notes :—Held, that there was good consideration for them, and that the trustees were entitled to recover. *Cook v. Wright*, 1 B. & S. 559 ; 30 L. J., Q. B. 321 ; 4 L. T. 704.

**Purchase-money on Sale which goes off.**—A plea to an action by payee against maker of a note, payable on demand ; that the note was given as and for the purchase-money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant ; and that no memorandum or note of the contract in writing was signed by the defendant, or any person lawfully authorized by him, and that there was not any consideration or value for the making or payment of the note, except as aforesaid, is bad. *Jones v. Jones*, 6 M. & W. 84.

**Lease not Executed.**—A. agreed to execute a lease of premises to B., who was to pay a certain sum for it ; B., who was let into possession, accepted a bill for the consideration-money drawn on him by A. : it is no defence to an action on the bill by A. against B., that the former refused to execute the lease, but his remedy is on the agreement. *Moggridge v. Jones*, 14 East, 486 ; 3 Camp. 38.

**Judgment Debt.**—To an action against maker





would have been a defence to an action by the plaintiffs and W., it was equally available against the plaintiffs. *Astley v. Johnson*, 5 H. & N. 137; 39 L. J., Ex. 161; 2 L. T. 406; 3 W. R. 218.

**Given on Sale of Goods—Purchaser refusing to accept—Not up to Sample.**—A defendant, having some bark to sell, applied to the plaintiffs to find a purchaser. The plaintiffs applied to T., who agreed to purchase the bark if equal to sample. The bark having been shipped, the defendant sent the plaintiffs the invoice, and requested them to accept a bill for the price, which they did, upon the offer of a del credere commission. The bark not being equal to sample, T. refused to accept it, and the plaintiffs having been called upon to pay the bill when due:—Held, that they were entitled to recover the amount of the bill as money paid to the defendant's use. *Hooper v. Trefry*, 1 Ex. 17; 16 L. J., Ex. 233.

To an action by indorsee against drawer, he pleaded that the bill was given in payment of the price of seventeen pockets of hops, sold by the plaintiff to the defendant as hops of a certain grower, and answering certain samples, to be delivered by the plaintiff to the defendant within a reasonable time; that, although a reasonable time had elapsed, the plaintiff had not delivered to the defendant any hops answering the samples, or any hops whatever; and that there was no consideration for the bill except as aforesaid. The plaintiff delivered seventeen pockets of hops, but inferior to the samples:—Held, that the allegation in the plea, that the plaintiff had not delivered any hops whatever, was immaterial, and might be rejected; and that without it the plea showed a total failure of consideration, and was an answer to the action. *Wells v. Hopkins*, 5 M. & W. 7; 2 H. & H. 11; 3 Jur. 797.

Where an action was brought on a bill given for goods sold and delivered, and the party to whom the goods were sold alleged that he had been fraudulently deceived in his contract, the goods delivered being inferior both in quality and quantity to what he had ordered:—Held, that he could not maintain a bill for an account and for an injunction to restrain the action, inasmuch as his object was to reduce the amount of the bill by the damages which he claimed for the breach of contract; and that as this was not the subject of set-off at law, it could not be the subject of account in equity. *Glennie v. Imrie*, 3 Y. & C. 436; 3 Jur. 432.

In an action by drawer against acceptor of bills given for goods supplied, which were to be "of good quality and moderate price," and were estimated at about 400l., and the bills given for that amount, it is no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor has paid more than the real value of the goods on the bills. *Obbard v. Betham*, M. & M. 483.

**—Forcibly Retaken by Vendor.**—In an action by payee against acceptor of a bill drawn for the balance of purchase-money of articles bought at a sale, it is no defence, that, two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that act as a rescind-

ing of the contract, but must bring trespass. *Stephens v. Wilkinson*, 2 B. & Ad. 320.

**—Delay in Delivery.**—H. acting as agent for N., in London, bargained with the defendant, at Hartlepool, for a cargo of coals, to be supplied to N.; payment to be in cash, less discount, in exchange for documents. The coals were shipped, and the shipping documents sent to the defendant's agent in London. N. being unprovided with money, H. agreed with the plaintiff that a bill at fourteen days should be drawn by the plaintiff on N., and indorsed by the plaintiff to H. The bill was accordingly drawn and indorsed on the 26th of March, and was indorsed by H. to the defendant, and by him indorsed to his bankers, who gave him credit for the amount, and again indorsed it. The defendant, on receipt of the bill, caused inquiries to be made as to the parties to the bill; and the result not being satisfactory, the shipping documents were not handed over, and consequently, on the 29th of March, N. repudiated the contract. On the 1st of April, H. offered the coals to N., but he refused to accept them. The plaintiff was afterwards compelled to pay the bill to indorsees for value:—Held, that the defendant having agreed to accept the bill in payment for the coals, there was a good consideration for the acceptance and indorsement of the bill, and that the delay in the delivery of the coals to the plaintiff, although it might give the plaintiff a cause of action against the defendant, did not amount to a total failure of consideration, nor entitle him to rescind the contract in pursuance of which it was given. *Osborne v. Donald*, 12 W. R. 9. Affirmed on appeal, 12 W. R. 831—Ex. Ch.

**Contract Work—Improperly done.**—A plea to an action by drawer against acceptor of a bill for 20l. 8s. 6d., that, before the drawing and acceptance of the bill, it was agreed that the plaintiff should do certain carpenter's work for the defendant for 63l.; that the defendant paid the plaintiff 43l. in part payment of the 63l., and afterwards accepted the bill on account of the residue of the 63l.; that the plaintiff did not perform his agreement, but neglected to perform some work, and performed, in an unworkmanlike manner, other work necessary to be done under the agreement; and that the sum of 43l. was more than the whole work done was worth,—is bad, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration, to which the money payment and the bill were alike applicable. *Trickey or Briquet v. Larne*, 6 M. & W. 278; 8 D. P. C. 174.

**Goods Sold under Warranty—Breach of.**—In an action on a bill given for the price of goods sold under a warranty, a breach of the warranty is an answer to the plaintiff's demand, if the defendant has tendered back the goods, although the plaintiff did not accept them. *Lewis v. Cosgrave*, 2 Taunt. 2.

A plea to an action by drawer against acceptor, that the goods which formed the consideration for the bill were sold under a warranty that they were fit and proper materials for the external roofing of buildings, and that they were not fit and proper, and that they were useless. An invoice was adduced at the trial, which consisted of three items, flooring, roofing and material, which were proved to be the goods for

which the bill was given.—Held, that no warranty could be implied as to the last item, that the material was fit for the purposes of either flooring or roofing.  
 plea, therefore,  
*Warrior, 1 C.*  
*v. Freeman, 3 Ex.*

**Rescission of given.]**—In an action joined on a plea that the cheque, it is that the contract cheque was given.  
*Osby, 1 Gale, 9*  
*103; 6 C. & P. 7*

**Partial Failure of a plea that the** 10*l.* 14*s.* 11*d.*, as fraudulently, due to the defendant defendant to A. and by means of defendant to defendant proved and found obtained by a plaintiff that the sum that such represents fraud :—Held, a plea, for that the "deceitfully" might be in substance consideration.  
*481; 20 L. J., C.*

In an action for 25*l.* 10*s.* 3 value received defendant pleaded, that he held a messuage a certain rent, and accepted in payment part of the rent; the plaintiff assigned the defendant had received and accepted due, and before assignment to the plaintiff of and from him; and that, the acceptance failed :—Held, on ground that it was a consideration, though and that fraud was not necessarily true in the plea. *Ct*  
*391; 2 M. & G. 1*

But a defendant who stipulated to pay was allowed to give the consideration damages; although the purpose of the contract was altered.  
*Stark, 51.*

A partial failure constitutes no ground to be deducted or definite compensation damages; as where plaintiff's disclosure of improvement in machinery

less beneficial than was anticipated by the parties.  
*Day v. Nix, 9 Moore, 159.*

It is no defence to an action by the drawer

consideration for so doing, or for paying the amount thereof, was bad on special demurrer. *Stoughton v. Kilmorey (Earl)*, 2 C., M. & R. 62; 3 D. P. C. 705; 5 Tyr. 568; 1 Gale, 91.

But was good after verdict. *Easton v. Pratchett*, 1 C., M. & R. 798; 3 D. P. C. 472; 6 C. & P. 736; 4 Tyr. 472; 1 Gale, 30; *S. P. (in error)*, 2 C., M. & R. 542; 4 D. P. C. 549; 1 Gale, 250; 5 Tyr. 1129.

In an action by drawer and payee against the acceptor, a plea, that he received no consideration from the plaintiff for accepting the bill is insufficient. *Graham v. Pitman*, 5 N. & M. 37; 3 A. & E. 521; 1 H. & W. 132.

In an action by an indorsee against acceptor, a plea, that there was not at any time any consideration for his acceptance or paying the bill, is bad. *Reynolds v. Iremey*, 3 D. P. C. 453.

In an action against acceptor, a plea is repugnant, which shows a consideration for his acceptance, and concludes that he has not received any value or consideration for the payment thereof. *Byass v. Wylie*, or *White*, 1 C., M. & R. 686; 3 D. P. C. 524; 5 Tyr. 377; 1 Gale, 50.

To an action on a bill for 50*l.*, drawn by M. upon and accepted by the defendant, and by M. indorsed to the plaintiff, the defendant pleaded, first, that the bill was drawn by M. and accepted by the defendant, and indorsed by M. to the plaintiff, and the plaintiff first held the same for the special purpose of getting the same discounted, and to hand the proceeds to the defendant; that the plaintiff, acting in fraudulent collusion with M., got the bill discounted, and, contrary to and in violation of the special purpose for which the bill was drawn, accepted and indorsed, and for which the plaintiff first held the same, handed to the defendant 17*l.*, and no more; and that there never was any other consideration for the acceptance by him of the bill, or for the plaintiff being the holder:—Held, that the plea, though informal, was good in substance, since it confessed a *prima facie* title in the plaintiff by indorsement, and avoided it by shewing that he was the holder of the bill for a special purpose only, and without consideration. *Dobie v. Larkan*, 10 Ex. 776.

Indorsee against drawer. Plea, that his indorsement was in blank; that he delivered the bill to A. (not a party to the bill) only to get it discounted for him; that A. fraudulently, and in violation of that special purpose, delivered it to B.; of all which the plaintiff had notice—is bad, for not shewing distinctly that the defendant never had value for the bill. *Noel v. Rich*, 2 C., M. & R. 360; 4 D. P. C. 228; 1 Gale, 225; 5 Tyr. 632. And see *Noel v. Boyd*, 4 D. P. C. 415.

To an action against drawer and indorser of two bills, he pleaded that the plaintiff was applied to for a loan of money to B., but agreed to give two-thirds of the amount in money and one-third in wine, upon having the two bills given to him as a security for the wine; that the contract for the sale and delivering of the wine was a gross fraud, and that the defendant had not had any value:—Held, that the plea was bad, as being only an answer to a part, and that the allegation of fraud was too general. *Connop v. Holmes*, 4 D. P. C. 451; 2 C., M. & R. 719; 1 Tyr. & G. 85.

To an action by indorsee against acceptor, he pleaded that the drawer indorsed the bill to the

plaintiff without value or consideration, and that the plaintiff always held the same without value or consideration, and that after the bill became due the drawer accepted scrip certificates from the defendant in satisfaction and discharge of the bill:—Held, after verdict, that the plea was bad. *Milnes v. Dawson*, 5 Ex. 948; 20 L. J., Ex. 81.

To an action by indorsee against maker of a note, he pleaded, that he made the note and indorsed it to the London and Westminster Bank, as a collateral security for advances made, or to be made, to the Marylebone Bank, upon the terms, that, if those advances should be repaid before the note became due, he should not be called upon to pay it. The plea averred that the advances so made were repaid before the note became due; that he had no value for his indorsement; and that the note was indorsed after it became due:—Held, that it was an essential allegation, without which the plea must fail, that the advances were repaid before the note became due; and, therefore, that it was a misdirection for the judge, on the trial of this issue, to tell the jury, that, if the note was given as a part security for the advances so made to the Marylebone Bank, the maker was entitled to a verdict. *Richards v. Macey*, 14 M. & W. 484; 14 L. J., Ex. 359.

To a note payable on demand, the defendant pleaded that at the time of the making the note the plaintiff was illegally possessed of the goods of the defendant, and wrongfully detained the same, without any right or title so to do, and refused to give them up unless the defendant would make and deliver to him a note payable on demand; that he, in order to gain possession of his goods, and for no other purpose, made and delivered to the plaintiff the note:—Held, that the plea was bad, for not shewing the circumstances under which the plaintiff became possessed of the goods, and negating any colour or pretence of right in him to detain them. *Keams v. Durell*, 6 C. B. 596; 6 D. & L. 357; 18 L. J., C. P. 28; 13 Jur. 153.

A plea that there were accounts between the plaintiff and the defendant, upon which the plaintiff alleged that a balance was due to him; that thereupon the defendant, at the request of the plaintiff, and on the faith of such allegation, made and delivered to the plaintiff a note for and on account of the balance; that the note was delivered to the plaintiff on the condition that he should not demand payment, unless it should appear that such balance was due; that at the time of making the note there was not any balance or money whatever due from the defendant to the plaintiff, nor was the defendant indebted to the plaintiff in any sum of money whatever:—Held, a good plea of want of consideration; that the agreement therein did not negative the absolute contract stated in the note; and that it was not necessary that the plea should allege that the agreement not to enforce the note, if no debt were due, was in writing. *Id.*

In an action on a bill by indorsee against acceptor, a plea alleging only that the acceptance was obtained by fraud, is bad. *Bramah v. Roberts*, 1 Bing. N. C. 469; 1 Scott, 350; 3 D. P. C. 392.

In an action on a note, a plea that the note was given without consideration, and that it was obtained from the defendant by the plaintiff upon a representation that he, the defendant,

no such sum of money, or any part thereof, was ever due, is sufficient, without alleging that the representation was made fraudulently. *Southall v. Rigg*, 11 C. B. 481; 20 L. J., C. P. 145; 15 Jur. 706.

In an action by payee against maker, on a note payable on demand with interest a plea that

tioned at the interview concerning her non-liability:—Held, that the note so obtained was invalid, and that the case was too plain to render it necessary to send it to be tried at law. *Coward v. Hughes*, 1 Kay & J. 443. See *La Touche v. La Touche*, 3 H. & C. 576.

Where a defendant in custody at the request

*Brewer*, 3 D. P. C. 266; 1 C., M. & R. 651; 5 Tyr. 222.

**Promissory Note to Trustee of Illegal Company.]**—Persons to a number exceeding twenty had formed themselves into a society called the "Ipswich Mechanics' Mutual Benefit Society." The object of the society was to raise, by monthly subscriptions from the members, a fund for the purpose of making advances to members. The society was not registered under the Companies Act, 1862:—Held, that a promissory note given by a member to the trustee of the society to secure a sum of money advanced to such member under the rules of the society was invalid, and no action could be maintained thereon. *Jennings v. Hammond*, 9 Q. B. D. 225; 51 L. J., Q. B. 493; 31 W. R. 40.

**Forged Bill.]**—A. accepted a bill for 1,000*l.* for B.'s accommodation. A bill for that amount, purporting to be drawn by B. and accepted by A., and by B. indorsed to C., and by C. to D. for value, was afterwards presented to A. for payment. A. having had an opportunity of inspecting the bill, gave D. a cheque for 100*l.*, and a renewed bill at three months (similarly drawn and indorsed) for 1,000*l.* in exchange for the bill so presented to him. A. afterwards discovered that the acceptance so delivered up to him was forged:—Held, no answer to an action by C. upon the substituted bill. *Mather v. Maidstone (Lord)*, 18 C. B. 273; 25 L. J., C. P. 311.

If A., the indorsee for value of a bill to which B., the indorser, has forged the acceptance of C., delivers it up to B. on his solicitation, and receives from him, in lieu thereof, a bill accepted by D., without consideration, A. may maintain an action on this bill against D., unless there was an agreement between him and B. to stifle a prosecution for forgery. *Wallace v. Hardacre*, 1 Camp. 45.

**Against Bankruptcy Law.]**—A. having petitioned the court for the relief of insolvent debtors, his discharge was opposed by B. An agreement was entered into between them, that A. should give B. a note as a security for his debt, and that B., in consideration thereof, should not oppose the making of a final order for protection. This arrangement was sanctioned by the commissioner of the court, who adjourned the final hearing to allow of its being effected. The note was accordingly given, the opposition withdrawn, and the final order for protection made:—Held, that the agreement was illegal as against the policy of the law, and that the note given in pursuance of it was therefore void. *Humphreys v. Welling*, 1 H. & C. 7.

**Against Gaming Law.]**—To an action on a bill drawn by B. upon and accepted by the defendant, and indorsed by B. to the plaintiff, he pleaded, that before accepting the bill he authorized B., in his own name, but on account of the defendant, to lay bets on horse races; and B., in pursuance of such authority, laid such bets, and lost them; that B. afterwards voluntarily, and without the request of the defendant, paid the losses on such bets; the bets were wagering contracts; and that the defendant accepted the bill for repayment to B. of the moneys which he had so paid; and that there was no other considera-

tion for the acceptance, and no consideration for the indorsement:—Held, that the plea was bad; for the defendant, by giving the bill, acknowledged the money was paid on his account, and consequently that there was sufficient consideration for the payment of the bill. *Oulds v. Harrison*, 10 Ex. 572; 24 L. J., Ex. 66.

See also cases under GAMING.

**Against Usury Law.]**—To an action against an acceptor he pleaded that he borrowed 1,500*l.* of the plaintiff, and it was agreed between them that he should pay interest at the rate of more than 5*l.* per cent. per annum, viz., 100*l.*, contrary to the statutes then in force, and that to secure the principal and interest, he accepted bills to the amount of 1,600*l.*; that these bills were dishonoured at maturity, and that after the passing of the 17 & 18 Vict. c. 90, the bills sued on were given by way of renewal of the old bills, and to secure the payment to the plaintiff of the money secured by the old bills, including the 100*l.* interest:—Held, that there was good consideration for the bills, and that the plaintiff was entitled to recover on them. *Flight v. Reed*, 1 H. & C. 703; 32 L. J., Ex. 265; 9 Jur., N. S. 1016; 8 L. T. 638; 11 W. R. 426.

**Forbearing to Prosecute.]**—A note given in consideration of the payee's forbearing to prosecute a charge against the maker of obtaining money by false pretences, is illegal, and cannot be enforced. *Clubb v. Hudson*, 18 C. B., N. S. 414.

On an action on a bill, the defence being that the acceptor was threatened by the drawer, that if it were not given, he would make a criminal charge:—Held, that, unless the bill was obtained solely by reason of such threat, it would be no defence. *Thompson v. Holland*, 11 W. R. 260.

In an action by drawer against acceptor upon a bill of exchange the defence alleged that the bill sued upon had been accepted by the defendant in consideration of the plaintiff abandoning certain civil bill proceedings pending at the time of the acceptance against Mrs. S. for the recovery of a previous bill, to which the plaintiff asserted that Mrs. S. had forged her husband's name, and forbearing to proceed with criminal proceedings which the plaintiff had threatened to institute on the ground of the alleged forgery:—Held (on demurrer), that the defence was bad on the ground that the forbearing to proceed with the criminal proceedings was not illegal, inasmuch as no criminal proceedings had actually been commenced, nor was there any reasonable or probable cause for believing a criminal act to have been committed; that therefore this position of the alleged consideration was simply nugatory, not illegal; and this being so, that the abandonment of the civil proceedings formed a valid and sufficient consideration for the acceptance of the bill. *Bourke v. Mealy*, 14 Cox, C. C. 329.

**Compounding Felony—Liability of Acceptor—Indorsee.]**—In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to shew that the creditor was thereby induced to abstain from

prosecuting. *Ward v. Lloyd* (7 Scott, N. R. 499) followed. *Williams v. Bayley* (L. R., 1 H. L. 200) explained. *Flower v. Sadler*, 10 Q. B. D. 572—C. A. Affirming 9 Q. B. D. 83; 46 J. P. 503.

Semble, per Brett and Cotton, L. JJ., in an action by an indorsee of a bill of exchange against an acceptor for valuable consideration, it is no defence that the bill was indorsed by the drawer to the plaintiff in order to stifle a prosecution for felony. *Id.*

**Cases under Tippling Act.]—See INTOXICATING LIQUORS.**

## 2. ORIGINAL LIABILITY DETERMINED.

### a. Discharge by Payment or Release.

**In Action against Acceptor or Maker—What amounts to.]—**Nothing but payment or a release will discharge the acceptor. *Fentum v. Pocock*, 1 Marsh. 14; 5 Taunt. 192.

Oran express declaration by the holder. *Dingwall v. Dunster*, 1 Dougl. 247; *S. P.*, *Foster v. Dawber*, 6 Ex. 839; 20 L. J., Ex. 385.

Though the payee receives part of the money from the drawer when the bill becomes due, and takes an undertaking from him indorsed on the bill, by which he promises to pay the remainder at a future time, it does not discharge the acceptor. *Ellis v. Galindo*, 1 Dougl. 260, n.

If a drawer of a bill payable to his own order, before it is indorsed, gives the acceptor a general release; this is no defence to an action by the indorsee against the acceptor unless the indorsee knew of the release. *Dod v. Edwards*, 2 C. & P. 602.

A. accepted a bill for the accommodation of B., the drawer, who indorsed it over as a security for a debt, and afterwards became bankrupt. The indorsee entered into an agreement with the assignees, for purchasing part of the bankrupt's property, and for the arrangement of some claims which he, the indorsee, had upon the bankrupt's estate; and he afterwards gave them a release of all demands, no mention being made, during this transaction, of the bill which had been dishonoured. He knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation:—Held, that notwithstanding the release, the acceptor was still liable at the suit of the indorsee. *Harrison v. Courtauld*, 3 B. & Ad. 36.

Payment within 55 Geo. 3, c. 184, s. 19, of a bill, so as to render it no longer negotiable, must be a payment by the party ultimately liable. *Thomas v. Fenton*, 5 D. & L. 28; 2 B. C. Rep. 68; 16 L. J., Q. B. 362; 11 Jur. 633.

**—Credit given to Person ultimately Liable.]—**Credit given by the holder of a bill to the party ultimately liable, is tantamount to payment. *Atkins v. Owens*, 4 N. & M. 123.

Secus, as to credit given to a party not ultimately liable, as where the credit was given by the banker of the holder, such banker not being the party to the bill. *Id.*

**When Bill is in hands of bonâ fide Holder for Value.]—**Where two bills drawn by C. are accepted, and by him indorsed to his bankers, payment after they become due by the acceptor to C. is not alone sufficient to discharge him, as the

holders of the bill are entitled to the amount. *Field v. Carr*, 5 Bing. 13; 2 M. & P. 46.

An arrangement between drawer and drawee which discharged the latter's acceptance as regards the drawer, has not that effect as regards an indorsee for valuable consideration. *Clarke v. Cock*, 4 East, 57.

Where the holder of a bill which was a security for a debt due from A., B., C. and D., indorsed it over and put it into the hands of B., C. and D., who settled their accounts with A., saying that the bill had been satisfied by them, but the bill itself was not produced to nor seen by A. at the time of such settlement:—Held, that this was no defence for A. in an action by the holder against A., B., C. and D., the bill not having been in fact satisfied by the persons to whom it had been indorsed and handed over. *Featherstone v. Hunt*, 1 B. & C. 113; 2 D. & R. 233.

**—Part Payment by Stranger.]—**To an action by indorsees against an acceptor, he pleaded that whilst they were the holders of the bill, B. paid them the full amount of the bill, and then became entitled to become the holder; yet they did not deliver up the bill to him, but were suing without his or any other person's authority:—Held, that the plea was bad, inasmuch as it was consistent with the facts stated in it, that they were the lawful holders of the bill, and entitled to sue upon it. *Agra and Masterman's Bank v. Leighton*, 4 H. & C. 656; 2 L. R., Ex. 56; 36 L. J., Ex. 33.

A plea that a bill was accepted by way of payment for certain goods agreed to be sold and shipped for the acceptor by the drawer, and that the drawer only shipped, and the acceptor only received, a portion of the goods, amounting in price and value to 1,200*l.*, and that there was no consideration for the bill except the 1,200*l.*, and that the drawer paid the full amount of the bill to the plaintiffs whilst it was in their hands, and that the acceptor has a set-off against the drawer to the extent of 1,200*l.*, is a good equitable plea. *Id.*

If one is sued on a bill, and it appears that the plaintiff has agreed with a third person, that if he will advance part of the sum for the defendant the plaintiff will take that in discharge of the whole debt, and such third person so advances it, it is a good defence to the action. *Welby v. Drake*, 1 C. & P. 557.

To an action by indorsee of a bill for 55*l.*, the defendant pleaded that the bill was an accommodation bill, that the drawer indorsed the bill and other bills to the plaintiffs as security for repayment to them of 30*l.* advanced by them to the drawer, and that the bill was satisfied by payment to them by the acceptor of one of the other bills of the money so advanced and all interest thereon:—Held, no bar to the action, the payment having been made by a stranger and not having been ratified by the plaintiffs. *Kemp v. Balls*, 10 Ex. 607; 24 L. J., Ex. 47.

An indorsee is entitled to proceed in an action against the acceptor, for the recovery of the costs, though, pending the action, payment in full satisfaction of the amount of the bill, with interest and all moneys due thereon, is made by another party to the bill and accepted by the plaintiff. *Goodwin v. Cremer*, 18 Q. B. 757; 22 L. J., Q. B. 30; 17 Jur. 2.

**—Part Payment by Drawer.]—**The holder

of a bill, having been paid part by the drawer, can only sue the acceptor as regards that sum as trustee for the drawer. *Thornton v. Maynard*, 10 L. R., C. P. 695; 44 L. J., C. P. 382; 33 L. T. 433.

A vested right of action in the holder against the acceptor of a bill, can in general only be got rid of by a release, or by an accord and satisfaction as between them. But, if the bill is an accommodation bill, and the holder has notice of that fact when he receives it, payment by the drawer is a complete discharge. *Cook v. Lister*, 13 C. B., N. S. 543; 32 L. J., C. P. 121; 9 Jur., N. S. 823; 7 L. T. 712; 11 W. R. 369.

Bills which, as between A. and B., the respective drawers, and C., the acceptor, were in the nature of accommodation paper, were indorsed to the plaintiffs for value, and without notice of their character. A., B. and C. eventually stopped payment; and upon the winding up of their estates under inspection, the plaintiffs received on account of the bills drawn by A. upon C., 4s. in the pound from A.'s estate, and 16s. in the pound from the estate of C.; and, upon the bills drawn by B. upon C., they received 5s. 7d. in the pound from the estate of B., and 14s. 5d. in the pound from the estate of C. Upon the result of the whole transactions of consignment and discount between A. and B. and the plaintiffs, there remained a large balance due to the latter; and they sued C. upon his acceptances, seeking to recover the difference between the sums paid thereon by him and the amount of the several bills, and interest:—Held, that they were not entitled to maintain the action either in their own right or as trustees for A. or B. *Ib.*

— **Part Payment in full Satisfaction—Lex loci Contractus.**—A merchant abroad drew upon certain persons in this country a bill, and upon its becoming due paid the holder a part of the amount of the bill, both parties being at the time abroad; but such payment was made and received in full satisfaction; which payment, according to the law of the country where the bill was made, was considered to be in full satisfaction of a bill:—Held, that such payment afforded a good defence to an action on the bill in this country. *Ralli v. Dennistoun*, 6 Ex. 483.

**In Action against Drawer or Indorser—What amounts to.**—In an action by the indorsees of a bill of exchange against the accommodation drawer and indorser:—Held, that the receipt by the plaintiffs of composition notes of the acceptor, in pursuance of an arrangement in bankruptcy, was not equivalent to payment, and did not suspend their right of action against the defendant during the currency of the notes. *Provincial Bank of Ireland v. Dunne*, 2 Ir. L. R. 21.

The acceptor, a trader, had executed to the plaintiffs, his bankers, a mortgage for securing all debts due or to become due from him to them:—Held, that they were not bound, in the absence of express stipulation, to appropriate any part of the proceeds of the mortgage towards payment of the bill sued upon. *Ib.*

Semble, that the amount of the composition notes, when paid, should be appropriated by the plaintiffs in payment rateably of all the debts due to them by the acceptor, and, amongst others, of the sum due on foot of the bill sued upon. *Ib.*

The indorser of a bill is not discharged by reason of the holder having given the bill to the acceptor, and received his cheque for the amount, which cheque was returned for want of effects. *Ridley v. Blackett*, Peake's Add. Cas. 62.

— **Part Payment by Indorser—Liability of Drawer.**—In an action by indorsee against drawer, though the indorser has paid part of the money to the indorsee, he may recover the whole sum in the bill against the drawer. *Johnson v. Kennion*, 2 Wils. 262.

If the holder receives part payment from the indorser, he may still recover the residue against the drawer, if not the whole. *Walwyn v. St. Quintin*, 1 B. & P. 552; 2 Esp. 515.

— **Part Payment by Drawer.**—If the drawer of a bill payable to his own order, indorses it, and it is accepted and dishonoured, the drawer having received it back, and paid the amount to his indorsee, may return the bill to such indorsee for the purpose of his suing the acceptor upon it as trustee for the drawer. *Williams v. James*, 15 Q. B. 498; 19 L. J., Q. B. 445; 14 Jur. 699.

Payment is no answer to an action by such indorsee if there is evidence that when the drawer paid, the bill was left in the hands of the indorsee for the purpose of its being put in suit. *Ib.*

Where, after action by indorsee against acceptor, the drawer pays the indorsee part of the amount, the indorsee (unless he is suing as a trustee for the drawer) should take a verdict against the acceptor for the balance and interest only, and, when he is paid, he should give the bill up to the drawer. *Hemming v. Brook*, Car. & M. 57. See *Purshford v. Peck*, 9 M. & W. 196.

— **Part Payment by Stranger.**—Payment by a stranger of the amount of a bill to the bankers at whose house the bill is, by the acceptance, made payable, under an arrangement with such bankers, whereby the party paying obtains possession of the bill for a collateral purpose of his own, is not a payment of the bill by the acceptor. *Deacon v. Stodhart*, 2 M. & G. 317; 2 Scott, N. R. 557; 9 C. & P. 685.

Nor can such payment, if made before the bill becomes due, be considered as a payment for the honour of an indorser. *Ib.*

— **Satisfaction as between Drawer and Indorser—Rights of Acceptor.**—Satisfaction of a bill as between drawer or an indorser and an indorsee, whether before or after the bill becomes due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee. *Jones v. Broadhurst*, 9 C. B. 173.

To an action on a bill for 49l., by indorsee against acceptor, he pleaded that after the indorsement, and before action, the drawer delivered to the plaintiff who accepted goods of the value of 50l. in satisfaction of the bill, and of all damages in respect thereof, and that the plaintiff, from the time of the satisfaction of the bill, held the same against the will and consent of the drawer, and that the plaintiff commenced and prosecuted the action against and in opposition to the will and consent of the drawer:—Held, that the plea was no bar to the plaintiff's



right to recover against the acceptor on the bill. *Ib.*

**Effect of Payment.]**—When the drawee of a bill, which had been dishonoured, accepted and paid other bills for the amount, taking an assignment of the mortgage upon which the original bills were secured:—Held, that there being no contract, or sufficient evidence to shew that the intention of the parties was to keep the mortgage alive, such acceptance and payment operated as an extinguishment of the principal security, and not as a transfer of the bills for which it was originally given. *Simson v. Wilkinson*, 2 Moore, P. C. C. 275.

When by the contract for sale and purchase of goods it is stipulated that payment should be made by the buyers' acceptances of the sellers' drafts, if before the time for delivery of the goods the purchaser becomes insolvent or the acceptances are dishonoured, the vendor still has a lien for unpaid purchase-money. Difference in this respect between acceptances of the purchaser and those of a third person. *Gunn v. Bolekow, Vaughan & Co.*, 10 L. R., Ch. 491; 44 L. J., Ch. 732; 32 L. T. 781; 23 W. R. 739.

By a contract for the supply of iron rails, it was agreed that payment should be made by buyers' acceptance of sellers' drafts at six months' date, against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment. Inspector's certificates and wharfinger's certificates were from time to time handed to the buyers in exchange for their acceptances, and were pledged with T. as security for advances made by him, it being an alleged custom of the trade to treat such certificates as delivery warrants. The buyers having become insolvent before the first acceptance became due:—Held, first, that the delivery of the acceptances did not constitute a valid payment for the rails according to the contract. *Ib.*

Held, secondly, that no custom of the trade could give to the certificates the effect of warrants, and T. therefore had no lien on the rails. *Ib.*

**Receipt by Agent without Authority of Principal.]**—A company was the holder of a bill of exchange drawn by the defendant on D. The bill was drawn by him as surety for D. in respect of a debt due by D. to the company, and was to be met by the proceeds of claims of D. on S., which would accrue due before the maturity of the bill. The company took the bill with notice of these facts to their managing director C. D., in addition to his debt to the company, was indebted to C., their managing director. Subsequently, but before the maturity of the bill, C. obtained an order from D. upon S. for the amount of the above claims and received the money from S. This money he applied towards payment of his own demand on D. instead of towards the company's bill:—Held, that the receipt by C. of this money and his application of it to his own purposes did not afford any defence to the action, inasmuch as C. could not be said to have been acting within his authority as managing director when he so received and applied the money. *McGowan v. Dyer*, 8 L. R., Q. B. 141; 21 W. R. 560.

**Effect of Cancellation.]**—The mere fact of

cancelling the signature of the makers of a dishonoured note and writing "paid" on the note, corrected before the note is sent back to the holder by a memorandum thereon "cancelled in error," cannot be effectual to charge a bank with the receipt of the money. *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325; 47 L. J., P. C. 42; 38 L. T. 41; 26 W. R. 543.

The plaintiff obtained from the defendants an advance of 15,000*l.* upon the security of goods then in transit to Monte Video, consigned to S., and also of six bills of exchange drawn by the plaintiff upon and accepted by S., against the shipments. The plaintiff authorized the defendants, on the non-payment of the bills, to realize the goods, and held himself responsible for any deficiency. Two of these bills were duly paid; but other two having been dishonoured, the defendants (at Monte Video) proposed to realize the goods at once, whereupon the plaintiff gave them a cheque for 2,500*l.*, accompanied by a letter requesting them not to sell, and authorizing them to hold the 2,500*l.* as collateral security for S.'s acceptance, to be returned to the plaintiff when all the bills should have been paid. The remaining bills having also been dishonoured by S., the defendants took proceedings against him at Monte Video, which resulted in a judicial arrangement under which the goods were sold and the bills were delivered up to S. cancelled, without the knowledge or consent of the plaintiff. The sale of the goods did not produce sufficient, even with the 2,500*l.*, to pay all the bills. In an action by the plaintiff against the defendants to recover back the 2,500*l.*:—Held, that the plaintiff was the principal in the transaction, and as the bills had been dishonoured and there was a deficiency after realizing the goods, it was immaterial that S. had been discharged from liability upon the bills, and the defendants were not bound to refund the 2,500*l.* *Yglesias v. Mercantile Bank of the River Plate*, 3 C. P. D. 60; 38 L. T. 181; 26 W. R. 369. Affirmed on appeal. 3 C. P. D. 330; 38 L. T. 464; 26 W. R. 454—C. A.

**Interest in case of Non-payment.]**—The acceptor of a bill having died intestate before it fell due, and administration not being taken out for upwards of thirty-five years from the maturity of the bill:—Held, in a suit to administer the personal estate of the intestate, that interest was payable from the date at which the bill became due. *Mazwell v. Tuhill*, 1 Ir., Ch. D. 250.

**Proof of Payment.]**—A general receipt on the back of a bill is *prima facie* evidence of its having been paid by the acceptor, and will not of itself be evidence of a payment by the drawer, though produced by him. *Sholey v. Walsby, Peake*, 25.

The production of a bill from the custody of an acceptor is not *prima facie* evidence of his having paid it, without proof that it was once in circulation after it had been accepted. *Pfiel v. Vanbatenberg*, 2 Camp. 439.

A first count was on a note, dated 7th December, 1845, by the defendant, for payment of 500*l.* and interest, on demand, to C., the plaintiff's testator. The second count was on a similar note for 500*l.*, dated 20th January, 1846. Pleas: first, payment; and secondly, that it was agreed between C. and the defendant, that the latter should purchase with his own money a piece of paper marked with a 10*s.* receipt stamp, and should

write on it as follows:—"Hull, 16 February, 1846. Received of R. D. (the defendant) 1,080*l.*, being the interest and principal on two notes, dated December, 1845, and January, 1846, and in full of all demands;" and that the defendant should suffer C. to sign the same; and that such agreement and purchase of the piece of paper so stamped and such writing on by the defendant, and permitting C. to sign the same, should be accepted by C. in satisfaction and discharge. At the trial it appeared from the defendant's answer to a bill of discovery, that in 1835 and 1842, C. lent to the defendant two sums of 500*l.* upon the security of his notes, payable on demand, with interest. The interest was duly paid, and memoranda thereof indorsed by C. on the backs of the notes. At length, the backs of the notes being covered with these memoranda, it was arranged that new notes should be substituted, and accordingly the defendant gave C. the notes on which the action was brought. In February, 1846, C. told the defendant that he intended to give him the 1,000*l.* secured by the notes, and he wished to give the defendant a release and discharge for the same and interest thereon, and he directed the defendant to write out a receipt for such 1,000*l.* and interest for him, C. to sign as a release and discharge; and thereupon the defendant purchased a 10*s.* receipt stamp, and wrote thereon the receipt, which C. signed, and delivered to the defendant, with the express object of releasing him from payment of the 1,000*l.* and interest. No interest was afterwards applied for or paid. C. subsequently died, having bequeathed the notes to the plaintiff:—Held, first, that the transaction relating to the giving of the receipt did not amount to payment. *Foster v. Dawber*, 6 Ex. 839; 20 L. J., Ex. 385.

Held, secondly, that such transaction was not evidence in support of the second plea. *Ib.*

## b. Giving Time and Renewing.

### i. Giving Time to Acceptor.

**Generally.**—A mere delay by the holder to sue the acceptor does not discharge the drawer or indorsers, the right to sue not being suspended. *Philpot v. Bryant*, 1 M. & P. 754; 4 Bing. 717; 3 C. & P. 346.

If the holder, after protest for non-payment, and notice to the drawer, forbears to sue the acceptor, the drawer is not thereby discharged. *Walwyn v. St. Quintin*, 1 B. & P. 652; 2 Esp. 515.

So, after protest only, if the drawer is not entitled to notice. *Ib.*

Secus, before protest, or if the holder takes security from the acceptor after protest. *Ib.*; *S. P.*, *Collott v. Haigh*, 3 Camp. 281.

**After Dishonour of Bill.**—If the holder gives time to the acceptor of a bill or drawer of a note, after it has been dishonoured, the indorser is discharged. *Tindal v. Brown*, 1 T. R. 167; 2 T. R. 186.

**Receipt of Composition from Acceptor.**—So, if the holder receives a composition from the acceptor, he discharges the drawer. *Wilson, Ex parte*, 11 Ves. 10.

**Agreement to give Time.**—If the holder of a bill when due, after taking part payment from the acceptor, agrees to take a new acceptance from him for the remainder, payable at a future

date, and that in the meantime the holder should keep the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to such agreement; though the drawer might have had no effects in the hands of the acceptor. *Gould v. Robson*, 8 East, 576.

So, if the indorsee, having sued the acceptor, receives from him a part payment, and takes a security for the remainder, with the exception of a nominal sum only, he is precluded from suing the indorser. *English v. Darley*, 2 B. & P. 61; 3 Esp. 49.

If, after a bill has been dishonoured, and notice of dishonour duly given, the holder takes part of the amount from the acceptor, and offers to take a warrant of attorney to secure the payment of the residue by instalments, which offer is not accepted: this is not such a giving of time to the acceptor as will discharge the drawer. *Hewitt v. Goodrick*, 2 C. & P. 468.

In an action by indorsee against the executrix of the drawer, it was pleaded that the plaintiff being holder of the bill when overdue, without the authority of the drawer, agreed with the acceptor, that, in consideration that he, the acceptor, would for a reasonable time, to wit, for one month, use his best endeavours to procure a new and approved negotiable bill, to be taken by him, the plaintiff, if satisfactory to him, in lieu and substitution, and for and on account of the overdue bill, he, the plaintiff, would, for and during that period, forbear enforcing payment from the acceptor:—Held, sufficient, as shewing a binding agreement to give time to the acceptor, and that the drawer was therefore discharged. *Moss v. Hall*, 5 Ex. 46; 19 L. J., Ex. 205.

To an action against drawer, it is no defence that the plaintiff, before action, had consented to a judge's order in an action brought by him against the acceptor, that, upon payment of the principal and interest on a future day, all further proceedings should be stayed, otherwise judgment; it not appearing that such future day was posterior to that on which judgment could have been obtained in the action against the acceptor. *Kennard v. Knott*, 4 M. & G. 474; 5 Scott, N. R. 247.

An agreement between the holder and the acceptor of a bill dishonoured by non-payment, that the acceptor should pay to the holder the amount of the bill and no more, discharges the drawer, although his assignees (he being then a bankrupt) are parties to such agreement. *De la Torre v. Barclay*, 1 Stark. 7.

Action by holder of a bill against drawer. Plea, that the plaintiff, after indorsement to him by the drawer, and without his consent, agreed with A. to give time to the acceptor, in consideration that A. would see the bill paid, and that the plaintiff gave time accordingly, whereby he discharged the drawer from payment. A. was not alleged to be a party to the bill:—Held, that the plea was bad, inasmuch as the agreement to give time not being with the principal debtor, but with a stranger, no party to the bill, did not discharge the drawer as surety. *Frazer v. Fraser v. Jordan*, 8 El. & Bl. 303; 26 L. J., Q. B. 288; 3 Jur., N. S. 1054.

**After Judgment.**—The rule that the giving time to the acceptor or prior indorser has the

effect of discharging a subsequent indorsee, does not apply when the indulgence is given after final judgment has been signed in an action

To an action by indorsee of a bill alleged to have been indorsed by the drawer to the defendant, and by the defendant to W., and by W. to

6  
6  
6

8  
si  
tl  
h  
fi  
d  
a  
s  
a  
n  
d  
t  
p  
ti  
a  
l

h  
l

r  
h  
t  
r  
t  
c

w  
d  
a  
d  
e  
d  
t  
s  
u  
h  
e  
v

k  
t  
s  
c  
h  
n  
k  
2

v  
o

n  
4

h  
n  
v  
s  
:

took a cognovit from S., in an action on the bill, by which longer time was given than would have been required for obtaining judgment in that action. Upon general demurrer:—Held, that it sufficiently appeared that S., who indorsed to the plaintiff, was identical with the S. who was the first indorser, and that the plaintiff was cognizant of that fact at the time of taking the cognovit, and that therefore the plea set up a good defence, by shewing that the plaintiff had given time to a party prior to the defendant. *Hall v. Cole*, 6 N. & M. 124; 4 A. & E. 577; 1 H. & W. 723.

To a declaration on a bill, by indorsee against second indorser, he pleaded an action brought by the plaintiff against a prior indorser (the drawer), and a judge's order therein, by consent of the parties, that, on payment of debt and costs in a month, all further proceedings should be stayed; and that, if not so paid, the plaintiff should be at liberty to sign final judgment; and that unless such order had been obtained, judgment and execution might have been had long before the expiration of the month, and that the time given by the order was given without the defendant's consent:—Held, that the plea was no answer, the order not operating as an absolute stay of proceedings, and therefore not amounting to such a giving of time to the drawer as would discharge a subsequent indorser. *Michael v. Myers*, 1 D. & L. 792; 7 Scott, N. R. 444; 6 M. & G. 702; 13 L. J., C. P. 14.

To an action on a bill by indorsee against drawer, who pleaded that the drawee accepted, and the plaintiff sued the drawee on the bill, and, while that suit was pending, in consideration of 2l., agreed with the drawee that the plaintiff should stay all further proceedings, and forbear continuing to sue for two months, during which time the plaintiff could have continued further proceedings, which agreement was without the drawer's consent; and that, in pursuance of the agreement, and without the drawer's consent, the plaintiff did stay all further proceedings, and forbear continuing to sue the drawee:—Held, a good plea, though it did not expressly aver that the indorsee could have obtained judgment against the drawee before the time until which he agreed to forbear. *Isaac v. Daniel*, 8 Q. B. 500; 15 L. J., Q. B. 149.

### iii. Renewal.

**Giving fresh Bills.**—Bills, in lieu of which other bills are given, if permitted to remain with the holder, and the latter bills are not paid, may be enforced. *Barclay, Ex parte*, 7 Ves. 597.

Indorsee against acceptor. Plea, that the drawer indorsed it to C., in whose hands it remained when due; that C. being unable to obtain payment of it, returned it to B., who continued the holder of it until the defendant, before the indorsement to the plaintiff, delivered to B. another bill drawn by the same party, and accepted by the defendant for a greater amount, which B. accepted in discharge and satisfaction of the former bill—is a sufficient answer to the action, although it does not appear that the second bill was payable to order. *Lewis v. Lyster*, 2 C., M. & R. 704; 4 D. P. C. 377; 1 Gale, 320.

The defendant, being indebted to the plaintiff, gave him a note for 45l., which was dishonoured;

the latter afterwards agreed to accept 5s. in the pound, to be secured by the acceptance of a bill for 11l. 5s. by the defendant's brother, which was accordingly given, but the original note remained in the plaintiff's possession, and was to revive if the acceptance was not honoured. The bill was not paid the day it became due, but on the following morning the defendant tendered 12l. to the plaintiff, including its amount and expenses thereon, which the latter refused to accept, and brought an action on the original note:—Held, that he was not entitled to recover. *Soward v. Palmer*, 2 Moore, 274.

To a declaration by indorsee against the maker of a note for 420l., he pleaded, that after it became due, he gave the plaintiff two bills for 210l. each, to take up the note, and in lieu thereof: that the defendant was a party to the bills, and liable thereon to the plaintiff, and that they were not due, and were outstanding in his hands. The defendant gave in evidence a memorandum signed by the plaintiff, stating that the defendant had given him two bills for 420l.; and one of the bills was overdue and unpaid at the commencement of the action:—Held, that it was a question for the jury whether the bills were given in lieu of and satisfaction of the note, or only to gain time for payment; if the former, it was a defence to the action, although the defendant did not prove the latter allegation of the plea; if the latter, it was no defence, unless he proved that both the bills were outstanding at the commencement of the action. *Goldshede v. Cottrell*, 2 M. & W. 20.

**Upon Terms.**—A. drew a bill on B., which B. accepted. C. became the holder for value. Before due date it was agreed between A. and C., A. assuring C. of B.'s concurrence, that the bill should be renewed; and C. gave to A. a cheque on C. for the amount of the bill, to the intent that B. should be placed in funds to meet the original bill, and should thereupon accept the renewed bill. A. sent the new bill to B. for acceptance, and also sent him the cheque, and B. knew the purposes for which both were sent. B. cashed the cheque and paid the first bill, but refused to accept the second:—Held, that B. had no right so to appropriate the cheque without accepting the bill. *Torrance v. Bank of British North America*, 5 L. R., P. C. 246; 29 L. T. 109; 21 W. R. 529.

An action being brought against the acceptor, it was agreed between the parties that the defendant should pay the costs, renew the bill, and give a warrant of attorney to secure the debt. The defendant gave the warrant of attorney and renewed the bill but did not pay the costs:—Held, that the plaintiff might bring a fresh action on the first bill, while the second was outstanding in the hands of an indorser. *Norris v. Aylett*, 2 Camp. 329.

But where a defendant, being indebted to the plaintiff on a bill which was dishonoured, gave another bill at a longer date, and also a warrant of attorney to confess judgment, in case the second bill should not be paid when due, and agreed to pay the expenses of executing the warrant of attorney; and the second bill was duly honoured, but those expenses were not paid, and the first bill was retained by the plaintiff:—Held, that he could not sue the defendant on such original bill. *Dillon v. Rimmer*, 7 Moore, 427; 1 Bing. 100.

**Effect of.]**—A., by taking and renewing the acceptance of C., the agent of his debtor B., does not discharge B.; unless A. has elected between the acceptance and cash, or B. is misled or prejudiced by the arrangement. *Robinson v. Read*, 4 M. & R. 349.

Where, on a bill becoming due, the holder agrees to receive another bill in renewal of it, his remedy on the first is suspended till the second is dishonoured, as well for expenses incurred by non-payment of the first as for its amount. *Kendrick v. Lomax*, 2 Tyr. 438; 2 C. & J. 405.

**Agreements for.]**—The defendant accepted the plaintiff's draft at six months, and the plaintiff agreed in writing to renew the bill, if circumstances should prevent the defendant from meeting it at maturity. He made no application for renewal during the currency of the bill; but on the plaintiff presenting it for payment shortly after it became due, he claimed to have it renewed according to the agreement, circumstances having in fact prevented him from meeting it:—Held, that the defendant was not bound to apply for a renewal during the currency of the bill; but that it was sufficient if he did so within a reasonable time after it became due. *Maillard v. Page*, 5 L. R., Ex. 312; 39 L. J., Ex. 235; 23 L. T. 80.

A. wrote to B. saying: "I have been requested to grant a credit in favour of C., and I consent to do so, and authorize you to draw upon me for C.'s account, for 15,000*l.* in drafts at three months' date, which I engage to have renewed three times by drafts of the same date, making the currency of the credit twelve months in all, provided you give me an undertaking to furnish me with funds to pay each set of bills previously to maturity, in order to keep me out of cash advance." B. answered, copying and adopting this letter, but after the last word "advance," adding "for the said twelve months." In the next part of B.'s letter was this sentence: "We take note of the said credit, and subscribe to the engagement of renewing three times our drafts, with furnishing you with the funds to pay the drafts renewed, in order to keep you out of cash advance for twelve months." Bills were drawn and renewed under this agreement. The last renewals became due a few days after the expiration of twelve months from the date of B.'s letter:—Held, that the agreement was, in substance, to "pay each set of bills previously to maturity," and that B. had not satisfied it by keeping A. out of cash advance for the first bills and the first and second renewals, but was bound to keep A. out of cash advance for the last renewed bills. *English and Foreign Credit Company v. Arduin*, 5 L. R., H. L. 64; 40 L. J., Ex. 108.

A., having advanced large sums of money to the defendant, on account of estates in the West Indies, of which they were joint owners, received from the defendant two notes to the amount of 3,000*l.*, upon an agreement which contained these terms:—"Should the crops of the estates not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary from the condition of the properties." The crops proved unproductive, and the notes were renewed three times. An action was brought on the third renewed bill, which had been indorsed to the plaintiff with a knowledge of the agreement:—Held, that the agreement

stipulated for one renewal only. *Innes v. Munro*, 1 Ex. 473; 17 L. J., Ex. 71.

A defendant, being indebted in a certain amount, gave his creditor acceptances for a larger amount, which the creditor indorsed to third parties for their accommodation, and they indorsed them to the plaintiffs for value. One of them was dishonoured and twice renewed, and while the last renewal was in the plaintiffs' hands, they were parties to a deed of arrangement with their indorsers, in which they covenanted not to sue any of the other parties on bills, upon which, as between such parties and their indorsers, such parties would not be liable. Previously to the last renewal, the defendant had paid the bills to the amount he owed the drawer, and the plaintiffs then sued upon the last renewal of the bill:—Held, that the question was, not whether there was value for the original acceptance, but whether it was a bill on which, as between the indorsers and the plaintiffs, the indorsers would be liable. *Bailey v. Edwards*, 11 W. R. 266.

A court of law can only allow a defence to be pleaded on equitable grounds, where a court of equity would grant an absolute and unconditional injunction; and, therefore, to an action on a bill against acceptor, the court refused to allow him to plead, that the bill was accepted upon a distinct promise by the plaintiff that if the defendant would pay certain discount the plaintiff would renew from time to time, until the defendant was of ability to meet the bill; that he had always kept his part of that contract, but that the plaintiff had refused to renew upon application to him to do so; and that he had never been of ability to pay the bill. *Flight v. Gray*, 3 C. B., N. S. 320; 27 L. J., C. P. 13; 4 Jur., N. S. 13.

— **Parol.]**—In an action on a note or bill, the defendant cannot give in evidence a parol agreement entered into when it was drawn, that it should be renewed, and payment not demanded when it became due. *Hoare v. Graham*, 3 Camp. 57.

### 3. FORGERY.

#### a. Generally.

**When Parties are Estopped from Setting up the Defence of.]**—If a party to a bill, on being asked if it is his handwriting, answers that it is, and will be duly paid, he cannot afterwards set up a defence of forgery, for he has credited the bill, and induced others to take it. *Leach v. Buchanan*, 4 Esp. 226.

So, if he has at any time paid other forged bill of the same party, under similar circumstances. *Barber v. Gingell*, 3 Esp. 60.

If a holder of a bill agrees not to sue the acceptor, provided the latter will make an affidavit that the acceptance is a forgery, and such affidavit is accordingly made and sworn, he cannot afterwards bring an action on the bill, though the affidavit is false. *Stevens v. Thacker*, Peake, 187.

When a banker indorses, for the benefit of a customer, two parts of a bill, both being fully stamped, and with the words "eight days" written sufficiently far apart for the insertion after indorsement of the letter "y," such parts do not constitute two bills; there is no negligence such as to disentitle him from setting up the alteration as the defence to an action on the bill;

nor is he estopped from taking advantage of a fraudulent sale by the customer of the two parts as separate bills. *Société Générale v. Metropolitan Bank*, 27 L. T. 849; 21 W. R. 335.

**What amounts to.]**—Where a bill with a blank acceptance was drawn and indorsed by one Richardson, in the fictitious name of Wilson:—Held, in the absence of evidence that the drawer passed himself off for a different person of the name of Wilson, or of any intention to defraud any other person, that it was not a forgery, and that the bill was not void on that account. *Schulz v. Attley*, 2 Bing. N. C. 544; 7 C. & P. 99; 2 Scott, 815; 1 Hodges, 425.

**Of Indorsement—After Maturity.]**—Where the original indorsement of the payee's name on a bill is a forgery, a real indorsement by the payee after the bill has arrived at maturity will not give the holder any title. *Esdaile v. La Nauze*, 1 Y. & C. 394.

**Promise to Pay Forged Bill—Effect of.]**—W. accepted bills in the name, but without the authority, of his brother J., which bills were dishonoured when at maturity. W. was taken up upon another charge of forgery, and, while in custody, the holders of these bills applied to J. for payment of them:—Held, that the written acknowledgment by him (after the bills had been dishonoured), that he was responsible for the bills, and also that he engaged to pay them in case his brother should fail to do so, was not sufficient to make him liable upon the bills; no antecedent authority having been given to W. to accept the bills, and the subsequent acknowledgment of liability being made to screen his brother from a charge of forgery. *Edwards, Ex parte*, 2 Mont., D. & D. 241; 5 Jur. 706.

**Payment by Drawer to Indorsee on a Forged Bill—Recovery of Money Paid.]**—If a forged bill is accepted and paid by the drawee, he cannot recover the money back from the indorsee to whom he paid it. *Price v. Neal*, 3 Burr. 1354; 1 W. Bl. 390.

**Evidence to Sustain Defence of.]**—In an action against an acceptor who defends himself on the ground of his acceptance having been forged by A., evidence that A. forged his acceptance to another bill, and absconded on that account, is not admissible. *Balleotti v. Serani*, Peake, 142; *S. P., Viney v. Bares*, 1 Esp. 293.

In an action by first indorsee against acceptor, evidence is not admissible to shew that the drawer forged the defendant's acceptance to other bills, that the drawer absconded, and that then several bills, some of them with forged acceptances, were taken from a box in his house by the plaintiff's brother, and came into possession of the plaintiff, unless it can be shewn that the bill in question was one of such bills. To prove the forgery, such evidence only can be received as would have been admissible on an indictment against the drawer for the forgery. *Griffiths v. Payne*, 3 P. & D. 107; 11 A. & E. 131.

In an action on a bill which the defendant contends is a forgery, other bills of the defendant may be produced to the jury to compare the handwriting. *Allesbrook v. Roach*, Peake, Add. Cas. 27.

Where A., believing a bill shewn to him to have

been accepted by himself, gave another acceptance in lieu of it, and in consideration thereof it was delivered up: and it turned out that the first acceptance was a forgery. In an action on the second bill, by an indorsee against the acceptor, the plaintiff admitted that the acceptance of the first bill was a forgery, but set up that he was a bona fide holder of that bill for value:—Held, that the onus was cast on the plaintiff of proving that he was such bona fide holder. *Mather v. Maidstone (Lord)*, 1 C. B., N. S. 273; 26 L. J., C. P. 58; 3 Jur., N. S. 112.

In August, 1867, the defendant paid a bill (of which the plaintiff was the holder) upon which his name had been written as acceptor without his authority. In an action against him upon another bill similarly accepted, the jury found that the acceptance was not his signature nor written with his authority, that the forged signature was not adopted by him, that he did not know that the plaintiff was the holder of the former bill, and that he did not lead the plaintiff to believe that the acceptance of the bill sued upon was his:—Held, that the fact of the defendant having paid the bill in August, 1867, did not estop him from denying that the bill declared on was accepted by him or with his authority, and that the judge was not bound to tell the jury that, as matter of law, the plaintiff was entitled to a verdict. *Morris v. Bethell*, 5 L. R., C. P. 47.

**Restraining Negotiation.]**—Where a bill has been negotiated by means of a forgery of the name of the payee as indorser, a court of equity will restrain even a bona fide holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled. *Esdaile v. La Nauze*, 1 Y. & C. 394.

Bills in the hands of foreign indorsees, for value, were accepted in England, on the faith of the genuineness of a bill of lading, which was presented to the acceptor with the bills by the indorsees, but which afterwards proved to have been forged by the drawer. The indorsees were unaffected with notice of the forgery when they obtained the acceptances. In a suit in equity by the acceptor against the indorsees for delivery up of the bills, and an injunction against negotiating or proceeding at law upon them:—Held, that on the indorsees undertaking to deliver up the bills in the event of the judgment at law being against them no injunction ought to be granted. *Thiedemann v. Goldschmidt*, 1 De G., F. & J. 4; 1 L. T. 50; 8 W. R. 14.

#### 4. EQUITABLE DEFENCES.

**Acceptance on behalf of Company—Personal Liability of Acceptor.]**—To an action on a bill, the court allowed a defendant to plead, by way of equitable defence (leaving its validity to be questioned on demurrer), that he was chairman of a company completely registered; that the bill was drawn for the company's purposes, and accepted by him as chairman; that in order to bind the company, it ought to have been accepted by another director also, and countersigned by the secretary; that by mistake or accident this was omitted to be done, and that it never was intended that he should be bound personally. *Burgoyne v. Cottrell*, 24 L. J., Q. B. 28.



previous indorser, to recover the amount of the bill. *Low v. Copestake*, 3 C. & P. 300.

**Partners.**—Where indorsees sued the drawer in their own right, and it appeared that the bill had been indorsed to them in blank, before the death of one of the firm, who was a partner with the plaintiffs as bankers:—Held, that the action was well brought without their describing themselves as surviving partners in the declaration, as they were not bound to prove the partnership, or that the bill was indorsed or delivered to them jointly with their deceased partner. *Secus*, if the bill had been specially indorsed. *Attwood v. Rattenbury*, 6 Moore, 579.

Where a bill was indorsed to three partners, in respect of a debt due from the drawer and indorser, and was accepted by the defendant at the request of one of the partners, who engaged to provide for it when it became due:—Held, that the assignees of both could not recover against the acceptor, although the one partner was not privy to the engagement of the other. *Johnson v. Peck*, 3 Stark. 66.

**Executor.**—The 7 Will. 4 & 1 Vict. c. 26, s. 3, empowering a testator to bequeath all personal estate which, if not bequeathed, would devolve upon his executor, does not enable a testator to bequeath a note made to him, so as to pass the right to sue in respect of it. Such right is in the executor. *Bishop v. Curtis*, 18 Q. B. 878; 21 L. J., Q. B. 391; 17 Jur. 23.

Where the legatee of such note is convicted of felony, the forfeiture caused by such conviction does not divest the executor of his right to sue, though he is a trustee for the crown in respect of the proceeds of the suit. *Ib.*

**Adding Parties.**—The plaintiff having sued on a bill of which the defendant was acceptor, he stated by way of defence that the bill was accepted by him on behalf of a company in part-payment of a ship which was afterwards transferred to the company; that the defendant was induced to accept the bill by the fraud of the plaintiff in misrepresenting the seaworthiness of the ship, and that the defendant and the company had a counter-claim over against the plaintiff for the fraud and misrepresentation. On an application by the defendant under Ord. XVI. r. 13, to add the company as a defendant, the court refused the application, holding that on the facts the company ought not, on the application of the defendant, to be joined as a co-defendant under Ord. XVI. r. 13. *Norris v. Beasley*, 2 C. P. D. 80; 46 L. J., C. P. 169; 35 L. T. 845; 25 W. R. 320.

See further PRACTICE (Parties).

**Against Parties out of the Jurisdiction.**—A British subject, residing at Florence, there signed two promissory notes and sent them to London, where they were delivered to the payee:—Held, that the "cause of action" arose upon the delivery of the notes, and therefore he could be sued upon them. *Chapman v. Cottrell*, 3 H. & C. 865.

## 2. AT WHAT TIME ACTION CAN BE BROUGHT.

**Not till Day after Bill becomes Due.**—It is too early to issue a writ on the day on which a bill is due; it is sufficient in such case to plead that the bill was not due at the time of commencing the action. *Hells v. Giles*, 2 Gale, 209.

**Against Drawer.**—An action cannot be brought against the drawer till notice of the refusal, insolvency or absconding of the acceptor. *Dagglish v. Weatherby*, 2 W. Bl. 647.

If a bill is not accepted, an action will lie upon it against the drawer before the time when it is made payable. *Milford v. Mayor*, 1 Dougl. 55; *S. P.*, *Bright v. Purrier*, Bull. N. P. 269; 3 Burr. 1687.

**By Indorsee against Indorser.**—So, an action lies by indorsee against indorser immediately on the non-acceptance of the drawee, though the time for which the bill was drawn has not elapsed. *Bollingalls v. Gloster*, 3 East, 481; 4 Esp. 268.

It is no defence to an action against an indorser, that it was commenced before a reasonable time had elapsed after a notice of the dishonour; the only remedy the defendant has is to apply to the court to stay proceedings on payment of costs. *Siggers v. Lewis*, 2 D. P. C. 681; 1 C., M. & R. 370; 4 Tyr. 847.

**Drawer against Acceptor.**—In an action by drawer against acceptor on a bill for the freight of a chartered ship, which the drawer agreed to renew for three months if the charterer did not return before the bill was due:—Held, that where no application appeared to have been made for such renewal, the holder might sue before the expiration of the three months. *Gibbon v. Scott*, 2 Stark. 286.

**When a previous Action has been brought.**—Where a note purports to be payable on demand, but was in truth given to secure the payment of money by instalments, the payee having already brought an action on the note, and taken a cognovit for the instalments due, cannot maintain a second action for default in payment of the subsequent instalments. *Siddall v. Raveliffe*, 1 M. & Rob. 263; 1 C. & M. 263; 3 Try. 411.

The holder of a bill having sued the acceptor upon it at maturity, transferred it during the pendency of the action without consideration, and with notice of the pendency of the former action, and thereupon the transferee brought an action upon the bill against the acceptor:—Held, that the pendency of the first action was not the subject of a plea in bar to the second action, but matter only for an application for the equitable interference of the court. *Deuters v. Townsend*, 5 B. & S. 613; 33 L. J., Q. B. 301; 10 Jur., N. S. 1072; 10 L. T. 602; 12 W. R. 1002.

**Statute of Limitations.**—L., in 1846, promised to pay, three months after date, to B. or to C., his wife, 500*l.* B. died in 1863, leaving C. surviving. There was an indorsement on the note in L.'s handwriting of his name and the year 1866. C. died in 1868:—Held, that it was not intended to make a new note, and that there was a sufficient acknowledgment to exclude the Statute of Limitations. *Bourdin v. Greenwood*, 13 L. R., Eq. 281; 41 L. J., Ch. 73; 25 L. T. 782; 20 W. R. 166.

The plaintiff in the action sued on a promissory note at three months, dated the 11th March, 1874; the note was therefore *prima facie* due on the 14th June of the same year. The 14th of June was a Sunday. The writ in the action bore date 14th June, 1880, which was a Monday. It was contended that the right of action was





**County Court.]**—A plaintiff, seeking to recover less than 20*l.* on a bill, was refused a summons out of a county court under the Summary Procedure on Bills of Exchange Act, on the ground that, where the claim was for less than 20*l.*, the jurisdiction of the county court was taken away by 19 & 20 Vict. c. 108, s. 4.—Held, that that section did not take away any jurisdiction possessed by the county court under the Bills of Exchange Act. *Holbrook v. Jones*, 4 L. R., C. P. 14; 38 L. J., C. P. 22; 19 L. T. 320; 17 W. R. 54.

**Letting in to Defend.]**—A defendant will be allowed to appear and defend where there is any defence suggested, either in law or in fact, which there is any reasonable ground for supposing may possibly be supported. *Mathews v. Maryland*, 27 L. J., Ex. 148; *S. P.*, *Clay v. Turley*, 37 L. J., Ex. 2.

The act gives to a judge a discretion as to the sufficiency of affidavits for leave to appear; and it is doubtful whether the court has any original jurisdiction: therefore, where the judge has considered the application, and deemed the affidavit to be insufficient, the court will not do more than intimate an opinion. *Smith v. Dix*, 6 Jur., N. S. 1016.

To entitle a defendant served with a writ under the Bills of Exchange Act, 1855, to leave to appear and defend, it is not necessary that he should produce an affidavit of merits. It is enough if the affidavit discloses any defence, whether legal or equitable. *Casella v. Darton*, 8 L. R., C. P. 100; 42 L. J., C. P. 58.

When on an application upon counter affidavits the court refused to rescind an order for leave to appear and defend, or to pay into court the sum indorsed on the writ:—Held, that the court will not decide between conflicting affidavits as to the credibility of the defence set up, and it has no power to compel a defendant to pay into court the sum indorsed. *Freebairn v. Stevens*, 30 L. J., Ex. 1; 6 Jur., N. S. 1101; 3 L. T. 672.

When an order has been made it will not be rescinded on affidavits contradicting the defence, and answered by affidavits on the part of the defendant raising a bona fide conflict of testimony. *Brutton v. Thomas*, 1 F. & F. 377.

In an action commenced by a writ of summons under the Bills of Exchange Act of 1855, leave to appear and plead will be given whenever there is an apparently real defence, and the condition of bringing the money into court, or finding security, will only be imposed where there is reason to doubt its bona fides. *Agra and Masterman's Bank v. Leighton*, 2 L. R., Ex. 56; 36 L. J., Ex. 33.

If leave has been given on affidavits shewing a good defence as between the original parties to the bill, and stating circumstances which raise the inference that the plaintiff is not a holder for value, or is for any other reason liable to be opposed by the same defence, affidavits in answer will be received to contradict that inference, and will, if clear and cogent, be ground for rescinding the leave. *Ib.*

**Amendment of Affidavits.]**—If a defendant obtains leave to appear and defend on an affidavit which appears, upon the facts, to be

the court will neither construe such an affidavit strictly, nor try the case on counter affidavits. *Edwards v. Ramsey*, 10 W. R. 20.

**Order obtained by means of Fraud.]**—The court will interfere to set aside the order if obtained fraudulently. *Pollock v. Turncock*, 1 H. & N. 741; 3 Jur., N. S. 92.

**Payment of Money into Court under Bills of Exchange Act to abide the Event.]**—Money paid into court under the Bills of Exchange Act, 18 & 19 Vict. c. 67, pursuant to a judge's order, "to abide the event" of an action then pending, forms no part of the debtor's estate, but is a security to the creditor for the payment of the amount recoverable in the action, notwithstanding that the matters in dispute in the action have been referred, and bankruptcy supervened before any proceedings are taken in the matter of the arbitration. *Tate, Ex parte, Keyworth. In re*, 43 L. J., Bk. 55; 29 L. T. 849; 22 W. R. 350. Affirmed on appeal, 9 L. R., Ch. 579; 43 L. J., Bk. 102; 30 L. T. 620.

#### 4. WHEN LOST OR DESTROYED.

**Generally.]**—A payee of a negotiable bill, who has lost the instrument, cannot, on its coming to maturity, maintain, without its production, an action against the acceptor for the amount. *Ramus v. Croze*, 1 Ex. 167; 16 L. J., Ex. 280; 11 Jur. 715.

Even although the holder offers an indemnity. *Hansard v. Robinson*, 7 B. & C. 90; R. & M. 404, n.

The loss of a negotiable bill given on account of a debt is an answer as well to an action for the debt, as to an action on the bill. *Croze v. Clay (in error)*, 9 Ex. 604; 23 L. J., Ex. 150; 18 Jur. 654—Ex. Ch.

But a maker of a note not negotiable cannot refuse to pay it when due, on the ground that the payee has it not in his possession or power, and cannot produce it in order to deliver it up to the maker on payment. *Wain v. Bailey*, 10 A. & E. 816; 2 P. & D. 507.

Courts of equity have never acquired jurisdiction to give relief on account of the destruction of a bill of exchange; but there is a complete remedy in such cases at law. *Wright v. Lord Mardstone*, 1 Kay & J. 701; 24 L. J., Ch. 623; 1 Jur., N. S. 1013. *S. P.*, *Edge v. Bamford*, 31 Beav. 247, 31 L. J., Ch. 903; 9 Jur., N. S. 8; 7 L. T. 88; 10 W. R. 812.

**Swing in respect of the Consideration for.]**—Where an unindorsed bill has been lost by the drawer, he may recover against the acceptor, in respect of consideration. *Holt v. Watson*, 12 Moore, 510; 4 Bing. 273.

On the sale of goods, the purchaser agreed to accept bills for the price, and to pay the sums of money for which the bills should be given when the bills became due. One of the bills having been afterwards destroyed by the purchaser, in the hands of a person to whom it had been indorsed as trustee for the vendor:—Held, that no action could be maintained by the vendor on the promise to pay the money when the bills should become due. *Jungbluth v. Way*, 1 H. & N. 71; 25 L. J. Ex. 257.

A cheque given for stock sold was lost by the vendor in going home; the purchaser was immediately informed of this fact, but refused to pay without an indemnity. Four months after, the bankers on whom the cheque was drawn, stopped payment with sufficient money of the drawer's in their hands to answer it:—Held, that under these circumstances an action would not lie for the price of the stock. *Beran v. Hill*, 2 Camp. 381.

In an action for goods sold, the defence relied on a lost bill of exchange given by the defendant on account of the causes of action. The court allowed the plaint to be amended by adding a count on the bill of exchange. *Nash v. Macken*, 5 Ir. R., C. L. 51.

**Promise to Pay after Loss.]**—An express promise to pay the contents of a lost bill, if given without some new consideration, is void. *Davis v. Dodd*, 4 Taunt. 602; *S. C.*, 1 Wils. Ex. 110.

An averment that the defendant was indebted on a bill, and that the plaintiff, having lost the bill, had at his request given him a bond acknowledging payment, and conditioned to indemnify him against the bill, states a good consideration for a promise by the defendant to pay the contents of the bill. *Williamson v. Clements*, 1 Taunt. 523.

**Indemnity for.]**—A plea of a bill given for and on account of the claim, and lost, was struck out on an indemnity being given by the plaintiff to the defendant. *Ringrose v. Blizard*, 2 F. & F. 375.

Where an action is brought on a bill, which is alleged to have been lost, a judge has no power to order a stay of proceedings until an indemnity is given, the defendant undertaking to pay debt and costs. *Aranguren v. Scholfield*, 1 H. & N. 494.

When a party brings an action on a lost bill against the acceptor without first offering to give him an indemnity against the claims of other persons on the bill, the court or a judge, in the exercise of discretion, will make an order under the Common Law Procedure Act, 1854, s. 87, that the loss of the bill shall not be set up as a defence, only on the terms that the plaintiff pay the defendant his costs of the action up to that time as well as give a proper indemnity against such claims. *King v. Zimmermann*, 6 L. R., C. P. 466; 40 L. J., C. P. 278; 24 L. T. 623; 19 W. R. 1009.

**Secondary Evidence as to.]**—Upon non acceptance, the plaintiff having proved that the bill was destroyed:—Held, that secondary evidence of its contents was admissible. *Blackie v. Pidding*, 6 C. B. 196.

Upon an issue that the defendant did not make the note declared on, it appearing that the note is lost, secondary evidence may be given of its contents; and this whether the note be negotiable or not. *Charnley v. Grundy*, 14 C. B. 608; 2 C. L. R. 822; 23 L. J., C. P. 121; 18 Jur. 653.

A plea that the note had been destroyed, pursuant to an agreement between the maker and the plaintiff's testator to whom it was given, cannot, by rejecting the allegation as to the agreement, be treated as a plea setting up the loss of the note. *Id.*

**Costs.]**—See post, XIV., 5.

## 5. AMOUNT RECOVERABLE.

### a. Interest.

**How Payable.]**—In an action against the drawer of a foreign bill dishonoured here for non-acceptance, where the plaintiff is allowed a per-centage in the name of damages, he is only entitled to interest from the day the bill ought to have been paid. *Gantt v. Mackenzie*, 3 Camp. 51.

But where there is no allowance for damages, the plaintiff is entitled to interest from the day the bill was dishonoured for non-acceptance. *Harrison v. Dickson*, 3 Camp. 52, n.

When a bill is made payable with interest, it is to be calculated from the date. *Doman v. Dibden*, R. & M. 381; *S. P.*, *Kennerley v. Nash*, 1 Stark. 452.

A bill or note payable on a day certain carries interest from that day, unless the non-payment has been occasioned by the negligence of the holder. *Laing v. Stone*, 2 M. & R. 561; *S. P.*, *Upton v. Ferrers (Lord)*, 5 Ves. 801.

The drawer of a bill which is dishonoured by the acceptor is not liable to pay interest for the time which elapses between the day whereon the bill becomes due; and the day when the drawer receives notice of the dishonour. *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36.

A note in this form, "I promise for myself and my executors to pay A. (or her executors), one year after my death, 300l., with legal interest," bears interest from its date. *Raffey v. Greenwell*, 10 A. & E. 222; 2 P. & D. 365.

In an action against a drawer of a bill not bearing interest, which has been dishonoured by non-acceptance, if the jury finds the plaintiff entitled to interest by way of damages, the measure of damages is the rate of interest at the place where the bill was drawn. *Giles v. Fremont*, 9 Ex. 25; 22 L. J., Ex. 820; 17 Jur. 302.

**Note on Demand.]**—In an action on a note payable on demand, the jury cannot give interest, except from the time a demand of payment is made. The issuing of a writ of summons is a sufficient demand. *Pierce v. Fothergill*, 2 Bing. N. C. 167; 2 Scott, 334; 1 Hodges, 251.

Interest is not allowable on the notes of a banking company where the notes are payable on demand, and no demand for payment has been made before the company is ordered to be wound up. *Herefordshire Banking Company, In re*, 4 L. R., Eq. 250; 36 L. J., Ch. 806.

**Bill must be produced.]**—Interest is not recoverable on a bill of exchange unless it is produced. *Fryer v. Brown*, R. & M. 145.

In an action by indorsee against acceptor, he pleaded by way of confession and avoidance, but failed to establish the matter of avoidance:—Held, that he could not recover interest upon the bill from the date of its maturity, without producing it. *Hutton v. Ward*, 15 Q. B. 26; 19 L. J., Q. B. 293; 14 Jur. 372.

**Renewed Bill.]**—Plaintiff held a bill drawn by defendant; when it became due in March, the defendant asked for time, and in June the acceptor gave plaintiff another bill for the same sum, plaintiff telling him at the same time that something was due for interest, and continuing to hold the first bill; the second bill was paid

after it became due :—Held, that the plaintiff was entitled to sue the drawer of the first bill, as well as the acceptor, for the interest due upon it. *Lumley v. Hudson*, 4 Bing. N. C. 15; 5 Scott, 238.

Where a bill (afterwards paid) has been given to the holder of a former bill, some time after the latter became due, for the amount of the principal only, an action may be maintained on the first bill for the amount of interest previously due thereon. *Lumley v. Musgrove*, 5 Scott, 230; 4 Bing. N. C. 9; 3 Hodges, 247; 1 Jur. 799.

**Bill payable by Instalments.**—Where a note is payable by instalments, and, on failure of payment of any instalment, the whole is to become due, the interest is to be calculated on the whole sum remaining unpaid on default of any instalment, and not on the respective instalments at the respective times when they would become payable. *Blake v. Lawrence*, 4 Esp. 148.

**After tender of Amount.**—The maker of a note paid money into the hands of an agent to retire it; the agent tendered the money to the holder of the note, on condition of having it delivered up; the note being mislaid, this condition was not complied with; and the agent afterwards became bankrupt with the money in his hands :—Held, that the maker was still responsible on the note, but that interest was not recoverable after the time of the tender. *Dent v. Dunn*, 3 Camp. 296.

**Bill Purchased by Agent upon Death of Principal.**—Where an agent, having money in his hands belonging to his principal, purchased bills, which he indorsed specially to the latter, who at the time of the indorsement was dead, but the agent did not know it :—Held, that the administrator of the principal was only entitled to recover interest on bills accepted after the death of the intestate, from the time of the demand of payment made by the administrator, and not from the time the bills became due. *Murray v. East India Company*, 5 B. & A. 204.

**Bankruptcy.**—Interest accruing before the act of bankruptcy cannot be added to the principal sum due on a bill, so as to constitute a good petitioning creditor's debt, unless interest is specially made payable on the face of the bill. *Cameron v. Smith*, 2 B. & A. 305.

**Billetes issued by Foreign Government.**—The defendant being under agreement to pay the plaintiff the value of certain billetes issued by the Peruvian government, on a remonstrance by the British government, as a compensation for injury done to the plaintiff :—Held, that the prothonotary was to estimate the value, as the value of a bill of exchange for the same number of dollars on a house of respectability at Lima, although the billetes were at a great discount. *Delegal v. Naylor*, 5 M. & P. 443; 7 Bing. 460.

**Acceptance Abroad—Default in England.**—A bill was drawn and accepted in Paris, payable in England. The drawer and acceptor were living in Paris. No rate of interest was expressed to be payable on the bill :—Held, that the

default being made in England, interest was payable according to the English and not the French law. *Cooper v. Waldegrave (Earl)*, 2 Beav. 282.

**Forms part of Debt.**—Action upon a note, for 40*l.* payable on demand, with interest. Plea, as to the debt, that the defendant paid 150*l.* in satisfaction of the debt, and of all damages :—Held, that the interest was part of the debt, and not damages merely, and that it was recoverable as such upon the pleadings. *Hudson v. Fawcett*, 7 M. & G. 348; 2 D. & L. 81; 8 Scott, N. R. 32; 13 L. J., C. P. 141.

**Who Liable for.**—A party guaranteeing the acceptance and payment of a bill guarantees the payment of the interest as well as the principal. *Ackermann v. Ehrensperger*, 16 M. & W. 99; 16 L. J., Ex. 3.

Where a bill is drawn for a given sum, with interest at ten per cent. per annum, the drawer, on the default of the acceptor, is liable for interest at ten per cent., after the maturity of the bill, and notice of dishonour. *Keene v. Keene*, 3 C. B., N. S. 144; 27 L. J., C. B. 88.

**Amount of.**—If a note is payable, with interest at the rate of six per cent. per annum twelve months after date, the judge will advise the jury, in allowing interest up to the time of signing judgment, to allow it at the rate of five per cent. only. *Ward v. Morrison*, Car. & M. 136.

#### b. Re-exchange.

**When Holder entitled to.**—An acceptor of a foreign bill is not liable for re-exchange, nor for more than the principal, together with interest, according to the legal rate of interest where the bill is payable. *Woolsey v. Crawford*, 2 Camp. 445.

Upon a motion to refer it to the master to compute principal, interest and costs upon a bill drawn in Scotland upon and accepted by the defendant in England, the court would not direct the master to allow re-exchange. *Napier v. Schneider*, 12 East, 420. And see *Goldmid v. Tate*, 2 B. & P. 55.

A. deposited money at the banking-house of B. in Paris, for which B. gave him his note "payable in Paris, or at the choice of the bearer at the Union Bank in Dover, or at my usual residence in London, according to the course of exchange upon Paris;" after this note was given, the direct course of exchange between London and Paris ceased altogether, having been, previously to its total cessation, extremely low; the note was at a subsequent period presented for acceptance and payment at the residence of B. in London, at which time there was a circuitous course of exchange upon Paris by way of Ham-burgh :—Held, that A. was entitled to recover upon the note, according to such circuitous course of exchange upon Paris at the time when the note was presented. *Pollard v. Herries*, 3 B. & P. 335.

A., in England, drew a bill on B. in a foreign country, which, after having been negotiated through another foreign country, was presented to B., who refused to pay it on account of the law of the country in which he resided having prohibited such payment :—Held, that the drawer

was liable for the whole amount of the re-exchange between the different countries. *Mellish v. Simeon*, 2 H. Bl. 378.

A verdict having passed for the defendant, in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn in London on Lisbon, upon evidence that the enemy was in possession of Portugal when the bill became due, and Lisbon was then blockaded by a British squadron, and there was in fact no direct exchange between Lisbon and London, though bills had in some instances been negotiated between them through Hamburg and America about that period; the court refused to grant a new trial, on the presumption that the jury had founded their verdict upon the fact that no re-exchange was proved to their satisfaction to have existed between Lisbon and London at the time; the question having been properly left to them, to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or was liable to pay re-exchange; and, saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country. *De Tastet v. Baring*, 11 East, 265; 2 Camp. 65.

Where a bill drawn and indorsed in England and payable abroad is dishonoured by the acceptor's non-payment, the holder is entitled as against the drawer to the amount of the re-exchange, that is, the value at the rate of exchange on the day of the dishonour, of the sum expressed on the face of the bill in the currency of the place where it is payable, with interest and expenses. *Suse v. Pompe*, 8 C. B., N. S. 538; 30 L. J., C. P. 75; 7 Jur., N. S. 166; 9 W. R. 15.

In an action against the drawer of a bill so drawn, accepted and dishonoured, evidence is not admissible to prove a usage among merchants here to entitle the holder at his option to demand from the drawer the amount of the re-exchange, or the sum which he gave him for the purchase of the bill, this being a usage which in terms contradicts the written instrument. *Ib.*

#### c. Costs and Expenses.

**What are Necessary.**—The holder of two bills of exchange, upon which the same parties were liable, issued two writs under 18 & 19 Vict. c. 67, and signed judgment for default of appearance. Leave was afterwards given to defend the actions in respect of the bills upon payment of the costs of the judgments:—Held, that the plaintiff ought not to have issued two writs, and was entitled only to those costs which would have been allowed if he had issued one writ. *Jackson v. Freeman*, 26 L. T. 584; 20 W. R. 683.

The holders of a bill sued the acceptor and drawer concurrently. The acceptor paid, and without any demand for the costs of the writ of summons, they served the drawer with declaration. He pleaded payment before action, and the judge at the trial, considering their conduct improper, entered a nominal verdict, and refused to certify:—Held, that they had a right to go on until payment of costs by the drawer, and that the judge had no power to enter a nominal verdict upon this plea. *London and Suburban Bank v. Walkinshaw*, 25 L. T. 704.

**On Higher Scale.**—In an action on a bill of

exchange properly brought in the Chancery Division, costs may be allowed on the higher scale under Ord. VI. rr. 2, 3. *Pooley v. Driver*, 5 Ch. D. 468.

**Suing in Wrong Court.**—A plaintiff suing in a superior court instead of the sheriff's court, on a lost bank note for less than 20*l.*, cannot recover his costs. *Noble v. Bank of England*, 2 H. & C. 355; 33 L. J., Ex. 81; 9 Jur., N. S. 778; 8 L. T. 733; 11 W. R. 916.

A plaintiff who recovers judgment by default under 18 & 19 Vict. c. 67, for a sum not more than 20*l.*, in an action on a bill, which he might have brought in the London Small Debts Court, is entitled to his costs. *Healey v. Johns*, 8 El. & Bl. 946; 27 L. J., Q. B. 183; 4 Jur., N. S. 508.

But a plaintiff who commences an action under 18 & 19 Vict. c. 67, for a cause within the jurisdiction of the London Small Debts Court, and after the defendant has obtained leave to plead, recovers an amount not more than 50*l.*, is deprived of his costs by the London (City) Small Debts Extension Act, 1852. *Harris v. Swinburn*, 5 B. & S. 370; 33 L. J., Q. B. 313; 10 Jur., N. S. 1234; 12 W. R. 978.

**Noting and Incidental.**—Expenses of noting and postage incurred on the return of an inland bill are not recoverable by the holder, unless specially laid as damages, and proved accordingly. *Kendrick v. Lomax*, 2 Tyr. 438; 2 C. & J. 405.

Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange and other incidental expenses beyond the amount of 5*l.* per cent., if such charges are reasonable and warranted by usage. *Auriol v. Thomas*, 2 T. R. 52.

**According to Law of Foreign Country.**—There being a law in Pennsylvania, that bills drawn or indorsed there on persons in England, and protested, should be paid to the holder, with 20*l.* per cent. for damage; bills drawn on a merchant in England were accepted by him; he becoming bankrupt before they were due, they were protested for non-payment; the drawer, having paid the money due on the bills and the 20*l.* per cent. to the holder, was permitted to prove both under the commission. *Francis v. Rucker*, Amb. 672.

A drawer in Louisiana of bills upon acceptors in London, is entitled to prove under a deed of arrangement executed by the latter, upon their becoming insolvent, to their creditors, not only for the amount of the bills, but also for 10*l.* per cent. upon that amount in lieu of re-exchange, which, by the law of Louisiana, he had been obliged to pay to the holders of the bills, on their return dishonoured and protested for non-payment in Louisiana. *Walker v. Hamilton*, 1 De G., F. & J. 602.

A fixed law at a foreign place of drawing, as to damages and interest for non-payment of a bill, binds the drawer as part of his contract. *State Insurance Company, In re*, 32 L. J., Ch. 300; 9 Jur., N. S. 298.

**Who Liable for.**—An indorser of a bill having had an action brought against him by the indorsee, is not entitled to recover from the

acceptor the costs incurred in such action. *Davson v. Morgan*, 9 B. & C. 618.

An accommodation acceptor, who takes the bill up and pays it to a bona fide holder after action brought by him, cannot recover the costs of such action against the parties liable to him for the sum paid on the bill. *Roach v. Thompson*, M. & M. 487.

#### 6. STATING PROCEEDINGS.

**When.]**—The payee of a note having paid the amount to the indorsee, on default of the maker, sued the latter in the name of the indorsee, but without any authority from him, and obtained a verdict. The maker having paid the debt, the court, upon his application, stayed the proceedings, without costs on either side, and each party bearing his own costs of the rule. *Coleman v. Biedman*, 7 C. B. 871; 7 D. & L. 121.

**Stay of Proceedings—Defence of.]**—Two actions having been brought upon a bill, one against the drawer, and the other against the acceptor, the drawer obtained an order for a stay of proceedings on payment of debt, interest and costs:—Held, that the payment under the order could not be pleaded in bar of the further maintenance of the second action, as a payment in satisfaction or discharge of the action, against the acceptor, or relied on as a ground for reduction of damages. *Randall v. Moon*, 12 C. B. 261; 21 L. J., C. P. 226.

In an action by indorsee against indorser it is no defence that the plaintiff, before action, had consented to a judge's order in an action against the drawer, that, upon payment of the debt and costs within one month, all further proceedings should be stayed, and that, unless such payment were so made, the plaintiff should be at liberty to sign final judgment, although the plea also states that the plaintiff could have obtained such judgment before the expiration of the month, inasmuch as such order did not amount to an absolute stay of proceedings. *Michael v. Myers*, 6 M. & G. 702; 1 D. & L. 792; 7 Scott, N. R. 444; 13 L. J., C. P. 14; 7 Jur. 1156.

It is no defence to an action against the drawer, that the proceedings in an action against the acceptor had (without his consent) been stayed at an early stage by a judge's order to pay debt and costs in three weeks, otherwise judgment. *Kennard v. Knott*, 5 Scott, N. R. 247; 4 M. & G. 474.

**Right to Bill on.]**—A plaintiff sued a defendant on a bill, and at the same time proceeded by summons in bankruptcy, under 12 & 13 Vict. c. 106, s. 78. The action having been stayed, on payment of debt and costs:—Held, that the plaintiff had no right to keep the bill until the costs in bankruptcy were paid. *Cornes v. Taylor*, 10 Ex. 441; 18 Jur. 963.

**In Equity.]**—Where an action has been commenced by an indorsee of a note against the maker, which is impeached on the ground of fraud, and a distinct allegation that such note was not to be negotiated, but to be an item in the further settling of accounts between the parties; and also that the indorsee received such note with notice of the terms on which it was given; the court will restrain the indorsee and

his alleged agent from issuing execution on any judgment he may obtain in such action until answer or further order. *Bainbridge v. Hemingway*, 12 L. T. 74.

A., a shareholder in a company, having held 500 shares, and as he alleged forfeited 490, brought an action against the company for services for a given sum. The company pleaded, but did not plead any set-off, and afterwards withdrew the pleas. A. entered up judgment, and issued execution against B., one of the directors, who obtained time on giving a note. He alleged that at the time he gave it he did not know that A. was a shareholder or had forfeited shares, and he alleged that A. was indebted on his 500 shares in more than the sum claimed; but he had signed a return under 7 & 8 Vict. c. 110, stating that A. had held 500 shares, but had forfeited 490:—Held, that he had no equity to restrain an action by A. on the note. *Hammond v. Ward*, 3 Drew. 103.

Where a bill given for the price of a guaranteed article, which turned out to be worthless, was negotiated by the seller before notice of the failure of consideration, a court of equity refused to set aside the purchase, and order the bill, though not due, to be retired by him on behalf of the purchaser, coming for relief after notice that the bill had been parted with, his remedy being at law. *Jackson v. Shanks*, 12 Jur., N. S. 917; 15 W. R. 55.

#### 7. FOR CONSIDERATION UNDER MONEY COUNTS.

**Generally.]**—If a declaration on a bill, by drawer against acceptor, contains also the common counts, the plaintiff will be entitled to enter the verdict on such of those counts as apply to the consideration of the bill, as well as on the count upon the bill, provided the consideration of the bill is stated in the particulars of demand; and the plaintiff will, after he has closed his case, be allowed to call a witness, and prove the consideration, to prevent these issues being found for the defendant. *Ryder v. Ellis*, 8 C. & P. 357.

Where a bill is given in payment for goods which, upon presentment to the drawee, is refused acceptance:—Held, that the holder having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter count, although the credit on the bill is not expired. *Hickling v. Hardey*, 1 Moore, 61; 7 Taunt. 312.

A bill payable to a fictitious person or order is completely void; but if money paid by the holder as a consideration for the indorsement finds its way to the acceptor, it may be recovered as money had and received. *Bennett v. Farnell*, 1 Camp. 130.

A declaration alleged that the defendant made his bill of exchange, and directed the same to B., and required him to pay to the defendant's order and then indorsed the bill to the plaintiffs. The bill was drawn by F., and indorsed by the defendant in blank, and having been delivered by the defendant to F., was by him taken to a bank of which the plaintiffs were the managers, where it was received by them in renewal of another bill discounted by them, and drawn and indorsed by the same parties:—Held, that the plaintiffs were not entitled to recover on an

account stated. *Burmester v. Hogarth*, 11 M. & W. 97; 12 L. J., Ex. 178.

**When Acceptor discharged by Alteration in Bill.**—An indorsee cannot recover on the money counts from an acceptor, who is discharged by a material alteration in the bill. *Long v. Moore*, 3 Esp. 155, n.

**Evidence.**—In an action by indorsee against indorser, evidence of an acknowledgment of an existing debt and of a promise to pay by the defendant, is admissible, and sufficient to support a count upon an account stated. *Wagstaffe v. Boardman*, 9 D. & R. 248.

A promise by a drawer to pay the indorsee and holder of bills overdue, is evidence of an account stated in an action by the indorsee against the drawer. *Oliver v. Dorratt*, 2 M. & Rob. 230.

**—Of what Note or Bill is.**—In an action on a bill or note by an indorsee against an indorser, the bill will not be evidence of an account stated, unless there is an admission of the money being due. *Bird v. Legge*, 7 D. P. C. 814; 5 M. & W. 418; 3 Jur. 823.

A note is evidence under the money counts, only as between the original parties to it. *Waynam v. Bend*, 1 Camp. 175; *S. P., Bentley v. Northouse*, M. & M. 66; *Eales v. Dicker*, M. & M. 324.

A bill payable to the order of the drawer, in an action by him against the acceptor, is good evidence under the money counts. *Thompson v. Morgan*, 3 Camp. 101.

In August, 1844, the defendant gave the plaintiff a note for 23l. 2s. 6d., which the note described as being the interest due on a note for 117l. 4s., dated the 6th July, 1838, up to the 6th July, 1844:—Held, evidence of an account stated, in August, 1844, of a then subsisting debt of 117l. 4s. *Perry or Penny v. Slade*, 8 Q. B. 115; 15 L. J., Q. B. 10; 10 Jur. 31.

A note given by the defendant to the plaintiff, payable five years after date, for value received, is evidence of an account stated, against which the Statute of Limitations does not commence to run until the maturity of the note. *Fryer v. Roe*, 12 C. B. 437.

Where a plaintiff cannot recover on a count on a note for want of a stamp, he may recover on a count for money lent, by proving an acknowledgment on a demand made. *Tyte v. Jones*, 1 East, 58, n.

Action by indorsee of a bill for 57l. 10s., and upon an account stated against the acceptor. The bill was upon an insufficient stamp; and the plaintiff, in order to recover upon the account stated, produced two letters written by the acceptor after the dishonour of the bill. In the first, which was dated on the day the bill became due, and which was addressed "To the gentleman who calls with the bill," he expressed his regret that it was not in his power to take up the bill. In the second letter, which was in answer to one from the plaintiff's attorney, requiring payment of the acceptance in favour of Tilbury for 57l. 10s., he said, if he had had the money he should not have let his acceptance be dishonoured; and he proposed that Tilbury should draw upon him in a month:—Held, that these letters did not amount to an acknowledgment that the sum of 57l. 10s. was due to the plaintiff, but merely that it was

due to the person legally entitled to the bill; that it was necessary, therefore, for the plaintiff to prove an indorsement of the bill; and that the bill not being on a sufficient stamp, could not be looked at by the jury for the purpose of ascertaining this fact. *Jardine v. Payne*, 1 B. & Ad. 663.

**Right to Begin.**—In an action on a bill or note, and a common money count, special pleas to the one, and never indebted to the other, if the plaintiff does not undertake to prove a sufficient transaction on the latter count, the defendant is entitled to begin. *Oakeley v. Ooddean*, 2 F. & F. 656.

## 8. PLEADINGS.

**Declaration—Sufficiency of.**—A declaration by indorsee against acceptor of a bill, payable three months after date, which period has elapsed. Breach, that he had not paid. A demurrer that the declaration did not shew that the three days of grace had elapsed before action, was set aside as frivolous. *Padwick v. Turner*, 11 Q. B. 124; 17 L. J., Q. B. 7; 11 Jur. 930; *S. P., Shepherd v. Shepherd*, 3 D. & L. 199; 1 C. B. 847; 14 L. J., C. P. 220; 9 Jur. 668.

In an action by indorsee against indorser of a bill, drawn payable in London, the declaration averred a presentment generally, not stating in London; but the venue was London:—Held, a sufficient averment of a presentment in London. *Boydell v. Harness*, 3 C. B. 108; 4 D. & L. 179; 15 L. J., C. P. 233.

A count on a note payable at a place named in the note is bad, after verdict, for want of an averment of presentment at that place. *Emblin v. Dartnell*, 12 M. & W. 830; 1 D. & L. 1010; 13 L. J., Ex. 255.

In an action by a banking company as indorsee against indorser, the declaration stated that L. made his note in Scotland payable to the defendant's order, and delivered it to him; that he indorsed and delivered it to the company; that the note was not paid, although duly presented for payment, and that it was protested for non-payment, whereof the defendant had notice:—Held, on motion in arrest of judgment, that the declaration was good, the word "whereof" not being confined to the averment of protest only. *Bonar v. Mitchell*, 5 Ex. 415; 19 L. J., Ex. 302.

In an action by indorsee against acceptor, it is not necessary to allege his notice of the indorsement. *Skelton v. Halstead*, 2 D., N. S. 69; 6 Jur. 961.

It is not necessary in a declaration on a bill to aver that the maker delivered it; it is sufficient to state that he made it. *Churchill v. Gardner*, 7 T. R. 596.

A bill payable to the order of A. is payable to A., without alleging any order made; and it is sufficient to declare that A. delivered the bill to the defendant, which he accepted, without alleging a re-delivery of the bill by the defendant. *Smith v. McClure*, 5 East, 476; 2 Smith, 43; *Bluet v. Middleton*, 1 D. & L. 376.

In an action against indorser, if the plaintiff does not allege a demand on, and refusal by the acceptor, on the day when the note was payable, it is error, and not cured by verdict. *Rushion v. Aspinall*, 2 Dougl. 679.

In like manner it is error, and not cured by

verdict, if he does not allege notice to the defendant of the refusal by the acceptor. *Ib.*

If a conditional acceptance is declared upon, it must be set forth specially, with an averment that the condition has been performed. *Ralli v. Sarrell*, D. & R. N. P. C. 33. See *Russell v. Phillips*, 14 Q. B. 891.

The indorsee of note cannot declare against his indorser as maker, even where the latter has indorsed a note not payable or indorsed to him; and where, consequently, his indorsee cannot sue the original maker. *Gwinnett v. Herbert*, 5 A. & E. 436; 6 N. & M. 723; 2 H. & W. 194.

A declaration against the maker of a note, payable at a particular place, which avers a presentment at the place, need not aver a refusal at the particular place. *Butterworth v. Le Despencer (Lord)*, 3 M. & S. 150.

In an action on a note by indorsee against maker, notice of the indorsement need not be averred. *Reynolds v. Davies*, 1 B. & P. 625.

So, in a declaration by indorsee against acceptor, it is unnecessary to aver notice of the indorsement. *Heald v. Johnson*, 2 Smith, 44.

It is not necessary in an action against a drawer for non-acceptance to aver the delivery of the bill to the plaintiff. *Devereux v. Morrissey*, 17 Ir. C. L. R. 785.

In an action for the non-acceptance of a foreign bill, when drawn in sets of threes, it is not necessary to aver either the non-acceptance or non-payment of the second and third bills. *Ib.*

The allegation in a declaration that the bill is "now overdue," is not a traversable allegation, but part of the description of the instrument declared on. *Hinton v. Duff*, 11 C. B. N. S. 724; 2 F. & F. 561; 31 L. J., C. P. 199; 5 L. T. 797; 10 W. R. 295.

Where, therefore, an action was commenced on the 11th of June, and the bill only arrived at maturity on that day:—Held, that the plaintiff failed to sustain the declaration, and that his right to recover was properly put in issue by non acceptavit.

— **Foreign Bill.**—A declaration against drawer or indorser of a foreign bill should allege that it was made in parts beyond the seas. *Armani v. Castrique*, 2 D. & L. 432; 13 M. & W. 443; 14 L. J., Ex. 36; *S. P., Bank of Ireland v. Archer*, 11 M. & W. 383.

— **Date of Bill.**—It is not necessary to set out the date of a bill; its delivery is its date. *Giles v. Bourne*, 6 M. & S. 73; 2 Chit. 300.

The statement in a declaration that the defendant, on a certain day, made his note does not require proof that the note bore date on that day. *Smith v. Lord*, 2 D. & L. 759; 14 L. J., Q. B. 112; 9 Jur. 450.

— **When Payable.**—Where a count on a note was demurred to, because it omitted to state the time at which it became payable, or whether it was payable before action, the court set aside the demurrer as frivolous. *Gurney v. Hill*, 2 D., N. S. 936; 12 L. J., Q. B. 297; 7 Jur. 834.

**Names of Parties—Before the C. L. P. Act of 1852.**—In an action by indorsee against acceptor, the declaration alleged that one J. Bankes made his bill, and the defendant specially demurred, on the ground that the christian-name of Bankes ought to have been set out in full, or

that it should have been alleged that he was designated by an initial letter in the bill; the court set aside the demurrer as frivolous. *Braithwaite v. Harrison*, 1 D. & L. 210; 7 Jur. 898.

But in subsequent cases, the court refused to set aside such a demurrer, as being frivolous. *Nash v. Calder*, 5 C. B. 177; 5 D. & L. 341; 17 L. J., C. P. 91; *S. P., Smith v. Bull*, 15 L. J., Q. B. 413; 10 Jur. 946.

Afterwards it was held to be informal to describe any of the parties to a bill or note by the initials only of their christian-names, without shewing that they were so described in the instrument itself. *Esdaile v. Maclean*, 15 M. & W. 277; 16 L. J., Ex. 71.

Therefore, an averment that J. C. Pawle made his bill, which the defendant accepted, and that J. C. Pawle indorsed it to the plaintiff, was ill. *Levy v. Webb*, 9 Q. B. 427; 15 L. J., Q. B. 407; 10 Jur. 980; *S. P., Kinnersley v. Knott*, 7 C. B. 980; 7 D. & L. 128; 18 L. J., C. P. 281; 13 Jur. 658; *Miller v. Hay*, 3 Ex. 14; 18 L. J., Ex. 487; 12 Jur. 985.

Action against the maker of a note. Plea, that it was made by the defendant as the treasurer of a society, which consisted of divers persons, to wit, fifty persons, and was called "The Silurian Lodge of Odd Fellows," and as a security for any balance due to the society from the defendant, as such treasurer, was bad, on special demurrer, for not stating the names of the persons composing the society, nor any reason for not giving them. *Williams v. Miles*, 6 D. & L. 433; 18 L. J., Ex. 295.

**Plea—Non assumpsit or never Indebted.]**—To a declaration on a bill and an account stated, the defendant pleaded non assumpsit, whereupon the plaintiff signed judgment as for want of a plea:—Held, that he was not justified in signing judgment, the proper course being to demur; and the court refused to amend such judgment by confining it to the issue raised on the first count. *Eddison v. Pigram or Peagram*, 4 D. & L. 277; 16 M. & W. 137; 16 L. J., Ex. 33; 10 Jur. 1090.

In an action on a bill by indorsee against acceptor, and a count on an account stated, he pleaded non assumpsit:—Held, that the cause could not be tried on this plea, and, the jury being sworn, plaintiff took a verdict for the amount of the bill and interest, without adducing any evidence, and without putting in the bill. *Neale v. Procter*, 2 C. & K. 456.

To a declaration containing a count by indorsee against indorser of a bill, and a count on an account stated, the defendant, who was under terms of pleading issuably, pleaded thus: "And the defendant says, that he did not indorse the bill, as in the first count mentioned; and as to the last count, that he did not promise." The plaintiff having signed judgment, on the ground that the first plea, in terms, applied to the whole declaration, and was therefore non-issuable, the court set aside the judgment for irregularity. *Bousfield v. Edge*, 1 Ex. 89; 5 D. & L. 99; 17 L. J., Ex. 169.

To an action containing a count on a bill and another on an account stated, the defendant pleaded non assumpsit:—Held, that the plaintiff was not bound to demur, but might apply to a judge to set the plea aside. *Robeson v. Ellis*, 5 D. & L. 403; 2 B. C. Rep. 185; *S. P., Fraser v. Newton*, 8 D. P. C. 773.

To a declaration, the first count being on a



note, and the other counts being common counts, the defendant, without a rule to plead several matters, pleaded to the first count, a traverse of the making of the note, "and for a further plea as to the whole declaration," non assumpsit:—Held, that the plaintiff was entitled to sign judgment. *Harrey v. Hamilton*, 4 Ex. 43; 7 D. & L. 85; 18 L. J., Ex. 377.

By 5 & 6 Vict. c. 22, s. 40, the general issue may be pleaded, and that act and the special matter given in evidence, in defence of an action on a security given by a bankrupt, with interest, to persuade a creditor to forbear opposing, or consent to the allowance of his certificate:—Held, that the general issue of non assumpsit (by statute) might be pleaded under this enactment in an action on a bill or note. *Weeks v. Argent*, 16 M. & W. 817; 16 L. J., Ex. 209; 11 Jur. 525.

—**Set-off.**—In an action by the payee of a joint and several note against one who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety by way of equitable defence, to plead a plea of a set-off due from the payee to the principal, arising out of the same transaction out of which the liability of the surety arose. *Bechervaise v. Lewis*, 7 L. R., C. P. 372; 41 L. J., C. P. 161; 26 L. T. 848; 20 W. R. 726.

—**Other Pleas.**—A declaration by indorsee against indorser stated that A. drew the bill payable to his own order, and indorsed it to the defendant, who indorsed it to the plaintiff. A plea traversed the indorsement by A. to the defendant:—Held, that the defendant was estopped from pleading the plea, and that it raised an immaterial issue. *Macgregor v. Rhodes*, 6 El. & Bl. 266; 25 L. J., Q. B. 318; 2 Jur., N. S. 834.

There is no material distinction between a plea traversing the indorsement of a bill *modo et forma*, and one which denies its indorsement to a particular indorsee, as alleged in the declaration. *Waters v. Thanet (Earl)*, 7 D. P. C. 261; 7 Scott, 181; 1 Arn. 509; 3 Jur. 171.

A plea by indorser that he did not make or draw the bill is not a nullity, so as to entitle the plaintiff to sign judgment, as every indorser is, in contemplation of law, a new drawer. *Allen v. Walker*, 2 M. & W. 317; 5 D. P. C. 460; M. & H. 44; 1 Jur. 57.

In an action by an indorser against acceptor, the court refused to allow a plea denying the drawing as well as a plea denying the acceptance. *Gilmore v. Hague*, 4 D. P. C. 303; 1 H. & W. 523.

An acceptor of a bill for 78*l.* 13*s.* 6*d.* pleaded payment into court of 5*l.* 3*s.* 6*d.*, and nil debet beyond that sum, which is bad. The plaintiff, however, joined issue, and went to trial, and the defendant had a verdict. On cause shewn against rule nisi for judgment non obstante veredicto, or a new trial:—Held, that as plaintiff had chosen to take issue on the allegation that no more than 5*l.* 3*s.* 6*d.* was due, which was an intelligible proposition for trial, it was open to the defendant to avail himself of any defence which he might have to the action. *Finlayson v. Mackenzie*, 3 Bing. N. C. 824; 6 D. P. C. 71; 5 Scott, 20; 3 Hodges, 211.

A plea to an action by indorsee against maker, that he was not, at the time of the commence-

ment of the action, the lawful holder of the note, is embarrassing, and an amendment was ordered, "that after the indorsement, and at the time when the action was commenced, the plaintiff had ceased to be and was not the holder of the note." *Barber v. Doyle*, 12 Ir. C. L. R. 342.

On a plea that the defendant did not make the note, he cannot give in evidence that he was of imbecile mind at the time when he made it. *Harrison v. Richardson*, 1 M. & Rob. 504.

In an action on a bill, averring dishonour by acceptor, and notice thereof to the defendant, a plea that the defendant had not notice of the dishonour on the day the bill became due, is bad, as tendering an immaterial issue. *Stericker v. Barker*, 9 M. & W. 321; 6 Jur. 154.

**Replications.**—To an action upon a bill purporting to be drawn by A. payable to the order of B., and to have been indorsed by B. to C., and by C. to the plaintiff, the defendant (who had accepted the bill for the honour of A.), besides traversing the indorsements by B. and C., pleaded that, when the bill was made, there was no such person as B., the supposed payee, but that his name was merely fictitious, whereof the defendant at the time of his acceptance of the bill had no notice or knowledge. The court declined to allow the plaintiff to reply that the names of B. and C. were already on the bill when the defendant accepted it, and consequently that he was estopped from denying that they were real indorsers, holding that the matter was admissible under the traverse of the indorsement. *Phillips v. Im Thurn*, 18 C. B., N. S. 400.

—**Before C. L. P. Act of 1852.**—To an action by payees against maker, he pleaded that his brother was in his lifetime indebted to the plaintiffs in the amount of the note; and that after his death, and before interment, one of the plaintiffs, by a threat, that, unless the defendant would make the note, the plaintiffs would prevent the funeral of his brother from taking place, procured the making of the note from the defendant who made and delivered it upon such threat, and for no other cause whatever. Replication, that one of the plaintiffs did not by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of his brother from taking place, procure from the defendant the note as alleged:—Held, that the replication was a good answer to the plea. *Atkinson v. Davies*, 11 M. & W. 236; 2 D., N. S. 771; 12 L. J., Ex. 169.

To a plea by acceptor that the bill was, to the knowledge of the holder, negotiated by fraud, and that no consideration was given for the indorsement to the holder, it was sufficient for the holder to reply that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration. *Bramah v. Roberts or Baker*, 1 Bing. N. C. 469; 1 Scott, 350; 3 D. P. C. 392; 1 Hodges, 66.

## 9. EVIDENCE.

### a. Production of Instrument.

**When Necessary.**—Action against acceptor. Plea, that before acceptance, a fiat in bankruptcy issued and was in prosecution against him, and he then owed the plaintiff a debt, provable under the commission, and that the acceptor, in

consideration that the plaintiff would prove such debt under the commission, accepted the bill in part payment of the debt to be so proved, whereby the bill was and is void:—Held, that the statements in the plea did not oblige the plaintiff to produce the bill at the trial, nor entitle the defendant, to offer evidence of it, without a notice to produce. *Goodered v. Armour*, 3 Q. B. 956; 3 G. & D. 206; 11 L. J., Q. B. 56; 6 Jur. 1062.

In an action on a bill, to which there is a plea of fraud and covin, the plaintiff is not bound to produce the bill on the trial without notice. *Lawrence v. Clark*, 14 M. & W. 250; 3 D. & L. 87; 15 L. J., Ex. 40.

Where a plaintiff has obtained judgment on demurrer in an action on a bill, he is entitled, at the assessment of damages on the demurrer, to the full amount of the bill, without producing it in evidence. *Lane v. Mullins*, 1 G. & D. 712; 2 Q. B. 254; 1 D., N. S. 562; 5 Jur. 1084; *S. P.*, *Davis v. Barker*, 4 D. & L. 468; 16 L. J., C. P. 86.

If there is one invariable mode in which bills are drawn between particular parties, this may be proved by parol evidence, without any of the bills being produced. *Spencer v. Billing*, 3 Camp. 310; 1 Rose, 362.

#### b. To vary Terms.

**Written.**—An indorsee of a bill or note taking it under an agreement not to sue the indorser, cannot sue such indorser, though the indorsement is unqualified. *Pike v. Street*, M. & M. 226. See *Foster v. Jolly*, 1 C., M. & R. 703.

If A. and B., being partners, dissolve their partnership, and in the deed of dissolution it is stipulated that A. shall receive all debts due to the firm, and afterwards C., a debtor of the firm, accepts a bill drawn by B. for the amount of the debt due to the firm:—Held, that the stipulation in the deed of dissolution is no defence to an action by B. against C. on this bill. *King v. Smith*, 4 C. & P. 108.

It is not competent to the maker of a note, in an action by a payee, to give in evidence an oral agreement to vary or contradict the express contract upon the face of the note, but a contemporaneous agreement in writing may be adduced for that purpose. *Brown v. Langley*, 4 M. & G. 466; 5 Scott, N. R. 249; 19 L. J., C. P. 62.

In an action by A. & Co., indorsees and holders of a note payable twelve months after date, against B., the payee and indorser, he pleaded a verbal agreement existed between A. & Co. and C. and D. the makers, to withhold the enforcement of the note till a balance of a floating account was struck:—Held, that the verbal agreement qualifying the written contract expressed in the note was bad in law. *Pollock v. Bradbury*, 8 Moore, P. C. C. 227.

A. made his note payable on demand, with interest, in favour of B. and C., executors of D. A. was, with other relatives, to be entitled to benefits under D.'s will upon the coming of age of the youngest legatee named in the will. By agreement between the legatees, the executors were authorized to lend the funds in their hands on personal security; and a part of these funds having been lent to A. (as well as to the other legatees), he gave the executors the note. By the agreement it was settled that the note given

to the executors should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The executors did not sign this agreement, but when it had been signed by the other parties, took it into their possession. The executors brought an action on the note while the legatee was alive, and before he had attained the specified age. A. pleaded the agreement as an answer, averring that the executors had accepted and received the note on the terms and conditions of the agreement, and that the youngest legatee was still under age. At the trial the agreement was proved:—Held, by the Queen's Bench, that the executors were bound by the agreement, the meaning of which was that the securities should remain outstanding until the legatee attained twenty-five, and that the plea was proved. *Webb v. Spicer*, 13 Q. B. 886; 18 L. J., Ex. 143.

But the Exchequer Chamber held, that the agreement was collateral to the note, because, though stated to be contemporaneous with it, it was not stated to be parcel of it, and was not between the same parties; that as a collateral agreement it was invalid for want of consideration, and was no defence, being at most a covenant not to sue for a limited time, and also a covenant with other covenantees than the defendant alone. *S. C.*, 13 Q. B. 894; 7 D. & L. 324; 19 L. J., Q. B. 34; 14 Jur. 33.

Held afterwards, by the House of Lords, that the plea was bad in substance, for that the agreement was collateral to, and was not between the same parties as the note. *Salmon v. Webb (in error)*, 3 H. L. Cas. 510.

**Parol.**—It is not competent to an acceptor to set up a parol contract inconsistent with the contract upon the face of the bill. *Benant v. Cross*, 10 C. B. 895; 2 L., M. & P. 351; 20 L. J., C. P. 173; 15 Jur. 828.

A parol agreement contemporaneous with a promissory note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, is immaterial and inoperative to contradict the terms of the note. *Stott v. Fairlamb*, 52 L. J., Q. B. 420; 48 L. T. 574.

**As to Payment.**—To an action by payee against the drawer of a bill payable twelve months after date, he pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that it was agreed between the plaintiff and himself and the acceptor that the acceptor should deposit with the plaintiff securities to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, he should not be liable to be sued on the bill. The plea then went on to aver that the securities were deposited with the plaintiff by the acceptor, but that he had not sold but still held them:—Held, that oral evidence of the agreement alleged in the plea was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill. *Abrey v. Cross*, 5 L. R., C. P. 37.

In an action by payee against the maker of a note, parol evidence is inadmissible to prove an agreement that he should not be liable if the

assets of a third party should be sufficient to pay the debt for which it was given. *M'Dougall v. Field*, 6 Ir. R., C. L. 185.

In an action on a bill, it is an inadmissible defence, that by a contemporaneous parol agreement it was stipulated that payment should not be called for until the determination of another suit, and that that suit was still undetermined. *Adams v. Wordley*, 1 M. & W. 374; 2 Gale, 29.

When a note is payable fourteen days after date, and is not deposited as a collateral security, and the consideration is not disputed, no parol testimony is admissible to prove any agreement that it was not to be paid if a verdict was obtained in an action pending between other parties; for that would be to contradict a written contract by parol evidence. *Foster v. Jolly*, 1 C. M. & R. 703; 5 Tyr. 239; *S.C.*, nom. *Foster v. Sibley*, 1 Gale, 10.

The legal effect of a bill cannot be controlled or varied by a parol condition; therefore, where it was verbally understood between the acceptor and payee of a bill, that its amount should be paid out of a particular fund:—Held, that this did not control the legal operation of the bill. *Campbell v. Hodgson*, Gow, 74.

— **As to Renewal.**—In an action on a note or bill, the defendant cannot give in evidence a parol agreement entered into when it was drawn that it should be renewed, and that payment should not be demanded when it became due. *Hoare v. Graham*, 3 Camp. 57.

To a declaration on a bill by the drawer and payee against the acceptor, he pleaded that he accepted the bill on a condition then agreed on between him and the drawer, viz., that in a certain event which occurred the drawer would renew the bill. The plea did not aver that this agreement was in writing:—Held, that, as the agreement would not be a defence unless it was in writing, the plea must be construed as alleging a written agreement, and that the plea was therefore good. *Young v. Asten*, 4 L. R., C. P. 553; 38 L. J., C. P. 233; 21 L. T. 327; 18 W. R. 63.

— **As to Consideration.**—Where a testatrix in her lifetime gave the plaintiff a note to pay him or order, on demand, 100l. "for value received and his kindness to me," with a verbal engagement on his part that the note should not be demanded until after her death. In an action upon the note, parol evidence cannot be received to shew that it was not given for a valuable consideration. *Woodbridge v. Spooner*, 1 Chit. 661; 3 B. & A. 233.

Where a bill or note expresses the consideration for which it is given, evidence cannot be given of a consideration inconsistent with its terms. *Ridout v. Bristow*, 1 Tyr. 84; 1 C. & J. 231.

Where a widow gave a note "for value received by my late husband:"—Held, first, that the note was valid on the face of it; and, secondly, that she was not at liberty to shew as a defence, that it was given as an indemnity against liabilities incurred on behalf of her late husband, and that the payee had not been damaged. *Id.*

It is no defence to an action by payee against maker of a note, that the payee had agreed to convey an estate to the maker, in consideration of a sum of money then paid or secured to be

paid to the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day; and that such estate had never been conveyed. *Spiller v. Westlake*, 2 B. & Ad. 155; *S. P.*, *Jones v. Jones*, 6 M. & W. 84.

A sum of 400l. belonging to A. was put by him into the hands of B., his solicitor, who laid it out on mortgage, and the deeds were deposited with A. Interest being in arrear, and A. pressing for payment, B. gave a note, payable three months after date, to A. for the amount of principal and interest; and it was agreed, at the time of giving the note, that A. should deliver up the deeds to B. and should hold the note till the sale of the mortgaged premises should be completed. When the note became due, A. sued B. upon it, though the deeds had not been delivered up, or the sale of the mortgaged premises been completed. The judge left it to the jury to say whether the note was given on a condition precedent, that the deed should be delivered up:—Held, that it ought to have been left to them to say what the consideration of the note was, and whether it had wholly failed or not. *Richards v. Thomas*, 1 C., M. & R. 772.

In an action by payee against maker of a note, though it is not competent to him to controvert or vary by parol the contract that appears on the face of the note, he may shew that there was no consideration, or that the consideration has failed. *Abbott v. Kendricks*, 2 Scott, N. R. 183; 1 M. & G. 791.

— **Note on Demand.**—Where a defendant undertook to pay a note on demand, he cannot adduce evidence to shew a liability on a contingency only. *Rawson v. Walker*, 1 Stark. 361.

Where a note is, on the face of it, payable on demand; oral evidence of an agreement entered into when it was made, that it should not be paid until a given event happened, is inadmissible. *Moseley v. Handford*, 10 B. & C. 729.

— **To shew that Note was given as Security for Interest only.**—Parol evidence is inadmissible to prove a note expressed to be a security for 500l. and interest, to have been intended to secure the interest only. *Hill v. Wilson*, 8 L. R., Ch. 888; 42 L. J., Ch. 817; 29 L. T. 238; 21 W. R. 757.

#### c. Declarations and Admissions.

**Of Party outside the Note.**—What is said by a third party at the time of signing a note as to the consideration for which it is given, is not evidence against the payee, if he was not present. *Healey v. Jacobs*, 2 C. & P. 616.

**Declarations of former Holders.**—In an action by indorsee against maker of a note, where the plea alleged that the note was obtained from him by fraud, and the name of A. (who had indorsed to the plaintiff), had been fraudulently indorsed, of all which the plaintiff had notice:—Held, that the maker was not at liberty to read letters of A. written while he was holder of the note, which, it was alleged, would have implicated the plaintiff in the fraud, for no evidence had been given to connect the plaintiff with A., or to shew that the note had been indorsed to the plaintiff without consideration, or when overdue. *Phillips v. Cole*, 2 P. & D. 289; 10 A. & E. 106; 4 Jur. 83.

In an action by indorsee against maker of a

note, declarations of the payee (not uttered at the time of making the note) are not evidence to prove that the consideration for the note was money lost at play, unless previously shewn that the indorsee is identified in interest with the payee, as by having taken the note after it was due, or without any consideration. *Beauchamp v. Parry*, 1 B. & Ad. 89.

The declarations of the holder of a bill made whilst it is current, are not admissible against a subsequent holder under an indorsement made before the bill became due. *Smith v. Di Wruit*, R. & M. 122.

In an action by indorsee against acceptor, the declarations of a former holder are evidence, if shewn that he was the holder at the time, and was making such declarations against his own interest; but it is otherwise, if he made them after he had given up the possession of the bill. *Pocock v. Billing*, 2 Bing. 269; 9 Moore, 499; 1 C. & P. 230; R. & M. 129.

The declarations of a former holder of a note, payable on demand, made while he was the holder, are not evidence for the defendant in an action by a subsequent holder, unless the note had been presented for payment before such declarations were made. *Borough v. White*, 2 C. & P. 8.

Where, in an action by indorsee, the defence is that the defendant had settled it in account with the holder when due, and that the plaintiff took it after it became due, what was said by the person represented as the holder and indorsee when it became due is not evidence; he should himself be called. *Duckham v. Wallis*, 5 Esp. 251.

The declaration of an indorser, made whilst he was holder, is evidence to go to the jury against a holder under an indorsement made before the bill was due; if there is evidence which satisfies the judge that the indorsee is merely an agent to sue for the indorser; and the jury is afterwards to judge, first, of the agency, and then of the effect of the declaration. *Welstead v. Levy*, 1 M. & Rob. 138.

In an action against maker of a note, letters of an indorser are not admissible to impeach the indorsee's title, though the indorsement was made after the note was payable. *Clipsam v. O'Brien*, 1 Esp. 10.

**Admissions of Acceptor.**—In an action by indorsee against acceptor the defence was that the bill was a forgery; he had represented it to be so to certain bankers, who were applied to to discount it for a prior holder; the bankers wrote a letter, stating what the acceptor had said, and minutely entering into the circumstances. This letter was received in evidence preliminarily to the observation which was made upon it by the holder.—Held, properly received. *Miers v. Bowler*, 2 Jur. 95.

**Declarations of Drawer.**—The declarations of the drawer are admissible in evidence to shew that the bill was obtained by fraud; the plaintiff must, however, be shewn to be in some way privy to the fraud. *Peckham v. Potter*, 1 C. & P. 232.

A written memorandum, given by a drawer to the acceptor, stating that the bill was drawn altogether for his accommodation, and that he will save him harmless against it, is evidence to shew that the bill was an accommodation bill,

even in an action against the acceptor by a bona fide indorsee. *Reeces v. Toome*, 5 Jur. 370.

**As to Consideration.**—On an issue, whether consideration was given by the plaintiff for a note, his letters shewing that he was pressed for money, are evidence for the defendant. *Homan v. Thompson*, 6 C. & P. 717.

**Of Handwriting.**—In action upon a note dated the 10th of November, an admission by the defendant of the handwriting of a note dated the 10th of October, was produced.—Held, that it was not necessary for the plaintiff to give evidence of the handwriting of the note mentioned in the declaration, since it was evident that the defendant's intention in the admission was to admit the handwriting of the note declared upon, and that the misdescription could not have misled him. *Field v. Hemming*, 5 D. P. C. 450; M. & H. 21; 1 Jur. 24.

In an action on a bill, the defendant was, by a judge's order, to make the admission specified in a notice to admit, and the notice called on him to admit that the document specified to be original was written, signed or executed, as it purported to have been, saving all just exceptions to its admissibility as evidence in this cause. The notice described the bill of exchange in the usual manner.—Held, that this admission did not preclude the defendant from objecting that the bill was not properly stamped, and also that this was not such an admission as dispensed with the production of the bill. *Vain v. Whittington*, Car. & M. 484.

**As to Authority of Acceptor.**—If an order to admit a bill is made where the notice describes it as having been "accepted by one H. B. for the defendant," it is not competent to the defendant to dispute the authority of H. B. to accept as his agent. *Wilkes v. Hopkins*, 3 D. & L. 184.

#### d. Proof of Consideration and Fraud.

**What Sufficient.**—In an action by a third indorsee against the acceptor, he cannot put the plaintiff to prove consideration, by giving *prima facie* evidence to shew the want of it, merely as between the drawer and his indorsee, and each subsequent indorser and indorsee; but he must also shew the want of consideration as between himself and the drawer. And for this purpose, it is not enough to prove that the drawer, on the day before the maturity of the bill, procured all the indorsements to be made without consideration, in order that the action might be brought by an indorsee, on the understanding that the money, when recovered, should be divided between one of the indorsees and the drawer. *Whittaker v. Edmunds*, 1 A. & E. 638; 1 M. & Rob. 366.

Action by the indorsees against the indorser of a note for 500*l.* Plea, except as to 200*l.*, that the note was delivered to the defendant, in order that he might indorse it for the accommodation of the maker, to enable him to obtain advances of money thereon; that the plaintiffs had only advanced to the amount of 200*l.*, and that there was no consideration for the residue. Replication, that the plaintiffs were the holders of the note for good and valuable consideration, given to the maker in respect of their being the holders of the note to the full amount:—Held, first, on

this issue, that it was not incumbent upon the plaintiffs, in the first instance, to prove the consideration given for the note; but that it was necessary for the defendant to begin, and impeach the plaintiff's title. *Percival v. Frampton*, 2 C., M. & R. 180; 3 D. P. C. 748; 5 Tyr. 579.

Held, secondly, it having been proved that more than 500*l.* being due from the maker to the plaintiffs at the time the note was paid in to them, they entered the note as a bill discounted to his credit, but that 18*l.* only were paid to him, that that was equivalent to their having advanced the amount mentioned in the note, and was a giving of a valuable consideration within the meaning of the issue. *Ib.*

Held, thirdly, that if the note was given to them as a security for a previous debt, the plaintiffs might be properly stated to be the holders for a valuable consideration. *Ib.*

**Presumption of—How rebutted.**—Action on a note at two months after date by indorsee against maker. Plea, that he delivered the note to the indorsee in payment of a bet on the amount of hop duty, and that the plaintiff took it when overdue, and without value. It was proved that the note was made and given for the bet to the indorser in January, 1855; it bore date 1st January, 1854; but across it, at the time it was delivered by the maker, was written, "Due the 4th March, 1855." In fact, the date of 1854 was a mistake for 1855, not noticed by any one. It was indorsed to the plaintiff in January, 1855. The judge left it to the jury to say whether there was value for the indorsement, telling them that the burthen lay on the defendant to prove that there was none:—Held, that the memorandum, that the note was due on the 4th March, 1855, was equivalent to a memorandum correcting the error in the date, and being made before the note was issued, operated as a correction, and consequently, that the note was not overdue. *Fitch v. Jones*, 5 El. & Bl. 238; 24 L. J., Q. B. 293; 1 Jur., N. S. 854.

Held, also, that there was no misdirection; for that, though proof that a negotiable instrument was affected with fraud or illegality in the hands of a previous holder, raises a presumption that he would indorse it away to an agent without value, and consequently calls on the plaintiff for proof that he gave value, the presumption does not arise when the previous holder merely held without consideration. And that the bet, though void, and therefore no consideration, was not illegal, so as to raise a presumption that the indorsement was without value. *Ib.*

The presumption, that the holder of a bill has given value for it, is rebutted when it appears that the acceptance is a forgery; and it then lies on the holder to prove that he gave consideration. *Mather v. Maidstone (Lord)*, 1 C. B., N. S. 273; 26 L. J., C. P. 58; 3 Jur., N. S. 112.

In an action on a bill, proof of any such circumstances of suspicion as might be left to the jury as evidence of fraud in the original negotiations of the bill will be sufficient to call upon the plaintiff to prove that he is a holder for value. *Hill v. Featherstone*, 3 H. & N. 284; 27 L. J., Ex. 308; 4 Jur., N. S. 813.

**Reference made in Note to an "Annexed Contract" not annexed—Production of.**—In an action on a note, the note purported to be "for

value received in Pennance shares, pursuant to annexed contract;" no contract was in fact annexed:—Held, that this special description of the consideration for the note did not render it incumbent on the plaintiff to put in any contract or other document beside the note itself, in order to establish his case. *For v. Frith*, Car. & M. 502.

**Plea of No Consideration.**—In an action by the holders against maker of a cheque, he pleaded that the cheque had been given and indorsed without consideration. It appeared that the plaintiffs were trustees of a bank; that the cheque had been one of a number obtained by a person against whom the bank had a large account, and paid by him over to one of the bank agents, on a corrupt understanding between them, that it was to be entered in the bank books, for the purpose of creating a colourable balance of the account, but that, after the books were inspected by the trustees, the cheques should be returned, and none of the parties were to be sued upon it. The cheque had originally been obtained from the defendant, in consideration of a counter cheque for the like amount given by the payee, and on an understanding that neither was to be presented for payment:—Held, that neither of the allegations was proved. *Bosanquet v. Corser*, 8 M. & W. 142; 5 Jur. 369; S. C., at nisi prius, 9 C. & P. 604.

In an action on a note, by indorsee against maker, he pleaded that he was induced to make the note by the fraud of the payee, and that it was indorsed by the payee without consideration, and that the plaintiff sued thereon as trustee. The defendant having closed his case, the judge told the jury that there was no evidence to sustain the plea. The jury, however, returned a verdict for the defendant. The court granted a new trial, without examining whether the direction of the judge was right or wrong. *Wood v. Cox*, 17 C. B. 280.

**Onus probandi.**—Where an acceptor or other party sued upon a bill pleads only that it was given for goods not delivered, or for any other consideration which has failed, the defendant has a right to begin, but the onus of proof is upon him, and he is bound to satisfy the jury that the goods have not been delivered, or that the consideration has failed in toto, and if he does not prove this, except as to part, the plaintiff is entitled to recover for the rest. *Clark v. Holmes*, 2 F. & F. 79.

Where the immediate indorser of a bill to the plaintiff has parted with the bill in violation of good faith, want of consideration as between him and the plaintiff is presumed, so as to throw upon him the onus of proving consideration. *Smith v. Braine*, 16 Q. B. 244; 20 L. J., Q. B. 201; 15 Jur. 287.

In an action by indorsee against acceptor, the mere absence of consideration for the acceptance and prior indorsements, does not throw the onus on the plaintiff of proving the consideration for the indorsement to him, where no circumstances of fraud or illegality appear. *Whittaker v. Edmunds*, 1 M. & Rob. 366; S. P., *Jacob v. Haggate*, 1 M. & Rob. 445; *Batley v. Catterall*, 1 M. & Rob. 379.

Action by an indorsee against the acceptor. Plea, that he accepted the bill for the accommodation of the drawer, and that the drawer did not

give nor did the defendant receive, any consideration for his accepting or paying the bill; that the drawer indorsed the bill to the plaintiff without any consideration; and that the plaintiff held the bill without consideration. Replication, that the drawer indorsed the bill to the plaintiff for a good and valuable consideration:—Held, that it was not incumbent on the plaintiff to begin, and prove, in the first instance, that he gave value for the bill; but that the rule is otherwise where the title of the holder is impeached on the ground of fraud, duress, or that the bill has been lost or stolen. *Mills v. Barber*, 1 M. & W. 425; 5 D. P. C. 77; 2 Gale, 5.

Upon a plea of no consideration to an action on a note, to which the plaintiff replied that there was a consideration, the onus of proving that there was no consideration lies upon the defendant. *Lacey v. Forrester*, 3 D. P. C. 668; 2 C., M. & R. 59; 5 Tyr. 567; 1 Gale, 139.

Action against maker of a cheque. Plea, that it was delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration. Replication, that it was delivered for a good consideration:—Held, that the illegal drawing of the cheque was so admitted as to throw on the plaintiff the onus of proving consideration. *Bingham v. Stanley*, 1 G. & D. 237; 2 Q. B. 117; 6 Jur. 381.

Action by indorsee against maker of a note. Plea, that the note was given for a gaming debt, and indorsed to the plaintiff with notice, and without consideration. Replication, that the note was indorsed to the plaintiff, without notice of the illegality, and for a good and sufficient consideration:—Held, that, on these pleadings, the illegal making of the note was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration; but that, in order to compel him to do so, the defendant ought to have proved the illegality. *Edmonds v. Groves*, 2 M. & W. 642; 5 D. P. C. 775; M. & H. 211; 1 Jur. 592.

When a promissory note is given by principal and surety for a definite sum, and payable on a fixed day, it is presumed to be given in consideration of an advance at the date of the note; and if the payee asserts, as against the surety, that the object of the note was to secure the payment of the balance of an account current between the principal and the payee, the burden of proof lies on the payee. *Boys, In re, Eedes v. Boys, Hop Planters' Company, Ex parte*, 10 L. R., Eq. 467; 39 L. J., Ch. 655.

Indorsee against maker of a note payable to B. Plea, that the note was delivered to B. by the maker, without consideration, and in order that B. might raise money thereon in the maker's behalf; that the plaintiff advanced upon the security of the note a small sum, to wit, 200l., and no more, and the note was therefore indorsed by B. to the plaintiff; that before the action, the plaintiff was paid and satisfied by the defendant all the money by him advanced, and all his right, title and cause of action, upon and in respect of the same. The replication denied the payment and satisfaction. At the trial, the defendant gave no evidence in support of his plea, and the jury found a verdict under the direction of the judge for the whole amount of the note:—Held, that the direction was right, and that the defendant could not avail himself of the admission in the pleading, that only 200l. had been advanced, to limit the plaintiff's right to recover to

that sum. *Robins v. Maidstone*, D. & M. 30; 4 Q. B. 811; 12 L. J., Q. B. 321; 7 Jur. 694.

—Where there is Fraud or Illegality.]—

To an action by indorsee against maker, he pleaded, that the note was indorsed to the plaintiff by his indorser, in violation of good faith, and in fraud and contempt of an order for referring the claim of that indorser to arbitration; and that the plaintiff took the note with knowledge of the premises. The plaintiff replied that he had not, when he took the note, any knowledge of the premises:—Held, that the defendant was bound to begin at the trial, and to prove the plaintiff's knowledge of the fraud; and that the plaintiff was not bound in the first instance to prove consideration given for the indorsement to him. *Smith v. Martin*, 9 M. & W. 304; 1 D., N. S. 418; Car. & M. 58.

In an action by indorsee against acceptor, to which the defendant pleads that the bill was obtained by fraud, and that it was indorsed to the plaintiff without consideration, to which he replies *de injuria*, although the latter allegation is necessary to render the plea good, proof of the fraud casts on the plaintiff the onus of proving consideration. *Harvey v. Twiss*, 6 Ex. 556; 20 L. J., Ex. 318; 15 Jur. 544; S. P., *Bailey v. Bidwell*, 13 M. & W. 73.

Upon the trial of such an issue it is not the duty of the judge, to determine as a preliminary fact whether fraud is sufficiently proved, to cast on the plaintiff the onus of proving consideration, but only whether there is evidence of fraud for the jury; and it is correct for him to direct them, that if they think the fraud proved in the absence of proof by the plaintiff of consideration, the defendant is entitled to the verdict. *Id.*

Action on a bill, drawn by M. upon and accepted by the defendant, indorsed by M. to K. and by K. to the plaintiff. Plea, that the bill was accepted by the defendant, and drawn and indorsed in blank by M., without value, and that the defendant gave it to E. to get it discounted for the defendant; that E. did not get it discounted, but in fraud of the defendant, and without the consent of M., delivered it to some person unknown, and that neither K. nor the plaintiff gave value for the indorsements to them. A second plea was the same as the first, except that instead of alleging want of consideration by H. and the plaintiff, it alleged that H. and the plaintiff had notice that the bill had been obtained from the defendant by fraud. On the part of the defendant, evidence was given that E. had obtained possession of the bill by fraud, upon which the judge ruled that the onus was cast upon the plaintiff of proving that he gave value:—Held, that this ruling was correct. *Berry v. Alderman*, 14 C. B. 95; 2 C. L. R. 691; 23 L. J., C. P. 34.

Where a bill or note is shewn to have originated in illegality or fraud, a presumption arises that a subsequent holder gave no value for it; and such presumption will support a plea that the plaintiff is a holder without consideration, unless rebutted by the defendant shewing that he gave value. But where there is a mere absence of consideration between the original parties, no such presumption arises, and the defendant is bound to prove by evidence the allegations in his plea. *Fitch v. Jones*, 5 El. & Bl. 238; 24 L. J., Q. B. 293; 1 Jur., N. S. 854.

**What is Evidence of Fraud.**—In an action by indorsee against acceptor, in order to raise a presumption that the plaintiff had received the bill fraudulently and without value, evidence was offered to shew that the defendant had been defrauded of it; that H., the person from whom the plaintiff received it, had stood at the dock in the Old Bailey, that he had retired thence and was seen no more at large for eighteen months, and that the plaintiff had admitted that he "had known H. for a considerable time :"—Held, no evidence to go to the jury that the plaintiff was aware of H.'s conviction or disreputable character. *Berry v. Alderman*, 13 C. B. 674; 1 C. L. R. 566.

Under a plea, alleging that the bill declared on was delivered to a party for a specific purpose, and afterwards handed to the plaintiff, who is not a bona fide holder, evidence of fraud in the plaintiff is not receivable. *Uther v. Rich*, 10 A. & E. 784; 2 P. & D. 579.

#### e. Proof of Payment.

**What is Sufficient.**—A. kept an account at a bank, who discounted for him a bill for 365*l.*, drawn by him upon and accepted by the defendant. The day before the bill became due, A. went to the bank, who held another bill of his for 370*l.*, due that day, and requested the manager to retire the two bills by discounting two others of similar amounts. The manager consented, and A. gave him a bill for 365*l.*, purporting to be accepted by the defendant, to retire the bill of that amount. The bank discounted the second bill for 365*l.*, and placed the proceeds to the credit of A. minus the discount, and the bank got back from their London agent the first bill for 365*l.*, with the acceptance cancelled. Several thousand pounds had been subsequently paid by A. into the bank. It afterwards turned out that the acceptance of the second bill for 365*l.* was forged by A. In an action by the bank against the defendant, as acceptor of the first bill :—Held, that the facts did not support a plea of payment of the bill by A. *Bell v. Buckley*, 11 Ex. 631; 25 L. J., Ex. 163.

**Lapse of Time—Note unaccounted for.**—Where a note of twenty years' date is unaccounted for, it is a presumption of payment. *Duffield v. Creed*, 5 Esp. 52.

**Effect of Receipt.**—A bill was drawn by A. on B., and indorsed to C. The bill was not satisfied when due, but part payments were afterwards made by the drawer and acceptor. Two years after it had become due, D. paid the balance to C., the holder, and the latter indorsed the bill, and wrote a receipt on it in general terms :—Held, that the receipt was not conclusive evidence that the bill had been satisfied either by the acceptor or drawer, but that parol testimony was admissible to explain it. *Graves v. Key*, 3 B. & Ad. 313.

An acceptor of a bill, on its presentation to him when due, did not take it up; but afterwards, on the same day, a person unknown called at the banker's where it lay, and paid the amount, and received back the bill with a general receipt indorsed upon it. In an action by the indorsee against the acceptor, the bill was produced bearing that receipt :—Held, no evi-

dence of payment of the bill by the acceptor. *Phillips v. Warren*, 14 M. & W. 379; 14 L. J., Ex. 280; 9 Jur. 930.

**Without Production of Note.**—To an action by indorsee against maker of a note, he pleaded, that, before making the note, he made another note for the accommodation of the indorser, who indorsed it to the plaintiff; that when it became due he (the defendant) made the note in the declaration, and gave it to the indorser, to take up such prior note. He then averred payment by the indorser to the plaintiff of the note in the declaration, and acceptance by the plaintiff :—Held, that the only material part of the plea was payment of the note declared upon, and that such payment might be proved without producing the note; and that all the averments as to the prior note were surplusage, of which the defendant was not bound to give any evidence. *Shearman v. Burnard*, 2 P. & D. 565; 10 A. & E. 593.

**In Cash.**—Payment of a bill is understood in the lex mercatoria, and is used in 55 Geo. 3, c. 184, s. 19, as a payment in cash of the bill when it comes to maturity. *Morley v. Culterwell*, 7 M. & W. 174; 1 H. & W. 13; 4 Jur. 1163.

A plea in an action on a bill by indorsee against drawer, that the bill was paid by the acceptor before it became due, and afterwards reissued by him without any new stamp, can be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and acceptor, whereby the bill is treated as being satisfied. *Id.*

**By Stranger.**—To an action by indorsees of a bill for 55*l.*, the defendant pleaded that the bill was an accommodation bill, that the drawer indorsed the bill and other bills to the plaintiffs as security for repayment to them of 30*l.* advanced by them to the drawer, and that the bill was satisfied by payment to them by the acceptor of one of the other bills of the money so advanced, and all interest thereon :—Held, no bar to the action, the payment having been made by a stranger, and not having been ratified by the plaintiffs. *Kemp v. Balls*, 10 Ex. 607; 24 L. J., Ex. 47.

**Of Joint and Several Note.**—A plea of payment by one of several makers of a joint and several note is supported by proving a payment of the note by one of his co-makers. *Braumont v. Greathead*, 3 D. & L. 631; 2 C. B. 494.

Payment and acceptance of the amount of a note after it becomes due, and when the holder is entitled to nominal damages, is a plea of payment and acceptance in discharge of the debt and damages; consequently, the holder, after such payment and acceptance, cannot maintain an action for such nominal damages. *Id.*

An agreement between the payee and one of several makers of a joint and several note, that the payee shall take another note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the joint and several note. *Thorne v. Smith*, 2 L. M. & P. 43; 10 C. B. 659; 20 L. J., C. P. 71; 15 Jur. 469.

**Of part Payment of Note Payable on Demand.**

—By the rules of a money-loan society, it was provided that each holder of shares should pay a sum per week upon each share, and that each member should take his share by sale, or, for want of a purchaser, by ballot; that for each share he was to receive 40*l.*, when paid by the members, upon giving a security, to be approved of by the committee. A. purchased a 40*l.* share, and, by way of the security required, he gave with two parties a joint note, payable on demand, for 40*l.*, to the treasurer of the society. He continued the weekly payments regularly for some time, and others were made by his sureties, and then default was made:—Held, in an action upon the note, in default of payment of the weekly sums, that the preceding payments of the weekly sums were no evidence in support of a plea of part payment of the note. *Jones v. Grattan*, 8 Ex. 773; 22 L. J., Ex. 247.

**Plea of Payment—Sufficiency of.**—In an action on a bill by indorsee against acceptor, a plea that the indorsement was in blank; that, at the time the bill became due, it was in the hands of W., as lawful holder for value, who, while he was holder, and in pursuance of an agreement with the acceptor, and after the bill was due, and before the plaintiff's possession, and before action, accepted of the acceptor 10*l.* in part payment of the bill, and a note at three months for the residue, which note he paid when due:—Held, that the plea sufficiently disclosed W.'s title to the bill, and also a payment to him in discharge of the bill. *Lomas v. Landells*, 6 C. B. 577; 6 D. & L. 296; 18 L. J., C. P. 88; 13 Jur. 38.

To an action by indorsee against acceptor, a plea puis darrein continuance, that an earlier indorser paid to the plaintiff, then being holder, and the plaintiff accepted, the full amount of the bill, and all interest thereon, in full satisfaction and discharge of the bill, and all moneys due in respect thereof, not mentioning damages or costs, is a bad plea. *Goodwin v. Cremer*, 18 Q. B. 757; 22 L. J., Q. B. 30; 17 Jur. 2.

## XV. APPROPRIATION OF SECURITIES.

**Generally.**—When a drawer of an accommodation bill deposits securities in the hands of the acceptor, and appropriates such securities to the meeting of the bill, such appropriation overrides any general lien of the deposittee upon the securities. *Inman v. Clare*, 5 Jur., N. S. 89; Johns. 769.

**Right to Securities, but not to Money arising from them.**—The Gothenburg Company in London were in the habit of accepting bills drawn upon them by the Merchant Bank at Gothenburg, and the bank from time to time forwarded bills payable in London, which the company either discounted or collected as they arrived at maturity, and a running account was kept by the company as between themselves and the bank. The company stopped payment on the 20th January, 1879, and went into liquidation on the 22nd of the same month, and consequently the bank had to take up the company's acceptances to the amount of 2,197*l.* The bank claimed to be paid this sum out of the proceeds of bills amounting to 2,300*l.*, which had been remitted by itself to the company, and some of which

remained in the hands of the company at the commencement of the liquidation:—Held, that the proceeds of bills discounted before the stoppage could not be followed by the bank; but that the bank was entitled to all bills remitted by it to the company which were in the hands of the company when it stopped payment. *Gothenburg Commercial Company, In re*, 44 L. T. 166; 29 W. R. 358—C. A.

**Bill of Sale.**—A. being indebted to C., A. and B. gave their joint and several note for the amount to C.: A. becoming further indebted, and pressed for further security, by a bill of sale (reciting that C. having demanded payment of the debt, A. had requested him to accept a further security), assigned his household effects to C. as a further security, with a proviso that he should not be turned out of possession of the effects till after three days' notice:—Held, that C.'s remedy on the note was neither suspended nor extinguished by the bill of sale, but that he might sue A. on the note at any time, notwithstanding the bill of sale. *Twoopeny v. Young*, 5 D. & R. 259; 3 B. & C. 208.

**Agreement that Acceptor's Effects should be first Sold before calling upon Surety.**—Defendant drew bills as surety for H., who accepted them, and it was provided by a deed to which the plaintiff, the holder, as well as the defendant, was a party, that he should not sue defendant on the bills till H.'s effects should have been sold, and the proceeds applied in discharge of the bills. H.'s effects were seized, and sold under a commission of bankruptcy, the trustee, to whom they had been conveyed by the deed, having, with the knowledge and assent of the defendant, omitted to take possession of them in time:—Held, that the plaintiff was not barred from suing the defendant on the bills. *Lancaster v. Harrison*, 6 Bing. 726; 4 M. & P. 561.

**Of Mortgage.**—K. & Co. accepted bills for L. & Co., and L. & Co. mortgaged to K. & Co. an estate in Guiana to secure a cash credit, granted by K. & Co., to the extent of 75,000 dollars. There was a general current account between the two firms. K. & Co. and L. & Co. each became insolvent:—Held, that, under the circumstances, the mortgage was a security for money advanced to meet the bills. *City Bank v. Luckie*, 5 L. R., Ch. 773; 23 L. T. 376; 18 W. R. 1181.

Held, also, that the holders of the bills were entitled to the benefit of the mortgage security, and to have the money received from the mortgage security applied in payment of the bills. *Id.*

**Of Consignments.**—P. & Co. were cotton merchants at Pernambuco. A., at Liverpool, wished to obtain consignments of cotton from them. They desired some security other than his own. He obtained from Bamed's Banking Company at Liverpool a letter of credit, by which the bankers authorized the Pernambuco firm to draw on them "against cotton purchased in conformity with instructions." The drafts were to be "covered by shipping documents, say invoices and bills of lading of cotton addressed to this company, and forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honour



such drafts." Some shipping documents of cotton were sent, and some bills were accepted—one bill was accepted without any shipping documents being sent—and then, before any of these bills were due, the bankers became bankrupt, and bills arriving immediately afterwards were left unaccepted. On a winding-up order, issued in the matter of the bank, the agent of the Pernambuco firm, who was also a partner in that firm, claimed to prove against the bankers for the whole amount of the bills, without bringing into account the value of the cotton which had been sold, or which remained in hand:—Held, that he was not in a position to do so, but was entitled only to prove for the balance. *Banner v. Johnston*, 5 L. R., H. L. 157; 40 L. J., Ch. 730; 24 L. T. 542.

The bill holders had no lien over the goods in the hands of the bankers, so as to enable them to treat the bankers as trustees for their interests. The bankers were only debtors to the bill holders for the surplus remaining after the goods consigned had been applied to satisfy the acceptances. *Ib.*

A banking company in Liverpool, at the request of L., granted to his agent in New Orleans a credit for 20,000*l.*, under which they were to be at liberty to draw bills upon the bank against cotton purchased by them on his account. The bills were to be accompanied by the corresponding bills of lading for cotton, and the bank undertook to accept the bills, on the bills of lading being given up to them, and to pay them at maturity. Under this credit his agent drew on the bank a bill for 7,798*l.* against 242 bales of cotton. The bill was discounted at New Orleans, and the discounters sent it with the bills of lading of the cotton to their agents in Liverpool, who presented it for acceptance, and it was accepted by the bank, to whom the bills of lading were handed. Soon afterwards the bank, in pursuance of some arrangement which they made with L., handed the bills of lading to him that he might raise money upon them. He pledged them with certain brokers for 6,000*l.*, and paid that sum into the bank to an account called his cotton account. Before the bill matured the bank stopped payment and was ordered to be wound up. Afterwards the brokers sold the cotton, and, after repaying themselves what they had advanced, with interest, paid the balance of the purchase-money to the holders of the bill. They were afterwards admitted to prove in the winding-up for the amount of the bill. The Master of the Rolls ordered that the balance of the proceeds of sale of the cotton which the bill holders had received should be set off against the dividends payable to them upon the amount of their proof:—Held, that no such set-off could be admitted. *Barned's Banking Company, In re, Leech, Ex parte*, 6 L. R., Ch. 388; 40 L. J., Ch. 590; 24 L. T. 647; 19 W. R. 552—L. J.J.

Leave was given to the liquidators to apply to have the amount of the proof reduced by the sum which the bill holders had received from the proceeds of the sale of the cotton. *Ib.*

On the 14th of September P. & Co. purchased from H. a floating cargo of maize, and on the same day resold it to the defendant. On the 4th of October P. & Co., according to the custom of the trade, paid H. (who retained the shipping documents) a deposit of 883*l.* on account of the cargo, and the same day drew a bill on the de-

fendant for that amount, which he accepted. P. & Co. thereupon discounted the bill with his bankers. On the arrival of the cargo in November, P. & Co., acting on the defendant's instructions, sold the cargo for him to C., who paid H. the balance due from P. & Co. on the first sale, and received direct from H. the shipping documents. There was then remaining in C.'s hands a balance of 415*l.* due to the defendant. On the 2nd of December P. & Co. executed a deed of inspectorship; on the 17th the bill for 883*l.* was dishonoured at maturity; and on the 20th the defendant filed in Dublin a petition for arrangement with his creditors. Had P. & Co. not suspended payment, they would have been entitled, according to the regular course of business, to have appropriated the balance of 415*l.* to the taking up of the bill; and it would also have been their duty towards the defendant to have done so and to have retired the bill. C. having paid the 415*l.* into court:—Held, that the money paid in ought to be applied towards taking up the bill, and ought not to be paid to the defendant or his trustees. *Bank of Ireland v. Perry*, 7 L. R., Ex. 14; 41 L. J., Ex. 9; 25 L. T. 845; 20 W. R. 300.

Two firms of G. & Co. and L. & Co. engaged in a joint transaction, which consisted in the purchase of cotton by L. & Co. in Bombay, which was consigned to G. & Co. in London for sale by them on the joint account. The cotton was paid for by means of the proceeds of bills of exchange which were drawn by L. & Co. upon G. & Co. and were sold to bankers in Bombay. The bills of lading of the cotton were sent to G. & Co. to put them in funds to meet their acceptances when due. Both firms went into liquidation. Some of the cotton which had been bought on the joint account came into the hands of the trustee of L. & Co.:—Held, that the holders of acceptances of G. & Co., the proceeds of which had been employed in paying for this cotton, were entitled to have the proceeds of the cotton specifically appropriated to meet the bills, subject, however, to the right of the creditors (if any) of the aggregate partnership composed of the two firms to have the proceeds of the cotton applied as part of the joint estate of that partnership. *Deuchurst, Ex parte, Leggatt, In re*, 8 L. R., Ch. 965; 42 L. J., Bk. 87; 29 L. T. 125; 21 W. R. 874.

A firm of merchants in England employed a firm of merchants in South America as their agents to purchase goods and send them to England. The foreign firm drew bills on the English firm, and sold them in South America, and with the proceeds purchased goods which they shipped to England, sending the bills of lading directly to the English firm, and at the same time advising them of the drawing of the bills, by means of which they had purchased the goods, and requesting them to carry the invoice price of the goods to their account. The English firm went into liquidation, and the foreign firm also became bankrupt. When the English firm stopped payment a cargo of goods was in transitu, and some of the bills drawn for purchasing them had been accepted by the English firm, but not paid, and others had not been accepted. The trustee in the liquidation took possession of the cargo on its arrival. The creditors of the foreign firm claimed to have the goods appropriated to meet the bills drawn in respect of them:—Held, that the foreign firm, whether regarded as the agents of

the English firm or as vendors, had parted with all property in the goods, and had no power to direct the appropriation of the proceeds; and, therefore, no equity arose on the insolvency of the two firms in favour of the holders of the bills to have the proceeds applied in payment of the bills under the doctrine of *Waring, Ex parte*, 19 Ves. 345. *Banner, Ex parte, Tappenbeck, In re*, 2 Ch. D. 278; 45 L. J., Bk. 73; 34 L. T. 199; 24 W. R. 476—C. A.

A direction by consignor to consignee to place the invoice price of goods to his credit, and the bills drawn against them to his debit, does not amount to an appropriation of the goods to protect the bills. *Ib.*

A company employed an agent for the sale of goods in a shop taken for that purpose. The agent was to be paid a commission on the sale, and he was to accept bills for the company for such a reasonable amount as was represented by the goods on his premises; and if on the bills arriving at maturity the agent had not sufficient funds in his hands to meet the bills, the company was to make good the difference. The company failed and was wound up, and at that time a bill accepted by the agent had not arrived at maturity:—Held, that the agent had a lien upon the goods in his hands for the amount of the bill. *Pary's Patent Felted Fabric Company, In re*, 1 Ch. D. 631; 45 L. J., Ch. 318; 24 W. R. 507.

Y., a merchant at Costa Rica, consigned goods to M., L. & Co., of London, and at the same time drew bills on M., L. & Co., intending that the goods should be a provision for the bills. Two of the bills came into the hands of the plaintiff, who presented them to M., L. & Co. for acceptance, but they declined to accept them. Y., on being informed of this, wrote to S., in London, requesting him to take charge of the consignment and to realize it, honouring all his drafts which on account of it he had drawn upon M., L. & Co., and to telegraph if the proceeds were insufficient to cover the drafts. Upon these instructions S. wrote to the plaintiff, referring to the bills, and informing him that he expected delivery of the goods sent by the drawer against them, and would then write again. Shortly afterwards S. obtained the delivery warrants from M., L. & Co., and wrote to the plaintiff, saying that he would dispose of the same as instructed by the sender:—Held, that the plaintiff and other holders of the bills had a specific charge upon the proceeds of sale. *Ranken v. Alfaro*, 5 Ch. D. 786; 46 L. J., Ch. 832; 36 L. T. 529—C. A. Reversing 35 L. T. 664.

A firm at Bombay shipped cotton to a purchaser in London, drawing against him for the amount of the invoice prices of the cotton, with a direction to place the amount to the account of the shipments. The purchaser accepted the bills, and received the bills of lading, but his acceptances were dishonoured at maturity, and were taken up for the honour of the vendors by their London agents. The purchaser subsequently went into liquidation, and the London agents claimed the proceeds of sale of the cotton as against the trustee in the liquidation:—Held, that there had been no specific appropriation of the proceeds of the cotton to answer the bills of exchange, and that the trustee was entitled. *Entwistle, In re, Arbutnot, Ex parte*, 3 Ch. D. 477; 25 W. R. 238—C. A.

chased from the New Orleans Bank a bill drawn by them upon the Bank of Liverpool, and was told by the persons representing the New Orleans Bank at the time of the purchase that the Liverpool Bank had, or would have, funds of the New Orleans Bank sufficient and applicable to meet the bill, and appropriated for the purpose. Before the bill was presented for acceptance, the New Orleans Bank stopped payment, and the Liverpool Bank declined to accept the bill on presentation, or to pay it at maturity, on the ground that though they had sufficient funds of the New Orleans Bank to meet the bill, none of such funds were specifically appropriated to the payment of it. The course of business between the two banks was for the New Orleans Bank to remit to the Liverpool Bank bills for collection, and to draw bills against the remittances, taking care to keep them always in funds to meet the bills drawn upon them:—Held, that there was no specific appropriation of the funds of the New Orleans Bank in the hands of the Bank of Liverpool to meet the bill, and that the statement made to him amounted to no more than a representation of the course of dealing between the two banks. *Thompson v. Simpson*, 5 L. R., Ch. 659; 39 L. J., Ch. 857; 18 W. R. 1090. *See next case.*

A representation or an assurance given by the drawer of a bill, that the bill was drawn "specially" or "expressly" against funds already remitted by him more than sufficient to meet the bill on maturity, does not amount to a specific appropriation or equitable assignment of the funds so remitted, although it is given to one who is induced thereby to purchase the bill, unless it is also represented, or the fact is, that there was a trust already constituted, by which the payer of a bill would hold funds in trust for the payment of the particular bill, or of bills of that particular class or description. *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, 6 L. R., H. L. 352; 43 L. J., Ch. 269; 22 W. R. 194.

A customer paid in a sum of money to a country banker with instructions to remit 500*l.*, part of the sum, to a London banker to meet acceptances of the customer. The banker on the same day sent several bills to a bill broker, directing him to remit the proceeds to the London banker, and directed the London banker to meet the acceptances. Next day the country banker stopped payment:—Held, that the 500*l.* was appropriated, and that the customer was entitled to recover it back in full. *Farley v. Turner*, 3 Jur., N. S. 532; 26 L. J., Ch. 710.

M. paid a certain sum into a country bankers' with written directions to apply it to meet a bill of exchange payable the next day at the country bankers' London agents. The country bankers stopped payment the next day without having advised their London agents of the payment of the sum, and the bill on being presented was dishonoured:—Held, that the country bankers having made no specific appropriation of the sum, A. was only entitled to prove as a general creditor. *Barned's Banking Company, In re, Massey, Ex parte*, 39 L. J., Ch. 635; 22 L. T. 853; 18 W. R. 818.

L., a merchant of Bremen, on various occasions consigned goods to S., of Havana, against which by the direction of S. he drew bills upon a common correspondent of theirs, R. of London,

who accepted them. S. then remitted to R. sundry bills, accompanied by directions to hold them against certain specified bills on account of which S. was liable to R., amongst them R.'s acceptances of L.'s bills on behalf of S. Previous to the maturing of the bills so remitted, S. and R. both suspended payment. Upon an application by L. against the trustee of R.'s estate to have the proceeds of the bills so remitted by S. to R. appropriated to R.'s acceptances of L.'s bills:—Held, that the rule in *Waring, Ex parte* (19 Ves. 346), was applicable; that in the course of business between the parties, the remittances of S. were specifically appropriated to certain items of liability, and among them to R.'s acceptances, and that the appropriation was not affected by the abatement caused by the two bankruptcies. *Smart, Ex parte, Richardson, In re*, 8 L. R., Ch. 220; 42 L. J., Bk. 22; 28 L. T. 146; 21 W. R. 237.

Held, also, that there was sufficient privity between the parties to admit of the application of *Waring, Ex parte*. 1b.

On the day before certain acceptances fell due, the acceptors handed to their country bankers short bills and cash specifically to meet the acceptances which were payable at the country bankers' London agents. The bankers remitted the bills to the agents, with part of the cash and some small cheques, accompanied by a letter of advice in their usual form, debiting the remittances, and advising the agents of the acceptances, but also crediting or directing certain payments, the total of which with the acceptances exceeded the amount of the remittances. The agents acknowledged the remittances and advice in the usual manner, but on presentation refused payment of the acceptances, which they indorsed "Awaiting further advice;" and before the acceptances could be again presented, the country bankers had stopped payment. On a bill filed by the acceptors seeking to have the short bills specifically appropriated to meet their acceptances:—Held, that the agents might retain the bills to answer the general balance due to them from the country bankers. *Johnson v. Roberts*, 44 L. J., Ch. 465; 32 L. T. 446. Affirmed on appeal, 10 L. R., Ch. 505; 44 L. J., Ch. 678; 33 L. T. 138; 23 W. R. 763.

Y. & Co. used to accept accommodation bills drawn upon them by G., a foreign merchant, and the latter used to remit to them other bills to meet the acceptances at maturity, and to keep them out of cash advances. The account of these bills was kept separately from the general account between the parties. Y. & Co. filed a liquidation petition, under which their creditors duly resolved to accept a composition of 3s. 4d. in the pound. A trustee had been appointed under the liquidation petition, and into his hands came certain remittances sent by G. to meet bills drawn by him on Y. & Co., who accepted them, but failed before the bills matured:—Held, that G. was entitled to have the remittances returned to him, subject to the right of Y. & Co. to be indemnified for the 3s. 4d. in the pound paid by them under the composition to the holders of the acceptances, to meet which the remittances were specifically appropriated. *Gomez, Ex parte, Iglesias, In re*, 10 L. R., Ch. 639; 32 L. T. 677; 23 W. R. 780.

When securities which have been given as between drawer and acceptor or indorser of bills to secure payment of those bills are realized and

distributed amongst the bill holders, such realization and distribution are to be considered as effected at the time when the bills accrued due, and all questions as to the proof or reduction of proof of the bill holders against the indorser as to dividends paid on proof before such actual distribution are to be determined on this footing; and that whether the administration of the insolvent estates is in bankruptcy or in chancery. *Barned's Banking Company, In re, Joint Stock Discount Company, Ex parte*, 19 L. R., Eq. 1; 44 L. J., Ch. 97. Affirmed on appeal, 10 L. R., Ch. 198; 44 L. J., Ch. 494; 31 L. T. 862; 23 W. R. 281.

M., a foreigner, drew a bill on Y., which was accepted, and remitted a bill of exchange to cover it. Before the acceptance became payable Y. filed a petition for liquidation and the remittance came in specie to the hands of the receiver appointed in the liquidation. Shortly afterwards resolutions were duly registered for accepting a composition payable by instalments. M. was also insolvent, and had, since making the remittance, entered into a composition with some of his creditors, but had not made any cession of his property, and remained liable to be sued on the bills. He was indebted to Y. on the account between them beyond 2,000*l.*:—Held, that as M., though unable to pay his debts, was liable to be sued, was free to deal with his property as he pleased, and was not subject to the jurisdiction of any court, the doctrine of *Waring, Ex parte* (19 Ves. 345), did not apply, and that the holder of Y.'s acceptance could not claim payment out of the remittance. *General South American Company, Ex parte, Iglesias, In re*, 10 L. R., Ch. 635; 45 L. J., Bk. 54; 33 L. T. 112; 23 W. R. 343.

It was agreed between T., a London merchant, and S. & Co., a firm carrying on business at London and Shanghai, that T. should from time to time accept bills to be drawn upon him by S. & Co., on the security of the bills of lading of goods to be consigned by them to their house at Shanghai for sale, and the net proceeds were to be remitted to the London house, which was to pay them over to T. Amongst other transactions carried out in pursuance of this agreement, T. in March, 1873, accepted two bills at six months' sight for 825*l.* and 750*l.* respectively against goods, and sent the bills of lading of the goods to S. & Co.'s house at Shanghai. They sold part of these goods in two lots for 247*l.* and 757*l.* and paid the proceeds of the sales, together with those of other sales, into a bank at Shanghai to their own credit, and on the 26th July, with those two sums, and with other moneys, they purchased drafts on London for 1,198*l.* and 1,000*l.*, which they remitted to their London house "to our credit," and in their letter of that date enclosing the drafts they sent lists of sales with which they credited their London house, and which comprised the two sales for 247*l.* and 757*l.* The drafts, on reaching London, came into the hands of the trustee in the liquidation of S. & Co., who had filed a liquidation petition in August, 1873:—Held, that there was no specific appropriation, so as to entitle T. to receive the 247*l.* and 757*l.* out of the remittances of 1,198*l.* and 1,000*l.* in payment pro tanto of his acceptances for 825*l.* and 750*l.* *Cooper, Ex parte, Scheibler, In re*, 31 L. T. 417.—L. J.

A shipper at Bombay having consigned goods to merchants in England, drew on them for

1,200l., and insured the goods for 1,700l. He sold the drafts to a bank, and handed them at the same time the policy of insurance and the bills of lading, with a letter of hypothecation signed by him. This letter stated that the shipper, having sold the bills to the bank, and having at the same time handed to them, "as collateral securities for the due payment of" the bill, "the bills of lading and shipping documents of the several goods stated at foot," thereby authorized the bank, "on default being made in acceptance on presentment, or in payment at maturity" of the bill, to sell the goods and apply the proceeds in payment of the bill; "the balance, if any, to be placed against any other of my bills which may at the time be in the hands of the said bank, or any other liability of me to the said bank." The only documents stated at foot were the bill of exchange and the bill of lading. The ship was burnt at sea and the cargo lost. The draft for 1,200l. was duly accepted, but the acceptors failing, it was dishonoured at maturity. The bank recouped themselves out of the policy moneys which had been paid to them by the insurance office, and had a balance in their hands. This balance having been claimed by assignees for value of it from the shipper, the bank claimed it as a collateral security for a debt due to them from the shipper on another account. He had shipped goods to other consignees, and had drawn against the goods bills, which were also in the hands of the same bank. When the bills fell due the drawees had requested the bank to defer presentment of the bills. The bills had not been presented, but the goods had been sold at a loss, and the bank had re-drawn upon the shipper for the deficiency; but he had failed:—Held, that the letter of hypothecation did not extend to any other liability of the shipper to the bank than that arising upon the 1,200l. bill. *Latham v. Chartered Bank of India*, 17 L. R., Eq. 203; 43 L. J., Bk. 612; 29 L. T. 795.

Held, also, that the bank having, at the request of the drawees, refrained from presenting the bills, had practically given them time, and had thus released the drawer, and that the shipper was not indebted to the bank on this account. *Id.*

Held, on both grounds, that the plaintiffs were entitled to the surplus in the hands of the bank. *Id.*

See further, PAYMENT.

**Bills Drawn against Bills of Lading.**—A party accepted bills to meet goods consigned to him. The acceptances were made payable "on delivery of the bills of lading." The bills of lading remained, with the bills of exchange, in the possession of the bank who had discounted the latter for the drawers:—Held, on the bankruptcy of the acceptor, that the goods were part of his estate which the bank held as security for their debt, and therefore that the bank could only prove for the amount due on the bills of exchange after deducting the value of the goods. *Brett, Ex parte, Howe, In re*, 6 L. R., Ch. 838; 40 L. J., Bk. 54; 25 L. T. 252; 19 W. R. 1101.

Corn merchants in California agreed to send cargoes of wheat to a miller in England, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of

the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:—Held, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the English bank had no priority. *Gilbert v. Guignon*, 8 L. R., Ch. 16; 21 W. R. 281.

A bank presented a bill of exchange to the drawees for their acceptance, accompanied by a ticket representing that the bank held bills of lading to cover it. The drawees thereupon accepted the bill, relying on the statement that the bank held bills of lading which both parties thought to be genuine. The bills of lading had been forged by the drawer of the bill of exchange:—Held, that the drawees were not entitled to demand from the bank genuine bills of lading before paying the amount of the bill of exchange. *Barter v. Chapman*, 29 L. T. 642.

L. & Co. employed S. & Co. as their correspondents at Havannah, and R. as their correspondent in London. They consigned certain cargoes to S. & Co., at the same time informing them that they would draw bills on R. for the value. This they accordingly did, and the bills were accepted by R. Before the bills came to maturity, S. & Co. sent remittances in short bills to R. to cover the amount of the bills, telling him to take them, "against the acceptances." R. became bankrupt, and the acceptances were not paid, and soon after S. & Co. became insolvent:—Held, that the remittances must be applied to meet the acceptances, under the ruling of *Waring, Ex parte* (19 Ves. 345). *Smart, Ex parte, Richardson, In re*, 8 L. R., Ch. 220; 42 L. J., Bk. 22; 28 L. T. 146; 21 W. R. 237.

It is no objection to the application of the rule in that case that the party sending the remittances was not a party to the bills as drawer or indorser, provided the bills were drawn in respect of a transaction in which he is liable. *Id.*

See also SHIPPING.

## BILLS OF LADING.

See SHIPPING.

## BILLS OF SALE.

1. *Parties*, 1823.
2. *What amounts to, so as to require Registration*, 1824.
3. *Fixtures and Growing Crops*.
  - a. *Fixtures*, 1886.
  - b. *Growing Crops*, 1840.

4. *Possession of the Goods.*
  - a. In Grantor, 1841.
  - b. In Grantee, 1846.
5. *Property passing by*, 1850.
6. *Successive Bills of Sale*, 1859.
7. *Stamping*, 1861.
8. *When Fraudulent and Void.*
  - a. Continuation of Possession, 1861.
  - b. Under Bill of Sale from Sheriff, 1863.
  - c. Conveyance, Fraudulent.—*See FRAUDULENT CONVEYANCES—HUSBAND AND WIFE (MARRIAGE SETTLEMENTS).*
9. *Operating as an Act of Bankruptcy.—See BANKRUPTCY.*
10. *Registration.*
  - a. Affidavit, 1864.
    - i. Generally, 1864.
    - ii. Attestation, 1865.
    - iii. Description of Grantor, 1870.
    - iv. Description of Grantee, 1875.
  - b. Statement of Consideration, 1876.
  - c. Renewal of, 1882.
  - d. Condition, 1884.
  - e. Effect of, 1885.
  - f. Non- or Defective Registration, 1886.
  - g. Proof of, 1887.
11. *Priority*, 1888.
12. *Putting in Force*, 1890.
13. *Specific Performance of Agreement to give Bill of Sale*, 1897.
14. *Evidence to Impeach Validity of*, 1898.

## 1. PARTIES.

**By Fictitious Owner.]**—A., who was living in the same house with B., was the owner of certain goods therein, which goods A. for a fraudulent purpose, permitted B. to raise and receive money upon by way of bill of sale in his own name to C., who believed the goods to be the goods of B. The goods being afterwards seized under a *fi. fa.* against A.—Held, that the sale to C. of the goods was valid, B. being in effect the agent of A. in the transaction. *Low v. McGill*, 10 L. T. 495; 12 W. R. 826.

A party in apparent possession of household furniture gave a bill of sale for value, and complied with the formalities required by 17 & 18 Vict. c. 36; another person, whose property the goods really were, represented to the grantee that they were the property of the grantor. A *fieri facias* having been issued against the property of the real owner, the goods were taken in execution by the sheriff, and an interpleader issue directed to try the right to them as between the grantee of the bill of sale and the execution creditor:—Held, first, that the owner of the goods was estopped from alleging that the goods were not the property of the party giving the bill of sale. *Richards v. Johnson*, 4 H. & N. 660; 28 L. J., Ex. 322; 5 Jur., N. S. 520.

Held, secondly, that the execution creditor was not so estopped. *Id.*

A bill of sale was executed by A. to B., but the person who was really interested in the goods was C., who advanced the money, but whose name did not appear either in the bill of sale or in the affidavit filed therewith:—Held, that though B. might be treated in equity as a mere trustee, there was no trust which need appear upon the face of the instrument. *Robinson v. Collingwood*, 17 C. B., N. S. 777; 34 L. J., C. P. 18; 10 Jur., N. S. 1080; 11 L. T. 313; 13 W. R. 84.

**By Company.]**—A trading company may give a bill of sale of its effects as a security for a debt due from the company in respect of goods supplied for the purpose of its trade. *Shears v. Jacobs*, 35 L. J., C. P. 241; 14 L. T. 286; 14 W. R. 609.

A bill of sale was given by a company; two directors affixed their signatures near the seal:—Held, that the directors signed as such, and not as attesting witnesses; and that, consequently, their residences and occupations need not be stated in the affidavit filed pursuant to 17 & 18 Vict. c. 36. *Defield v. White*, 2 L. R., C. P. 144; 36 L. J., C. P. 25; 12 Jur., N. S. 902; 15 L. T. 211; 15 W. R. 68.

**By Executrix.]**—An assignment by an executrix after probate and after judgment against her for a debt due from her testator, of all his property and effects to trustees for the benefit of his creditors, is valid as against the judgment creditor. *Wolverhampton and Staffordshire Banking Company v. Marston*, 7 H. & N. 148; 30 L. J., Ex. 402; 7 Jur., N. S. 1040; 4 L. T. 524; 7 W. R. 790.

**May be set up by an Executor de son tort.]**—A duly registered bill of sale from a deceased party may be set up by an executor de son tort, if *bonâ fide*, though possession was not taken until after the death, but for any goods not included in the bill of sale he must account as executor. *Webster v. Blackman*, 2 F. & F. 490.

**Insolvent Testator—Rights against Executor.]**

—Where a testator assigned his property, and the plaintiff, in an action against the executor, set up fraud in the assignment, and suggested, to prove the fraud, that the testator was insolvent at the time of the assignment, it is sufficient for the purposes of the plaintiff in the action, if, by the very act of assignment, the testator made himself insolvent—that is, if the property left after the conveyance was not enough to pay his debts. *Jackson v. Bowley*, Car. & M. 97.

But where the sum realized after the death of the testator very nearly equalled the amount of his debts, the judge still left it to the jury to say whether there had been fraud in the assignment. *Id.*

## 2. WHAT AMOUNTS TO, SO AS TO REQUIRE REGISTRATION.

**Statutes.]**—*See* 41 & 42 Vict. c. 31, and 45 & 46 Vict. c. 43.

**Form—Instrument not in Accordance with the Form given by the Act.]**—The Bills of Sale Act (1878) Amendment Act, 1882, s. 9, provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof, shall be void, unless made in accordance with the form in the schedule to the act annexed. The act also provides (s. 7) that personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes, viz., amongst others—1. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security. 2. If the grantor

shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes. 4. If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his receipts for rent, rates, and taxes. By a bill of sale the grantor assigned to the grantee the goods enumerated in the schedule thereto, by way of security for the payment of 300*l.* money advanced, and 180*l.* for agreed capitalized interest thereon at the rate of 60*l.* per cent. per annum, making together the sum of 480*l.*, by instalments of a certain amount, at certain specified dates. The grantor also covenanted, amongst other things, that she would deliver to the grantee the receipts for rent, rates, and taxes, in respect of the premises on which the goods assigned might be, when demanded "in writing or otherwise;" and also that she would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or become a bankrupt. It was also by the said bill of sale agreed, that if the grantor should break any of the covenants, all the moneys thereby secured should immediately become due and be forthwith paid to the grantee, and it was provided that the chattels assigned should not be liable to seizure for any other cause than those specified in the Bills of Sale Act (1878) Amendment Act, 1882:—Held, that the bill of sale was void, as not made in the form given in the schedule. *Davis v. Burton*, 11 Q. B. D. 537; 52 L. J., Q. B. 636—C. A. Affirming 10 Q. B. D. 414; 52 L. J., Q. B. 334; 48 L. T. 433; 31 W. R. 523; 47 J. P. 392.

Held, also, that the bill of sale could not be supported, inasmuch as it enabled the grantee to seize the goods upon a failure by the grantor to produce the receipts for rent, rates, and taxes, after a verbal demand. *Id.*

By a bill of sale, a mortgagor in consideration of 30*l.* paid to him by the mortgagee, and also in consideration of the sum of 10*l.* charged by the mortgagee by way of bonus or commission, assigned certain chattels to the mortgagee to secure the repayment of the principal sum of 40*l.*, with interest at 5 per cent. It was agreed between the parties that the mortgagor should "forthwith" pay to the mortgagee the said principal sum, and interest, and costs then due; and also all rents, taxes, &c., and forthwith produce the receipts for the same. And it was also agreed and declared, amongst other things, that if the mortgagor should make default in payment of the sums at the time and in the manner appointed, or do or suffer anything whereby he should render himself liable to become a bankrupt, or remove or suffer the chattels to be removed, or if execution should be or should have been levied against the goods of the mortgagor, or if default should be made in the performance of any of the covenants, then it should be lawful for the mortgagee to enter and seize. There was a proviso at the end of the bill of sale that the chattels assigned should not be liable to seizure or to be taken possession of by the mortgagee for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882:—Held, that the bill of sale was void as not in accordance with the form in the schedule to the act; and further, that the invalidity of certain of the causes for which the mortgagee might enter and seize, was not cured by the

VOL. I.

proviso at the end of the bill of sale. *Pearce, Ex parte, Williams, In re*, 49 L. T. 475; 32 W. R. 187.

— **Rate of Interest.**—A bill of sale was given by way of security for the payment of 100*l.*, being the amount advanced, and the sum of 76*l.*, being the interest agreed to be paid for the advance; and the mortgagors agreed to pay to the mortgagees the principal sum, together with the agreed interest thereon, by sixteen equal consecutive quarterly instalments of 11*l.* each. The bill of sale authorized the mortgagees, in events within the Bills of Sale Act (1878) Amendment Act, 1882, to enter into the mortgagors' premises, and take possession and sell the chattels comprised in the security, and out of the proceeds pay themselves the principal and interest secured, or so much as should be unpaid, with costs. The mortgagees having entered and taken possession:—Held, upon motion for an injunction by the mortgagors against the mortgagees, that for the purpose of the motion the bill of sale must be held to be valid within the Bills of Sale Act (1878) Amendment Act, 1882, s. 9, and that it was not necessary to state specifically in the bill of sale the actual rate of interest secured. *Wilson v. Kirkwood*, 48 L. T. 821.

**Sale and Receipt.**—A tradesman expecting the execution of a fieri facias issued by the Court of Chancery for payment of costs in a suit, effected a sale of the whole of his furniture and stock in trade. The only document passing upon the occasion was a receipt for the money paid upon the purchase:—Held, that the receipt given for the goods did not amount to a bill of sale, and therefore that it did not require registration. *Hall v. Metropolitan Saloon Omnibus Company*, 4 Drew 492; 28 L. J., Ch. 777; 7 W. R. 316.

A creditor having agreed with his debtor to take a growing crop in satisfaction, the debtor gave him a receipt for the amount of the debt as if for money paid on a sale of the crop, and the creditor having taken possession:—Held, that the transfer, though not registered, was good as against an execution creditor. *Newman v. Cordinal*, 2 F. & F. 840.

B. mortgaged two engines to an association as security for a loan made to him; the association marked its initials upon the engines. The mortgage of the engines was taken in the form of a memorandum of sale and receipt, with a power of removal at the convenience of the mortgagees. On the afternoon of the day on which B. had filed his petition for liquidation, the association, without any notice of such petition having been filed, made a demand of possession of the engines. The sheriff was in possession at the time of the demand under some execution for debts, each under 50*l.*:—Held, that the receipt was a bill of sale within the Bills of Sale Act, and not having been registered, was void as against the trustees in the bankruptcy. *Bamfield, In re, Newport Credit Company, Ex parte*, 20 W. R. 925.

Being pressed to pay rent in arrear, a tenant and his partner sold their furniture to the landlord under an arrangement, by which the purchase-money was to be applied in payment of the rent due, and the following document was drawn up:—"Bought of Messrs. D. & J. W. [certain goods at specified prices]. Memorandum.—We acknowledge that we have this day

sold and delivered to Mr. M. the above articles and effects for the price above named, 163*l.* 13*s.*, and that payment therefor has been made to us of that amount in account between us, and under the agreement arranged to be made with respect to the amount owing by us to him for rent, interest and expenses." The sale was subsequently advertised. The goods were delivered to the landlord, and then let by him to the tenant, who remained in possession of them until the 30th of October, when they were seized by the sheriff under a *fi. fa.* issued by an execution creditor of the tenant:—Held, that the document was a mere receipt, and, notwithstanding the memorandum, did not need registration as a transfer under the Bills of Sale Act. *Graham v. Wilcockson*, 46 L. J., Ex. 55; 35 L. T. 601.

Upon the trial of an interpleader issue, the claimant, in order to prove a sale of goods to him, put in a (stamped) receipt, as follows:—"Received of Mr. J. B. the sum of 90*l.*, being the amount agreed to be paid for the purchase of household furniture and effects on the premises, No. 94, &c., of which I have this day taken possession. G. E. B." No money passed at the time; but the consideration for giving the receipt was a past debt; and the goods remained in the debtor's possession:—Held, that the instrument did not require registration as a bill of sale. *Byerley v. Prevost*, 6 L. R., C. P. 144. *But see next case.*

**Inventory of Goods with Receipt for Purchase-money attached.**—An inventory of goods with receipt for purchase-money attached, the vendor remaining in apparent possession of the goods, is a bill of sale within the meaning of the Bills of Sale Act, 1854, and requires registration. *Cooper, Ex parte, Baum, In re*, 10 Ch. D. 313; 48 L. J., Bk. 40; 39 L. T. 521; 27 W. R. 298—C.A.

**Sale of Goods with Contemporaneous Agreement to re-demise them to the Vendor.**—On the 18th of July, 1877, C. advanced to A., a trader, 150*l.* to pay out an execution then on his premises. A. signed a receipt, annexed to an inventory of certain articles of furniture belonging to him, and handed it to C. On the same day C. and A. executed an agreement by which C. agreed to let, and A. to hire, the furniture for two months for 170*l.*, with power to sell upon default of payment, and in case of such sale any balance remaining after payment of the 170*l.* to be handed over to A., and any deficiency to be made good by him, and on payment of the whole sum due the goods to belong to A. Neither of these documents was registered. A. made default in paying the 170*l.*, and C. sent in W., an auctioneer, to take possession. W. paid C. the money owing to him, for which C. gave a receipt indorsed on the agreement of the 18th of July, 1877, as follows:—"Received of W. 120*l.* for the absolute sale to him of the whole of the goods herein specified." On the same day (22nd of September, 1877) W. entered into an agreement with A. to let him the furniture for three months for 145*l.*, to be paid by three instalments. The agreement contained terms identical with those in the agreement of the 18th of July. This document was not registered. A. made default in paying the instalments, and W. sold the furniture. A. remained in apparent possession of the goods until the happening of the act of bankruptcy on which he was adjudicated bankrupt.

Upon a motion by A.'s trustee in bankruptcy against W., for payment to him of the proceeds of sale:—Held, on appeal (reversing the decision of the registrar, sitting as chief judge), that the two documents of the 18th of July, together constituted a conditional sale or mortgage of the chattels, and consequently required registration, and not having been so registered were void as against the trustee in bankruptcy, and that the transaction of the 22nd of September was a transfer of C.'s rights as a mortgagee and gave W. no better title than C. himself had, and that the trustee was entitled to the proceeds of sale. *Odell, Ex parte, Walden, In re*, 10 Ch. D. 76; 48 L. J., Bk. 1; 39 L. T. 333; 27 W. R. 274—C.A.

**Inventory of Goods with Receipt given by Sheriff's Officer.**—A receipt containing an inventory and given by a sheriff's officer for the price of goods sold under an execution, is not an "assurance" within the Bills of Sale Act, 1854, and does not require registration under that statute, even although the purchaser from the sheriff allows the execution debtor to remain in possession of the goods. *Woodgate v. Godfrey*, 5 L. R., Ex. 24; 49 L. J., Ex. 1; 42 L. T. 34; 28 W. R. 88—C.A.

The sheriff having seized the goods of the defendant under a writ of *fi. fa.* issued by C., sold them to the claimant for 65*l.* A deposit of 40*l.* was paid at the time of sale, and 25*l.* on the following day; the sheriff thereupon gave to the claimant an inventory of the goods, and a receipt for the price, which were never registered under the Bills of Sale Act, 1878. The defendant remained in possession of the goods, which were afterwards seized by the sheriff under a writ of *fi. fa.* issued in the present action:—Held, that the inventory and receipt did not amount to a "bill of sale" within the meaning of the Bills of Sale Act, 1878; and that the claimant was entitled to the goods as against the plaintiffs. *Woodgate v. Godfrey* (5 Ex. D. 24) followed: *Marsden v. Meadows*, 7 Q. B. D. 80; 50 L. J., Q. B. 536; 45 L. T. 301; 29 W. R. 816—C.A.

**When possession actually changed.**—Where there is an assignment, with actual delivery, and visible change of ownership and possession, the statute does not apply, and although some portion of the assignor's family remains on the premises, that is only evidence on the question of possession. *Davies v. Jones*, 7 L. T. 130; 10 W. R. 779.

**Crops when severed from Land.**—Though a bill of sale under the Bills of Sale Act, 1854, does not require registration in respect of growing crops, yet when the crops are subsequently severed by the grantor they become personal chattels, and, if possession has not been taken of them by the grantee before the commencement of the bankruptcy of the grantor, they will pass to the trustee in the bankruptcy. *Branton v. Griffiths* (1 C. P. D. 349; 2 C. P. D. 212) distinguished. *National Mercantile Bank, Ex parte, Phillips, In re*, 16 Ch. D. 104; 50 L. J., Ch. 231; 44 L. T. 265; 29 W. R. 227—C.A.

**Deed for Benefit of Creditors.**—A deed for the benefit of creditors, whereby the debtor, in consideration of the surety's joining him in signing promissory notes for the composition, and

covenanting with the creditors to pay them the composition, assigns all his property to the surety absolutely, is not a deed requiring to be registered. *Beevor v. Savage*, 16 L. T. 358.

In order to bring a deed of assignment for the benefit of creditors within the exception in the statute, it is not necessary that the deed should appear on the face of it to be executed by all the creditors. *General Furnishing and Upholstery Company v. Venn*, 2 H. & C. 153; 32 L. J., Ex. 220; 9 Jur., N. S. 550; 8 L. T. 432; 11 W. R. 756; *S. P.*, *Ashford v. Tinte*, 7 Ir. C. L. R. 91.

An agreement to assign chattels to a bona fide creditor, followed by open delivery and possession of the same, need not be registered. *Piercy v. Humphreys*, 17 L. T. 463.

**Post-nuptial Settlements.**—Trustees under a settlement of a married woman purchased of her husband his household furniture, when he gave them a receipt as follows:—"Received of J. D. and C. J., the trustees under the deed of settlement for the benefit of my wife, 93l. 6s. 6d., for the purchase of my household goods and effects mentioned in the inclosed inventory and valuation as purchased this day by J. D. and C. J., as trustees named in the deed of settlement, and empowered to purchase by such deed:—"Held, that the document was not a bill of sale. *Allsopp v. Day*, 7 H. & N. 457; 31 L. J., Ex. 105; 8 Jur., N. S. 41; 5 L. T. 320.

A post-nuptial settlement, made in consideration of natural love and affection, is not a marriage settlement within the exception in the statute, and therefore requires to be filed as a bill of sale. *Fowler v. Foster*, 28 L. J., Q. B. 210; 5 Jur., N. S. 99.

**Debentures.**—A company whose business it was to buy and sell house property, hotel buildings, land and furniture, and to furnish hotels and carry on the business of hotel-keepers, issued debentures whereby they purported to pledge the property belonging to them for the time being during the subsistence of the debentures, with all the buildings and stock on and connected with their property, and all the receipts and revenues to arise therefrom; and they thereby declared that the debenture loan should be "a first charge on their undertaking and property, and receipts and revenues:—"Held, that these debentures created a charge upon the property of the company, but did not include the capital of the company, and that the issuing of them was not on that account ultra vires. And that the non-registration of these debentures under the Bills of Sale Act, 17 & 18 Vict. c. 36, did not make them invalid as to the chattels as against the liquidator of the company. *Marine Mansions Company, In re*, 4 L. R., Eq. 601; 37 L. J., Ch. 113.

The term liquidation in s. 8 of the Bills of Sale Act, 1878, refers to the liquidation of a person's affairs in bankruptcy, and not to the winding-up of a company. A company issued debentures which were a first charge upon its plant and stock-in-trade. The company was ordered to be wound up, and the official liquidator sold the plant and stock-in-trade, and claimed to be entitled to retain the proceeds as against a holder of debentures of the company on the ground that the debentures had not been registered under the Bills of Sale Act, and that

they were therefore void under s. 8 against the liquidator of the company:—Held, that the Bills of Sale Act had nothing to do with the winding-up of companies; that the debentures retained their priority although not registered under the act; and that the debenture holder had a right to have the proceeds of the sale paid to him by the official liquidator. *Asphaltic Wood Pavement Company, In re*, 49 L. T. 159; 32 W. R. 16.

**Building Agreement—Power for Landlord to seize Materials on Default of Builder.**—

A building agreement between a landowner and a builder contained a stipulation that the landowner, upon the default of the builder in fulfilling his part of the agreement, might re-enter upon the land and expel the builder, and that on such re-entry all the materials then in and about the premises should be forfeited to and become the property of the landowner "as and for liquidated damages:—"Held, that this stipulation was not a bill of sale within the meaning of s. 7 of the Bills of Sale Act, 1854, inasmuch as, though it was a "licence to take possession of personal chattels," the possession was not to be taken "as security for any debt." *Newitt, Ex parte, Garrud, In re*, 16 Ch. D. 522; 51 L. J., Ch. 381; 44 L. T. 5; 29 W. R. 344—C. A.

Semble, that if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, and the landowner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture. The decision in *Doe v. Brindley* (12 Moo. C. P. 37) questioned. Under such a stipulation, the interest of the builder in the materials being a defeasible one, the right of the landowner to seize is not defeated by the commission of an act of bankruptcy by the builder before the seizure is made. The trustee in bankruptcy of the builder takes subject to the right of the landowner under the agreement. *Id.*

By a building contract, after providing for the erection of houses, and the granting of leases to the builder as they should be finished, and for advances to be made by A., the owner of the land, to enable B., the builder, to carry on the work, to be repaid before the leases were granted, it was agreed by Article 7, that all materials which should have been brought upon the premises by B. for the purpose of erecting such buildings, should be considered as immediately attached to and belonging to the premises, and that no part should be removed therefrom without A.'s consent; and by Article 8, in case B. should fail to proceed with the erection and completion of the houses, or any of them, within the times specified, it should be lawful for A., his executors, administrators, and assigns, to enter upon and take possession of the whole or any part of the land not leased, with all buildings and improvements thereon, and all bricks and other building materials thereon, for his and their own absolute use and benefit:—Held, that the instrument was not an assignment, transfer, or other assurance of personal chattels, or a "licence to take possession of personal chattels as security for a debt," within 17 & 18 Vict. c. 36. *Brown v. Bateman*, 2 L. R., C. P. 272; 36 L. J., C. P. 134; 15 L. T. 658; 15 W. R. 359.

By a building contract it was agreed that all



materials brought on the land by the intended lessee should become the property of the intended lessors. The intended lessee entered and commenced building, but obtained no lease:—Held, that the materials brought on the land by him vested in the intended lessors, and were not liable to be taken in execution by a creditor of the intended lessee, and that the agreement was not a bill of sale. *Blake v. Izard*, 16 W. R. 108.

An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land, shall become the property of the landowner, is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). *Reeves v. Barlow*, 11 Q. B. D. 610.

**Brewer's Lease—Stock-in-Trade.**—A brewer's lease, which contains a licence and an authority to the lessor, in case of default being made in payment of such sum of money as should be due and owing to him from the lessee on the balance of the account current, to take possession of the stock-in-trade and effects of the lessee, must be registered, otherwise it will be void as against assignees in bankruptcy. *Hopcraft, Ex parte*, 14 W. R. 168.

**Mortgage.**—B., in consideration of advances from his bankers, conveyed to them two pieces of ground by a deed reciting that one portion was already mortgaged in fee, upon trust for the sale of the land and application of the purchase-money. By the terms of the deed B., as a further security for the principal and interest for the time being due from him in respect of the advances, attorned and became tenant to the bankers, their heirs and assigns, at and from the date of the deed, of such of the hereditaments and premises thereby conveyed "as were in his occupation, for and during the term of ten years," if that security should so long continue, "at and under the yearly rent of 800*l.*, to be paid yearly on every 1st of October in every year, the first yearly rent to be paid and payable on the first day of October then next; provided, that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the bankers, their heirs, executors, administrators or assigns, upon or after the execution of the trusts of sale therein contained, to enter into and upon the mortgaged premises or any part thereof, and to eject B. and any tenant or person claiming or to claim under him therefrom, and to determine the term of ten years, notwithstanding any lease or leases that might have been granted by B." This deed was not executed by the mortgagees, but B. continued his exclusive occupation of the premises until they distrained upon him for arrears of rent, no rent having been paid by him:—Held, that the deed was not rendered invalid by reason of its not being registered as a bill of sale. *Morton v. Woods*, 4 L. R., Q. B. 293; 38 L. J., Q. B. 81; 17 W. R. 414; 9 B. & S. 659—Ex. Ch.

**Mortgage of Stone Quarry—Fixtures—Tramways and Steam Crane.**—By a deed of mortgage of a stone quarry the quarry was granted, together with the mills, buildings, steam engines, motive power, plant, fixed and moveable machinery, apparatus, rails, sleepers, implements, fittings, and fixtures of every description, then or at any

time thereafter fixed to, or placed upon, the hereditaments; all in the same clause of the deed. The mortgage was executed after the passing of the Bills of Sale Act, 1878, but before the 1st of January, 1879, when that act came into operation. At the date of the mortgage there was a tramway in the quarry, and there was also a steam crane, cramped on to large stones, and kept in position by two guys:—Held, that the tramway and crane were fixtures, and that the mortgage did not require registration either under the old or under the new Bills of Sale Act, in order to give the mortgagee the right to retain the tramways and crane as part of his security, as against a liquidation trustee. *Moore and Robinson's Banking Company, Ex parte, Armytage, In re*, 14 Ch. D. 379; 49 L. J., Bk. 60; 42 L. T. 443; 28 W. R. 924.

41 & 42 Vict. c. 31, s. 7.]—Observations on the meaning and object of the 7th section of the Bills of Sale Act, 1878. *Ib.*

**Mortgage of an Agreement for a Lease of a Theatre, with a Covenant to charge the Furniture and Fittings "brought or to be brought into the said Theatre."**—C. and B. being, under an agreement, tenants for a short period of a theatre, with power to renew the tenancy and take a lease, charged the agreement, and the lease to be executed in pursuance thereof, with the payment to N. of 275*l.* by weekly instalments of 10*l.*, and interest at the rate of 30 per cent. per annum; and covenanted with N. (amongst other things) to charge the furniture brought or to be brought into the theatre with the payment of the moneys thereby secured. The deed was not attested by a solicitor:—Held, that this deed was in fact a bill of sale within the meaning of the Bills of Sale Act, 1878, and not having been executed by a solicitor of the Supreme Court, in accordance with the 10th section of that act, it was, so far as it was a bill of sale, wholly void, even as against the grantor. *Baghott v. Norman*, 41 L. T. 787.

**Transfer or Assignment of Bill of Sale—Fresh Advance not exceeding Amount originally secured.**—A bill of sale of goods, which was duly registered, was given to secure 500*l.* with interest, part of which was at a subsequent date paid off. A deed was afterwards made between the two parties to the bill of sale and the plaintiff, whereby the security was transferred and the goods assigned to him, on his paying off the amount remaining due on the bill of sale and making a further advance to the grantor, the whole amount secured by this deed being 501*l.* 15*s.* 9*d.*, with interest, and the rate of interest and the times of payment being different from those of the former deed:—Held, by the Queen's Bench Division, that this deed was a transfer and not a new bill of sale, and need not be registered under the Bills of Sale Act, 1878, to be effectual as to the whole amount secured by it, against an execution creditor:—Held, by the Court of Appeal, that whether or not the deed was an effectual security, without registration, for the fresh advance, it was, as to the amount which remained due on the former bill of sale, a transfer and valid to that extent without registration under the Bills of Sale Act, 1878, so as to entitle the plaintiff to the goods. *Horne v. Hughes*, 6 Q. B. D. 676; 44 L. T. 678;

29 W. R. 576; 45 J. P. 604—C. A. Affirming 50 L. J., Q. B. 403; 44 L. T. 421.

At law non-existing property to be acquired at a future time is not assignable; in equity it is so. *Holroyd v. Marshall*, 10 H. L. Cas. 191; 33 L. J., Ch. 193; 9 Jur., N. S. 213; 7 L. T. 172; 11 W. R. 171.

**Agreement for Hire.**—R., on the 29th of November, 1877, entered into an agreement with C. & Co. to hire some furniture from them, which was of the value of 63*l*. R. was to pay C. & Co. 10*l*. on the signing of the agreement, 5*l*. on the 4th of January then next, and 5*l*. on the 4th of each succeeding month during the continuance of the agreement, and he was also on the signing of the agreement to deposit with C. & Co. promissory notes for the total amount of the instalments as collateral security, and without prejudice to their title to the furniture and to the rights under the agreement. In case of the furniture being seized by them under the agreement, the notes, or so many of them as should then be current, were to become void. In the event of non-payment of any of the notes when due, C. & Co. might seize, remove, and retake possession of the furniture as in their first and former estate, notwithstanding any payments made by R., which payments were then to be forfeited to C. & Co. Upon payment by R. to C. & Co. of the full amount of 66*l*. by the above instalments, the furniture was to become his property, but, until the whole of that sum had been paid, the furniture was to remain the sole property of C. & Co., and was only let on hire to R. The furniture was delivered to R. and he gave the promissory notes. On the 9th of January, 1878, he filed a liquidation petition, under which a trustee was appointed, who took possession of the furniture, which was then in R.'s house. On the 19th of March, some of the monthly instalments being overdue, C. & Co. seized the furniture:—Held, that the property in the furniture did not pass to R. until payment of the full amount of the instalments, and that consequently the agreement did not amount to a bill of sale by R., and did not require registration. *Craucour, Ex parte, Robertson, In re*, 9 Ch. D. 419; 47 L. J., Bk. 94; 39 L. T. 2; 26 W. R. 733—C. A.

**Mortgage of Share in Partnership.**—A mortgage by a partner of his share in a partnership is an assignment of a chose in action, and not within the order and disposition clause of the Bankruptcy Act, 1869, or the Bills of Sale Act, 1854. *Bainbridge, In re, Fletcher, Ex parte*, 8 Ch. D. 218; 47 L. J., Bk. 70; 38 L. T. 229; 26 W. R. 439.

Under a will B. was entitled to a share in a distillery business, carried on in partnership with A., on trust for himself and his three brothers equally. B., in 1872, purchased the interests of his brothers under the will, and secured the purchase-money by assignment of all his share and interest in the distillery, and the partnership and goodwill. The deed was never registered under the Bills of Sale Act. B. and A. then entered into fresh articles of partnership, under which they became interested in the business in equal moieties. In 1877 B. became bankrupt:—Held, that the assignment by B. in favour of his brothers created a valid charge against the trustee in bankruptcy, both on the plant, stock-

in-trade, assets, goodwill, and book debts of the partnership, and on the tenant's or trade fixtures. *Id*.

**Furniture of Married Woman—Separate Estate.**—A married woman gave up to her husband 500*l*., held upon trust for her separate use, upon the understanding that he would settle his furniture upon her for her separate use. He assigned the furniture to a trustee to hold for the use and benefit of his wife, and the property remained in the joint possession of husband and wife. The assignment was not registered under the Bills of Sale Act, 17 & 18 Vict. c. 36, and the husband afterwards became bankrupt. Upon a bill filed by the wife to have the assignment reformed so as to create a binding trust for her separate use, and to restrain the assignee from keeping possession of the furniture:—Held, that independently of that statute, the wife would have been entitled to have the furniture secured for her separate use; but the assignment operating as a bill of sale came within the act, and not being registered, the furniture remained in the order and disposition of the bankrupt, and could not be protected against the assignee. *Ashton v. Blackshaw*, 9 L. R., Eq. 510; 39 L. J., Ch. 205; 21 L. T. 197; 18 W. R. 307.

**Chattels in Scotland.**—A bill of sale of personal chattels situate in Scotland, though made in England, and by a domiciled Englishman, need not be registered under the Bills of Sale Act, 17 & 18 Vict. c. 36. *Coote v. Jech*, 13 L. R., Eq. 597; 41 L. J., Ch. 599.

**Letter of Hypothecation.**—A letter of hypothecation does not require registration as a bill of sale. *North-Western Bank, Ex parte, Slee, In re*, 15 L. R., Eq. 69; 42 L. J., Bk. 6; 27 L. T. 461; 21 W. R. 69.

**Dock Warrant.**—Nor does a dock warrant. *Id*.

**Mercantile Transactions.**—The Bills of Sale Act does not apply to ordinary mercantile transactions. *Id*.

**Agreement for Lien.**—By an agreement under seal, W., a manufacturer at Bradford, agreed from time to time to supply goods to L., so that he might, during the continuance of the agreement, have a credit to a certain amount, for which W. was to draw bills of exchange which L. should accept from time to time for the invoice price of the goods; that L. should ship all goods purchased under this agreement to R. & Co., of Shanghai, for sale on his account, the bills of lading to be sent by L. immediately on receipt, by post, to R. & Co., to whose order the bills of lading were to be made out; that W. should have a lien on the bills of lading, and each shipment of goods, in transit outwards, such lien to extend only to the particular shipment. Under this agreement L. purchased of W. goods which W. sent in the ordinary course to a packer at Bradford to be packed and forwarded to L. for shipment:—Held, that the agreement was not a bill of sale within s. 1 of the Bills of Sale Act. *Watson, Ex parte, Love, In re*, 5 Ch. D. 35; 46 L. J., Bk. 97; 37 L. T. 75; 25 W. R. 489—C. A.

**Ships.**—A ship built in order to be sold to a foreigner, and to be delivered to him at a foreign port, was assigned by her builder to the plaintiff for a valuable consideration, under an agreement which was not in the form of a bill of sale of a ship given by the Merchant Shipping Act, 1854. The assignment was not registered, either under that Act, or under the Bills of Sale Act, 1854. At the time of the assignment the vessel had been completely built and had been tried:—Held, that the assignment fell within the proviso in the Bills of Sale Act, 1854, s. 7, which exempts assignments of a ship from the operation of that statute. *Union Bank of London v. Lenanton*, 3 C. P. D. 243; 47 L. J., C. P. 409; 38 L. T. 698—C. A.

**When Grantor in Custody.**—A., when in custody on a criminal charge, executed a bill of sale upon some jewels, which were then in the hands of the police. The bill of sale was never registered, and A. was afterwards adjudicated a bankrupt:—Held, that the bill of sale was void as against the claim of the trustee in bankruptcy. *Newsham, Ex parte, Wood, In re*, 40 L. T. 104.

**Assignment of Bill of Sale.**—When a bill of sale executed before the Bills of Sale Act, 1854, is assigned after the act, registration of the assignment is not necessary in order to render it valid as against a trustee in bankruptcy. *Shaw, Ex parte*, 46 L. J., Bk. 114; 36 L. T. 805; 25 W. R. 686.

**Agreement to give.**—An agreement to give a bill of sale need not be registered. *Homan, Ex parte, Broudbent, In re*, 12 L. R., Eq. 598; 19 W. R. 1078. *But see following cases.*

An agreement for a bill of sale, if relied on as an equitable assignment of the property, requires to be registered. *Mackay, Ex parte, Brown, Ex parte, Jeavons, In re*, 8 L. R., Ch. 643; 42 L. J., Bk. 68; 28 L. T. 828; 21 W. R. 664.

Traders, in consideration of goods being supplied to them by brokers on credit, signed a written document addressed to the brokers, by which they undertook and agreed "to hold at your disposal all our stock of soap and raw materials, and from time to time, whenever required by you so to do, to execute a valid and effectual transfer and assurance of the same to you . . . to the intent that out of the premises all claims and demands for the time being owing from us to you may be fully paid and satisfied." The security was to be a continuing one. This document was never registered under the Bills of Sale Act, nor was any bill of sale ever executed. Some time afterwards the traders filed a liquidation petition. A few days before the petition was filed the brokers demanded possession of the soap and raw materials then on the traders' premises, but did not succeed in obtaining it:—Held, that the document not having been registered, was void against the trustee under the liquidation. *Conning, Ex parte, Steele, In re*, 16 L. R., Eq. 414; 42 L. J., Ch. 74; 21 W. R. 784.

A deed by which a debtor covenants that if the debt is not paid on a day named certain chattels shall be charged with it, and that he will, when required, assign them to the creditor as security, requires registration as a bill of sale. *Edwards v. Edwards*, 2 Ch. D. 291;

45 L. J., Ch. 391; 34 L. T. 472; 24 W. R. 713—C. A.

A merely equitable assignment of chattels is within the Bills of Sale Act. *Id.*

A parol agreement to give a bill of sale does not require registration under the Bills of Sale Act, 1878, and a bill of sale given in pursuance of such an agreement is not void under the act by reason of the non-registration of the agreement. *Hawwell, Ex parte, Hemingway, In re*, 23 Ch. D. 626; 52 L. J., Ch. 737; 48 L. T. 742; 31 W. R. 711—C. A.

### 3. FIXTURES AND GROWING CROPS.

#### a. Fixtures.

**Trade—Generally.**—A lessee for years demised by an indenture of mortgage buildings used as an iron factory for the residue of the term, except the last two days, and by it he also assigned all the machinery, plant, fixtures, implements, utensils and effects, then or thereafter to be fixed to or used in or about the buildings, subject to redemption on payment of the mortgage money and interest:—Held, that the indenture, being an assignment of fixtures, was an assignment of personal chattels within the Bills of Sale Act, and required registration. *Hautry v. Butlin*, 8 L. R., Q. B. 290; 42 L. J., Q. B. 163; 28 L. T. 532; 21 W. R. 633.

The Bills of Sale Act, (17 & 18 Vict. c. 36), by the interpretation clause, declares fixtures to be personal chattels, but makes them so only for particular purposes, such as are therein described, and not for all purposes and under all circumstances whatever. *Mear v. Jacobs*, 7 L. R., H. L. Cas. 481; 44 L. J., Ch. 481; 32 L. T. 171; 23 W. R. 526.

Assignment by way of mortgage of a piece of ground held by underlease, together with the steam saw mills and buildings thereon, and the steam engines, boilers, fixed and moveable machinery, plant, implements and utensils, then or thereafter fixed to or placed upon, or used in or about the premises; to hold the hereditaments, and such of the machinery, plant, utensils and premises as were in the nature of landlord's fixtures, and could not lawfully be removed by the lessee, unto the mortgagee, his executors, administrators and assigns, for the residue of the term; and as to such of the machinery and premises as were in the nature of tenant's or trade fixtures, and could lawfully be removed by the lessee, unto the mortgagee, his executors, administrators and assigns absolutely. There was power to the mortgagee to sell the premises thereby assigned, or any part or parts thereof, either together or in parcels:—Held, that the mortgage, not being registered as a bill of sale, was void against a trustee in bankruptcy as to the trade fixtures. *Eslick, In re, Alexander, Ex parte*, 4 Ch. D. 503; 46 L. J., Bk. 30; 35 L. T. 914; 25 W. R. 260.

A lease of a piece of land was granted to a trader, he covenanting to build upon it a steam saw-mill, messuages, or dwelling-houses, and at the end of the term to yield up to the lessor the land, buildings, and fixtures, except the steam saw-mill, machinery, fixtures, and things connected therewith which it was agreed the lessee might remove. The lessee afterwards mortgaged the property, the mortgage deed assigning the land, together with the steam saw-mills and

buildings thereon, and the steam-engines, boilers, fixed and moveable machinery, plant, implements, and utensils fixed to, placed upon, or used in or about the ground, hereditaments, saw-mills, and buildings, to hold the hereditaments, and such of the machinery, plant, &c., as were in the nature of landlord's fixtures, to the mortgagee for the residue of the term, and as to such of the machinery and premises as were in the nature of tenants' or trade fixtures to the mortgagee absolutely, subject to redemption. The deed contained a power for the mortgagee, in default of payment of the mortgage money, to sell the premises, or any part or parts thereof, either together or in parcels. The deed was not registered under the Bills of Sale Act. The mortgagor filed a liquidation petition. The mortgage money remained due. The mortgagee had not taken possession of any of the property comprised in the deed:—Held, that the effect of the deed was to authorize the mortgagee to sever the trade fixtures from the premises, and to deal with them separately, and consequently that the deed, not having been registered under the Bills of Sale Act, was void *quâ* the trade fixtures as against the trustee in the liquidation. *Ib.*

The lease of a shipbuilding yard and the trade fixtures therein were assigned to a shipbuilder, to hold the leasehold premises for the residue of the term granted by the lease, and to hold the trade fixtures absolutely. He deposited the lease and the assignment with his bankers as a security for advances made by them to him. No memorandum of charge was executed. The mortgagor afterwards filed a liquidation petition. The bankers had not taken any possession of the trade fixtures:—Held, that, as against the trustee in the liquidation, the bankers had no title to the trade fixtures. *Trethowan, In re, Tweedy, Ex parte*, 5 Ch. D. 559; 46 L. J., Bk. 43; 36 L. T. 70; 25 W. R. 399.

— **Public-house.**—The lessee of a public-house and two cottages, who was bound by the covenants of his lease to deliver up, at the expiration of the term, all fixtures, except trade fixtures, demised by way of mortgage the public-house and premises, including all the tenant's fixtures, to a mortgagee for all the residue of the term except the last three days. The deed contained a power to the mortgagee, in case of default, to sell the premises or any part, either together or in parcels, and either for the term thereby granted or for the original term, with a declaration that in case of a sale the mortgagor should hold the last three days of the term in trust for the purchaser. The lessee filed a petition for liquidation, and a trustee was appointed:—Held, that the deed gave no power to the mortgagee to sell or take possession of the fixtures separately from the buildings, and that therefore it did not require to be registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). *Barclay, Ex parte, Joyce, In re*, 9 L. R., Ch. 576; 43 L. J., Bk. 137; 30 L. T. 479; 22 W. R. 608.

The true test whether a mortgage deed of a building and of fixtures requires registration under the Bills of Sale Act, as respects the fixtures, is, whether it gives power to the mortgagee to sell or take possession of the fixtures separately from the building. *Ib.*

A publican demised by way of mortgage a leasehold public-house to his brewers:—Held,

that the instrument, as regarded trade fixtures included in the demise of the premises to which they were attached, required registration. *Meux v. Allen*, 22 W. R. 609, n.

— **Looms.**—Looms put up by the lessee of a cotton mill for his convenience during the existence of his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor, are, though easily movable without injury to the freehold, fixtures which will pass under an assignment of "the mill, fixed machinery, and hereditaments, with all looms and other machinery, fixed or movable," without the necessity of registering the assignment as an assignment of chattels. *Boyd v. Shorrocks*, 5 L. R., Eq. 72; 37 L. J., Ch. 144; 17 L. T. 197; 16 W. R. 102.

— **Machinery, &c.**—In 1862, the owner in fee in possession of land and premises, deposited the title deeds relating to them with the trustees of a banking company, to secure the balance of his account. Afterwards he built a mill upon the land, and fitted it with engines and machinery, as well as shafting and pipes, for the purpose of supplying and communicating steam power and gas throughout the building. He also supplied and affixed all the machinery and articles necessary for adapting the mill for the business of a woollen manufacturer, which he carried on there. The machines were in general firmly fixed to the floor, roof or side walls of the building in a quasi permanent manner by screws or bolts, or soldered with lead. The object of fixing was to secure steadiness and keep the machines in their places when worked. There was also a washer or a washing-machine, press plates and papers, a loom machine, a beaming frame, a desk in the counting house, condenser, bobbins, and fencings and clogs. By a bill of sale dated the 18th January, 1865, the owner assigned all the machinery and articles in the mill at that time to the plaintiff, who knew of the deposit of the title deeds with the trustees of the banking company. On the 25th August, 1866, the land, premises, machinery, &c., were conveyed to the trustees, the plaintiff not acquiescing in that conveyance:—Held, first, that the machines passed to the mortgagees under the equitable mortgage and the conveyance of the 25th August, 1866, as fixtures annexed to the freehold, the annexation being necessary and permanent; though as between landlord and tenant they would be considered as trade fixtures. *Longbottom v. Berry*, 5 L. R., Q. B. 123; 39 L. J., Q. B. 37; 22 L. T. 385; 10 B. & S. 852.

Held, secondly, that the articles were movable chattels and passed to the plaintiff under the bill of sale. *Ib.*

F. was holder of a mortgage created by a deed containing two witnessing parts, one assigning the property, the other the machinery. B. was holder of a second mortgage on the same property, and F. of a third mortgage of the same property. The first two mortgages were not registered under the Bills of Sale Act, the third was. F. entered into possession, and kept the property in repair, but could not obtain a tenant. On taking the accounts between them, an attempt was made to surcharge F. with a large sum, on the ground that the trade fixtures passed to him by the first mortgage, though not regis-

tered, and with a heavy occupation rent:—Held, first, that the fixtures did not pass by the first mortgage, as it was not registered. *Begbie v. Fenwick*, *Fenwick v. Begbie*, 24 L. T. 58; 19 W. R. 402. See *S. C.* on appeal, 6 L. R., Ch. 869; 25 L. T. 441; 20 W. R. 67.

Held, secondly, that, under the circumstances, F. could not be charged with an occupation rent. *Id.*

M. by a bill of sale assigned to the plaintiff the machinery and plant standing and being on certain premises used as a refinery, and specified and described in an inventory, "subject to the additions to and alterations and renewals of parts of the machinery which have taken place since [a certain previous date], and are shewn by the alterations in red ink in the inventory or which shall hereafter be in or upon the same premises:—"

—Held, that these words included machinery and articles brought on the premises for the purposes of the refinery subsequently to the execution of the bill of sale, the assignment being absolute, and the goods, though not specific at the date of the bill of sale, having become so by being brought into and made a part of the machinery of the refinery. *Leatham v. Amor*, 47 L. J., Q. B. 581; 38 L. T. 785; 26 W. R. 739.

The freehold of a mill was mortgaged by J. to M., and for further security, J. afterwards assigned to him machinery then upon the premises. By a deed of the 14th September, 1853, J. assigned to the defendant, subject to the mortgage, the equity of redemption of the mill, and all the machinery included in the assignment to M., and also other machinery that had been subsequently erected and fixed in the mill. By another deed of the 14th of August, 1854, J. assigned to the defendant, to secure a further advance of 500*l.*, machinery then on the premises, and set forth in a schedule to the deed, and which did not include any of the machinery assigned by the deed of the 14th of September, 1853; and also further charged with the 500*l.* the equity of redemption in the premises before charged to the defendant. The machinery assigned by this latter deed was affixed to the premises only for the purposes of trade, and this deed of sale treated them as machinery which J. had a right to sell distinct from the land. The deed of the 14th of August had not been registered. J. became bankrupt, the defendant at the time having taken possession of the machinery:—Held, in an action by the assignees of J., first, that the machinery assigned by the deed of the 14th of August, 1854, was personal chattels within 17 & 18 Vict. c. 36, s. 7; and that the deed itself was a bill of sale, as it created a primary charge on the machinery distinct from the land; and, therefore, that the deed, not having been registered, was inoperative. *Waterfall v. Penistone*, 6 El. & Bl. 876; 26 L. J., Q. B. 100; 3 Jur., N. S. 15.

Held, also, that being trade fixtures, the machinery did not by subsequent annexation pass to the mortgagee of the freehold. *Id.*

A mortgage of trade fixtures, together with the freehold, by the owner of the freehold, does not require to be registered as a bill of sale. *Mather v. Fraser*, 2 Kay & J. 536; 25 L. J., Ch. 361; 2 Jur., N. S. 900.

—**Substituted Property.**—A lessee for years of premises and a cloth mill standing thereon, mortgaged them all by deed, conferring a power of sale on the mortgagees and containing a

covenant by the mortgagor to keep insured against fire, but not registered under the Bills of Sale Act:—Held, that the deed passed to the mortgagees all articles of trade machinery affixed to the mortgaged premises, whether they were so affixed before the mortgage or subsequently affixed in place of others of the same description which were affixed at the time of the mortgage, but afterwards destroyed by accidental fire. *Irish Civil Service Building Society v. Mahony*, 10 Ir. R., C. L. 363.

**Tenant's.]**—A mortgage by a leaseholder of his tenant's fixtures with his lease, in whatever form, requires registration under the Bills of Sale Act, as a bill of sale of fixtures. Such a mortgage is quite different from a mortgage by a freeholder of fixtures with the freehold. There the title to the land and to the fixtures is identical, for the fixtures belong to the landlord simply as part of the land, and it is for this reason that such a mortgage does not require registration. *Daglish, Ex parte, Wilde, In re*, 8 L. R., Ch. 1072; 42 L. J., Bk. 102; 29 L. T. 168; 21 W. R. 893.

When there is a mortgage of leasehold property and fixtures with a power of sale, the Bills of Sale Act, 1854, applies not only where the power of sale authorizes the mortgagee to sell the fixtures separately from the leasehold property, but also where there is a separate assignment of the fixtures. *Brown, Ex parte, Reid, In re*, 9 Ch. D. 389; 48 L. J., Bk. 10; 39 L. T. 338; 27 W. R. 219—C. A.

#### b. Growing Crops.

**Generally.]**—Growing crops are goods and chattels within the 17 & 18 Vict. c. 36, being capable of complete transfer by delivery. *Sheridan v. McCarty*, 11 Ir. C. L. R. 506; 5 L. T. 27.

After growing crops had been seized and taken possession of under a bill of sale, but before sale of them, a *fi. fa.* on the judgment of another creditor of the vendor was delivered to the sheriff, who seized and sold the crops, and paid the proceeds to the execution creditor. The debtor subsequently became insolvent, and petitioned the Insolvent Debtors Court for protection under 7 & 8 Vict. c. 96; but his assignees withdrew from contesting the right of the vendee of the bill of sale:—Held, that the vendee of the bill of sale was entitled to the proceeds of the crops as against the execution creditor, and that it would have made no difference in this respect if the assignees had not withdrawn. *Congree v. Everett*, 10 Ex. 298; 23 L. J., Ex. 273; 18 Jur. 655.

A tenant for years of a farm being indebted to his landlord, assigned by a bill of sale all the household goods and furniture, horses, cows, and all the hay, corn and grain as well in stock, and in the barn and granary, as now standing, growing and being upon the farm, and all carts, waggons, &c., and also all the tenant right and interest yet to come and unexpired of the debtor, in trust to sell and pay the debt, and the residue to the debtor:—Held, that, under this assignment, the tenant's interest in crops grown in future years of the term passed to the landlord. *Petch v. Tutin*, 15 M. & W. 110; 15 L. J., Ex. 280.

A document, by which A. agrees to sell to B.

"five acres of wheat now standing in, &c., at 6l. per acre, B. to cut and carry the corn any time he may require; and B. agrees to purchase the said five acres upon the above conditions," is a bill of sale within the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1, as the intention is apparent to pass the immediate property. *Brantom v. Griffiths*, 2 C. P. D. 212; 46 L. J., C. P. 408; 36 L. T. 4; 29 W. R. 313.

A bill of sale of growing crops does not require registration under the Bills of Sale Act, 1854. *Payne, Ex parte, Cross, In re*, 11 Ch. D. 534; 40 L. T. 563; 27 W. R. 808.

#### Validity of Bill of Sale as affecting Assignee.]

—B., the tenant from year to year of a farm of the defendant, assigned by bill of sale to the plaintiff all his property upon the farm together with all growing and all other crops, which at any time thereafter should be in or about the same or any other premises of his. On the 25th of April, after the execution of this bill of sale, the defendant distrained for rent, and while in possession under that distress, he, having no knowledge of the bill of sale, agreed with B., that he would forego all claim for rent, that B. should surrender the farm to him, and that the tenancy should be determined as from the 24th of June next ensuing. In May, B. having made default in payment of the instalments under the bill of sale, the plaintiff took an inventory of the goods on the farm, and put locks on the gates of the fields in which the crops were growing. The defendant then informed the plaintiff of the agreement between himself and B.; whereon the plaintiff removed the locks and shortly after gave the defendant notice of the assignment to him by the bill of sale of the crops. The defendant attended to the cultivation of the crops, took possession of the farm on the 24th of June, and reaped and sold the crops as they came to maturity. In an action of trover and for the conversion of the crops:—Held, that although the plaintiff was in equity entitled to relief, yet an action of trover could not be maintained; that the surrender by the tenant to the landlord was a valid surrender at law, but that it could not affect prejudicially the equitable rights of the plaintiff as assignee of the crops; that if there could be no valid surrender as against the plaintiff, and if the tenant must still be considered with regard to the plaintiff to be in possession, so that the plaintiff could claim to be by the assignment in the same position as the tenant, then the plaintiff, although entitled to the value of the crops when sold, was also liable to pay the rent of the farm, and the expenses of cultivating and harvesting the crops, and that as the balance on a settlement of account was in favour of the defendant, judgment must, in the circumstances of the case, be entered for the defendant. *Clements v. Mathews*, 11 Q. B. D. 808; 52 L. J., Q. B. 772—C. A. Reversing 47 L. T. 251.

#### 4. POSSESSION OF THE GOODS.

##### a. In Grantor.

**Apparent Possession.**—By a bill of sale all the furniture and effects in a private dwelling-house were assigned for a valuable consideration. Soon after the bill was made, an agent of the holder of the bill took possession of the furniture and

effects, and resided in the house armed with a copy of the bill, which he was directed to shew to any person claiming the furniture, or interfering with his possession. The assignor, who was tenant of the house, continued as before to reside there, and to have the use of the furniture, subject to the possession of the agent. Shortly after the agent's entry the assignor was adjudicated a bankrupt. The transactions being assumed to be *bonâ fide*:—Held, that nothing had been done to change, in the view of the outer world, that appearance of ownership with which the assignor was invested, and that the chattels were in his "apparent possession" within the meaning of 17 & 18 Vict. c. 36, s. 7, and passed to the assignee in bankruptcy, the bill not having been duly registered. *Honnann, Ex parte, Vining, In re*, 10 L. R. Eq. 63; 39 L. J., Bk. 4; 22 L. T. 179; 18 W. R. 450.

Held, also, that the definition of "apparent possession" in the interpretation clause applies to cases where more than merely formal possession has been taken by or given to another person. *Ib.*

The occupation mentioned in the 7th section of the Bills of Sale Act, 1854, means a *de facto* occupation; and therefore, where goods comprised in an unregistered bill of sale had been deposited in rooms rented by the grantor, and the keys of the premises had been demanded by and given up to the grantee in consequence of non-compliance by the grantor with the conditions of the bill of sale, and the grantor never returned to the premises, but the grantee entered, marked the goods, and kept the keys, the jury found rightly, that the premises were not occupied by the grantor; and the goods were therefore not in his "apparent possession." *Robinson v. Briggs*, 6 L. R., Ex. 1; 40 L. J., Ex. 17; 23 L. T. 395.

H., on the 3rd November, in the year 1870, executed a bill of sale assigning the furniture in his house to L., to secure a debt of 1,000l. This bill of sale was never registered. On the 28th November, 1870, L. sent a broker's man to take possession of the furniture. This man continued to live in the house of H., and to sleep there, until he became bankrupt, but he was permitted to use and enjoy the furniture just as before the possession was taken. On the 19th December, bills were posted in the neighbourhood announcing a sale of the furniture by auction on the 28th December. On the 23rd December H. was adjudicated a bankrupt:—Held, that at the date of the bankruptcy the furniture remained in the possession or in the apparent possession of H., and that the trustee was entitled to it. *Lewis, Ex parte, Henderson, In re*, 6 L. R., Ch. 626; 24 L. T. 785; 19 W. R. 835.

An advertisement of an intended sale of goods comprised in a bill of sale, if it is to have the effect of taking the goods out of the possession or apparent possession of the maker of the bill of sale, must, even though posted upon the premises where the goods are, state that the sale is to take place under a bill of sale. *Ib.*

The grantor of a bill of sale of household furniture managed a business as servant to the grantee at a weekly salary, and was allowed to reside in the house where the business was carried on and to use the furniture as part of his salary, the grantee residing elsewhere. The furniture having been taken in an execution

against the grantor, and the bill not having been duly registered:—Held, that the furniture was in the apparent possession of the grantor within 17 & 18 Vict. c. 36, ss. 1, 5, and that the execution creditor was entitled to it as against the grantee. *Pickard v. Marriage*, 1 Ex. D. 364; 45 L. J., Ex. 594; 35 L. T. 343; 24 W. R. 886.

Goods formally seized by the sheriff under an execution remain in the apparent possession of the debtor within the meaning of the Bills of Sale Act. *Mutton, Ex parte, Cole, In re*, 14 L. R., Eq. 178; 41 L. J., Bk. 57; 26 L. T. 916; 20 W. R. 882. See *Saffery, Ex parte, contra, post*, col. 1849.

The goods of a debtor having been seized in execution, and a man left in possession, the holder of an unregistered bill of sale over them paid the debt and costs and took possession himself. On the same day, and before he did so, the debtor was adjudicated bankrupt:—Held, that the bill of sale was void against the trustee in bankruptcy. *Ib.*

Held, also, that the holder of the bill of sale was entitled to be paid, out of the proceeds of the goods, the amount of the executions, which were good against the trustee. *Ib.*

Goods comprised in a bill of sale, which entitles the holder to take possession upon default in payment after demand, remain, notwithstanding the registration of the bill of sale, until demand is made, in the reputed ownership of the grantor. *Harding, Ex parte, Fairbrother, In re*, 15 L. R., Eq. 223; 42 L. J., Bk. 30; 28 L. T. 241.

H. having borrowed various sums of money from A., on the 10th September, 1874, executed a bill of sale to him of furniture and other articles as a security for the repayment of the money with interest. By the terms of the bill of sale, H. was to retain possession of the goods until payment of the debt was demanded by A., who was entitled to take possession of the goods if the debt was not repaid with interest within twenty-four hours after demand. The bill of sale was not registered. H., intending to reside at Ogbear Hall, the house of the interpleadant, delivered possession of some of the goods to one B., who, under her directions, kept the goods for some time, and then took them to the hall. On arriving there, B. was allowed to place the goods in four rooms, and, having locked the doors, to take away the keys. A. subsequently served H. with a written demand for payment of the money owing to him, and not having been paid within twenty-four hours after such demand, he went to the hall and demanded possession of the goods from the interpleadant, to whom he gave notice of his title and threatened to take away the goods by force. The interpleadant, however, refused to allow him to take possession of the goods, or to enter the house. Subsequently, H. filed a petition for liquidation:—Held, that, when the petition for liquidation was presented, the goods were still in the possession of H., within the Bills of Sale Act, s. 1, and that her trustee in liquidation was therefore entitled to them as against A. claiming under the bill of sale. *Ancona v. Rogers*, 1 Ex. D. 285; 46 L. J., Ex. 121; 35 L. T. 115; 24 W. R. 1000—C. A. Reversing 33 L. T. 749.

Held, secondly, that if the effect of the deposit of the furniture at the house of the interpleadant had been to make him the bailee of the goods

for the grantor, they would have still been in possession of the grantor; possession of a bailee being, for the purposes of the Bills of Sale Act, possession of the bailor. *Ib.*

Held, thirdly, that whether the goods were in the possession of the grantor as occupant of the rooms, or as bailor of the goods to the interpleadant, the demand of possession by the grantee (though the refusal to accede to it was wrongful) had not the effect of taking the goods out of the possession of the grantor, for the purposes of the Bills of Sale Act. *Ib.*

**Question of Fact.**—The possession or apparent possession of a vendor or mortgagor, under the 17 & 18 Vict. c. 36, is in general a question of fact. *Gough v. Ewerard*, 2 H. & C. 1; 32 L. J., Ex. 210; 8 L. T. 363; 11 W. R. 702.

E., by an agreement, sold certain timber lying partly on his private wharf, and partly on a public wharf, to G. for 300*l.*, E. agreeing to pay all rent and other charges upon the timber for six months, within which time G. was to remove it. G. took possession of the key of the private wharf, and sold some of the timber lying there, but he did nothing with reference to the timber on the public wharf, the key of which remained in the hands of the wharfinger, except taking persons to look at it with a view to its sale. E., by another written agreement, sold to G., for 50*l.*, some furniture lying in a house, the property of E., and part of which house E. had previously used as an office, and occasionally slept in, but of which apartments he had the use. By the agreement G., out of the 50*l.*, was to pay the wages due to E.'s servant, who remained in the house, and the rates and taxes. E. did not use the house after the agreement:—Held, that on these facts, there was no possession, or apparent possession of the timber, either at the private or public wharf, or of the furniture, by E., so as to render them liable to seizure under an execution against E. *Ib.*

**Sale of Machinery—Apparent Possession by Vendor after the Sale.**—P., a trader, being in want of capital, sold to the plaintiffs certain agricultural machinery (including a steam-engine and threshing machine, with their appurtenances) for the sum of 700*l.*, and signed a sale or receipt note for the same. The plaintiffs, thereupon, by an agreement in writing, let the said machinery on hire to P. for a term of three years at or for the sum of 882*l.*, payable by quarterly instalments of 73*l.* 10*s.*, and the said agreement provided (amongst other things) that in case of default being made by P. in the payment of the sum of 882*l.*, or the said quarterly instalments, or any part thereof, or if P. during the term became bankrupt, or assigned, or parted with the possession of the machinery or any part thereof, without the consent of the plaintiffs, it should be lawful for them to resume and take absolute possession of the said machinery. Neither the sale note nor the agreement was registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), and P. paid two instalments of 73*l.* 10*s.* due under the agreement and no more. P., without the consent or knowledge of the plaintiffs, and after he had made default in the payment of the instalments, parted with the possession of the steam-engine and threshing

machine, with their appurtenances, and delivered the same to the defendant, who had no notice of the above agreement, for the purpose of having them sold by auction, and the defendant advanced 100*l.* to P. on them, and also incurred expenses in attempting to sell them. P. then committed an act of bankruptcy by absconding, and the plaintiffs demanded possession of the steam-engine and threshing machine with their appurtenances from the defendant, who claimed a lien upon them in respect of his commission and charges as auctioneer in such attempted sale, and also in respect of the advance of 100*l.*, which had not been repaid to him by P. In an action brought to recover the steam-engine and machinery with their appurtenances, or their value, and damages for their detention :—Held, that the plaintiffs were entitled to judgment on the grounds that the steam-engine and machinery (whether the agreement amounted to a bill of sale or not) were not in the possession or apparent possession of P. at the time of his bankruptcy, within the meaning of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1 ; nor in the order and disposition of P. within the meaning of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, sub-s. 5. *Lincoln Waggon and Engine Company v. Mumford*, 41 L. T. 655.

**Stock-in-Trade—Implied Licence to dispose of.**—B., a trader, assigned to the plaintiff his stock-in-trade by a bill of sale with a proviso that until default in payment of the money advanced, B. should be entitled to make use of such stock without hindrance or disturbance on the part of the grantee. B. afterwards sold the goods to the defendants by private contract and absconded. The jury found that "B. sold the goods fraudulently, and not in the ordinary course of his business ; but the defendants did not know this, and bought the goods *bonâ fide* :"—Held, that, upon this finding, the verdict was properly entered for the plaintiff ; the right of the grantor to deal with the goods being subject to the implied condition that the dealing should be only in the ordinary course of his business. *Taylor v. McKeand*, 5 C. P. D. 358 ; 49 L. J., C. P. 363 ; 42 L. T. 833 ; 28 W. R. 628 ; 44 J. P. 784.

**Implied Licence to carry on Business—Liability of Purchaser.**—Claim : That the plaintiffs were holders of a bill of sale duly registered, comprising, amongst other things, all the growing crops and all the goods, chattels, and effects which then were or thereafter should be on or about the farm and premises of S., a farmer, and that defendant wrongfully deprived the plaintiffs of the use and possession of twelve quarters of wheat comprised in the bill of sale. —Defence : That the plaintiffs suffered S. to have the possession of the goods, and to hold himself out as having not only the possession but the property in them, and that he sold the same to the defendant, who bought them in the ordinary course of business, and without any notice that they did not belong to S. That S. was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale, and it was the ordinary course of business of S. in such business to make such sales :—Held, that the defence was good, for the bill of sale by implication conferred a licence on the grantor to carry on his business and dispose of the goods so as to give a valid title to pur-

chasers. *National Mercantile Bank v. Hampson*, 5 Q. B. D. 177 ; 49 L. J., Q. B. 480 ; 28 W. R. 424.

The grantor of a bill of sale, described in the instrument as an innkeeper and horsedealer, in consideration of a loan of 100*l.*, assigned to the plaintiff by the said bill of sale all his personal property, including "an entire horse called Fireaway, a cob called Charley, and a pony called Nelly." The bill of sale contained a covenant that so long as the money should remain owing, the grantor would not remove any of the said property from the said messuage without the consent of the plaintiff, and provided that until default in payment the grantor should hold, make use of and possess the property thereby assigned. Subsequently, and without the consent of the plaintiff, the grantor sold the three horses, Fireaway, Charley and Nelly, at a public auction, where one of them, the cob, was purchased by the defendant. In an action of detinue brought by the plaintiff to recover the cob or its value from the defendant, it was held, that the object of the bill of sale being to enable the grantor to carry on his business, the sale of the horses, which must be taken to have been sold in the ordinary course of his business, was not a breach of the covenant, and that the action was, therefore, not maintainable. *National Mercantile Bank v. Hampson* (*supra*) followed ; *Walker v. Clay*, 49 L. J., C. P. 560 ; 42 L. T. 369 ; 44 J. P. 396.

**Seizure within Twenty-one Days.**—The assignee of goods assigned under a bill of sale has twenty-one days from the date of the bill of sale, within which he may either file the bill of sale, or take the goods out of the apparent possession of the assignor ; and, therefore, the title of such assignee to the goods is not defeated by their seizure while in the apparent possession of the assignor, but before the twenty-one days have expired, under a *fi. fa.* issued on the goods of the assignor by an execution creditor. *Marples v. Hartley*, 3 El. & El. 610 ; 30 L. J., Q. B. 92 ; 7 Jur., N. S. 446 ; 3 L. T. 774 ; 9 W. R. 334.

**Rights of Assignee.**—Where goods are assigned as security for an advance of money, upon trust, to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made, the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer. *White v. Morris*, 11. C. B. 1015 ; 21 L. J., C. P. 185 ; 16 Jur. 500.

Such an assignment, though void as against creditors, is good as between the parties, and as between either party and a stranger. *Id.*

A bailiff of a county court, claiming to seize goods on behalf of a judgment creditor, is a stranger within that rule, unless he proves the legal authority under which he seized on behalf of such creditor, viz. the judgment. *Id.*

#### b. In Grantee.

**Possession of Grantee—Immaterial how obtained.**—If the grantee under an unregistered bill of sale has, before the bankruptcy of the grantor, acquired possession of the goods so as to exclude the apparent possession of the grantor, it is immaterial whether the possession has been



obtained by means of a transaction which, taken per se, would have amounted to a fraudulent preference. *Symons, Ex parte, Jordan, In re*, 14 Ch. D. 693; 42 L. T. 106; 28 W. R. 803—C. A.

Per James. L. J.: Observations on *Darby v. Smith* (8 T. R. 82). *Id.*

When the grantee of a bill of sale takes possession of the goods comprised in it, and advertizes them for sale as the goods of the grantor sold under a bill of sale, the goods, though still in the house of the grantor, are no longer in the apparent possession of the grantor within the meaning of 17 & 18 Vict. c. 36, ss. 1, 7; and the bill of sale, although not duly registered, is valid against an execution levied on the goods of the grantor. *Emanuel v. Bridger*, 9 L. R., Q. B. 286; 43 L. J., Q. B. 96; 30 L. T. 194; 22 W. R. 404.

Actual possession taken by the grantee of an unregistered bill of sale, even though taken wrongfully, may exclude the operation of the Bills of Sale Act. *Fletcher, Ex parte, Henley, In re*, 5 Ch. D. 809; 46 L. J., Bk. 93; 37 L. T. 758; 25 W. R. 573—C. A.

If the grantee of an unregistered bill of sale given by way of mortgage attempts to take possession of the property comprised in it before he is authorized to do so by the terms of the deed, he is a mere trespasser and his possession will not be extended by construction of law beyond the articles of which he has obtained actual physical possession, though in the case of a person who is entitled to take possession the possession of one article may be construed as the possession of all that is comprised in the deed. *Id.*

**When taken within Time limited for Registration.]**—When possession is taken by the assignee of the property comprised in a bill of sale, within the twenty-one days limited by the Bills of Sale Act, the deed does not require to be registered in order to be available. *Northern Investment and Discount Company, Ex parte, Carlisle, In re*, 27 L. T. 520.

When the goods and chattels comprised in a bill of sale are seized within twenty-one days from its making, under an execution issued against the grantor, and the sheriff interpleads upon a claim by the grantee, upon the trial of the issue the grantee is entitled to the goods and chattels as against the execution creditor, although the bill of sale is never registered. *Brignall v. Cohen*, 21 W. R. 25—Ex. Ch.

A. made a bill of sale to the plaintiff on the 27th June, and the assignee remained in possession under it on the 2nd July. On the 6th July the sheriff seized under a fieri facias at the suit of the defendant against S.:—Held, that as A. was not in apparent possession for twenty-one days, the bill of sale did not require to be filed, and therefore, without being filed, gave the assignee a good title. *Marples v. Hartley*, 3 El. & El. 610; 30 L. J., Q. B. 92; 7 Jur., N. S. 446; 3 L. T. 774; 9 W. R. 334.

A. executed a bill of sale of goods to B. on the 20th November, 1860. On the 10th December A. executed to B. a second bill of sale of the same goods, and the first was cancelled, but neither was registered; and on the 31st December A. executed a third bill of sale of the same goods to B., but the second one was not cancelled. The defendant levied under a fi. fa. on the 4th January, and the third bill of sale

was registered on the 10th:—Held, that the property in the goods passed from A. by the execution of the first bill of sale, and that the execution of the other bills of sale was but the exercise of his right of redemption, and the granting a fresh security, and that the third bill having been registered within the twenty-one days was good as against the execution-creditor. *Hollingsworth v. White*, 6 L. T. 604; 10 W. R. 619.

A bill of sale is not invalid in consequence of not having been filed within twenty-one days, if the goods referred to in it are seized within the twenty-one days in which it might have been filed. *Hanbury v. White*, 2 H. & C. 300; 32 L. J., Ex. 258; 9 Jur., N. S. 913; 8 L. T. 508; 11 W. R. 785

**— After such Time.]**—Possession taken under an unregistered bill of sale more than twenty-one days old will not avail against the title of the trustee in liquidation under a subsequent petition, if the grantor of the bill of sale has committed a prior act of bankruptcy, though such act of bankruptcy may have been unknown to the holder of the bill of sale at the time when he took possession. *Turner, In re, Attwater, Ex parte*, 5 Ch. D. 27; 46 L. J., Bk. 41; 35 L. T. 682; 25 W. R. 206—C. A.

In s. 1 of the Bills of Sale Act, 1854, the "time of such bankruptcy" means the time of the act of bankruptcy. The grantee, under an unregistered bill of sale, took possession of the property comprised in it before the filing of a liquidation petition by the grantor. The day before possession was taken the grantor had committed an act of bankruptcy of which the grantee had no notice:—Held, that the title of the grantee was defeated by virtue of the relation back of the title of the trustee in the liquidation to the earlier act of bankruptcy. *Id.*

**Husband and Wife.]**—R.'s wife, during her minority, executed a conveyance of a house of which she was seised in fee to R.'s father, with whom R. was in partnership, for 5000. The deed was not acknowledged by the wife. R. was credited with the purchase-money in the partnership. On a subsequent sale, the purchaser required the wife's concurrence in and confirmation of the deed of conveyance. R. procured her concurrence by executing at her request a bill of sale upon his furniture to secure payment of the value of the house to a trustee for her. The bill of sale was registered, and formal possession of the furniture was given to the trustee. The furniture remained in the house occupied by R. and his wife, until he presented a petition for liquidation:—Held, that the transaction amounted to a purchase by R. of his wife's concurrence to the second sale, that the possession was consistent with the terms of the deed, and that the wife's trustee was entitled to the furniture as against the trustee in liquidation. *Cox, Ex parte, Reed, In re*, 1 Ch. D. 302; 33 L. T. 757; 24 W. R. 302.

**What is taking Possession.]**—The holder of a bill of sale, which was not registered, sent a man to take possession and prevent the grantor retaining the goods. This man entered the premises in which the goods were, but could not get into the room in which they were, but kept watch outside the door of such room, the grantor being

absent. The jury having found that the man intended *bonâ fide* to take possession:—Held, that there was evidence to justify such finding, and that a verdict found for the holder of the bill of sale against an execution creditor whose execution was put in after such taking of possession was rightly found. *Furber v. Finlayson*, 34 L. T. 323; 24 W. R. 370.

#### Actual Possession of Sheriff under Execution.]

—If the goods comprised in an unregistered bill of sale are, at the time of the filing of a bankruptcy petition against the grantor, in the actual visible possession of the sheriff under an execution, issued either by the grantee or by a third person, they are not, even though the grantee has himself taken no possession, in the "apparent possession" of the grantor, and the Bills of Sale Act does not apply. *Mutton, Ex parte (ante, col. 1843)*, not followed. *Saffery, Ex parte, Brenner, In re*, 16 Ch. D. 668; 44 L. T. 324; 29 W. R. 749—C. A.

#### Possession of Grantee by Man put in by Him.]

—J., having executed a bill of sale, a man was put in possession of the goods comprised in it by the grantee. The house, in which the goods were, belonged to J., and he had a key of it; he did not sleep in it, but he went in and out as he pleased:—Held, that the goods were in the possession or apparent possession of J. within the meaning of the Bills of Sale Act, 1878, ss. 4, 8. *Seal v. Claridge*, 7 Q. B. D. 516; 50 L. J., Q. B. 316; 44 L. T. 501; 29 W. R. 598—C. A.

**Power to Grantee to take Possession, with subsequent Proviso that Grantor shall retain Possession.]**—A bill of sale of chattels empowered the grantee to take possession in case (*inter alia*) the grantor should become embarrassed in his affairs, or in case any action at law should be commenced against him. There was a subsequent proviso that, until default should be made in payment, according to the covenant and proviso therein contained, it should be lawful for the grantor to retain possession:—Held, by the Court of Appeal, that the prior clause was not controlled by the subsequent proviso, but that, on the happening of one of the specified events, the grantee was entitled to take possession, though no default in payment had been made by the grantor. *National Guardian Insurance Company, Ex parte, Francis, In re*, 10 Ch. D. 408; 40 L. T. 237; 27 W. R. 498—C. A.

#### Mortgage of House and Furniture—Letting by Mortgagor.]

—The mortgagor of a house and furniture let the same to a tenant for six months with the consent of the mortgagee, to whom, by arrangement between the parties, a certain portion of the rent was paid. The mortgage deed was not registered as a bill of sale. The mortgagor having become bankrupt, the mortgagee, at the termination of the six months' tenancy, took possession of the furniture and goods in the house, and claimed to retain them as against the trustee in the liquidation. The county court judge declared that the furniture and goods formed part of the debtor's estate, and ordered them to be delivered up to the trustee:—Held, on appeal, that inasmuch as the furniture and goods comprised in the mort-

gage deed were not used and enjoyed by the bankrupt so as to be in his apparent possession within the meaning of the Bills of Sale Act, 1854, the mortgagee was entitled to retain them. *Morrison, Ex parte, Westray, In re*, 42 L. T. 158; 28 W. R. 524.

#### 5. PROPERTY PASSING BY.

**Property in Possession at time of making Deed.]**—An assignment, by way of mortgage, from a lessee to his lessor, of furniture and stock-in-trade in, about, upon and belonging to an inn, with a power, upon non-payment, to enter into, possess, hold and enjoy the inn for the residue of the assignor's term therein, and to take, possess, hold and enjoy all the goods, chattels, effects and premises, passes nothing but what was in, upon, or about the inn at the time of the assignment. *Tupfield v. Hillman*, 6 M. & G. 245; 6 Scott, N. R. 967; 12 L. J., C. P. 311; 7 Jur. 771.

*Secus*, if power had been given to enter upon default, and take the goods, chattels and effects then in, upon or about the inn. *Id.*

A deed of bargain and sale cannot pass the property in goods which do not belong to the grantor at the time of the execution of the deed, unless there is some new act done by the grantor after he acquires the property, indicating his intention that such subsequently acquired property should so pass. *Lunn v. Thornton*, 1 C. B. 379; 14 L. J., C. P. 161; 9 Jur. 350.

A deed purported to assign to G. absolutely "the household goods and furniture, cows, horses, and other farming stock, implements of husbandry, corn, hay and other agricultural produce, cheese, dairy utensils, and other things which are now, or which, at any time during the continuance of this security, shall be, in, about and belonging to the dwelling-house;" but a clause followed, by which it was declared, "that, if A. shall pay to G. the sum advanced on the security of the property, on the 1st of January, 1845, or at such earlier day as G. shall appoint by notice in writing, and shall in the meantime pay the interest," then the deed shall be void. It was further declared, that, after default in payment of the sum after notice, it shall be lawful for G. to receive and take into his possession, and thenceforth to hold and enjoy, the household goods, &c.; and also to sell and dispose of the same. And that, until default, it shall be lawful for A. to hold, make use of, and possess the household goods, &c.:—Held, first, that the deed was a present conveyance from A. to G. *Gale v. Burnell*, 7 Q. B. 850; 14 L. J., Q. B. 340; 10 Jur. 198.

Held, secondly, that it did not operate as an assignment of goods thereafter to be brought upon the premises. *Id.*

A., being indebted to B., by a bill of sale, which was found to have been *bonâ fide* executed, conveyed to him all his stock-in-trade, household furniture, &c., absolutely. The bill of sale contained a covenant by A. to pay the debt on demand, and a proviso for redemption on payment of the debt and interest on demand; and a further proviso, that the assignor should continue in possession until default. The goods having been subsequently, and before any demand made by B., seized by the sheriff under a *fi. fa.*, upon a judgment entered up against A. on a warrant of attorney:—Held, that B. had not

such a right of immediate possession as to entitle him to maintain trover against the sheriff. *Bradley v. Copley*, 1 C. B. 685; 14 L. J., C. P. 222; 9 Jur. 599.

A bill of sale of goods, described as being in warehouses belonging to A., was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon trover brought against the assignee of A., who had seized the goods, it appeared that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards, whereupon the Supreme Court of Bombay held, that there had been no valid transfer, and consequently no conversion, and gave judgment and verdict in accordance with such view:—Held, on appeal, that the judgment and verdict were not justified by the evidence, and must be reversed, and a new trial granted. *Muttyloll Seal v. O'Dowda*, 6 Moore, P. C. C. 324.

**Looms and Things belonging thereto.**—C. assigned to S. by bill of sale "all and singular the 104 power looms, and other effects and things belonging thereto, now being in, upon or about the mill, particularly set forth in the schedule." The schedule was as follows: "Looms made by S." The looms were in use at the date of the execution of the bill of sale. Healds, reeds, wefts and waste cans are attached to the looms when in use, and the looms are not complete for weaving till they are supplied; but they form no part of the looms as they come from the makers. They are made, and often sold at sales, separately from the looms. Different healds and reeds are used in weaving cloth of different degrees of fineness; they do not ordinarily belong to any particular loom, but can be detached and used with any loom indifferently:—Held, that the healds, reeds, weft and waste cans which were on the premises at the time of the execution of the bill of sale passed to S. *Coot v. Sagur*, 3 H. & N. 370; 27 L. J., Ex. 378.

**Personal Estate in Dwelling-house.**—B., who was a yearly tenant of a house which he occupied, being indebted to A., executed a bill of sale, by which he assigned to A., "all the household goods, furniture, stock-in-trade, and other household effects in or about the dwelling-house, and all other the personal estate whatsoever," of B., with power to A. to sell in case of default in payment of the debt due to him from B., and to stand possessed of the moneys to arise from such sale, upon trust to satisfy the expenses and debt, and to account for the surplus, if any, to B.:—Held, that, notwithstanding the general words used, B.'s term or interest in the dwelling-house did not pass under such bill of sale to A. *Harrison v. Blackburn*, 17 C. B., N. S. 678; 34 L. J., C. P. 109; 10 Jur., N. S. 1131; 11 L. T. 453; 13 W. R. 135.

Held, also, that even if the term did pass, A. could not, before entry, maintain an action of trespass in respect of such dwelling-house. *Id.*

**Goods in Schedule—Received after Deed executed.**—In an assignment of all the furniture in a house, and comprised in a schedule annexed, goods bought and inserted in the schedule before, but not received until after the execution of the

bill of sale, will pass. *Sutton v. Bath*, 1 F. & F. 152.

**Property Elsewhere.**—The plaintiff, a contractor for carrying the mails from Halstead, in Essex, to Haverhill, in Suffolk, and back, being indebted in 30*l.* to the defendant, executed in October, 1871, a bill of sale as a security for the debt, whereby he granted to the defendant "all and every the household furniture, plate, linen, china, books, live and dead stock, horses and other cattle, carts and carriages, corn and hay, and all other the goods, chattels, personal estate and effects, whatsoever and wheresoever, of him the plaintiff, and which now or at any time hereafter, may be in, about, or upon his dwelling-house and premises at Halstead or elsewhere," with a proviso making void the indenture on payment by the plaintiff of the principal and interest on a day therein mentioned. And it was provided that in default in payment of the principal and interest at the time therein mentioned, the defendant should, and might, enter upon the message and premises of the plaintiff, where any of his goods, chattel and personal estate were deposited, and take possession of the same, and for that purpose, if necessary, break open any doors or other obstructions, and sell and dispose of the goods, and receive the money arising from the sale, and apply the same in manner in the bill of sale mentioned. On the 18th May, 1875, the plaintiff drove the mail-cart from Halstead to Haverhill, as usual, and put up his horse and cart at the Bull Inn stables there, where also was standing at the time a second horse belonging to him, two horses being necessary for working the mail. He then went away on business, and during his absence the defendant came to the stables and seized and carried away the plaintiff's two horses, and afterwards sold them, and applied the proceeds in payment of 13*l.* 9*s.* 4*d.*, balance of the plaintiff's debt of 30*l.* which then remained due under the bill of sale. In an action by the plaintiff against the defendant for so seizing his horses, the court made absolute a rule to enter the verdict for the plaintiff for 30*l.*, the value as found by the jury of the horses seized, on the ground that there was not in the bill of sale any assignment of future property, nor any assignment of property "elsewhere" than on the plaintiff's premises. *Greenbirt v. Smea*, 35 L. T. 168.

Held, also, that the plaintiff was not entitled to recover anything in addition to the value of the horses, as special damage resulting from the loss of them; and that the defendant was not entitled to make any deduction on account of the balance of the debt remaining due to him from the plaintiff on the security of the bill of sale, but must recover that, if at all, by a proper proceeding against the plaintiff. *Id.*

A debtor, who carried on his business at No. 111, Fore-street, London, but who resided at No. 10, The Grove, South Lambeth, executed a bill of sale to a creditor of all and singular the plate, linen, goods and chattels, which then were in or about the message and premises, No. 10, The Grove, South Lambeth. There was then a clause in the bill of sale, "that all the household furniture, plate, linen, china, glass, pictures, prints, wines, liquors, and all other the goods, chattels, and effects of whatever nature, which the mortgagor now is, or during the con-

tinuance of the security shall become, possessed of, shall be subject to the security hereby made, and it shall be lawful for the mortgagor to enter into any messuage or premises and to take possession thereof." There were other provisions inserted with a view of securing the mortgagee; but although the house, No. 10, The Grove, was frequently mentioned, no mention in terms was made of the premises, No. 111, Fore-street:—Held, that, upon a proper construction of the bill of sale, it did not operate upon the property upon the premises, No. 111, Fore-street, but operated alone upon the property upon the premises, No. 10, The Grove. *Nee v. Parren*, 14 L. T. 591. Affirmed, 15 L. T. 320—Ex. Ch.

**Substituted Property.**—A lessee for years of premises and a cloth mill standing thereon mortgaged them all by deed, conferring a power of sale on the mortgagees and containing a covenant by the mortgagor to keep insured against fire, but not registered under the Bills of Sale Act:—Held, as against an execution creditor of the mortgagor, who remained in possession, that the deed passed to the mortgagees all articles of trade machinery affixed to the mortgaged premises, whether they were so affixed before the mortgage or subsequently affixed in place of others of the same description which were affixed at the time of the mortgage, but afterwards destroyed by accidental fire. *Irish Civil Service Building Society v. Mahony*, 10 Ir. R., C. L. 363.

An assignment of goods on the premises, with power to seize substituted effects, includes goods ordered and delivered to a carrier the day before, but not delivered to the assignor until the day after the execution of the bill of sale. *Sladden v. Sergeant*, 1 F. & F. 322.

R. assigned to the defendant all the dye-ware and consumable stores on his premises, upon trust to permit R. to remain in possession, and carry on his trade until a specified event, and on that happening, to stand possessed of the premises upon trust to enter and take possession of all the premises, including all substituted consumable stores, pursuant to the declaration thereafter contained, and to sell the same. There also was a clause, that when any of the dye-ware, &c., thereby assigned and specified in the schedule should be consumed, and others substituted for them, in the ordinary way of the business, the substituted dye-ware, &c., should belong to the defendant upon the trusts before declared, and should be considered as included in the assignment, in like manner as if they were now the property of R., and were included in the schedule, so that the security might at all times be of an adequate value. R. continued in possession until the specified event, and during that time substituted dye-ware, &c., for others consumed in the way of his business. After the event happened, the defendant took possession of all the dye-ware, &c., then on the premises, including those which had been substituted by R., and several months after sold the same dye-ware, &c. R. had become bankrupt after the seizure, and before the sale, and his assignees sued in trover for the substituted dye-ware:—Held, that the property in the substituted dye-ware vested in the defendant when he took possession under the deed, either by a transfer of them, made valid by a new act subsequently done by the grantor, or by virtue of

the express authority to take possession of them, completed by possession being actually taken. *Hope v. Hayley*, 5 El. & Bl. 830; 25 L. J., Q. B. 155; 2 Jur., N. S. 486.

By a bill of sale the grantor assigned to the grantee the stock-in-trade then in certain specified premises, and also the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises, either in addition to or in substitution for stock-in-trade therein at the date of the bill of sale:—Held, by Lopes, J., that the assignment was sufficient to pass the property in stock-in-trade afterwards brought into the premises in addition to or in substitution for that previously there. *Lazarus v. Andrade*, 5 C. P. D. 318; 49 L. J., C. P. 847; 43 L. T. 30; 29 W. R. 15; 44 J. P. 697.

**Effect of, as passing Property, where no Covenant of Mortgagor not to Sell.**—In consideration of a loan of money, G., the mortgagor, by bill of sale conveyed his furniture, stock-in-trade, and other effects in and upon the farmhouse occupied by him, to the plaintiff, and all things of the like nature which might at any time during the continuance of the security be brought on the premises. The bill of sale contained provisos that if the mortgagor should upon demand made to him or his assigns pay the amount secured the security should be void, and that in case he should make default in payment of the amount, or in case he should assign the goods or permit them to be removed from the premises before such payment, it should be lawful for the plaintiff to enter upon the premises and take possession of and sell the goods assigned. There was a further proviso that until the mortgagor or his assigns should make default, or do any act whereby the power of entry might be put in force, it should be lawful for him or his assigns to hold and possess the goods assigned. The mortgagor, while part of the consideration-money remained unpaid, sold and delivered off his premises to the defendant part of the goods assigned. The plaintiff thereupon demanded these goods from the defendant, and upon his refusal to give them up, brought an action for their conversion. At the trial the jury found that the sale to the defendant was not in the ordinary course of business:—Held, that the defendant was liable, for upon the true construction of the bill of sale, the sale and removal of the goods gave no title to the defendant as against the plaintiff. *Payne v. Fern*, 6 Q. B. D. 620; 50 L. J., Q. B. 446; 29 W. R. 441.

**Inventory including Goods not mentioned in Mortgage.**—A mortgage of a manufactory and the machinery, working plant, &c., in or upon the same, and more particularly enumerated and specified in an inventory attached to the mortgage, does not include stock-in-trade described in the inventory but not mentioned in the mortgage. *Jardine, Ex parte, McManus, In re*, 23 W. R. 382. Affirmed on appeal, 10 L. R., Ch. 322; 44 L. J., Bk. 58; 32 L. T. 681; 23 W. R. 736.

**Words sufficient to comprise Book Debts—Sale of Goods left in Possession of Grantor.**—H. was in business as a tobacconist, and B. lent him the sum of 2,500*l.* on security of an unre-

gistered bill of sale, by the provisions of which a share in the profits was to be paid to B. in lieu of interest, and the leasehold premises on which the business was carried on were mortgaged to B. to secure his loan, together with the goodwill "and all the goods, wares, merchandize, stock-in-trade, fixtures, furniture, articles, effects, and things belonging to" H. in respect of the business, and it was declared "that all fixtures, furniture, goods, wares, merchandize, articles, and things" which should during the continuance of the security "be brought upon the premises" or "be in any other place or places in the actual or constructive possession of H." should be included in the security. The deed also provided that the property should remain in the possession of H. until B. should take possession, for its insurance, and for the keeping of proper books of account, in which entries were to be made "of all the moneys, goods, wares, merchandize, debts, and other effects belonging or owing to" H. in respect of the business. H. sold some of the goods on credit, but did not receive the price. B. took possession of the premises under the powers contained in the deed, and gave notice to the persons who had bought goods on credit to pay the price to him. Shortly afterwards H. presented a liquidation petition. The trustee in liquidation and B. both claimed the book debts:—Held, that the book debts were not assigned by the deed, but they were the proceeds of goods allowed to be sold by H. for his own profit in his own business, and belonged to H.'s trustees. *Broune v. Fryer*, 46 L. T. 636—C. A. Reversing 45 L. T. 521.

**Book Debts, Exception of.]**—In estimating whether a bill of sale comprises the whole of a trader's property, the value of his book debts is to be taken into account. *Burton, Ex parte*, 13 Ch. D. 102; 41 L. T. 571; 28 W. R. 268; *S. P. Field, Ex parte, Marlow, In re*, 13 Ch. D. 106, n.; 28 W. R. 267—C. A.

**After-acquired Property.]**—A., in consideration of a debt due from him to B., assigned to B., for securing that or any future debts, "all the fixtures and fittings, household furniture, stock-in-trade, chattels and effects, in and about the premises of A., and which were more particularly mentioned in a schedule thereto, and all the right and interest of A. thereto;" and for the more effectually securing the payment of the debt, and other moneys and interest, A. thereby authorized and empowered B., his executors or administrators, to enter into and upon the premises of A., whether acquired subsequently to the date of the deed, and not legally passing under it, or previously thereto, which before the satisfaction of that security should at any time be upon the premises, in the name or names of A., his executors, administrators or otherwise, to make and perfect any assignment, transfer or delivery thereto, to any agent or trustee, for B., or to a purchaser or otherwise:—Held, that, under this deed, A. was justified in seizing after-acquired property of B. upon the premises built subsequently to the date of the instrument. *Chidell v. Galsworthy*, 6 C. B., N. S. 471.

When on the face of an assignment of personality it is plain that it was intended to operate as a continuing security, and to apply to property afterwards acquired and substituted for that

which was originally assigned, it will, if the words are capable of such a construction, be so applied. *Carr v. Allatt*, 27 L. J., Ex. 385.

Where in such a case the deed was found capable of such a construction, although rather in the indirect form of a power of attorney than in the way of direct conveyance, it was construed to extend to stock and young crops on a farm not occupied by the assignor at the time of the execution of the deed. *Ib.*

In 1852, certain traders mortgaged to the plaintiff their machinery, stock-in-trade, &c., present and future. In January, 1855, they made an invalid assignment of all their effects to trustees for the benefit of creditors. The plaintiff having afterwards sold, without notice of an act of bankruptcy, all the property of the bankrupts, including that specified in his mortgage deeds, as well as after-acquired property:—Held, that he was entitled to that property only which was specified in his own mortgage deed. *Carr v. Acraman*, 11 Ex. 566; 25 L. J., Ex. 90.

At law non-existing property to be acquired at a future time is not assignable; in equity it is so. *Hutroyd v. Marshall*, 10 H. L. Cas. 191; 33 L. J., Ch. 193; 9 Jur., N. S. 213; 7 L. T. 172; 11 W. R. 171.

At law, although a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity, the moment the property comes into existence, the agreement operates upon it. *Ib.*

H. sold to T. all the machinery on T.'s mill and premises. The deed, registered as a bill of sale, after reciting the purchase, witnessed that H. assigned to a trustee all the machinery specified in a schedule on trust, if T. paid to H. 5,000*l.* on demand, for T. absolutely; but in default of such payment, then to sell and apply the proceeds. The deed also provided that all the machinery which, during the continuance of the security, should be fixed or placed on the mill and premises, in addition to or substitution for the present machinery, should be subject to the same trusts. T. remained in possession, working the mill, and from time to time sold part of the machinery, and purchased new, of which he gave notice to H. Afterwards H. demanded payment of the 5,000*l.*, which was not paid. An execution creditor of T. issued a *fi. fa.*, and the sheriff seized the added or substituted machinery:—Held, that the added and substituted machinery became, as soon as it was put in the mill, subject to the deed: and H. was equitable owner, and had priority over the execution creditor, without the formality of taking actual possession. *Ib.*

An assignment of chattel property, with a power to seize future chattels, does not operate in equity as an assignment of such future chattels, nor give the assignee a present interest in them. *Irvine v. Whitmore*, 4 De G., J. & S. 1; 33 L. J., Ch. 63; 9 Jur., N. S. 1214; 9 L. T. 311; 12 W. R. 113.

S., lessee of a brickfield, in 1858 assigned to H., by way of mortgage, "the stock of bricks then being, or at any time thereafter to be," in or upon the brickfield. In 1859, S., in consideration of an advance, executed a bill of sale, in which H. joined, for the purpose of postponing his security, by which he assigned to G. all and singular the prepared clay and earth, and stock of bricks in and upon the brickfield; and S.

granted to G. "full licence, power and authority, at all times during the continuance of the security, to enter into or upon the brickfield, and to seize and take possession of and sell all and every the clay, bricks and machinery, plant, &c., which might be in and upon the same premises, in such and in like manner as if the same formed part of the chattels and effects thereby assigned, or intended so to be:"—Held, that the deed of 1859 operated as an equitable assignment of the chattels on the premises at the date of the security, with a power to the mortgagee, at any future time during the continuance of the security, to enter and seize the property which he might then find there. *Id.*

When a bill of sale given to secure a debt contains, together with an assignment of existing property, words which amount to a licence to seize after-acquired property, but which do not amount to an equitable assignment of the latter, such licence is co-extensive with the debt, and cannot be exercised after the debt has been barred by the bankruptcy of the debtor. *Cole v. Kernot, Thompson v. Cohen*, 7 L. R., Q. B. 527; 41 L. J., Q. B. 221; 26 L. T. 693.

A bill of sale, purporting to convey a right to after-acquired property, gives only an equitable right, which can only be enforced by taking possession after a demand. *Belding v. Read*, 3 H. & C. 955; 34 L. J., Ex. 212; 11 Jur., N. S. 547; 13 L. T. 66; 13 W. R. 867.

A bill of sale by a debtor to a creditor purported to convey all the personal estate and effects of the debtor, then being or thereafter to be upon certain premises or elsewhere in Great Britain. It also contained a power, in case the debt secured was not paid on demand, to enter any premises in the occupation of the debtor and distrain the goods there. The creditor went to the debtor's house and demanded payment of the debtor's wife; the debtor being absent from home and the debt not being paid, he thereupon seized furniture, stock-in-trade, and other goods of the debtor, acquired since the bill of sale, some being on the debtor's premises and some not.—Held, first, in an action by the assignees of the debtor, who had become bankrupt, against the creditor, that the conveyance passed neither at law nor in equity the after-acquired property, it not having been specifically ascertained within the principle of *Holroyd v. Marshall*, *supra*. *Id.*

Held, secondly, that the power never came into operation, no sufficient demand having been made, and that therefore the assignees were entitled to recover from the creditor the value of all the after-acquired property. *Id.*

—**Assignment of future-acquired Property—Stock-in-trade—Substitution of.**—By a bill of sale the grantor assigned to the grantee the stock-in-trade then in certain specified premises, and also the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises, either in addition to or in substitution for stock-in-trade therein at the date of the bill of sale:—Held, by Lopes, J., that the assignment was sufficient to pass the property in stock-in-trade afterwards brought into the premises in addition to or in substitution for that previously there. *Lazarus v. Andrade*, 5 C. P. D. 318; 49 L. J., C. P. 847; 43 L. T. 30; 29 W. R. 15; 44 J. P. 697.

—**Growing Crops.**—By a bill of sale the

grantor assigned to the grantee (inter alia) the "growing crops" then in and about certain specified premises, and also (inter alia) the "growing crops" which at any time thereafter should be in or about the same or any other premises of the grantor during the continuance of the security:—Held, that the assignment was sufficient to pass the property in the future-growing crops on their coming into existence. *Clements v. Mathews*, 47 L. T. 251; 47 J. P. 21. Affirmed on this point, but reversed on another point, 11 Q. B. D. 808; 52 L. J., Q. B. 772—C. A. See also *ante*, col. 1840.

—**Charge of.**—A person by a written instrument charged "all his present and future personalty" to secure to the plaintiff any sums he might become indebted to him for, and afterwards incurred debts to the plaintiff:—Held, that this instrument operated to charge all the personal property belonging to the debtor at the date of the instrument, but did not operate to charge after-acquired property. *Holroyd v. Marshall* (10 H. L. C. 191) distinguished. *D'Epineuil, In re* (No. 2), *Tadman v. D'Epineuil*, 20 Ch. D. 758; 47 L. T. 157; 30 W. R. 702.

—**Bankruptcy of Assignor—Liability provable—Order of Discharge—Release from Liability.**—An assignment for value of general future property operates as a contract to assign the property if and when acquired, the liability upon which, in the event of the bankruptcy of the assignor, is a "liability provable" under the 31st section of the Bankruptcy Act, 1869; therefore an order of discharge (Bankruptcy Act, s. 49) releases the debtor from all further liability upon such an assignment. But quære, whether the liability upon an assignment of particular future property would be barred by an order of discharge. By bill of sale, duly registered, A. assigned to B. all the chattels then upon his business premises, and also all the chattels which might thereafter be brought upon the same premises, as a security for 300l. A. afterwards went into liquidation and obtained his discharge. He then commenced a new business, and brought a new set of chattels upon his premises. B., who had not come in under the liquidation, claimed A.'s new set of chattels, as forming part of his security:—Held, that A.'s discharge released him from all further liability upon the assignment. *Culley v. Isaacs*, 51 L. J., Ch. 14; 30 W. R. 70—C. A. Reversing 50 L. J., Ch. 707; 44 L. T. 872.

—**Marriage Settlement.**—A debtor by a bill of sale assigned for value to a creditor certain specified chattels at his place of business, "and all other chattels which might be or at any time thereafter be brought thereon in addition to or in substitution thereof." The debtor became bankrupt, and after his order of discharge brought other chattels upon the premises. The creditor did not prove for his debt in the bankruptcy:—Held, that the assignment of the after-acquired chattels, although absolute in form, amounted merely to a contract to assign, for the breach of which the assignor incurred a liability provable in his bankruptcy, and from which he was released by the order of discharge; that consequently the goods brought on the premises after the order of discharge could not be seized by the creditor under his bill of sale. Whether the same rule applies to a covenant in a marriage settlement to settle future property, quære. *Culley*

v. *Isaacs*, 19 Ch. D. 342; 51 L. J., Ch. 14; 45 L. T. 567; 30 W. R. 70—C. A. See 45 & 46 Vict. c. 43, ss. 5, 6.

#### 6. SUCCESSIVE BILLS OF SALE.

**Validity of, without Registration, against Execution Creditors.**—When a bill of sale is given for good consideration, but not registered, and before the expiration of the time for registration it is annulled, and a similar bill of sale given which also is not registered, and, after this process has been repeated several times, at last a bill of sale is duly registered, such last bill of sale is valid against execution creditors, if made bona fide with the intention of passing the property comprised in it. *Smale v. Burr*, 8 L. R., C. P. 64; 42 L. J., C. P. 20; 27 L. T. 555; 21 W. R. 193.

A debtor renewed bills of sale on his goods to the plaintiff from time to time, so as to evade the necessity for registration, and after seizure by the sheriff on a judgment against the debtor, the plaintiff duly registered his last bill. Before the execution of this last bill, but after that of the plaintiff's previous bills, the defendant had, without the plaintiff's knowledge, obtained and registered another bill of sale from the debtor:—Held, that the plaintiff was entitled to the goods, notwithstanding the defendant's previously registered bill of sale. *Hunter v. Turner*, 32 L. T. 556; 23 W. R. 792.

W., owing 500*l.* to E., and being pressed to give security, an agreement was come to between them and the plaintiff that W. should give the plaintiff a bill of sale of the furniture in W.'s house, that the bill should be kept renewed for twelve months, and neither the original bill nor the renewals should be registered unless W. should get into difficulties. Accordingly W. executed a bill of sale on the 8th of March, 1872, by which he assigned all the furniture to the plaintiff, with a proviso for redemption if the 500*l.* were paid on the 8th of March, 1873, or on any earlier day after twenty-four hours' demand in writing; and it was agreed that after default in payment the plaintiff might take possession and sell, but in the meantime the goods should remain in W.'s possession. A second bill of sale in similar terms was executed on the 27th of March, 1872; but the first bill remained in the plaintiff's possession uncanceled. On the 13th of April he demanded payment; on the 15th of April W. was in difficulties, and the bill of sale was duly registered on that day. The goods were afterwards taken in execution at the suit of a judgment creditor of W.:—Held, that, though the transaction might be an evasion of the Bills of Sale Act, 1854, there was nothing in that statute to render it illegal; that the substitution of the second bill of sale for the first amounted to a transfer of the goods from the plaintiff to W., and from him to the plaintiff again; so that the property passed by the second bill, which, being registered, was good against the judgment creditor. *Ramsden v. Lupton*, 9 L. R., Q. B. 17; 43 L. J., Q. B. 17; 29 L. T. 510; 22 W. R. 129—Ex. Ch.

**Against Trustee in Bankruptcy.**—A trader procured a loan of 55*l.* on the security of two bills of sale which included the whole of his property, which was worth more than 600*l.* At the same time he agreed verbally with the lender of

the money that the bills of sale should be given up and fresh bills substituted for them within the time allowed for registration, and that this should be repeated from time to time. The original bills were executed in May, 1870, and they were renewed in June and again in July, no fresh advance being made to the mortgagor on either occasion. Early in August the mortgagor filed a petition for liquidation by arrangement, and the July bills were then registered within the proper time:—Held, that the bills of July were void as against the trustee of the bankrupt. *Cohen, Ex parte, Sparke, In re*, 7 L. R., Ch. 20; 41 L. J., Bk. 17; 25 L. T. 473; 20 W. R. 69—L. J.

Although a registered bill of sale, which is in fact the last renewal of a series of unregistered bills of sale, each renewed within twenty-one days of the preceding one, with a view to avoid publicity, and being fac-similes and in substitution of the original bill of sale, may be good as against an execution creditor, it will be void as against a trustee in bankruptcy, as being an act of bankruptcy within the Bankruptcy Act, 1859. s. 6. *Sterens, Ex parte, Sterens, In re*, 20 L. R., Eq. 786; 44 L. J., Bk. 136; 33 L. T. 135; 23 W. R. 908.

**Arrangement between Debtor and Creditor not fraudulent Evasion of Act.**—A trader executed a bill of sale of the furniture in his house to a creditor, as security for the payment of two bills of exchange which the creditor had discounted for him. The bills were to become due before the expiration of the twenty-one days allowed for registration under the Bills of Sale Act; and, in compliance with the debtor's request, the creditor agreed not to register the bill of sale till the bills of exchange had become due and been dishonoured, nor did he take possession of the furniture. On the bills falling due the creditor took them up, and the debtor gave him a new bill of sale of the furniture, and new bills of exchange, which were to fall due on the 30th October, were substituted for the old ones. The new bills of exchange having been dishonoured at maturity, the creditor instructed an auctioneer to take possession of the furniture, but the men who were sent to do so on the 31st October failed to get into the house till the following morning, when they seized the furniture and removed it. The new bill of sale was duly registered on the 31st October, and on the same day the debtor filed a petition for liquidation by arrangement, and was subsequently adjudicated bankrupt:—Held, that the arrangement between the debtor and his creditor was not a fraudulent evasion of the Bills of Sale Act, and that the creditor was entitled to the proceeds of the sale of the furniture. *Harris, Ex parte, Pulling, In re*, 8 L. R., Ch. 48; 42 L. J., Bk. 9; 27 L. T. 501; 21 W. R. 44—L. J.

**Bill given in Pursuance of Agreement not an Act of Bankruptcy.**—A trader gave a bill of sale of all his property to secure an existing debt and a fresh advance, with a stipulation that the bill should not be registered, but that, when required by the creditor, the debtor would give a fresh bill of sale, which the creditor might register. A fresh bill of sale was given in pursuance of this agreement without any further advance being made, which was duly registered by the creditor, and under which he took possession. The debtor subsequently filed a liquidation peti-

tion :—Held, that the agreement to give a fresh bill of sale was valid ; and that the bill, being given in pursuance of such agreement, did not constitute an act of bankruptcy. *Jackson, In re, Hall, Ex parte*, 4 Ch. D. 682 ; 46 L. J., Bk. 39 ; 35 L. T. 947 ; 25 W. R. 382.

### 7. STAMPING.

**When Unstamped.**—The registration of a bill of sale is not avoided because the stamp is insufficient at the time of registration. The defect may be cured by having the proper stamp affixed afterwards. *Bellamy v. Saul*, 4 B. & S. 265 ; 32 L. J., Q. B. 366 ; 8 L. T. 534 ; 11 W. R. 800.

**Horses substituted—Names Indorsed on Bill.**—A bill of sale, assigning certain horses as a security, and also such other horses as might be substituted for them in the business of the assignor, provided the names and descriptions of such substituted horses were indorsed :—Held, that the indorsements did not require an additional stamp, being only for the purpose of identification. *Barker v. Aston*, 1 F. & F. 192.

**Authority to act under.**—A mere authority to act under a particular bill of sale, *semble*, does not require to be stamped as a letter or power of attorney. *Baker v. Dale*, 1 F. & F. 271.

**Cancelled Bill of Sale.**—On an issue to try the property in goods which the plaintiff claimed under a bill of sale, a previous bill of sale of the same goods, though cancelled, is not admissible to prove bona fides, unless stamped. *Williams v. Gerry*, 2 D. N. S. 201 ; 10 M. & W. 296 ; 11 L. J., Ex. 389.

## 8. WHEN FRAUDULENT AND VOID.

### a. Continuation of Possession.

**Generally.**—The mere continuance in possession, by a debtor, of property which he has assigned by bill of sale to his creditor, is not, *per se*, such a badge of fraud as renders the bill of sale fraudulent and void ; it is only *prima facie* evidence of fraud. *Macdonald v. Swiney*, 8 Ir. C. L. R. 73 ; *S. P.*, *Eastwood v. Browne*, R. & M. 312.

Continuance in possession, to render such a transaction void, must be accompanied by other circumstances, from which a jury may arrive at the conclusion that its object was fraudulent. *Id.*

The question of fraud or no fraud is always one for the jury, not for the judge. *Id.*

It is a general rule in the transfer of chattels, that the possession must accompany and follow the deed. *Edwards v. Harben*, 2 T. R. 587.

Therefore, where the conveyance is absolute, the possession must be delivered immediately ; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition is performed. *Id.*

A bill of sale of goods made for a valuable consideration, unaccompanied with the possession, is valid as against the vendor ; and as against a creditor, with whose knowledge and assent it was given. *Steel v. Brown*, 1 Taunt. 381.

Goods were taken under a *fi. fa.* as the goods of Sophia W., and on an issue directed to try whether the goods were the property of B., it was proved that the goods, prior to 1836, belonged to Martin W., when they were distrained for rent, and the sum for which they were distrained, paid in the name of Sophia W., with the money of the plaintiff. In 1837, Martin W. became bankrupt, and the plaintiff paid 128*l.* to the official assignee for Martin W.'s interest in the goods. Early in 1839, Martin W. took the benefit of the Insolvent Debtors Act, but his assignees never claimed the goods. In November, 1839, Sophia W. executed an assignment of the goods to the plaintiff, and in March, 1840, the goods were seized under a *fi. fa.* against Sophia W. The goods always had remained in the possession of Martin W. as the ostensible owner of them, and Sophia W. never was in the possession of them :—Held, that B. had made out his property in the goods ; and that, as Sophia W. had never been in the possession of the goods, and never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent. *Burling v. Paterson*, 9 C. & P. 570.

Held, also, that the fact, that the assignment was kept at Martin W.'s house, was immaterial, and that it was also immaterial that no possession of the goods had been delivered by Sophia W. to the plaintiff, as the right to them would pass by the execution of the deed. *Id.*

**Until Default.**—A., being indebted to B. in 10*l.* for goods, applied for a further supply upon credit, and for a loan. B. refused to grant either without security ; and it was then agreed that A. should give a bill of sale of his household furniture and fixtures, and that B. should give him credit for 200*l.* on that security. Before the bill of sale was executed, B., upon the faith of such agreement, advanced to A. 90*l.* in money and goods, and afterwards, on the 8th of May, 1828, A. executed a bill of sale, whereby in consideration of the debt of 100*l.*, he bargained and sold to B. all his (A.'s) household goods and furniture, with a proviso, that if A. should pay the 100*l.* by instalments, the first of which was to be due on the 7th of June, the deed should be void ; but in default of payment of any of the instalments at the time appointed, it should be lawful, although no advantage should have been taken of any previous default, for B. to enter upon the premises and take possession, and sell off the goods. There was a further proviso, that until such default it should be lawful for A. to keep possession of them. In 1823, A. had given a warrant of attorney to C. and D. as a security for a debt of 1,100*l.*, and they, in 1828, entered up judgment and sued out a *fi. fa.*, under which the sheriff seized the goods :—Held, in an action by B. against the sheriff, that the bill of sale was not fraudulent by reason of A.'s having continued in possession. *Martindale v. Booth*, 3 B. & Ad. 498.

**Grantee allowing Grantor to exercise Acts of Ownership.**—Where a party who obtains a bill of sale takes possession under it, but suffers the late owner of the goods to interfere or exercise any act of ownership, it will avoid the bill of sale as against a subsequent bona fide execution. *Paget v. Perchard*, 1 Esp. 205.



And it is not enough that a person is put in to keep possession jointly with the assignor. *Worrell v. Smith*, 1 Camp. 333.

#### b. Under Bill of Sale from Sheriff.

[The following cases were decided under 24 & 25 Vict. c. 134, s. 74, which has been repealed by 32 & 33 Vict. c. 83, s. 20.]

The goods of A. being taken in execution, and put up to sale, B. became the purchaser, and took a bill of sale from the sheriff, but permitted A. to continue in possession: A. then executed another bill of sale of the goods to C. a creditor, under which the latter took possession, whereupon A. brought an action against C. for the goods:—Held, that the first bill of sale was valid, and that A. was therefore entitled to recover. *Kid v. Rawlinson*, 2 B. & P. 59; 3 Esp. 52.

A creditor having taken in execution the goods of a debtor who had confessed judgment, and having herself bought them by public auction, and taken a bill of sale for a valuable consideration from the sheriff, and let the goods to the former owner for a rent which was actually paid, has a title which cannot be impugned as fraudulent by other creditors having executions against the same debtor. *Watkins v. Birch*, 4 Taunt. 823.

Where a person, pretending to be a purchaser of goods under an execution, leased the goods at a rent to the former owner, who still continued in possession, no money having been proved to be given for the purchase, nor rent paid under the lease, it was a question for the jury, whether the lease was not fraudulent. *Reed v. Blades*, 5 Taunt. 212.

The goods of A. being in possession of the sheriff under a fi. fa., he executed a deed of assignment to B. for a valuable consideration, on which the execution was withdrawn; B. superintended the management of the property, but allowed A. to continue in possession: the property was afterwards seized under a subsequent execution at the suit of C.; held, that such property was protected by the assignment to B., although A. continued in the visible possession. *Jezepeh v. Ingram*, 1 Moore, 189.

A., a farmer, executed a bill of sale on the 26th of September of all his property absolutely to B. for a debt of 600*l.*; B. put his son in possession, A. continuing to reside on the premises, and to conduct the farm. On the 30th of November, the sheriff took the stock, corn, &c., in execution, at the suit of C. against A. After satisfying the execution, enough remained to cover the 600*l.* due to B.:—Held, that the jury, allowing for the fluctuation of the market, was warranted in finding that the goods, at the time of executing the bill of sale, were not worth more than the 600*l.*, and therefore that the bill of sale was made bonâ fide, and that A. was entitled to recover the amount of 600*l.* in trover against the sheriff. *Benton v. Thornhill*, 2 Marsh. 427; 7 Taunt. 149.

An assignment from the sheriff under a fi. fa. on a judgment obtained by a friendly creditor, with intent to preserve the use of the property to the debtor and defeat another execution, although the transaction will be of no greater force than an assignment from the debtor, will be valid, provided there was a real debt, and the assignment by the sheriff was bonâ fide. *Cookson v. Fryer*, 1 F. & F. 328.

Where a bill of sale of goods taken under a fi. fa. is made by an officer of the sheriff, the court

will presume that he was duly authorized to make it. *Robinson v. Collingwood*, 17 C. R., N. S. 777.

#### 9. OPERATING AS AN ACT OF BANKRUPTCY— See BANKRUPTCY.

#### 10. REGISTRATION.

##### a. Affidavit.

##### i. Generally.

**Time of Filing.**—A bill of sale, and the affidavit of the time at which it was made, must be filed simultaneously with the officer acting as clerk of the dockets and judgments in the Queen's Bench. *Grindell v. Brendon*, 28 L. J., C. P. 333; 5 Jur., N. S. 1420; 33 L. T., O. S. 224; 7 W. R. 579.

**Sufficiency.**—An affidavit accompanying a bill of sale on filing, describing the maker as of Westbourne Rectory, near Emsworth, in the county of Hants, Westbourne Rectory being, in fact, in the county of Sussex, and adjoining Emsworth, which is in the county of Hants, is sufficient. *Bellamy v. Saul*, 7 L. T. 345.

In registering a bill of sale, the affidavit purported to be made by A. B., of such a description, who was also the attesting witness to the bill of sale, but the affidavit did not contain any further allegation of the residence and occupation of the attesting witness:—Held sufficient. *Allen v. Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249; 2 Jur., N. S. 451.

A bill of sale, which was filed, containing a description of the residence and occupation, but the affidavit of the time of the execution of the bill of sale which was filed with it not containing such description, was void, upon the ground of non-compliance with s. 1 of the 17 & 18 Vict. c. 36. *Hatton v. English*, 7 El. & Bl. 94; 26 L. J., Q. B. 161; 3 Jur., N. S. 294, 934, n.

An affidavit annexed to a bill of sale describing the grantor's residence and occupation to the best of the belief of the deponent is sufficient. *Roe v. Bradshaw*, 1 L. R., Ex. 106; 35 L. J., Ex. 77; 12 Jur., N. S. 29; 14 L. T. 641; 14 W. R. 284.

The affidavit filed with a bill of sale stating that the bill of sale was executed "on the day of which the same bears date," and, in another part, stating the day with a clerical error in substituting 1806 for 1876, is a sufficient affidavit of the time of execution. *Lamb v. Bruce*, 45 L. J., Q. B. 538; 35 L. T. 425; 24 W. R. 645.

**Defective.**—An execution having been levied on goods within twenty-one days after the making of a bill of sale thereof, a defective affidavit filed therewith does not vitiate the bill of sale. *Banbury v. White*, 9 Jur., N. S. 913.

**Amending.**—In the jurat of an affidavit of the execution of a bill of sale the date was written 10th January, 1860, instead of 1861:—Held, a clerical error which might be amended. *Hollingsworth v. White*, 6 L. T. 604; 10 W. R. 619.

**Making False Oath.**—A false oath sworn in an affidavit for the purpose of procuring the registration of a bill of sale is a misdemeanor at common law. *Reg. v. Hodgkiss*, 11 Cox, C. C. 365.

## ii. Attestation.

**Statute.**—By 45 & 46 Vict. c. 43, s. 10, the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of s. 10 of the principal act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed.

**By Solicitor of Grantee.**—The execution by the grantor of a bill of sale attested and registered under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31, s. 10), may be attested by the solicitor of the grantee. *Penwarden v. Roberts*, 9 Q. B. D. 137; 51 L. J., Q. B. 312; 46 L. T. 161; 30 W. R. 427.

**By Solicitor who is also Grantee.**—A solicitor who is the grantee of a bill of sale cannot also be the attesting solicitor of that bill of sale, so as to satisfy the requirements of the Bills of Sale Act, 1878, s. 10. *Szal v. Claridge*, 7 Q. B. D. 516; 50 L. J., Q. B. 316; 44 L. T. 501; 29 W. R. 598—C. A.

**Validity between Grantor and Grantee for want of.**—A bill of sale to which the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies, if it be not explained to the grantor and attested by a solicitor in compliance with the provisions of ss. 8, 10, is not void as between the grantor and grantee. *Davies v. Goodman*, 5 C. P. D. 128; 49 L. J., C. P. 344; 42 L. T. 288; 28 W. R. 559—C. A.

**Explanation by Solicitor.**—Sect. 10, though it requires that the attestation clause shall state that the effect of the bill of sale has before its execution been explained by the attesting solicitor to the grantor, does not require that any such explanation should have in fact been given. *National Mercantile Bank, Ex parte, Haynes*, *In re*, 15 Ch. D. 42; 49 L. J., Ch. D. 62; 43 L. T. 36; 28 W. R. 848; 44 J. P. 780—C. A.

**Liability of Solicitor omitting.**—Semble, that a solicitor who stated in the attestation clause to a bill of sale that he had explained the effect of it to the grantor when he had not in fact done so, would be liable to civil and penal consequences. *Id.*

**Nature and Sufficiency of.**—Per James, L. J.: Quære, whether, if the attestation clause states that before the execution of the bill of sale the effect thereof has been explained by a solicitor, the court can go into the question of the nature or sufficiency of the explanation. *Hill v. Kirkwood*, 42 L. T. 105; 28 W. R. 358—C. A.

**That Witness explained Bill.**—It is not necessary that the affidavit filed on the registration of a bill of sale should state that the solicitor who attested the execution of the deed explained the effect of it to the grantor before he executed it. *Bulland, Ex parte, Roper, In re*, 21 Ch. D. 543; 52 L. J., Ch. D. 113; 47 L. T. 488; 31 W. R. 102—C. A.

**Qualification of Solicitor.**—Per Cotton, L. J.:

The act does not require the solicitor who is the attesting witness to be a practising solicitor, nor one in any way connected with the grantee. *Hill v. Kirkwood, supra*.

**"Of its due Execution and Attestation."**—The affidavit "of its due execution and attestation" filed with a registered bill of sale under 41 & 42 Vict. c. 31, s. 10, sub-s. 2, must state, inter alia, that the bill of sale was "duly attested" by the attesting solicitor, i.e. that he was present and witnessed the due execution; an affidavit merely verifying his signature to the attestation clause, and describing his residence and occupation, is defective, and will therefore invalidate the registration. *Sharpe v. Birch*, 8 Q. B. D. 111; 51 L. J., Q. B. 64; 45 L. T. 760; 30 W. R. 428; 46 J. P. 246.

The affidavit which is filed on the registration of a bill of sale must shew that the solicitor whose name appears as the attesting witness to the deed did in fact attest it, i.e. was present when it was executed by the grantor. The affidavit, therefore, is not sufficient if it only verifies the signature of the solicitor to the attestation clause. *Sharpe v. Birch (supra)* followed. *Ford v. Kettle*, 9 Q. B. D. 139; 51 L. J., Q. B. 558; 46 L. T. 666; 30 W. R. 741—C. A.

The affidavit of the due execution and attestation of a bill of sale, filed, together with a copy of the bill of sale, by virtue of s. 10, sub-s. 2, of the Bills of Sale Act, 1878, is not sufficient, unless it contains a statement that the attesting witnesses were present and saw the execution of the bill of sale by the grantor. *Knightley, Ex parte, Moulson, In re*, 51 L. J., Ch. 823; 46 L. T. 776; 30 W. R. 844.

**Attestation may be Inferred.**—The affidavit of an attesting witness to a bill of sale under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 41), need not state in so many words that he did attest the bill of sale. It is sufficient if this can be inferred from the affidavit. *Yates v. Ashcroft*, 47 L. T. 337; 31 W. R. 156.

**Description of Residence and Occupation of Attesting Witness.**—An attesting witness's description of himself as deponent is sufficient. *Sladden v. Sergeant*, 1 F. & F. 322; *S. P., Nicholson v. Cooper*, 3 H. & N. 384; 27 L. J., Ex. 392.

The statute requires that the description of the residence and occupation of the attesting witness to a bill of sale shall be given, though the bill of sale is not made by a person in execution. *Id.*

Where a person has any fixed profession or business, or a vocation by which he gains his living, it must be mentioned in the description of an attesting witness, though it is not necessary to insert a description of an occupation which he has only casually and temporarily followed. *Sutton v. Bath*, 1 F. & F. 152; 27 L. J., Ex. 388.

The affidavit filed on registration of a bill of sale in pursuance of the Bills of Sale Act, 1878, s. 10, sub-s. 2, contained, in the introductory part describing the deponent, an accurate description of his residence. The body of the affidavit contained, inter alia, the following statements:—"I (the deponent) was present and saw the said (grantor of the bill of sale) duly execute the said bill of sale on the 15th day of December, 1881. The name subscribed to the said bill of

sale as that of the witness attesting the due execution thereof is in the proper handwriting of this deponent. I am a solicitor of the Supreme Court, and reside at—;" there being thus no description of the residence of the attesting witness in the body of the affidavit:—Held, that the affidavit was sufficient to satisfy the requirements of the Bills of Sale Act, 1878, s. 10, sub-s. 2, in respect of the description of the residence of the attesting witness.—By Manisty, J.: The body of the affidavit sufficiently incorporated by reference the description of the residence of the attesting witness contained in the introductory part.—By North, J.: It is sufficient that the description of the occupation and residence of the attesting witness should be found in the introductory part of the affidavit. *Blaisberg v. Parke*, 10 Q. B. D. 90; 52 L. J., Q. B. 110; 48 L. T. 311; 31 W. R. 246.

It is sufficient if the affidavit filed with the bill of sale refers to the description of the residence and occupation of the attesting witness mentioned in the bill of sale. *Banbury v. White*, 2 H. & C. 300; 32 L. J., Ex. 258; 9 Jur., N. S. 913; 8 L. T. 508; 11 W. R. 785.

A bill of sale given by a company had the seal of the company affixed to it, and opposite such seal were the signatures of two directors, with the addition of the word "directors" after the signatures, and also the signature of the secretary, with the word "secretary" after it. It was the practice of the company to affix the seal in the presence of the board, and for two directors to attest the sealing, and the articles of association authorized the directors to make regulations for the use of the seal:—Held, that the two directors did not sign as attesting witnesses, and that therefore their residence and occupation were not required to be stated in the affidavit of verification. *Shears v. Jacobs*, 35 L. J., C. P. 241; 14 L. T. 286; 14 W. R. 609.

The registration of a bill of sale, the execution of which has been attested by two witnesses, will be invalid unless the affidavit filed with the copy of the bill of sale contains a description of both witnesses. *Pickard v. Marriage*, 1 Ex. D. 364; 45 L. J., Ex. 594; 35 L. T. 343; 24 W. R. 886.

An attestation to a bill of sale correctly described the witness as, "Solicitor, Bloomfield Street, in the City of London." In the affidavit the witness describing himself as "Solicitor, of 16, Bloomfield Street, in the City of London," proceeded to state that he resided at "Grove House, Acton, in the City of London." His residence was in fact at Grove House, Acton, Middlesex. There were three places called Acton in England, none of them being in the City of London:—Held, a sufficient description of the residence of the attesting witness, it being one which, though inaccurate, would, coupled with the description in the bill of sale, enable a person of ordinary intelligence to conclude that the suburban Acton must be the place of residence of a solicitor carrying on business in the City of London. *Blount v. Harris*, 47 L. J., Q. B. 596. Affirmed on appeal, 4 Q. B. D. 603; 48 L. J., Q. B. 159; 39 L. T. 465; 27 W. R. 202—C. A.

—"Clerk."—It is sufficient if an attorney's clerk is described as of the office or place of business of his employers, though he sleeps elsewhere. *Attenborough v. Thompson*, 2 H. & N. 559; 27 L. J., Ex. 23; 3 Jur., N. S. 1307.

Therefore, where a bill of sale contained the following description of the attesting witness, "W. R. Cuthbert, of King's Bench-walk, Inner Temple, in the City of London, clerk to Messrs. Brundrett & Randall, of the same place, solicitors:—"—Held, that such a description was sufficient. *Blackwell v. England*, 8 El. & Bl. 541; 27 L. J., Q. B. 124; 3 Jur., N. S. 1302.

But it is not sufficient to describe as gentleman a witness who, though formerly an attorney, was at the time of the attestation acting as an attorney's clerk. *Tuton v. Sanoner*, 3 H. & N. 280; 27 L. J., Ex. 293; 4 Jur., N. S. 365.

Where the occupation of a party to or the witness of a bill of sale is not stated, the onus of proving that such party or witness has an occupation lies on the party seeking to impeach the bill of sale on that ground. *Id.*

An affidavit describing an attesting witness to the bill of sale, who was a clerk in a bank, as a "clerk" is a sufficient description of his occupation. *Lamb v. Bruce*, 45 L. J., Q. B. 538; 35 L. T. 425; 24 W. R. 645.

An attestation of the execution of a bill of sale purported to be by "Isac Simpson, clerk to F. L. L." The affidavit filed with it, commencing "I, Isaac Simpson, clerk to F. L. L., of," &c., stated that he was present, and saw the bill of sale executed, and was signed "Isac Simpson:—"—Held, that, by reasonable inference, the attesting witness to the execution of the bill of sale and the deponent were the same person, and therefore the affidavit contained a description of the residence and occupation of the attesting witness. *Routh v. Roublot or Boutell*, 1 El. & El. 850; 28 L. J., Q. B. 240; 5 Jur., N. S. 548; 7 W. R. 444.

A description of a clerk to an attorney as a gentleman is an insufficient description of an attesting witness. *Dryden v. Hope*, 3 L. T. 230; 9 W. R. 18.

And "P. M., of the City of Cork, law clerk," is insufficient. The residence of the witness must be described in such a manner as that a stranger may thereby be enabled to discover it with reasonable certainty. *Hams, In re*, 10 Ir. Ch. Rep. 100.

The affidavit filed with a bill of sale must give, either directly or by reference to the bill of sale, a description of the residence and occupation of the attesting witness at the time of his attesting a bill of sale. *Brodrick v. Scalé*, 6 L. R., C. P. 98; 40 L. J., C. P. 130; 23 L. T. 864; 19 W. R. 386.

Therefore, where the witness was described in the attestation as "clerk to a solicitor," but in the affidavit he was described as being then "a gentleman," without any statement that the description of him in the attestation to the bill of sale was true:—Held, that the statute had not been complied with. *Id.*

"Law clerk, Carlrow, in the county of Carlrow," is a sufficient description of an attesting witness to a bill of sale. *McCue v. James*, 19 W. R. 158.

"Insurance clerk" is a sufficient description of the occupation of an attesting witness. *Grant v. Shaw*, 7 L. R., Q. B. 700; 41 L. J., Q. B. 305; 27 L. T. 602.

An insufficient description of an attesting witness to a bill of sale contained in his affidavit registered therewith may be cured by reference to a sufficient description of him in the attestation clause of the bill of sale. *Mackenzie, Es*

*parte, Bent, In re*, 42 L. J., Bk. 25; 28 L. T. 486.

In an affidavit filed with a bill of sale, the attesting witness, William Knight Moston, stated, "I reside at Hanley, in the county of Stafford, and am an accountant." Moston was clerk to a Mr. Hayes, an accountant, who lived at Manchester, and Moston managed the business for him at Hanley, Moston being allowed by Hayes occasionally to do accountant's business on his own account; the name of Hayes and not Moston was over the door of the place of business. The parliamentary borough of Hanley contains a population of 40,000 persons. Hundreds of letters reached Moston by the post with the address of Hanley only:—Held, that the affidavit contained a sufficient description of the residence and occupation of the attesting witness. *Briggs v. Boss*, 3 L. R., Q. B. 268; 37 L. J., Q. B. 101; 17 L. T. 599; 16 W. R. 480.

— "**Gentleman.**"—An attesting witness to a bill of sale was described in the affidavit as "gentleman." He had been a proctor's managing clerk, but had ceased to be for six years. Since that time he had lived on an allowance from his mother, and had, on a few occasions, collected debts and written letters for other persons, and had drawn four bills of sale, but he had no regular occupation:—Held, that the description "gentleman" was sufficient. *Smith v. Cheese*, 1 C. P. D. 60; 45 L. J., C. P. 156; 33 L. T. 670; 24 W. R. 368.

A description of a clerk in a government office as a gentleman is not a compliance with 17 & 18 Vict. c. 36, which requires every bill of sale, and a description of the occupation of the person giving the same, to be filed. *Allen v. Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249; 2 Jur., N. S. 451.

**Esquire.**—A person was described in an affidavit as an esquire. Upon objection taken it was proved that he was a miller and a farmer, but it was not disproved that he was an esquire:—Held, that the affidavit was sufficient. *Doughty, In re*, 18 L. T., 188; 2 Ir. R., Eq. 235.

The lessee and manager of a theatre described himself, in a bill of sale, as an esquire. At the time of giving it he was not in any acting capacity, although he did occasionally appear on the stage:—Held, that the description was insufficient under the Bills of Sale Act, 17 & 18 Vict. c. 36. *Vining, In re*, 18 W. R. 450.

— **Of no Occupation.**—A bill of sale, and affidavit annexed, described the attesting witness as "W. J. Miller, 21, Remington-street, Islington, in the county of Middlesex, now in no occupation." The witness had been in the militia, but at the time of the execution of the bill of sale had no occupation:—Held, a sufficient description of the witness. *Trousdale v. Sheppard*, 14 Ir. C. L. R. 370.

Where the attesting witness to a bill of sale is a person having no occupation, and in his affidavit of the due execution of the bill of sale as required by the Act of 1854 has omitted so to state in describing himself, the court will not declare the bill of sale to be void upon the ground that it has not been properly registered. *Young, Ex parte, Symonds, In re*, 42 L. T. 744; 28 W. R. 924.

**Sworn before Solicitor of both Parties.**—An

affidavit filed with a bill of sale is good, though sworn before a solicitor acting for grantor and grantee of the bill. *Vernon v. Cooke*, 49 L. J., C. P. 767—C. A.

### iii. Description of Grantor.

**What Sufficient.**—The object of 17 & 18 Vict. c. 36, is to give the assignee and creditor a true idea of the position in life of the assignor; and, therefore, a misdescription, or absence of a true description, in regard to his occupation, is substantial, and invalidates the transaction. *Allen v. Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249; 2 Jur., N. S. 451.

A bill of sale purported to be given by A. B., of a certain place, "gentleman," and in respect of the furniture of his house there. The assignor carried on no business at that place, but was a clerk in the Audit Office:—Held, that "gentleman" was a misdescription of the party, which vitiated the bill of sale. *Id.*

It is not sufficient that the bill of sale, which is filed, itself contains a description of the residence and occupation of the grantor. *Hatton v. English*, 7 El. & Bl. 94; 26 L. J., Q. B. 161; 3 Jur., N. S. 294, 934, n.

In a bill of sale and affidavit of registration A. was described as a gentleman. He had been formerly a coal agent, but having been dismissed, he was at the time of the bill of sale out of employment:—Held, that there was no such misdescription as affected the validity of the bill of sale. *Morewood v. South Yorkshire Railway and River Don Company*, 3 H. & N. 798; 28 L. J., Ex. 114.

In an affidavit filed with a bill of sale under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 2, R., the grantor of the bill of sale, was described as "carrying on the business of a wine and spirit merchant, and dealer in provisions and general goods, at 4A, Dean-street, Liverpool, under the style of the London and Westminster Supply Association." At the time the bill of sale was granted, R., who formerly owned the business, was the manager, and received a salary:—Held, a misdescription. *Cooper v. Davis*, 48 L. T. 831; 31 W. R. 721.

A bill of sale and the affidavit filed on its registration described the grantors (who were father and son) by their true addresses, and added that they were mantle manufacturers carrying on business together under a specified firm. They had in fact formerly carried on the business of mantle manufacturers in partnership, but, at the time when the bill of sale was executed, the partnership had been dissolved, and the business was being carried on by the father alone, the son being in his employment as a clerk. The property comprised in the deed in fact belonged to the father alone, though both father and son joined in the assignment. The father alone filed a liquidation petition:—Held, that there was no misdescription of the grantors such as to affect the validity of the registration; (1) because the son not being a bankrupt, any misdescription of him was immaterial; (2) because, as to the father, the statement that he was carrying on business with the son was mere surplusage, and was not misleading. *Popplewell, Ex parte, Storey, In re*, 21 Ch. D. 73; 52 L. J., Ch. 39; 47 L. T. 274; 31 W. R. 35—C. A.

In the affidavit filed with a bill of sale, the deponent swore to the description of the grantor's

residence and occupation "to the best of his belief :"—Held, that the use of these words did not affect the description, which was sufficient if its truth in fact was not impeached. *Roe v. Bradshaw*, 1 L. R., Ex. 106; 35 L. J., Ex. 71; 12 Jur., N. S. 29; 14 W. R. 284; 4 H. & C. 178.

**When a Company.]**—The name of a company giving a bill of sale as "The Glucose Sugar and Colouring Company," is a sufficient description of its trade or occupation to satisfy the statute. *Shears v. Jacobs*, 1 L. R., C. P. 513; 35 L. J., C. P. 241; 12 Jur., N. S. 785; 14 L. T. 286; 14 W. R. 609; 1 H. & R. 492.

If a company gives a bill of sale, it is unnecessary to mention in the affidavit filed pursuant to the statute its residence and occupation, and it is not requisite that the directors, who execute it as directors, and not as attesting witnesses, should add descriptions of their residences and occupations. *Ib.*

A bill of sale was executed under the common seal of a trading company. Opposite the seal were the names of two of the directors, who purported to sign as directors. The secretary, who was called as a witness, stated that "it was usual to affix the seal in the presence of the board, and for two directors to attest it :"—Held, that the directors so signing were not attesting witnesses within the meaning of the statute. *Ib.*

**When a Corporation.]**—To a bill of sale given by a corporation there was affixed the seal of the company, with the following written opposite to the seal :—"Seal of company affixed at a board meeting this 23rd day of June, 1865, in the presence of R. O., chairman; R. C., director. Countersigned, C. D., Sec. pro temp." There was a resolution of the directors, that the seal should be "affixed to documents only in the presence of two directors, and such affixing should be attested by their respective signatures :"—Held, that R. O. and R. C. signed not as attesting witnesses, but only as part of the execution of the bill of sale by the company, and that, therefore, their residence and occupation were not required to be stated in the affidavit for registering the bill of sale. *Deffell v. White*, 2 L. R., C. P. 144; 36 L. J., C. P. 25; 12 Jur., N. S. 902; 15 L. T. 211; 15 W. R. 68.

—"A. B. the younger."—There is nothing in the 17 & 18 Vict. c. 36, which requires a son bearing the same name as his father, and being the grantor of a bill of sale, to describe himself as "A. B. the younger" in the bill of sale and affidavit. *Foulger v. Taylor*, 1 L. T. 57.

**When "Gentleman" sufficient.]**—In a registered bill of sale, T. was described as a gentleman. He had been clerk to a firm of attorneys which was dissolved, but at the time of giving the bill of sale, he was employed in making up the accounts, and sending out the bills of the firm :—Held, a misdescription, which vitiated the bill of sale. *Beales v. Tennant*, 29 L. J., Q. B. 188; 6 Jur., N. S. 628; 1 L. T. 295.

A medical student, who has only temporarily acted as a surgeon's assistant, may be described as a gentleman. *Sutton v. Bath*, 3 H. & N. 382; 1 F. & F. 152; 27 L. J., Ex. 388.

Where the occupation of a party to a bill of

sale is not stated, the onus of proving that such party has an occupation lies on him who impeaches the validity of the bill of sale. *Ib.*

A grantor of a bill of sale at the time of the execution thereof was living apparently without occupation, but was in fact in the employ of a mercantile firm as a buyer of silk. He was described in the affidavit filed therewith as a gentleman :—Held, a misdescription, and that the bill of sale was therefore invalid. *Adams v. Graham*, 33 L. J., Q. B. 71; 10 Jur., N. S. 356; 9 L. T. 606; 12 W. R. 282.

An uncertificated bankrupt, following no occupation at the time of granting a bill of sale, may properly be described in the affidavit as a gentleman, although at the time of filing the affidavit he carries on the business of a commission agent. *London and Westminster Loan Company v. Chase or Chace*, 12 C. B., N. S. 730; 31 L. J., C. P. 314; 9 Jur., N. S. 412; 6 L. T. 781; 10 W. R. 698.

One who, up to and at the time of the execution of a bill of sale, has never been actually engaged in any trade or occupation, is properly described therein (or in the affidavit filed therewith) as a gentleman. *Gray v. Jones*, 14 C. B., N. S. 743.

**Misdescription of Residence.]**—A farmer, whose real name was Joseph Wood, but who had assumed the name of Joseph Albert Wood, and had become known to his creditors by that name, executed a bill of sale in which he was described as "Joseph Wood, of Lache Hall Farm, in the county of Chester, farmer." The same name and description were given in the affidavit filed on the registration of the bill of sale. Lache Hall Farm was situate a short distance outside Chester, but was really within the county of the city of Chester, not in the county of Chester. It did not appear that there was any other farm of the same name in the county of Chester :—Held, by the chief judge and by the Court of Appeal, that the registration was valid. *M'Hattie, Ex parte, Wood, In re*, 10 Ch. D. 398; 48 L. J., Bk. 26; 39 L. T. 373; 27 W. R. 327—C. A.

The grantor of a bill of sale was therein correctly described as of "No. 37, Malpas Road, Deptford, in the county of Kent," and the attesting witness to such bill of sale was therein also correctly stated to be of "2, South Terrace, Hatcham Park Road, New Cross." In the affidavit, however, which was filed with a copy of the bill of sale, the residence of the grantor was described as "No. 73, Malpas Road, Deptford, in the county of Kent," and the residence of the attesting witness was described as "3, South Terrace, Hatcham Park Road, New Cross :"—Held, that there was not a true description of residence of the grantor, and attesting witness thereto, filed as required by the Bills of Sale Act, 1854. *Murray v. Mackenzie*, 10 L. R., C. P. 625; 44 L. J., C. P. 313; 32 L. T. 777; 23 W. R. 595.

In a bill of sale and affidavit filed, the grantors, G. and H., were described as residing at New-street, Blackfriars, in the county of Middlesex, and as printers and co-partners. G., residing at Wellington Place, Stoke Newington, in the county of Middlesex, and H., residing at Palsgrave Place, Temple Bar, in the county of Middlesex, carried on their business of printers at New Street, Blackfriars, in the city of London :—Held, that the description of residence

contained in the bill of sale and affidavit was sufficient, inasmuch as creditors could not be misled by it. *Heuer v. Cox*, 30 L. J., Q. B. 73; 6 Jur., N. S. 1339; 3 L. T. 508; 9 W. R. 143.

**Change of Occupation between Execution and Registration.]**—The description of the residence and occupation of a person making or giving a bill of sale, to be contained in the affidavit filed with the bill of sale, must be that which fits the party at the time of giving the security, and not at the time of filing it. *London and Westminster Loan Company v. Chase or Chace*, 12 C. B., N. S. 730; 31 L. J., C. P. 314; 9 Jur., N. S. 412; 6 L. T. 781; 10 W. R. 698.

**Change of Residence between Execution and Registration.]**—The "description of the residence" of the maker of a bill of sale, required by the Bills of Sale Act, 1854, s. 1, to be stated in the affidavit filed therewith, must be his residence at the time of swearing the affidavit and not of executing the bill of sale. *Button v. O'Neill*, 4 C. P. D. 354; 48 L. J., C. P. 368; 40 L. T. 799; 27 W. R. 592—C. A.

**By Reference to Bill of Sale.]**—The description of the residence of the grantor of a bill of sale, required to be stated in the affidavit for registration, will not be held incorrect so as to invalidate the registration upon the ground that the grantor was therein described in the same manner as in the bill of sale, notwithstanding that at the time of the filing of such affidavit, the person making it was aware that the grantor had in fact absconded. *Kaken, Ex parte, Heuer*, *In re*, 21 Ch. D. 871; 51 L. J., Ch. 904; 46 L. T. 856; 30 W. R. 954.

In an affidavit filed with a copy of a bill of sale, the deponent stated "that the paper writing annexed is a true copy of a bill of sale made by Isaac Anthony," and "that Isaac Anthony resides at Dynevor Lodge, and is an auctioneer." By the copy of the bill of sale annexed to the affidavit, Isaac Anthony was described as "of Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen, auctioneer," which was the true residence.—Held, that the description in the affidavit of the residence of the person making the bill of sale was not sufficient, but that the copy of the bill of sale in which the situation of the residence was stated with particularity enough to guide any inquiry as to the identity of the individual, might be referred to, in order to explain and supplement the description given by the affidavit; and that, therefore, the provisions of the 17 & 18 Vict. c. 36, s. 1, were satisfied. *Jones v. Harris*, 7 L. R., Q. B. 157; 41 L. J., Q. B. 6; 25 L. T. 702; 20 W. R. 143.

A bill of sale described the grantor as "I. B., of No. 9, George Street, Minories, in the City of London, hotel keeper." The affidavit annexed to the bill of sale described him as "the said I. B., of No. 9, George Street, Minories, in the said City of London, in the said bill of sale mentioned."—Held, that there was no sufficient description of the occupation of the grantor of the bill of sale. *Pickard v. Bretz*, 5 H. & N. 9; 29 L. J., Ex. 18; 5 Jur., N. S. 1134; 1 L. T. 45.

An affidavit filed with a bill of sale, and stating it to have been made between the parties resid-

ing at the places, and of the occupations therein mentioned, is sufficient. *Foulger or Foulgar v. Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154; 1 L. T. 57.

**Widow.]**—The "occupation" of the person making or giving a bill of sale, within 17 & 18 Vict. c. 36, s. 1, means the ordinary business or calling in life of such person, by reference to which he may be identified. *Luckin v. Hamlyn*, 21 L. T. 366; 18 W. R. 43.

Therefore, a woman who, at the time of giving a bill of sale, carried on a farm, which belonged to her deceased husband, merely as his executrix and not with a view to taking permanently to it, and has no other occupation, need not be described as a farmer in the affidavit; but is sufficiently described as a widow. *Id.*

E. W. was described in a bill of sale as of "W. S. Street, N. S., in the county of N., a widow, about to remove to E. U. Hotel, N. S., aforesaid." She had carried on the business of a licensed victualler for several years until about a month previously, when she removed to the above address, which was a private house.—Held, that the description of widow was sufficient and not likely to mislead, and that the latter part of the description was unnecessary, as shewing an intention only to take the hotel which might not be carried into effect. *Wolfe or Chapman, Ex parte, Davey*, *In re*, 44 L. T. 321. Affirmed, 45 L. T. 268—C. A.

**Lessee of Theatre.]**—The lessee and manager of a theatre, who occasionally acted there himself though not under any acting engagement, was described in a bill of sale, and in the affidavit filed at the registry, by his full names, his private dwelling-house, and as "esquire":—Held, that his occupation was not described so as to satisfy the statute. *Homann, Ex parte, Vining*, *In re*, 10 L. R., Ex. 63; 39 L. J., Bk. 4; 22 L. T. 179; 18 W. R. 450.

**Government Clerk.]**—In an affidavit of the execution of a bill of sale the maker was described as "government clerk;" he was a clerk in the Admiralty.—Held, that the description was sufficient. *Grant v. Shaw*, 7 L. R., Q. B. 700; 41 L. J., Q. B. 305; 27 L. T. 602.

**Circus Proprietor.]**—The proprietor of a travelling circus, which was then at Southampton, granted a bill of sale upon his circus property, in which he was described as "T. B., of No. 9, Ponton Terrace, Nine Elms, in the county of Surrey, but now carrying on business at Bar Street, in the town and county of the town of Southampton, and lodging at No. 3, Weymouth Terrace, in the said town of Southampton, circus proprietor." And in the affidavit it was stated that "T. B. at present resides at 3, Weymouth Terrace, and carries on business at Bar Street, in the town of Southampton, and has a permanent residence at 3, Ponton Terrace, Nine Elms, in the county of Surrey." He had not resided at Ponton Terrace for six years, but was the owner of the house, and lent it to his brother-in-law.—Held, that it was a sufficient and proper description. *Cooper v. Ibberson*; *Cooper v. Warnlow*, 44 L. T. 309; 29 W. R. 566.

**Shipbroker.]**—Describing a shipbroker as a

broker is sufficient. *Gugen v. Sampson*, 4 F. & F. 974.

"Until lately, &c."]—The affidavit filed with a registered bill of sale stated that the grantor "was until lately" a commercial traveller. It appeared that the grantor was a commercial traveller at the date of the execution of the bill of sale:—Held, that the description of his occupation was insufficient to satisfy the provisions of 17 & 18 Vict. c. 36, s. 1. *Castle v. Downton*, 5 C. P. D. 56; 49 L. J., C. P. 6; 41 L. T. 528; 28 W. R. 257.

**Accountant.**—The grantor of a bill of sale was described in the affidavit filed under the Bills of Sale Act as an "accountant." He was, in fact, a clerk in the accountant's department at the Euston Square station of the London and North Western Railway Company, but in his leisure time was occasionally employed to balance tradesmen's books:—Held, an insufficient description. *Larchin v. North Western Deposit Bank*, 10 L. R., Ex. 64; 44 L. J., Ex. 71; 33 L. T. 124; 23 W. R. 325—Ex. Ch.

**Variation in Christian-name.**—A variation between one of the christian-names of the grantor of a bill of sale in the bill itself and in the accompanying affidavit, which cannot mislead, is immaterial. *Orbrett v. Roue*, 25 W. R. 59.

**Part of Occupation only Set out.**—W. carried on business as a foreman tailor's cutter, and his wife kept a school and took in boarders at the house in which she and her husband lived. He borrowed 50*l.* upon the furniture in the house, to secure which he executed a bill of sale wherein he was described as a foreman tailor's cutter, no mention being made of the school:—Held, that the description was sufficient, and the registration valid. *National Deposit Bank, Ex parte, Willis*, *In re*, 26 W. R. 624—C. A. Reversing 38 L. T. 264; 26 W. R. 375.

A statement in the affidavit that the grantor resides at 18, St. Andrew's Place, Bradford, in the county of York, and is a stone merchant and quarry owner:—Held, to be sufficient, although he carried on business as lessee of stone quarries at two other places. *Knightley, Ex parte, Moulson*, *In re*, 51 L. J., Ch. 823; 46 L. T. 776; 30 W. R. 844.

#### iv. Description of Grantee.

**Clerical Error.**—In a bill of sale given to Gardnor, such name was correctly spelt; but in the copy which was filed it was erroneously spelt as Gardner:—Held, that the error being merely clerical, and not calculated to mislead, it was immaterial, and did not vitiate the bill of sale. *Gardnor v. Shaw*, 24 L. T. 319; 19 W. R. 763.

**Residence of—Affidavit on Re-registration.**—Under s. 11 of the Bills of Sale Act, 1878, when a bill of sale is re-registered the affidavit must set forth the names and addresses of the parties as in the bill of sale stated, though such description may be erroneous. In a bill of sale the grantee was described as "of London Road, Baldock, in the county of Hereford," her real address being London Road, Baldock, in the county of Hertford. Upon re-registration the

affidavit gave her right address and not that given in the bill of sale:—Held, that the affidavit did not comply with the directions of the act, and that the bill of sale was void accordingly. *Webster, Ex parte, Morris*, *In re*, 22 Ch. D. 136; 52 L. J., Ch. 375; 48 L. T. 295; 31 W. R. 111—C. A.

**To "B." and "C." carrying on Business as a Company.**—A. made a bill of sale to B. and C., and described them as "The City Investment and Advance Company:—Held, that the conveyance of the goods to "The City Investment and Advance Company" enured as a conveyance to B. and C. so soon as it was ascertained that they were the persons who carried on business under that name. *Maughan v. Sharpe*, 17 C. B., N. S. 443; 34 L. J., C. P. 19; 10 Jur., N. S. 989; 10 L. T. 870; 12 W. R. 1057.

#### b. Statement of Consideration.

**What Necessary and Sufficient.**—Sect. 8 of the Bills of Sale Act, 1878, requires that the consideration for a bill of sale should be truly stated in it, as it would properly have been stated independently of the act. But it does not require that a collateral agreement between the grantor and grantee as to the application of the consideration should be set forth. *Carter, Ex parte* (12 Ch. D. 908), questioned. *National Mercantile Bank, Ex parte, Haynes*, *In re*, 15 Ch. D. 42; 49 L. J., Bk. 62; 43 L. T. 36; 28 W. R. 848; 44 J. P. 780—C. A. Reversing 42 L. T. 64; 28 W. R. 399.

The consideration for a bill of sale was stated to be "the sum of 182*l.* 3*s.* now paid by the grantee to the grantor." That sum was, at the request and with the assent of the grantor, in fact paid thus,—8*l.* 3*s.* 3*d.* and 103*l.* 17*s.* 5*d.* to discharge two executions against the grantor's goods—25*l.* 0*s.* 9*d.* to a solicitor (who attested the execution of the bill of sale) for money lent and for costs due to him from the grantor,—and the balance 45*l.* 1*s.* 7*d.*, in cash to the grantor:—Held, in the absence of any suggestion of fraud, a sufficient setting forth of the consideration within 41 & 42 Vict. c. 31, s. 8. *Hamlyn v. Betteley*, 5 C. P. D. 327; 49 L. J., C. P. 465; 42 L. T. 373; 28 W. R. 956; 44 J. P. 411.

In a bill of sale, dated the 24th October, 1879, the consideration was stated to be 560*l.* that day paid by the mortgagee to the mortgagor, whereas in fact only 500*l.* were paid by the mortgagee to the mortgagor. Of the remaining 60*l.*, 20*l.* were paid to an auctioneer for valuation of the debtor's effects, and 40*l.* were retained by the mortgagee in respect of the costs of the bill of sale and other professional charges:—Held, that the consideration was truly set forth within the meaning of the 8th section of the Bills of Sale Act, 1878, and that the bill of sale was therefore good, as against the trustee in liquidation. *Challinor, Ex parte, Rogers*, *In re*, 16 Ch. D. 260; 44 L. T. 122; 29 W. R. 305—C. A.

The "consideration" mentioned by s. 8 is that which the grantor receives for giving the bill of sale, not necessarily the amount secured by it. *Id.*

A bill of sale, dated the 10th of January, 1879, recited that in the month of June preceding, the mortgagor applied to the mortgagee for a loan of 340*l.*, which the mort-

gaggee consented to make on the mortgagor agreeing to execute a bill of sale, when called upon to do so, of certain chattels; and that in the month of July following, the mortgagor applied for a further loan of 60*l.*, which the mortgagee agreed to make, on the condition that the advance should be secured in like manner. The facts were, that a sum of 73*l.* on the 3rd of March, 1878, another sum of 60*l.* on the 6th or 7th of April, 1878, and a third sum of 107*l.* on the 26th or 27th of April, 1878, were severally advanced by the mortgagee to a partnership firm, consisting of the mortgagor and another person. On the 8th of June, 1878, the partnership was dissolved, the mortgagor, taking over the assets, and undertaking in an informal way to indemnify his late co-partner against the debts of the partnership, of which the above 240*l.* remained one. On the 14th of June, 1878, the mortgagee advanced 100*l.*, and on the 16th of July he advanced the remaining 60*l.* to the mortgagor alone:—Held, that the consideration for which the bill of sale was given was not “set forth” therein sufficiently to satisfy the requirement of the Bills of Sale Act, 1878; and that the bill of sale was void. *Carter, Ex parte, Threapleton, In re*, 12 Ch. D. 908; 41 L. T. 37; 27 W. R. 943.

**Small Inaccuracy, does not Avoid.**—A small inaccuracy in the statement of consideration is not sufficient to avoid a bill of sale. *Winter, Ex parte, Fothergill, In re*, 44 L. T. 323; 29 W. R. 575—C. A.

**A Promise to give Bill of Sale.**—A sum of money advanced upon the faith of a promise that a bill of sale should be given, will be treated as an advance made on the execution of the bill of sale. But the promise must be a bona fide binding one, and the postponement of the execution of the bill of sale must also be bona fide, and not with any view to protect the credit of the borrower or other collateral object. *Fisher, Ex parte, Ash, In re*, 7 L. R., Ch. 636; 41 L. J., Bk. 62; 26 L. T. 931; 20 W. R. 849.

**On Easy Terms.**—A money-lender advertised loans on easy terms. A clergyman, sixty-nine years of age, and in needy circumstances, seeing the advertisement, borrowed 100*l.* of him, for which he took a bill of sale of the borrower's furniture, and this bill of sale contained provisions in case of non-payment on specified days, which, if carried out, would bring the interest up to 39 per cent. per annum:—Held, that the terms were not easy and did not comply with the advertisement. *Helsham v. Barnett*, 21 W. R. 309.

**Knowingly Misstated.**—An insertion in a bill of sale knowingly of a wrong sum does not necessarily invalidate the security as against creditors, if done without fraud, and with the intention of making the security available only to the extent of the sum actually due. *Biddulph v. Gould*, 11 W. R. 882.

**Forged Bill of Exchange.**—M. being already indebted to B., wrote telling him he had forged his signature to a bill of exchange for 100*l.*, and entreating B. to take up the bill to save him from prosecution and ruin, and offering, if B.

would do so, to give a bill of sale of all his property to secure the amount of the existing debt and the further advance. B. advanced the money and took the bill of sale. Shortly afterwards he took possession under it and sold the goods, and subsequently M. was adjudicated bankrupt, the execution of the assignment being the alleged act of bankruptcy. On an application by the trustee to recover the proceeds of the sale:—Held, that assuming the transaction between B. and M. was illegal, yet as B. had obtained possession of the property, M., being in pari delicto, could not, if he had remained solvent, have recovered it back, and that, there having been no offence against the bankruptcy laws, the trustee in bankruptcy stood in no better position. *Butt, Ex parte, Mapleback, In re*, 4 Ch. D. 160; 46 L. J., Bk. 14; 35 L. T. 503; 25 W. R. 103; 13 Cox, C. C. 374—C. A.

Semble, that the transaction did not amount to compounding a felony, or to misprision of felony. *Id.*

**Deduction for Commission on Loan and Costs of preparing Bill of Sale.**—At the execution of a bill of sale expressed to be “in consideration of 700*l.* now in hand paid,” and which the grantor covenanted to repay with interest thereon at the rate of 12*l.* 10*s.* per cent. per annum, the grantee, having previously paid 271*l.* for the grantor, handed to her his cheque for 429*l.*, which was immediately cashed, and the proceeds were thus applied: 350*l.* was paid by her directions to a creditor, 21*l.* 5*s.* 6*d.* was paid to a solicitor as costs for preparing the bill of sale, 7*l.* 10*s.* was paid to or retained by the grantee for commission on the loan and expenses in connexion therewith in pursuance of a previous arrangement to that effect between the grantor and grantee, and the grantor further gave to the grantee her promissory note for 10*l.* also in respect of commission on the loan and expenses connected therewith. The balance, 50*l.* 4*s.* 6*d.*, was paid to her:—Held, that the consideration was not truly stated, and the bill of sale was void as against an execution creditor of the grantor. *Hamilton v. Chaine*, 7 Q. B. D. 319; 50 L. J., Q. B. 466; 44 L. T. 764; 29 W. R. 676—C. A. Affirming 7 Q. B. D. 1; 44 L. T. 555; 29 W. R. 488.

**Rate of Interest.**—A bill of sale was given by way of security for the payment of 100*l.*, being the amount advanced, and the sum of 76*l.*, being the interest agreed to be paid for the advance; and the mortgagors agreed to pay to the mortgagee the principal sum, together with the agreed interest thereon, by sixteen equal consecutive quarterly instalments of 11*l.* each. The bill of sale authorized the mortgagees, in events within the Bills of Sale Act (1878) Amendment Act, 1882, to enter into the mortgagor's premises, and take possession and sell the chattels comprised in the security, and out of the proceeds pay themselves the principal and interest secured, or so much as should be unpaid, with costs. The mortgagees having entered and taken possession:—Held, upon motion for an injunction by the mortgagors against the mortgagees, that for the purpose of the motion the bill of sale must be held to be valid within the Bills of Sale Act (1878) Amendment Act, 1882, s. 9, and that it was not necessary to state specifically in the bill of sale the actual rate of



interest secured. *Wilson v. Kirkwood*, 48 L. T. 821.

**Sum paid "immediately before Execution of these Presents"—No Money paid.**—A mortgage of a leasehold brewery and some chattels was stated to be made in consideration of 2,000*l.* paid by the grantee to the grantor "immediately before the execution of these presents." No money was in fact paid by the grantee to the grantor, but the 2,000*l.* was the balance due by the grantor to the grantee in respect of the purchase-money of the brewery, which had been assigned by the grantee to the grantor, in consideration of 2,500*l.* by deed executed immediately before the mortgage. Of this sum only 500*l.* was paid by the grantor, it being agreed that the balance of 2,000*l.* should be secured by the mortgage:—Held, that the consideration was truly stated in the mortgage deed, so as to satisfy s. 8 of the Bills of Sale Act, 1878. *Bolland, Ex parte, Roper, In re*, 21 Ch. D. 543; 52 L. J., Ch. 113; 47 L. T. 488; 31 W. R. 102—C. A.

**Payment at or before Execution of Bill of Sale.**

—A bill of sale of chattels, dated the 23rd March, was expressed to be made "in consideration of 50*l.* by the assignee paid to the assignor at or before the execution hereof." In fact only 21*l.* 10*s.* was paid to the assignor on the execution of the deed, 3*l.* 10*s.* being retained by the assignee for the expenses of the deed, and 25*l.* being also retained and paid by him on the 30th March to the landlord of the assignor's house, in which the chattels comprised in the deed were, for two quarters' rent, for the quarters ending respectively the 25th March and the 24th June. The rent of the house was payable quarterly, but there was nothing to shew that it was payable in advance. The 3*l.* 10*s.* and the 25*l.* were retained upon the written request of the assignor, dated the day of the execution of the deed. On the 25th April the assignor filed a liquidation petition, and the trustee in the liquidation claimed the goods, on the ground that the consideration for the deed had not been stated in it in compliance with s. 8 of the Bills of Sale Act, 1878:—Held, that the consideration was not truly stated in the deed, and that it was, therefore, void as against the trustee—1. Because the 25*l.* was not paid to the assignor, but only agreed to be paid on his behalf; 2. Because, even if the 25*l.* were taken to have been paid to the assignor, it was not paid "at or before the execution" of the deed. *National Mercantile Bank, Ex parte*, (15 Ch. D. 42), and *Challinor, Ex parte* (16 Ch. D. 260), explained. *Rolph, Ex parte, Spindler, In re*, 19 Ch. D. 98; 51 L. J., Ch. 88; 45 L. T. 482; 30 W. R. 52; 46 J. P. 181—C. A.

**Deduction of Expenses.**—If the amount of the expenses incident to the preparation of a bill of sale, given by way of mortgage, is deducted from the sum stated in it as the consideration, and the balance only is actually paid by the lender to the borrower, the consideration is not truly stated so as to satisfy s. 8 of the Bills of Sale Act, 1878. *National Mercantile Bank, Ex parte* (15 Ch. D. 42), and *Challinor, Ex parte* (16 Ch. D. 260), must be treated as binding authorities only in so far as they decide that, if part of the sum stated in a bill of sale as the consideration is, by the grantor's direction, given at the time of the execution of the deed, applied in satisfying a then-

existing debt due by him, the money so applied may be properly stated in the deed to be money then paid to him. *Firth, Ex parte, Couburn, In re*, 19 Ch. D. 419; 51 L. J., Ch. 473; 45 L. T. 120; 30 W. R. 529—C. A.

**Agreement not to Register—Payment of increased Bonus.**—A bill of sale was expressed to be made in consideration of 242*l.* advanced by the grantee to the grantors, and the grantors agreed to repay the advance, together with a sum of 100*l.* by way of interest and bonus, in certain instalments. There was a verbal agreement by the grantee not to register the bill of sale, in consequence of which he charged a larger bonus for the advance than he would otherwise have done:—Held, that the agreement not to register was a mere collateral agreement, and not part of the consideration for the bill of sale, and that, therefore, it was unnecessary to state it in the deed. *Popplewell, Ex parte, Storey, In re*, 21 Ch. D. 73; 52 L. J., Ch. 39; 47 L. T. 274; 31 W. R. 35—C. A.

Held, also, that the agreement was not a "defalcance or condition" to which the deed was subject within the meaning of s. 10 of the Bills of Sale Act, 1878. *Id.*

**Loan of 70*l.*—Deduction of Interest from Loan.**

—A bill of sale, after reciting that the mortgagor had applied to the mortgagees to advance him the sum of 70*l.*, less 16*l.* the agreed interest and expenses, to be deducted and retained as thereinafter expressed, witnessed that, in consideration of 54*l.*, being the said sum of 70*l.* less the said sum of 16*l.* deducted and obtained therefrom, and being the agreed interest and expenses in consideration of which the loan was granted, and which said sums of 54*l.* and 16*l.* conjointly were (thereinafter called the loan) by the mortgagees paid to the mortgagor at or before the execution thereof, the receipt whereof the mortgagor thereby acknowledged, &c. It was proved or admitted that 54*l.* only had been paid by the mortgagees to the mortgagor at the execution of the bill of sale:—Held, that the consideration was truly set forth within the meaning of s. 8 of the Bills of Sale Act, 1878. *Collis v. Tawn*, 46 L. T. 387.

**Retention of Part to pay Costs of Solicitor and Auctioneer.**—A bill of sale is not vitiated under s. 8 of the Bills of Sale Act, 1878, because a part of the sum stated in it as the consideration is retained by the grantee to pay the solicitor's costs of preparing the deed and a further agreed sum for costs previously incurred, and the fee of an auctioneer for valuing the property with a view to the making of the loan. *Charing Cross Advance and Deposit Bank, Ex parte (infra)*, distinguished. *Challinor, Ex parte, Rogers, In re*, 16 Ch. D. 260; 44 L. T. 122; 29 W. R. 205—C. A.

**Recitals omitting Part of Sum advanced.**—A bill of sale was given to secure, not only a present advance, but also the amount for the time being due to the grantee upon a mortgage including future advances which had been previously given to him by the grantor. The recitals in the bill of sale in stating the amount then due on the mortgage omitted a sum which had been advanced on a bill then current:—Held, that

this misstatement formed no objection under s. 8 to the validity of the bill of sale. *Ib.*

**Statement of Consideration not made Valid by Receipt.**—In the operative part of a bill of sale it was expressed to be made in consideration of 120*l.* advanced upon its execution by the grantee to the grantor. In fact, only 90*l.* was paid to the grantor; 30*l.* being retained by the grantee for "interest and expenses." The execution of the deed was attested by a solicitor, and the attestation clause stated that before its execution the effect of the deed was explained by him to the grantor. At the foot of the deed, immediately after the attestation clause, there was a receipt, signed by the grantor, which stated that the 90*l.*, "together with the agreed sum of 30*l.* for interest and expenses," made "the sum of 120*l.*, the consideration-money within expressed to be paid."—Held, that the receipt was not part of the deed; and that the deed did not set forth the consideration for it, and was therefore made, by s. 8 of the Bills of Sale Act, 1878, void as against the trustee in the liquidation of the grantor. *National Mercantile Bank, Ex parte* (15 Ch. D. 42), distinguished. *Charing Cross Advance and Deposit Bank, Ex parte, Parker, In re*, 16 Ch. D. 35; 50 L. J., Ch. 157; 44 L. T. 113; 29 W. R. 204—C. A.

**Motive of Advance immaterial.**—"To prevent Institution of Proceedings."—A bill of sale, dated the 17th January, 1880, recited that the mortgagor was indebted to the mortgagee in the sum of 1,44*l.* 1*s.* 3*d.*, and that the mortgagor had agreed to execute the mortgage deed in order to induce the mortgagee not to institute proceedings against him. The facts as to the debt were, that, on the 13th January, 1880, the mortgagee drew a cheque for 1,44*l.* 1*s.* 3*d.*, and gave it to the mortgagor, but that, upon hearing rumours about the mortgagor, payment of the cheque was stopped at the bank. On the 16th January the stop was withdrawn by the mortgagee upon the distinct understanding that good security should be given, and the cheque was accordingly paid a few hours prior to the execution of the bill of sale. No proceedings had been threatened by the mortgagee.—Held, that the consideration was properly set forth within the meaning of the Bills of Sale Act, 1878. *Ord or Winter, Ex parte, Fothergill, In re*, 44 L. T. 323; 29 W. R. 575—C. A. Affirming 43 L. T. 637.

**Sum "now paid," but really to Secure past Debt.**—Where a bill of sale, given to secure a past debt contracted by instalments, states that the consideration is "now paid," the consideration is not truly set forth within s. 8 of the Bills of Sale Act, 1878. *Berwick, Ex parte, Young, In re*, 43 L. T. 576; 29 W. R. 292.

**No Money passing at Time of Execution—Previous Advances.**—A. being indebted to B. gave him a bill of sale to secure the sum of 7,350*l.*, which, on stating the accounts between them, was found to be the balance due, and by such bill of sale this sum was to be paid by A. with interest on demand in writing. The bill of sale recited that B. had agreed to lend A. 7,350*l.*, and the consideration for such bill of sale was stated therein to be 7,350*l.* then paid by B. to

A.—Held, that the bill of sale truly set forth the consideration for which it was given so as to satisfy s. 8 of the Bills of Sale Act, 1878, although no money in fact passed from B. to A. at the time the bill of sale was given. *Credit Company v. Pott*, 6 Q. B. D. 295; 50 L. J., Q. B. 106; 44 L. T. 506; 29 W. R. 326—C. A.

**Previous Advance and Present Payment.**—A bill of sale was expressed to be "in consideration of the payment of 81*l.* 18*s.* by the grantee to the grantor, and in further consideration of the payment of 16*l.* 3*s.* by the grantee to the sheriff of Surrey for and at the request of the grantor." The former sum was a past payment, and the latter sum was a present payment made in discharging an execution levied on the goods of the grantor.—Held, a sufficient setting forth of the consideration within s. 8 of the Bills of Sale Act, 1878. *Carrard v. Meek*, 50 L. J., Q. B. 187; 43 L. T. 760; 29 W. R. 244.

When possession of goods has been taken under a bill of sale, part of the consideration for which is money advanced, for the bona fide purpose of obtaining security for a pre-existing debt, the transaction is not invalid, though the creditor is aware, at the time of the advance, that the debtor has committed felony and intends to leave the country, and to apply a portion of the money advanced for that purpose. *Bagot v. Arnott*, 2 Ir. C. L. R. 1.

**Delay in Payment of.**—The registration of a bill of sale as of the day of its execution, is not invalidated by reason of the consideration-money not having been paid nor the deed attested until two days after the execution. *Darrell v. Terry*, 6 H. & N. 807; 30 L. J., Ex. 355.

#### c. Renewal of.

**When Possible.**—A bill of sale, void for want of renewal of registration at the commencement of the Bills of Sale Act, 1878, cannot be renewed under s. 14 of that act. *Askew v. Lewis or Lewis v. Driscoll*, 10 Q. B. D. 477; 48 L. T. 534; 31 W. R. 567; 47 J. P. 312.

**Effect of not Renewing.**—On the 10th May, 1873, one S. Vaughan executed a bill of sale over certain of his goods and chattels in favour of Swire, the plaintiff in the action. Swire failed to renew the registration of the bill of sale within five years of the date of its original registration. The goods remained in the ostensible possession of the grantor. The bill of sale gave the grantee power to enter the grantor's house and seize and sell. On the 11th January, 1883, the plaintiff put in an execution in the house of S. Vaughan, and left a man in possession until the 19th January. On the 19th January the plaintiff agreed to sell, and did sell, the said goods and chattels to C. Vaughan, son of S. Vaughan, the original grantor, for 250*l.* S. Vaughan continued to live in the same house, and the said goods and chattels remained in his apparent possession and control. On the same day C. Vaughan executed a bill of sale of the said goods and chattels to the plaintiff Swire for the sum of 250*l.* The defendant in the action issued his writ on the 11th January, 1883, against S. Vaughan for the amount of goods sold and delivered; judgment was signed against S.

Vaughan under Ord. XIV. r. 1, for the amount claimed. The *fi. fa.* was issued on the 26th January, and executed in the dwelling-house of S. Vaughan. The defendant was met with the claim of Swire that the goods and chattels assigned by the bill of sale of the 19th January, 1883, were his. An interpleader issue was ordered to be tried between them. At the trial the jury found for the plaintiff. The points of law were reserved by the judge for further consideration. It was contended, on behalf of the defendant (1) that the bill of sale of May, 1873, was within the operation of ss. 3 and 8 of the Bills of Sale Act, 1882, and void as against the grantor; (2) that as the goods seized by the execution creditor were in the apparent possession of the execution debtor, the bill of sale of January, 1883 (purporting to assign them to the plaintiff), was, under s. 8 of the Bills of Sale Act, 1878, void as against him, and that the plaintiff must rely on the bill of sale of 1873, which was also void (for want of renewal of registration) as against the execution creditor; and that therefore C. Vaughan acquired no title or interest in the goods by his purchase from Swire, and consequently passed none by his bill of sale of 11th January, 1883, to the plaintiff:—Held, that the operation of ss. 3 and 8 of the Bills of Sale Act, 1882, was not retrospective, so as to render the bill of sale of May, 1873, void as against the execution creditor:—Held, further, that as the goods seized by the execution creditor were in the apparent possession of the execution debtor, the bill of sale of January, 1883 (purporting to assign them to the plaintiff) was void as against the execution creditor, and that the plaintiff could only rely on the bill of sale of 1873, which was also void as against the execution creditor for want of renewal of registration. The purchaser from the plaintiff under the first bill of sale acquired no title or interest in the goods by reason of his purchase, and consequently passed none by his bill of sale of them to the plaintiff. *Swire v. Cookson*, 48 L. T. 877.

**After Assignment.]**—The 29 & 30 Vict. c. 96, s. 4, which requires the registration of a bill of sale under 17 & 18 Vict. c. 36, to be renewed every five years, in default of which the registration ceases to have any effect, is equally imperative when the grantee, before the period for renewal, assigns his interest under the bill of sale to a third person; and the assignee, if the registration is not renewed, has no title as against an execution creditor. *Karet v. Kosher Meat Supply Association*, 2 Q. B. D. 361; 46 L. J., Q. B. 548; 36 L. T. 694; 25 W. R. 691.

**Correctness of Dates.]**—Affidavits, presented at the office of the master for obtaining a renewal of the registration of two bills of sale, stated the original registration to have been respectively “on or about the 6th April, 1858,” and “on the 31st day of July, 1861;” the former was registered on the 7th April, 1858, the latter on the 30th July, 1861. The officer refused to file the affidavits on the ground that they did not state the exact and correct dates:—Held, that the duty of the master was ministerial, and therefore the court ordered him to file the affidavits. *Nedham, In re*, 8 B. & S. 190; 15 L. T. 467; 15 W. R. 346.

### d. Condition.

**What is.]**—A parol arrangement to repay by instalments a loan secured by a bill of sale is a condition within the meaning of the Bills of Sale Act, 1854, s. 2, and as such must be reduced into writing and appear on the registered copy of the bill of sale, otherwise the latter will be void against a trustee in bankruptcy. *Southam, Ex parte, Southam, In re*, 17 L. R., Eq. 578; 43 L. J., Bk. 39; 30 L. T. 132; 22 W. R. 456.

A bill of sale of chattels, with power to take immediate possession, was expressed to be made in consideration of an advance of 130*l.* to be repaid by certain instalments without interest, the whole to become payable on default in any instalment. In fact, the sum advanced was only 100*l.*, the mortgagee, who was a money lender, charging the 30*l.* by way of bonus and interest. A written memorandum was signed by the mortgagor, at the same time as the bill of sale, which stated that the 30*l.* was to be paid in full, notwithstanding that the money secured by the bill of sale might be repaid, or the mortgagee's rights under it enforced, before the expiration of the time limited for payment. The bill of sale was registered; the memorandum was not:—Held, that the memorandum was not a condition within the Bills of Sale Act, 1854, s. 2, and that its not being registered did not affect the validity of the bill of sale. *Collins, Ex parte, Lees, In re*, 10 L. R., Ch. 367; 44 L. J., Bk. 78; 32 L. T. 106; 23 W. R. 862. Reversing 31 L. T. 622.

C., a money lender, advanced 150*l.* to B., a trader, to pay out an execution, and B. gave C. the following receipt, written at the foot of an inventory of his furniture:—“Received of C. 150*l.* for the absolute sale to him of the above-mentioned articles of furniture.” On the same day C. and B. executed a memorandum of agreement, whereby C. agreed to let and B. to hire the same furniture for two months for 170*l.*; and it was agreed that in default of payment or in the event of the bankruptcy of B., C. should be entitled to seize and sell the furniture; and that, if it should realize more than 170*l.* he should pay the surplus to B., but if less, that B. should make good the deficiency to him; and it was agreed that when the 170*l.* and expenses had been paid to C. by B., the furniture should become the property of B. Neither of these two documents was registered under the Bills of Sale Act, 1854. Default having been made in payment of the 170*l.* W., an auctioneer, paid the amount to C., and B. indorsed on the memorandum of agreement a receipt for the amount “for the absolute sale to W. of the whole of the goods herein specified.” and W. executed an agreement relating the furniture to B. upon terms similar to those of the agreement between C. and B. This agreement was not registered under the Bills of Sale Act. The furniture remained in the apparent possession of B. till after the commission of an act of bankruptcy, upon which he was adjudicated a bankrupt, and his trustee claimed the proceeds of the furniture which had been sold by W.:—Held, that the two documents executed on the occasion of the advance of the money by C. were one transaction, and together constituted a conditional bill of sale, which was void as against the trustee for want of registration; that the transaction with W. was a mere trans-

fer to him of C.'s rights as mortgagee, and gave him no better title than C. had, and that the trustee was therefore entitled to the proceeds of sale. *Odell, Ex parte, Walden, In re*, 10 Ch. D. 76; 48 L. J., Bk. 1; 39 L. T. 333; 27 W. R. 274—C. A.

#### e. Effect of.

A. mortgaged furniture to B. with a power of sale on default, and after that mortgaged the furniture to C. by a second bill of sale. B. entered into possession of the goods on A.'s default in payment, and left his servant in possession. D., without notice of the second bill of sale, agreed with A. to purchase the goods, and B.'s servant delivered possession of them to D. D. then paid the balance due to B., and B. then delivered to D. his bill of sale, and gave him a receipt which purported to sell and assign the goods to D.:—Held, that D. had no title to the goods as against C. *Cooper v. Braham*, 15 L. T., 610.

**In the Event of the Bankruptcy of the Grantor.**—The 17 & 18 Vict. c. 36, does not alter s. 125 of the 12 & 13 Vict. c. 106, as to the doctrine of reputed ownership. *Badger v. Shaw*, 2 El. & El. 472; 29 L. J., Q. B. 73; 6 Jur., N. S. 377; 1 L. T. 323; 9 W. R. 210.

Therefore, where goods assigned to the plaintiff by a registered bill of sale remained in the possession of a bankrupt with the consent of the plaintiff:—Held, that the goods were in the order and disposition of the bankrupt, and that the plaintiff could not recover them from the assignees under the bankruptcy. *Id.*

A., a trader, on the 19th of April, 1856, executed to B. a bill of sale of furniture on the premises where he, A., carried on business, the consideration being stated as for goods sold, money lent, and money for which B. had become responsible for A. At the request of A. the bill of sale was not registered within the twenty-one days required by 17 & 18 Vict. c. 36; but on the expiration of that time another bill of sale of the same furniture was executed in similar terms, and was not registered. A third, a fourth, and a fifth bill of sale were in the same manner executed, and not registered; and ultimately a sixth was executed on the 5th of August, 1856, and was registered within the prescribed time, but not any of the other bills of sale were cancelled. A. was adjudicated bankrupt in December, 1856, the act of bankruptcy being committed in July previously by being denied to his creditors. Assignees were appointed, who filed a bill against B., praying an injunction to prevent him from removing the furniture, and a declaration that the bills of sale were fraudulent and void, and that they might be delivered up to be cancelled:—Held, that neither of the bills of sale, nor the registration of the last, constituted a dealing within the meaning of 12 & 13 Vict. c. 106, s. 133, and that, notwithstanding the registration of the last bill of sale, the furniture remained in the order and disposition of the bankrupt. *Stansfield v. Cubitt*, 2 De G. & J. 222; 27 L. J., Ch. 266; 4 Jur., N. S. 395.

**Abandonment after Registration.**—A bill of sale duly registered, but afterwards abandoned, has no operation. *Robertson v. Morley*, 16 L. T. 7.

**Registering Copies—Original Bill of Sale Lost.**—The filing of a copy of a bill of sale of personal chattels is valid and effectual, although the original bill of sale has been previously altered or destroyed. The property in the chattels will remain in the person to whom they were conveyed by the deed on its execution. *Green v. Attenborough*, 3 H. & C. 468; 34 L. J., Ex. 88; 11 Jur., N. S. 141; 11 L. T. 513; 13 W. R. 185—Ex. Ch.

#### f. Non- or Defective Registration.

**Rectification of Register—Statute.**—By 41 & 42 Vict. c. 31, s. 14, any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this act, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement, or otherwise, or as to any other matter, as he thinks fit to direct.

The Court of Appeal has no jurisdiction to rectify the register under s. 14 of the Bills of Sale Act, 1878. *Webster, Ex parte, Morris, In re*, 22 Ch. D. 136; 62 L. J., Ch. 375; 48 L. T. 295; 31 W. R. 111—C. A.

**Unregistered Bill of Sale.**—The Bills of Sale Act, 1882, s. 8, which makes a bill of sale void unless it is registered within seven clear days after execution, does not avoid an unregistered bill of sale which was executed more than seven clear days before the act came into operation. *Hickson v. Darlow*, 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 417—C. A. Affirming 52 L. J., Ch. 453; 31 W. R. 361.

Want of registration of a bill of sale does not nullify it, if the goods were in the actual possession of the assignee at the time of the execution. *Minister v. Price*, 1 F. & F. 686.

The statute only renders bills of sale void for defect of registration, not as between the parties, but as against creditors. *Hills v. Shepherd*, 1 F. & F. 191; *S. P., Barker v. Aston*, 1 F. & F. 192.

**Effect on subsequent Bill of Sale—41 & 42 Vict. c. 31.**—Sect. 9, by which a subsequent bill of sale executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale is, under certain circumstances, void, does not affect a subsequent bill of sale executed after the expiration of that time. *Carrard v. Meek*, 50 L. J., Q. B. 187; 43 L. T. 760; 29 W. R. 244.

**Seizure of Goods by unregistered Bill of Sale Holder—Rights of registered Bill of Sale Holder.**—Chattels were assigned to the defendant by a bill of sale, which was not registered. The grantor subsequently gave another bill of sale comprising the chattels to the plaintiff, who registered it. The defendant afterwards took possession of the chattels under his bill of sale. In an action against him by the plaintiff for conversion:—Held, that the Bills of Sale Act, 1878, s. 10, enacting that "in

case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels," affected the priority of the unregistered bill of sale. *Lyons v. Tucker*, 7 Q. B. D. 523; 50 L. J., Q. B. 661; 45 L. T. 403—C. A. Reversing 6 Q. B. D. 660; 50 L. J., Q. B. 322; 44 L. T. 312.

The provision in s. 10 of the Bills of Sale Act, 1878, as to the priority of bills of sale, applies to all competing bills of sale in all cases in which registration is necessary. It is a provision independent of s. 8 of the act, and applies equally in such cases whether there has or has not been a bankruptcy or an execution, and whether there are or are not two or more registered bills of sale. *Conelly v. Steer*, 7 Q. B. D. 520; 50 L. J., Q. B. 326; 45 L. T. 402; 29 W. R. 529—C. A.

**Estoppel of Grantee—By Notice of prior Unregistered Bill.**—The fact that an execution creditor was, at the time when his debt was contracted, aware that his debtor had given a bill of sale of chattels, does not prevent his availing himself of the objection that it has not been registered. *Edwards v. Edwards*, 2 Ch. D. 291; 45 L. J., Ch. 391; 34 L. T. 472; 24 W. R. 713—C. A.

**Clerical Error in Copy filed.**—A mere clerical error, consisting of the accidental omission of a few words, in the copy of a bill of sale carried into the Registration Office and filed pursuant to s. 10, sub-s. 2, of the Bills of Sale Act, 1878, if it be clear from the context that no one could be deceived or misled thereby, will not prevent the copy being a "true copy" within the meaning of the act or vitiate the bill of sale. *Kahn, Ex parte, Hever, In re*, 21 Ch. D. 871; 51 L. J., Ch. 904; 46 L. T. 856; 30 W. R. 964.

**Amendment after Registration.**—A bill of sale, and copy filed, stated in the recital the sum for which it was given as being 100*l.*, but, by mistake, in the operative part of the instrument, the sum was described as 1,000*l.* In all other parts the sum was correctly described as 100*l.*—Held, that this was a clerical error which might be amended, and therefore did not invalidate the bill of sale. *Elliott v. Freeman*, 7 L. T. 715.

An affidavit of registration of a bill of sale, omitted to state the description and occupation of the grantor, and of each of the attesting witnesses. An application to have the bill of sale and the affidavit of registration taken off the file, for the purpose of having this omission rectified, refused; the proper course being to file a new bill of sale and affidavit of registration, with an indorsement thereon, and referring to the first bill of sale, and to the effect that each of the bills of sale is made for the same purpose, and relates to the same transaction; but that by reason of an irregularity in the affidavit of registration of the first bill of sale, it had become necessary to file the second bill of sale and affidavit of registration. *O'Brien, In re*, 10 Ir. C. L. R. App. xxxiii.

#### g. Proof of.

**What is.**—The certificate of registration of a bill of sale at the Queen's Bench office is no evidence that the affidavit of execution has been

filed, as required by the Bills of Sale Act. *Mason v. Wood*, 1 C. P. D. 63; 45 L. J., C. P. 76; 33 L. T. 571; 24 W. R. 41.

Upon the trial of an interpleader issue, the plaintiff, in order to prove the due filing of a bill of sale, produced the bill of sale itself and the following certificate stamped with the seal of the Court of Queen's Bench—"Johnson and Mason. A document purporting to be a copy bill of sale, and dated the 8th day of April, 1875, indorsed with the above names, was registered at the judgment office of the Court of Queen's Bench on the 15th day of April, 1875 :"—Held, no evidence that an affidavit satisfying all the requirements of the statute had been filed with the bill of sale. *Ib.*

A certificate under the seal of the Queen's Bench Division, that an affidavit and copy bill of sale were filed as required by 17 & 18 Vict. c. 36, s. 1, does not relieve the party relying upon such bill of sale from the necessity of producing the copy filed, so as to shew that it is in the same terms as that proved to have been executed. *Emmott v. Marchant*, 3 Q. B. D. 553; 38 L. T. 508; or *Halkett v. Emmott*, 47 L. J., Q. B. 436; 26 W. R. 632.

Seemle, that such certificate of the filing of an affidavit under 17 & 18 Vict. c. 36, is, without production of the affidavit itself, *prima facie* evidence that the affidavit was in the form required by the act. *Ib.*

An office copy of the registry is admissible as proof under 14 & 15 Vict. c. 99, s. 14. *Sutton v. Bath*, 1 F. & F. 152; 27 L. J., Ex. 388.

The book which the officer is required to keep, for the entering therein of an alphabetical list of all bills of sale filed, and the dates of the execution and filing thereof, is a book of a public nature, within 13 & 14 Vict. c. 99, s. 14, so that a certified copy of it is admissible in evidence. *Grindell v. Brendon*, 6 C. B., N. S., 698; 28 L. J., C. P. 333; 5 Jur., N. S. 1420; 33 L. T., O. S. 224; 7 W. R. 579.

#### 11. PRIORITY.

**Between Holders of Bills of Sale.**—The holder of a prior bill of sale does not lose his priority by reason of the holder of a subsequent bill of sale of the same goods proceeding to take possession of them. *Allen, Ex parte, Middleton, In re*, 11 L. R., Eq. 209; 40 L. J., Bk. 171; 19 W. R. 274.

A and P. were each of them holders of a bill of sale on the same part of a non-trader's property. A's security was dated the 10th of February, 1870, and registered on the 2nd of March, 1870. P's was dated the 28th of February, 1870, and registered on the 18th of March, 1870. P. had no notice of A's bill of sale at the date of his own, and took possession before he received notice. On the 4th of April A. gave notice of his charge, but notwithstanding this P. proceeded to sell the goods. After the seizure, and before the sale, the debtor was adjudicated bankrupt :—Held, that the fact that P. had been the first to take possession did not give him priority over A., and that the latter was entitled to the first charge upon the proceeds of the sale. *Ib.*

A. was indebted to B., to C., and to D. B. obtained judgment for his debt and sued out a *f. fa.* thereon, whereupon A., on the day before the execution was levied, executed a bill of sale in favour of C. and D., D. however being no party to the deed, and having had no notice of it until

after the time when the sheriff proceeded to execute B.'s writ. The case not being one of bankruptcy:—Held, that the bill of sale was a valid security in favour of C. and then of D. in priority over B. *Westbury v. Clapp*, 12 W. R. 511.

A bill of sale of chattels was executed but not registered. The mortgagor executed a second bill of sale of the same chattels to another person, which was registered. Afterwards the mortgagor filed a liquidation petition:—Held, that the second mortgagee was entitled to such of the chattels as had not been seized by the first mortgagee before the liquidation. *Leman, Ex parte, Barraud, In re*, 4 Ch. D. 23; 46 L. J., Bk. 38; 35 L. T. 422; 25 W. R. 65—C. A.

A. executed a bill of sale to B., which was not registered. Subsequently he executed a bill of sale of the same property to C., which was registered. On the following day, C. took possession under his bill of sale and advertised the property for sale. After the seizure, but before the sale, A. filed a petition in bankruptcy, and a trustee was appointed. C. sold the goods, and after satisfying his own claim, paid over the balance to the trustee. B. brought an action for illegal seizure and sale of goods assigned to him against C., and claimed the amount owing to him by A.:—Held, that C.'s seizure was illegal and gave B. a good cause of action against him, which A.'s bankruptcy did not take away. *Payne v. Cales*, 38 L. T. 855.

The consequence of avoiding by an execution a bill of sale which is not registered, is to displace it altogether. *Richards v. James*, 2 L. R., Q. B. 285; 36 L. J., Q. B. 116; 16 L. T. 174; 15 W. R. 580; 8 B. & S. 302.

By a bill of sale dated the 12th April, the defendant assigned his goods to S. This bill of sale was not registered. On the 21st the same goods were assigned by the defendant to H., who, on the 11th May, registered his bill of sale. S. on the 9th May procured from the defendant another bill of sale for the same consideration as the former, and registered it on the 14th. On the 11th and 14th the sheriff levied under executions against the defendant. Claims being made by both S. and H. the sheriff took out an interpleader summons, and the execution creditors being content to be barred:—Held, that H. was entitled to priority over S. *Ib.* See cases *contra*, *post*, col. 1896.

**Between other Parties.**—A deed of assignment of chattels by a debtor to trustees void as against assignees in bankruptcy of the debtor for want of registration is nevertheless operative as between the immediate parties to it from the time of its operation until the proceedings in bankruptcy so as to pass the property in the chattels from the debtor. *Reg. v. Crease*, 2 L. R., C. C. 105; 43 L. J., M. C. 51; 29 L. T. 897; 22 W. R. 375.

An equitable assignment of chattels was not registered under the Bills of Sale Act. The chattels were taken in execution by a creditor of the mortgagor, before the mortgagee had more than a merely formal possession of them. The execution creditor had, before his debt was contracted, actual notice of the bill of sale:—Held, that the execution creditor could not be deprived of his statutory right to priority over the mortgagee. *Edwards v. Edwards*, 2 Ch. D. 291; 45 L. J., Ch. 391; 34 L. T. 472; 24 W. R. 713—C. A.

A made a fraudulent bill of sale of goods to

B., who subsequently, in the presence and with the sanction of A., but without his being a party to it, assigned to C., *bonâ fide*, and for a valuable consideration. The actual possession of the goods throughout remained in A.:—Held, that the second bill of sale was not affected by the fraud in the first, and that therefore C.'s assignment was protected against the creditors of A. *Morewood v. South Yorkshire Railway and River Dun Company*, 3 H. & N. 798; 28 L. J., Ex. 114.

## 12. PUTTING IN FORCE.

**Suspension of Right.**—Where a debt is secured by a bill of sale and a bill of exchange, the fact that the latter is outstanding does not suspend the right of the creditor to seize under the former. *Bramwell v. Eglington*, 5 B. & S. 39; 33 L. J., Q. B. 130; 10 Jur., N. S. 583; 10 L. T. 295; 12 W. R. 551.

An assignee under a bill of sale being entitled to take possession, on default in payment of the debt for which the bill of sale was given as security, after demand left at the debtor's last place of abode, may make a good demand of payment under that stipulation, although he has indorsed away a bill of exchange given as collateral security for part of the same debt, and which was outstanding in the hands of third parties at the time of the demand. *Ib.*

Goods were assigned by S. to the defendant by a bill of sale, in consideration of 50*l.* advanced by the defendant, with a proviso that if S. paid the 50*l.* upon demand in writing given to him, or left at his last place of abode, the deed should be void, but in default of payment contrary to the proviso, "then at any time thereafter" it was to be lawful for the defendant to take possession of the goods, which were to remain in S.'s possession until default. At the same time S. accepted and gave the defendant a bill at four months for 50*l.* to secure the same debt, and the defendant at once indorsed it over for value. On the 16th of February, the bill being still current, the defendant, knowing S. to be in gaol under a *ca. sa.*, left a demand in writing at his house, and took possession of the goods the same evening. S. was adjudicated a bankrupt on the 23rd of February:—Held, assuming the 23rd of February to be the material date, that on that day the goods were not in the order and disposition of the bankrupt with the consent of the defendant, the true owner; for that, if the defendant had been premature in taking the goods the same day as the demand, yet that did not prevent his taking possession in proper time before the 23rd; and that the mere taking of the bill of exchange did not suspend his remedy under the bill of sale. *Ib.* Affirmed on appeal: 1 L. R., Q. B. 494; 35 L. J., Q. B. 163; 12 Jur., N. S. 702; 14 L. T. 735; 14 W. R. 739—Ex. Ch.

**Seizure under Bill of Sale.**—S. advanced to an execution debtor, being a baker by trade, 155*l.* on the security of a bill of sale of his goods, and took possession of them by putting a man into possession of them in his house on the 15th May. The doors were kept locked, and the trade and business stopped, the key being kept by the man in possession. On the 17th May notices announcing a sale by auction of the goods were posted up outside the house, and in places about the neighbourhood, and the catalogues stated

that the sale would take place under a bill of sale on the 24th May. The debtor, who was an infirm old man, was allowed, though against the wish of the man in possession, to remain on in the house, on the plea that he could not get lodgings elsewhere. Between the 17th and the 24th May an execution was put in, the bailiff procuring admission by knocking at the door, and when it was opened forcing his way in. On these facts the verdict, at the trial of an interpleader issue to determine the right to the goods, was entered for the execution creditor:—Held, that the necessary inference from the facts was, that more was done than the taking merely formal possession, and that actual and real possession and control were in fact taken and kept by S., and that public notice of this was given by the catalogues announcing the sale, and therefore the verdict ought to be entered for S. *Smith v. Wall*, 18 L. T. 182.

The goods of a debtor being seized under a county court execution, A. set up a claim to them under a bill of sale to secure the repayment to him of a sum of money lent to the debtor. Under the power given to A. by the bill of sale to sell the goods, and out of the proceeds to reimburse himself and pay the surplus to the debtor, he had sold sufficient to repay the amount of his original loan, and the amount of a distress levied on the farm of the debtor and of rent due by him; but he had not been repaid a further sum advanced by him subsequently to the county court execution to pay a quarter's rent of the farm falling due on the day after the date of the execution:—Held, that he paid the last-mentioned sum of his own wrong; and that he could not, after the bill of sale had been actually satisfied, set up the bare legal property vested in him by it, as against the execution creditor. *Waterton v. Baker*, 17 L. T. 494.

A., in consideration of an advance of 650*l.*, made to him by B. and C., who carried on business under the name of "The City Investment and Advance Company," by a deed in the form of a mortgage, assigned to them all the goods, chattels and effects upon his farm and premises, to secure the repayment of the advance, with power to the mortgagees, on default, to sell at their discretion, and to pay over the surplus to A. B. and C. took possession under this deed (which was not registered), and sold the goods by auction. D., after B. and C. had taken possession, entered under a subsequent bill of sale (duly registered), and paid out a claim of the landlord for rent:—Held, that B. and C., having perfected their title by taking possession under their mortgage, had a right to sell, and that they were not responsible to D. for any default in the mode of conducting the sale. *Maughan v. Sharpe*, 17 C. B., N. S. 443; 34 L. J., C. P. 19; 10 Jur., N. S. 989; 10 L. T. 870; 12 W. R. 1057.

Held, secondly, that D. could not recover against B. and C. the sum paid by him to the landlord, as money paid to their use. *Ib.*

— **After Demand.**—A bill of sale contained a proviso for redemption if the debtor should "instantly on demand and without delay, on any pretence whatsoever," pay the sum due, such demand to be made "personally on the debtor, or by giving or leaving verbal or written notice to or for him at his place of business, so nevertheless that a demand be in fact made:"—Held, that the notice to be left for the debtor in his absence

must be such as might reach the debtor, so as to give him an opportunity of answering within a reasonable time. *Massey v. Staden*, 4 L. R., Ex. 13; 38 L. J., Ex. 34.

By a bill of sale dated the 15th April, 1873, the plaintiff assigned all his goods, &c., to the defendant to secure a sum of 100*l.*, upon the express condition that if the plaintiff did not, "immediately upon demand in writing" delivered to the plaintiff, or left for him at his home, pay the money due, it should be lawful for the defendant to seize and sell the goods comprised in the bill of sale. On the 22nd April, 1873, the defendant went with bailiffs to the plaintiff's house, and there saw his wife and son, who told him that the plaintiff was from home, they knew not where, and that he might be gone to America for aught they knew. The defendant then read and delivered to the wife and son a written demand for payment, which not being complied with, he at once put the bailiffs in possession, and after an interval of eight days sold the goods. The plaintiff returned to his home on the 8th May, and said he had started with the 100*l.* to go to S. on business, but had gone to R., had got drunk, and remained away on a spree. In an action against the defendant for so seizing and selling the plaintiff's goods:—Held, that the defendant was under the circumstances perfectly justified by the terms of the bill of sale in seizing the goods as he did, immediately upon the demand having been made as stated. *Whariton v. Kirkwood*, 29 L. T. 644; 22 W. R. 93.

By a bill of sale, A. assigned all his goods to secure a debt due from him to the assignee, subject to a proviso that the deed should become void upon payment of the debt on a certain day, or on some earlier day, to be appointed by the assignee by a notice in writing, to be served on A. twenty-four hours before the day of payment so appointed; interest to be paid in the meantime. It was agreed that, after default made in payment contrary to the proviso, it should be lawful for the assignee to enter and take possession of the goods, and to sell them, and reimburse himself out of the proceeds, accounting to A. for any surplus; and that, until such default, it should be lawful for A. to hold, use, and possess the goods without hindrance from the assignee. The assignee served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took, and sold the goods, but the notice was bad, having been served less than twenty-four hours before the day of payment appointed:—Held, that A. had, under the deed, the right of possession of the goods, defeasible only by default in payment after due notice, and that he might therefore sue the assignee in trespass, for having wrongfully entered and sold. *Brierly v. Kendall*, 17 Q. B. 937; 21 L. J., Q. B. 161.

Held, also, that in such action the measure of damages should be, not the value of the goods, but the value of A.'s interest in them at the time of the trespass. *Ib.*

By a bill of sale, the grantor covenanted to pay the sum secured immediately upon demand in writing, signed by or on behalf of the grantees, being given to him or left at his last known place of abode; and if he did not immediately upon such demand pay the money, the grantees were authorized to enter and seize the goods comprised in the bill of sale; and until

default in payment on such written demand, the grantor was to remain in possession of them. A written demand, signed by their attorneys on behalf of the grantees, "we hereby demand of you the immediate payment of" &c., was given by the attorneys to a sheriff's officer, who was authorized to receive the money; but he simply handed the document to the grantor, and then seized the goods:—Held, that the grantor was entitled to a reasonable time to get the money, and see the grantees, or some one whom he knew to be authorized to receive it. *Toms v. Wilson*, 32 L. J., Q. B. 33; 9 Jur., N. S. 492; 7 L. T. 421; 11 W. R. 117. Affirmed on appeal, 4 B. & S. 442; 32 L. J., Q. B. 382; 10 Jur., N. S. 201; 8 L. T. 799; 11 W. R. 952—Ex. Ch.

— **What demand sufficient.**—A bill of sale contained a provision that it should be void in case the mortgagor should pay the principal money thereby secured "upon demand, if and when the mortgagee should so require by a notice in writing," and until payment of the principal should pay interest thereon half-yearly, and also a proportionate part thereof "to the expiration of the said notice, when the same shall be given." And in default of payment power was given to the mortgagee to seize and sell the property comprised in the deed:—Sembles, that the mortgagee was not entitled to seize on the same day on which he made a demand for payment, the demand not being at once complied with. *Trevor, Ex parte, Burgharte, In re*, 1 Ch. D. 297; 45 L. J., Bk. 27; 33 L. T. 756; 24 W. R. 301.

By a deed, in consideration of money advanced, the present and future stock of the plaintiff were assigned to the defendant, subject to a proviso, that if the money were repaid at the end of ten years, or at such earlier day or time as the defendant should appoint by notice in writing, sent by post, or delivered to the plaintiff, or left at his house or last place of abode, the deed should cease and be void; provided, that if default should be made in payment contrary to the proviso, then and immediately thereupon it should be lawful for the defendant to enter upon the plaintiff's premises, and seize and sell the goods. The defendant served a notice on the plaintiff at noon to pay the money due at half-past twelve p.m. of the same day, and then, on default, seized and sold the goods on the plaintiff's premises:—Held, that the notice under the deed must be a reasonable notice, and that half-an-hour's notice was not reasonable. *Brighty v. Norton*, 3 B. & S. 305; 32 L. J., Q. B. 38; 9 Jur., N. S. 495; 7 L. T. 422; 11 W. R. 167; *S. P., Rogers v. Mutton*, 31 L. J., Ex. 275.

See also cases under MORTGAGE.

**Sale of Goods comprised in Bill of Sale in ordinary course of Business.**—Farm produce, &c., over which a bill of sale had been granted, were seized by the landlord of a farm under a distress for rent, and were appraised at a considerably greater amount than the amount of rent due. The agent of the landlord knowing that the tenant was indebted to the landlord in respect of the incoming valuation, but in ignorance of the bill of sale, allowed the tenant to sell a quantity of wheat which had been seized under the distress. Upon obtaining the amount

realized by the sale of the wheat, the agent paid to the landlord the amount due under the valuation. In an action by the landlord against the tenant and the grantor of the bill of sale, for breach of the covenants of the lease of the farm, and for an injunction to restrain the removal of the goods, &c., the grantor of the bill of sale counter-claimed in respect of the amount so paid to the landlord:—Held, that the sale of the wheat under the circumstances was not a sale in the ordinary course of business, and that the grantee of the bill of sale was entitled to recover the amount realized thereon from the landlord. *Musgrave v. Stevens*, 47 J. P. 295.

**"Reasonable excuse" for Non-production of Receipt for Rent.**—The provisions of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, apply to goods seized after the date of the commencement of the act under a bill of sale executed and registered before such date. Where the grantor of a bill of sale did not, upon demand in writing by the grantee, produce a receipt for rent which had only become due a few days, and of which it appeared the landlord had not yet required payment:—Held, that the grantor had not "without reasonable excuse" failed to produce his last receipt for rent, within the meaning of the 4th sub-s. of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882. *Cotton, Ex parte*, 11 Q. B. D. 801; 49 L. T. 52; 32 W. R. 58; 47 J. P. 599.

**Relief against Seizure of Goods.**—Where, after goods had been seized under a bill of sale for default in payment of instalments due thereunder, the grantor offered to pay the amount due, but the grantee refused to receive the same:—Held, that the court had power, under the above-mentioned section, to make an order restraining the grantee from selling the goods on condition that the amount due was paid. *Id.*

**"Order and Disposition."**—The Bills of Sale Act, 1882, repeals the 20th section of the Bills of Sale Act, 1878, in respect of bills of sale given by way of security, but not in respect of bills of sale given by way of absolute transfer, and therefore chattels comprised in a registered bill of sale given by way of absolute transfer are not in the order and disposition of the grantor within the Bankruptcy Act. *Swift v. Punnell*, 24 Ch. D. 210; 48 L. T. 351; 31 W. R. 543.

An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land, shall become the property of the landowner, is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). *Reeves v. Barlow*, 11 Q. B. D. 610.

Notwithstanding the repeal of s. 20 of the Bills of Sale Act, 1878, by s. 15 of the Bills of Sale Act, 1882, the effect of s. 3 of the latter act is, that the grantee of a bill of sale, registered under the Act of 1878 before the coming into operation of the Act of 1882, is, so long as the registration is subsisting, entitled to the protection afforded by s. 20 against the "order and disposition" of the grantor, even when an act of bankruptcy is committed by the grantor after the coming into operation of the Act of 1882. *Izard, Ex parte, Chapple, In re*, 23 Ch. D. 409; 52 L. J., Ch. 802; 49 L. T. 230; 32 W. R. 218—C. A.



**Consolidation of Mortgage with.]**—The doctrine of consolidation of mortgages does not enable the grantee by a registered bill of sale of goods seized under a *fi. fa.* to take a prior mortgage of other property of the grantor, and claim that the surplus proceeds of the goods, after discharging the sum secured by the bill of sale, shall be applied in satisfaction of the prior mortgage, so as to defeat the right of the execution creditor to such surplus. *Chesworth v. Hunt*, 5 C. P. D. 266; 49 L. J., C. P. 507; 42 L. T. 774; 28 W. R. 815; 44 J. P. 605.

**Payment by Instalments—Default—Giving Time—Waiver.]**—A bill of sale contained a proviso for redemption, and also a proviso if the grantor should make default in payment of 62l. or any part thereof, when and as the same should become due and payable according to the proviso for that purpose thereinbefore contained, the whole amount of moneys secured should be then immediately due and payable, and it should be lawful for, but not obligatory on, the grantee to take possession. The sum advanced was payable by instalments of 2l., the first on Monday, the 22nd May, and the others on Monday in each succeeding week, until the entire sum was paid. The grantor was unable to pay the instalment which became due on the 28th August, but the grantee of the company consented to wait till the 11th September, when the sum of 6l. was to be paid. Upon the 7th September, he took possession of the goods, and on the 11th he carried away the goods and sold them. An action having been brought to recover damages for such seizure and sale:—Held, that the time having been enlarged for paying the money, there had been no default, and therefore the grantor was entitled to recover damages. *Albert v. Grosvenor Investment Company*, 3 L. R., Q. B. 123; 37 L. J., Q. B. 24; 8 B. & S. 664.

The plaintiff gave the defendant a bill of sale on his goods as security for money advanced. The loan was to be repaid by instalments, and the bill of sale authorized the defendant at any time after the execution thereof to take and retain possession of all the goods comprised in it, until all the money payable under it should have been satisfied. It also contained a power of sale. The plaintiff, having paid thirteen instalments, on the day when the fourteenth became due, called upon the defendant and asked for time; the defendant replied that he would wait for a week, but he seized the goods upon the third day and sold them before any further default had been committed by the plaintiff. An action having been brought to recover damages for the seizure and sale, at the trial the judge asked the jury whether the defendant had so acted as to induce the plaintiff to believe that the defendant would hold his hand: the jury answered this question in favour of the plaintiff:—Held, that there was no evidence of a waiver by the defendant, and that there must be a new trial. Quære, whether *Albert v. Grosvenor Investment Company* (3 L. R., Q. B. 123) was correctly decided. *Williams v. Stern*, 5 Q. B. D. 409; 49 L. J., Q. B. 663; 42 L. T. 719; 28 W. R. 901—C. A.

**Injunction restraining Grantee—When granted.]**—On an interlocutory application by the grantor of a bill of sale for an injunction to restrain the grantee who has taken possession

under it from selling or continuing in possession, unless the bill of sale is clearly invalid, the only relief which will be granted is, that on the grantor bringing into court the amount which the grantee swears is due, the grantee will be restrained from making away with the mortgaged property. *Hill v. Kirkwood*, 42 L. T. 105; 28 W. R. 358—C. A.

The holder of an unregistered bill of sale was in possession of the chattels therein comprised when the debtor filed a petition for liquidation and obtained an order restraining the mortgagee from proceeding under his seizure until after the appointment of the trustee in liquidation. No evidence impeaching the deed or possession was produced in support of the application for the order:—Held, that the order had been improvidently granted and must be discharged. The court will not restrain the exercise of a mortgagee's legal rights, upon a mere suggestion that when the trustee in the liquidation is appointed he may be able to find evidence enabling him to impeach the mortgage deed. The court will require in support of an application for such an order evidence of belief at least, in the existence of facts sufficient to impeach the deed, and ample security to the mortgagee seeking to exercise his legal rights. *Shell, Ex parte Loneragan, In re* (4 Ch. D. 789; 36 L. T. 270), approved. *Bayly, Ex parte Hart, In re*, 43 L. T. 181—C. A.

**Interlocutory Injunction against Trespasser in Possession of Land.]**—Where after the expiration of a tenancy for years the holder of a bill of sale of the furniture of the late tenant put and continued a man in possession of the furniture upon the premises under a power in his security:—Held, that the landlord was entitled to treat the bill of sale holder as a mere trespasser; and in an action against him by the landlord to restrain him from selling the goods on the premises or continuing in possession, an interlocutory injunction was granted in those terms. *Smith v. Brown*, 48 L. J., Ch. 694.

**Effect of Execution on unregistered Bill of Sale.]**—Whether, under 17 & 18 Vict. c. 36, s. 1, the taking in execution of goods comprised in an unregistered bill of sale defeated the bill of sale wholly or only to the extent necessary to give effect to the execution, quære. The position in *Richards v. James* (2 L. R., Q. B. 285), that it has the former effect, doubted. *Artistic Colour Printing Company, In re, Fouldrinier, Ex parte*. 21 Ch. D. 510; 31 W. R. 149—C. A.

The effect of s. 8 of the Bills of Sale Act, 1878, in avoiding an unregistered bill of sale as against an execution creditor of the grantor, is to avoid it only to the extent necessary to satisfy the execution. *Richards v. James* (2 L. R., Q. B. 285) distinguished, on the ground that the words of s. 1 of the Bills of Sale Act, 1854, are different from those of s. 8 of the Act of 1878. *Blaiberg, Ex parte, Toomer, In re*, 23 Ch. D. 254; 52 L. J., Ch. 461; 49 L. T. 16; 31 W. R. 906—C. A.

If after the sheriff under an execution has seized the goods comprised in an unregistered bill of sale to which the Act of 1878 applies, the bill of sale holder takes a sufficient possession before the filing of a bankruptcy petition, on which the grantor is afterwards adjudicated a bankrupt, and the execution is then avoided by

virtue of the relation back of the title of the trustee in the bankruptcy to an act of bankruptcy committed before the levy of the execution, the execution is swept away as if it had never existed, and the bill of sale holder is entitled to the goods as against the trustee. *Id.*

**Wrongful Seizure under Bill of Sale—Damages Recoverable by Grantor.]**—Where a defendant had, under an assignment by an executrix of all moneys due to her under her husband's will, seized and sold the stock upon the plaintiff's farm, claiming under a bill of sale to her by a former occupier of the stock then on the farm, as security for money advanced by her, and the plaintiff had repeatedly applied to the defendant in vain for accounts of his claim, and there was no satisfactory evidence as to whether the original debt was subsisting, and the sale included many things which the defendant must have known were not in the bill of sale at all, and there were circumstances of great aggravation:—Held, that it was rightly left to the jury whether they believed the debt to be due, and whether it was due to the assignor, as executrix, and that if not they should find for the plaintiff, and that it was a proper case for vindictive damages; and they, having given beyond the full value of the stock seized, more than double that value by way of damages, the court was reluctant to interfere, although they thought the amount excessive, and recommended a compromise. *Thomas v. Harris*, 27 L. J., Ex. 353; *S. C.*, at nisi prius, 1 F. & F. 67.

**Bill of Sale by Equitable Owner.]**—Goods were vested in a trustee with power to sell them upon the direction of his cestui que trust. The cestui que trust, with the authority of the trustee, executed and registered a bill of sale assigning the goods:—Held, that the bill of sale was void as against execution creditors. *Chapman v. Knight*, 5 C. P. D. 308; 49 L. J., C. P. 425; 42 L. T. 538; 28 W. R. 919; 44 J. P. 491.

**—By Grantee of unregistered Bill not in Possession.]**—A county court judge decided that a registered bill of sale, given by a person out of possession of the goods assigned and deriving title from a grantee under an unregistered bill of sale, was invalid against an execution creditor:—Held, by Grove, J. (Lopes, J., dissenting), that this decision was correct. *Id.*

### 13. SPECIFIC PERFORMANCE OF AGREEMENT TO GIVE BILL OF SALE.

**Effect of.]**—On the 13th March A. commenced an action against B. to enforce specific performance of an agreement to execute a bill of sale of the chattels and effects in an inn. On the 16th March A., on his ex parte application, was appointed interim receiver, pending a reference for the appointment of a receiver, and the same day he took possession of the inn, and left a man in charge. The same night B. left the inn, and the next day filed a liquidation petition. The trustee under the liquidation claimed the chattels and effects in the inn on the ground that the agreement was void as against him under the Bills of Sale Act, and that the chattels and effects were in the apparent possession of B. at the commencement of the liquidation:—Held,

that the Bills of Sale Act did not apply, that the agreement created a good equitable charge in favour of A., and that the possession taken by A. as interim receiver took the chattels and effects out of the order and disposition of B. *Taylor v. Eckersley*, 5 Ch. D. 740; 36 L. T. 442; 25 W. R. 527.

**Interim Receiver, Appointment of.]**—In an action for specific performance of an agreement to execute a bill of sale, the plaintiff applied ex parte, and before the appearance of the defendant, for the appointment of a receiver, and the usual order was made directing a reference to chambers to appoint a receiver:—Held, that the plaintiff was entitled to have the property protected in the meantime, and the order of the court below varied by directing the appointment of the plaintiff as interim receiver without security for fourteen days, or until a receiver should be appointed under the order. *Taylor v. Eckersley*, 2 Ch. D. 302; 45 L. J., Ch. 527; 24 W. R. 450—C. A.

### 14. EVIDENCE TO IMPEACH VALIDITY OF.

**As to Fraud.]**—A., being sued as executor de son tort of his father, claimed goods under an assignment from his father to himself, the consideration whereof was stated in the deed to be a debt due from his father to him; and to prove that the deed was not fraudulent, it was proposed by A.'s counsel to go into evidence to shew that A.'s father really owed A. money:—Held, that, for this purpose, what A.'s father said to A., or in A.'s presence, as to his owing A. money, was receivable, as it was proof of an account stated between them, but that what A.'s father said on the subject in the absence of A. was not receivable, as that would be merely an admission by A.'s father, under whom A. claimed, but under whom the plaintiff did not claim. *Yardley v. Arnold*, Car. & M. 434.

To prove a bill of sale fraudulent, declarations made by the vendor at the time of executing it are admissible, but not those made at another time. *Phillips v. Eamer*, 1 Esp. 355.

In an action against the sheriff for seizing and converting goods as the goods of A., in which the plaintiff claimed property under a prior bill from A., it is necessary for the sheriff, in order to be let in to contend that the bill of sale is fraudulent and void, to give some evidence that he seized by authority from an execution creditor of A., as the bill of sale would be valid between the parties and against strangers, but void only as against creditors. *Bessey v. Windham*, 6 Q. B. 166; 14 L. J., Q. B. 7.

**Subsequent Bankruptcy of Grantor.]**—Trover by A. against the assignees of a bankrupt, for selling goods of A. A. gave evidence that, prior to the bankruptcy, the person in possession, and apparently the owner, had assigned them to C., who had for valuable consideration assigned them to A. A. had put a person in possession of the goods, but C. continued to carry on the business of the house where they were. On the part of the assignees it was suggested that the transaction was colourable, and that the goods belonged to the bankrupt. Before any evidence was offered of any connexion between A. and the bankrupt, one of the witnesses for

the defence was asked "whether he remembered C. making a claim to the goods after the bankruptcy." The question was disallowed:—Held, that it ought to have been allowed. *Ford v. Elliott*, 4 Ex. 78; 18 L. J., Ex. 447.

A. conveyed goods by bill of sale to B. By a second bill of sale A. conveyed the same goods to C. A. having become bankrupt, and the first bill of sale not having been duly registered, A.'s assignees brought trover for the goods:—Held, that B. could not set up the bill of sale to C. against the assignees. *Nicholson v. Cooper*, 3 H. & N. 384.

**Admissions.**—On an interpleader issue to try the right to goods claimed by the plaintiff under an assignment to secure a debt alleged to be due to him, the admissions of the assignor, before the date of the assignment, that he was indebted, are not receivable in evidence for the plaintiff. *Coole v. Braham*, 4 Ex. 183; 18 L. J., Ex. 105.

**As against Execution Creditors.**—Goods having been seized under an execution upon a judgment in a county court against R., the plaintiff, who claimed the goods under an assignment which was void against creditors, brought an action against the bailiffs of the county court for such seizure, and, to prove the trespass, put in evidence the writ of execution, with the levy indorsed thereon. The writ recited the judgment recovered in the county court:—Held, that this was not sufficient evidence of the judgment to justify the bailiffs. *White v. Morris*, 11 C. B. 1015; 21 L. J., C. P. 185; 16 Jur. 500.

In an interpleader issue between a claimant under a bona fide bill of sale duly registered, and an execution creditor of the assignor, the latter cannot set up a prior bill of sale to a third party, also bona fide, but void as against execution creditors for want of due registration. *Edwards v. English*, 7 Bl. & Bl. 564; 26 L. J., Q. B. 193; 3 Jur., N. S. 934.

In an interpleader issue between claimant and execution creditor, the plaintiff claiming under a bill of sale for alleged advances to the assignor, a son, the question is, whether the property was really intended to pass, and this will greatly depend upon whether the advances were really made; but it is not conclusive that the assignor's object was to evade an execution, because, except in cases of bankruptcy or insolvency, a debtor may prefer a particular creditor, and pay him in money or in goods; and the question will be whether he really meant to do so, or only to pretend and appear to do so for the purpose of escaping the execution, the goods to be afterwards resumed by the assignor. *Sutton v. Bath*, 1 F. & F. 152.

In an interpleader suit the question being between a claimant under a bill of sale from the sheriff and an execution creditor, the bill of sale, though it may not per se be sufficient prima facie evidence of the title of the claimant, is so coupled with some evidence of a prior seizure by the sheriff. *Hornidge v. Cooper*, 27 L. J., Ex. 814.

A claimant was plaintiff, and an execution creditor defendant, in an interpleader issue, to try whether certain goods were, at the time of the seizure thereof by the sheriff, under a writ of execution, the goods of the plaintiff. The plaintiff proved a valid bill of sale to him of the goods:—Held, that it was competent for the defendant to defeat the plaintiff's title by proving

a prior bill of sale to a third party. *Gadsden v. Barrow*, 2 C. L. R. 1063; 9 Ex. 514; 23 L. J., Ex. 134.

**Person Selling under—Estoppel.**—A party who has, under an authority from the assignee, acted upon a bill of sale by selling the goods, cannot, in an action by the assignee, for the proceeds, impeach its validity. Neither can he, if the authority to sell is in general terms to sell all the effects at a certain place, and he has afterwards admitted a balance in his hands on the sale, set up in such an action that part of the goods sold was not comprised in the bill of sale, and that the proceeds of the goods which were so have been exhausted by expenses or payments in pursuance of the authority. *Baker v. Dale*, 1 F. & F. 271.

## BIRTHS.

I. PROOF OF.—See EVIDENCE.

II. CONCEALING.—See CRIMINAL LAW.

## BISHOP.

See ECCLESIASTICAL LAW.

## BLASPHEMY.

I. WHAT IS.—See ECCLESIASTICAL LAW.

II. LIBELS.—See DEFAMATION.

## BLOCKADE.

See SHIPPING.

## BOARD.

I. OF HEALTH.—See HEALTH.

II. OF WORKS.—See METROPOLIS.

III. POOR LAW.—See POOR LAW.

IV. LOCAL GOVERNMENT.—See LOCAL GOVERNMENT.

**BOARDING HOUSE.***See* LANDLORD AND TENANT.**BOND.***See* DEED.**BOOKS.***See* COPYRIGHT.**BOROUGH.**I. VOTE FOR.—*See* ELECTION LAW.II. OTHER MATTERS RELATING TO.—*See* CORPORATION.**BOTTOMRY.***See* SHIPPING.**BOUNDARIES.**

1. *How Determined.*
2. *Evidence, 1903.*
3. *Duty of Landlord and Tenant to Preserve.*  
—*See* LANDLORD AND TENANT.
4. *Of Commons.*—*See* COMMONS.

## 1. HOW DETERMINED.

**When two Counties separated by a River—Inaccurate Description—Presumption.**—Upon an indictment against the inhabitants of Brecknockshire for non-repair of half a bridge, it was found, upon a special verdict, that the mid-channel of the river Wye had always formed the boundary between the counties of Brecon and Radnor, above and below, and partly within the parish of G., but that before 2 & 3 Will. 4, c. 64, the boundary receded, at a certain point within the parish, from the mid-channel to the right bank of the river, and thence inland, at a slant, and then back to the mid-channel of the river, so as to include within Radnorshire a part of the river, and 470 acres of land, on its right bank, part of the parish of G. No other portion of the parish of G., on the right bank of the Wye, than the 470 acres ever was in the county

of Radnor, and no part of the parish of G., which up to the passing of 2 & 3 Will. 4, c. 64, was situate in the county of Radnor, was isolated or detached from the remainder of the county, unless it was the portion of 470 acres. The bridge was within the parish of G., and crossed the river Wye between the points where the old boundaries of the counties of Radnor and Brecon left and returned to the mid-channel of the river, and the only part of the bridge which was out of repair was that extending from the mid-channel to the right bank of the river:—Held, that the inhabitants of Brecknockshire were liable to repair half the bridge, since it stood half in their county and half in Radnorshire; for that, upon such finding, it was clear that the 470 acres were the part of the parish of G. which was intended to be described in 2 & 3 Will. 4, c. 64, as isolated from the main body of the county of Radnor, and therefore to be transferred to the county of Brecon, though in strictness it was not isolated, but touched the remainder of the county on one side, and though it was inaccurately described in the first column of the schedule as belonging, at the time of the passing of the act, to Brecknockshire. *Reg. v. Brecknockshire*, 15 Q. B. 813; 19 L. J., M. C. 203; 15 Jur. 351.

Held, also, that 2 & 3 Will. 4, c. 64, and 7 & 8 Vict. c. 61, transferred to Brecknockshire not only the 470 acres, but also half the river, where it abutted upon them, so as to make the boundary between the counties of Radnor and Brecon run there, as elsewhere, per medium flum aquæ. *Id.*

Where two parishes are separated by a river, the medium flum is the presumptive boundary between them. *Rees v. Landulph*, 1 M. & Rob. 393.

**In a Borough under 2 & 3 Will. 4, c. 64—Place forming part of Ancient Borough.**—By a charter of James I. the bailiffs and burgesses of a borough had a right to return a member to parliament. By the same charter, twelve capital burgesses were nominated, and that body was to be thereafter kept up by electors from the common burgesses, and the office of capital burgess required residence within the borough. To the bailiff and capital burgesses power was given from time to time to elect and appoint such and so many other men, inhabitants or not inhabitants of the borough (with certain restrictions), to be thereafter burgesses of the borough. F. was, before the 2 & 3 Will. 4, c. 64, a part of the ancient borough, but so detached from the borough, that, by reason of including it, the boundary established by that act would not be continuous:—Held, by Wilde, C. J., and Maule, J., that F. had, before the 2 & 3 Will. 4, c. 64, formed part of the boundary for the purpose of the election of members to serve in parliament, and that it therefore was brought within the saving part of s. 37:—Held, contra by Cresswell and Williams, JJ. *Palmer v. Allen*, 6 C. B. 51; 18 L. J., C. P. 257; 13 Jur. 708.

**When Parish extends up to a Highway.**—An act of Charles II., creating a new parish of A. out of the old parish of M., enacted that "all that precinct included within the bounds hereinafter expressed" should form the new parish. On the northern boundary, where the old parish was divided from the parish of S. by a highway,

the precinct was described thus : " with all the houses and grounds abutting on and upon the king's highway or great road : "—Held, that the boundary of the new parish extended beyond the houses abutting on the highway to the medium flum of the highway. *Reg. v. Strand Board of Works*, 4 B. & S. 526; 12 W. R. 828.

**Where Parish extends up to a Tidal River.]**

—Where a parish extends up to a tidal river, but there is nothing to shew whether it does or does not extend beyond the line of the ordinary or medium high water mark, land between such high water and low water mark cannot be assumed to be within the parish, as there is no distinction in this respect between land on the sea-shore and land on the shore of a tidal river. *Bridgewater (Trustees) v. Hootle-cum-Linacre*, 2 L. R., Q. B. 4; 36 L. J., Q. B. 41.

**For a Town under 8 & 9 Vict. c. 18, s. 128.]**

In fixing the boundaries of a town, within 8 & 9 Vict. c. 18, s. 128, the court will be guided by the circumstance of there being a certain continuity of houses or otherwise, and not by what may be the legal boundaries of the borough. *Corington v. Wycombe Railway Company*, 2 L. R., Eq. 825; 14 W. R. 1018. See *sub tit. TOWN*.

**When described in a Deed and on a Map.]**

A grant of a mine was made to L. by a deed, with a map indorsed; the southern boundary being described in the deed as "a straight line drawn from V.'s house" to a certain boundstone; and the description of parcels concluded with these words, "which premises are particularly delineated by the map on the back hereof." On this map the line appeared to be drawn from the north-east corner of V.'s house. L. brought an action against R. for working through his southern boundary, and taking his ore. At the trial, parol evidence was admitted to shew that V.'s house was wrongly placed on the map, and that, if corrected, the line would run to the south of V.'s house; and the whole question was left to the jury:—Held, that though it was properly a question of evidence for the jury to identify and determine the position of V.'s house, it was a question of construction for the judge to decide what was the true meaning of the deed; that, in so doing, the judge was bound to look at the map, and that he ought to have directed the jury, that the true boundary line was that drawn from the north-east corner of V.'s house, when identified and correctly placed. *Lyle v. Richards*, 1 L. R., H. L. 222; 35 L. J., Q. B. 214; 12 Jur., N. S. 947; 15 L. T. 1.

See POOR LAW (PARISHES)—LOCAL GOVERNMENT—WAY.

## 2. EVIDENCE.

**Where the same Boundary separates other Properties.]**

—Where the boundary between two manors is formed by a ridge of hills which run beyond those manors, and, on an issue as to the boundary between one of those manors and a third manor, one of the parties wishes to prove that the same ridge is the boundary between the two latter manors; evidence of its being the boundary of the other two is admissible for this purpose, the three manors being contiguous.

*Briaco v. Lomar*, 3 N. & P. 308; 8 A. & E. 198; 1 W., W. & H. 235; 2 Jur. 682.

**Of Reputation.]**—Where, on an issue as to the boundary of a tenement, evidence has been given that the boundary in question is the same with the boundary of a certain hamlet, evidence of reputation as to the boundary of that hamlet is receivable as proof of a fact relevant to the issue. *Thomas v. Jenkins*, 1 N. & P. 687; 6 A. & E. 525; W., W. & D. 265; 1 Jur. 261. See 2 N. & P. 464.

In an action which turned on a question as to the boundary of two manors, a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to determine for which party the verdict was to be finally entered, and to set out the boundaries. He directed the verdict to be entered for the defendant. In a subsequent action by the defendant against a third party, where, also, the question substantially was as to the boundary of the same manors, the verdict was received, but the award rejected, as evidence of reputation. *Evans v. Rees*, 10 A. & E. 151; 2 P. & D. 626.

An ancient presentment by the homage of a manor, in the form of a book, set out the boundaries of the manor, and gave in alphabetical order the names of the several parishes within it, and of the tenants resident in each parish, but this part of the presentment contained nothing as to boundaries. Two or three sheets at the concluding part of it, where a parish, Y., should have followed in order, had been cut off, but it did not appear under what circumstances. In an action involving a question as to the boundary of the manor where it was admitted that the manor and Y. were conterminous in the direction of the locus in quo, the presentment was admitted in evidence of the reputed boundary, as the document, although mutilated, was perfect in that part of it which related to the subject of the boundary. *Id.*

**Cancelled Leases.]**—Expired leases, and counterparts of expired leases, though cancelled, are admissible upon a question of boundary. *Parton v. Dare*, 5 M. & R. 1.

**Old Assessments.]**—Old assessments to church rates are evidence upon a question of boundary, though the parish officers do not charge themselves with the receipt of the rate otherwise than by crosses set against the names of the parties rated. *Id.*

**Ancient Orders of Sessions.]**—Ancient orders of sessions containing statements respecting the extent of a district within the jurisdiction of the court of quarter sessions, made when no dispute as to boundary appears to have existed, are admissible in evidence. *Newcastle (Duke) v. Broxtowe*, 1 N. & M. 598; 4 B. & Ad. 273.

**Presentments or Answers of a Jury.]**—In an action by a lord of a manor for carrying away dollars claimed by him as wreck, two instruments dated in 1639 and 1657, and purporting to be presentments or answers of a jury, partly consisting of the tenants of the manor, to questions by commissioners of survey appointed by the lord, were put in to prove the boundaries of the manor, and also the lord's title to wreck, which was affirmed in particular passages:—Held, that

they were only evidence of the boundaries, and could not be admitted as declarations by the tenants of the manor, of the title of the lord to wreck, that being a matter of private right derived from the crown, respecting which they could not be taken to have any peculiar knowledge, as they had no concern with it. *Talbot v. Lewis*, 5 Tyr. 1.

## BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE.

## BREAD.

See HEALTH.

## BREWER.

See INTOXICATING LIQUORS.

## BRIBERY.

I. PARLIAMENTARY.—See ELECTION LAW.

II. MUNICIPAL.—See CORPORATION.

## BRIDGES.

See WAY.

## BRISTOL.

TOLZEY COURT.—See COURT.

## BROKER.

1. *Who are.*
2. *Acting as a Broker.*
3. *Duty and Obligation.*
4. *Remuneration*, 1907.
5. *Distress*.—See DISTRESS.
6. *Other Brokers*.—See INSURANCE—PRINCIPAL AND AGENT—SHIPPING—STOCK.
7. *Criminal Liability*.—See CRIMINAL LAW.

### 1. WHO ARE.

A person who hires or procures for another, persons to be employed by him in the laying out and surveying of a line of railway, is not a broker. *Milford v. Hughes*, 16 M. & W. 174; 16 L. J., Ex. 40; 14 Jur. 990.

A person who for brokerage and hire negotiates and concludes bargains for stock is a broker in point of law. *Tomson v. Green*, 4 Burr. 2103.

**Within Statutes relating to London.**—A ship broker, or one who obtains on commission freight and passengers for vessels, is not a broker, within the statutes regulating the admission of brokers for the city of London. *Gibbons v. Rule*, 12 Moore, 539; 4 Bing. 301.

But a stock broker is, and must be admitted by the lord mayor and aldermen. (*Lark v. Powell*, 1 N. & M. 492; 4 B. & Ad. 846.

An auctioneer is not. *Wilkes v. Ellis*, 2 H. Bl. 555.

### 2. ACTING AS A BROKER.

**Evidence of.**—A witness stated that he took S. to an office in the city of London used by the defendant, and that upon that occasion four memoranda were made by the defendant, each of the sale by S. of 1,000*l.* stock to a person whose name did not transpire; that nothing was handed over at the time, and that he did not see any money pass:—Held, evidence of an acting by the defendant as a broker, within 6 Anne, c. 16, and 57 Geo. 3, c. 1*x.* *Scott v. North*, 2 L. R., C. P. 270; 15 L. T. 508.

By 57 Geo. 3, c. 1*x.* s. 2, it is provided, that anyone acting as a broker within the city of London without a licence shall be subject to a penalty of 100*l.* A. was an officer of a company formed for the purpose of carrying on the business of stock-broking, and in the course of business bought some stock for a customer, and signed the bought and sold notes, the principals not seeing one another, and no one else acting as broker in the transaction. A. had no licence to act as broker:—Held, that he was liable to the penalty. *Scott v. Cousins*, 4 L. R., C. P. 179; 38 L. J., C. P. 156.

The dealing in, or buying and selling for reward of, shares in English or foreign joint stock banks or companies, or the debts, stocks or securities of foreign governments, is an acting and assuming to act as broker, within 57 Geo. 3, c. 1*x.* *Scott v. Jackson*, 19 C. B., N. S. 134.

### 3. DUTY AND OBLIGATION.

**To Principal.**—A broker is authorized, from a previous course of dealing between himself and his principal, on an approval of a purchase by the latter, to make out a contract note in his own name, without inserting that of his principal;

and, under such circumstances, does not violate the bond and oath imposed on him by the regulations of the city of London, provided he makes an entry in his book in the name of his principal. *Kemble v. Atkins*, 1 Moore, 6; 7 Taunt. 260; Holt, 427.

It is the duty of a sworn broker of the city of London to charge his principal only the cost price of articles purchased for him, in addition to his commission, and the principal having averred in an action that the broker had charged him a greater price than the cost price which the plaintiff had paid:—Held, that it was sufficient proof of such averment to produce a running unsettled account between the parties, by which it appeared that the principal had paid more than the amount of the overcharges, although on the whole account, and when the balance, at a subsequent period, was struck, the principal was indebted to the broker in a sum far exceeding such overcharges. *Procter v. Brain*, 2 M. & P. 284; 3 C. & P. 536.

**Liability to Discovery.**—A sworn broker of the city of London is in the nature of a public agent; and, therefore, in an action against him for negligence in making a contract, the court will compel him to produce his books for the purpose of enabling the plaintiff to inspect them and take a copy of the contract. *Browning v. Aylwin*, 9 D. & R. 801; 7 B. & C. 204.

In one case it was held that a London broker might refuse to allow his employer to inspect his contract book; and it is no breach of his bond, if he at the same time adds it shall be produced at the proper time, and does produce it afterwards before a court of aldermen. *London (Mayor, &c.) v. Brandon*, Holt, 438; 2 Stark. 14.

A person who holds himself out as a broker of the city of London, and is employed by a person who believes him to be such, cannot, when sued by his principal for an account of his transactions as such broker on the principal's behalf, protect himself from discovery, in a suit in equity, on the ground that it may render him liable to penalties for having acted as a broker without having been duly admitted as such, imposed by 57 Geo. 3, c. lx. *Robinson v. Kitchin*, 25 L. J., Ch. 441; 2 Jur., N. S. 294—L. J.; affirming, 21 Beav. 365; 25 L. J., Ch. 354; 2 Jur., N. S. 57.

**Bonds—Default.**—A bond was given by a broker to secure to the corporation of London the due performance of his duties. He made default:—Held, on his death, that the amount recovered on the bond was equitable assets, and in trust for the general body of his creditors, and not exclusively for those who had suffered by his defaults. *Nash v. Bryant*, 25 Beav. 533; 27 L. J., Ch. 748; 4 Jur., N. S. 550.

It is not a breach of the bond to employ a person who is not a sworn broker. *London (Mayor, &c.) v. Brandon*, Holt, 438; 2 Stark. 14.

Nor if he mistakes the quantity of goods he had bought, where he derived no advantage from such mis-statement, though it was the cause of considerable loss to his principal. *Ib.*

#### 4. REMUNERATION.

**When Acting without a Licence.**—A broker cannot maintain an action for work and labour, and commission for buying and selling stock, unless duly licensed by the mayor and aldermen of

the city of London. *Cope v. Rowlands*, 2 M. & W. 149; 2 Gale, 231.

—**Recovery of Money paid.**—To a declaration for money paid and on accounts stated, a plea that the causes of action accrued to the plaintiff, as a broker in the city of London, about the purchasing and selling for the defendant, in the city of London, of shares, and that he was not duly licensed, is a bad plea, inasmuch as the 6 Anne, c. 16, does not prevent an unlicensed broker from recovering money paid at the request of his employer, or for money due on accounts stated with his employer. *Jessopp v. Lutwyche*, 10 Ex. 614; 3 C. L. R. 359; 24 L. J., Ex. 65.

To a declaration on two bills by drawer against acceptor, a plea, that he retained the plaintiff to act as his broker in the city of London, and to enter into contracts in the city of London for the defendant in the purchase of stock and shares, and to pay, in and about completing such contracts and purchases, moneys, and that, in pursuance of such retainer, the plaintiff entered into contracts for the purchase of shares; and as incidental thereto paid for the defendant, in and about completing such contracts and purchases, moneys; that the plaintiff was not, at the time of the retainer and employment, and making such contracts and purchasing such shares, or paying such moneys, a broker duly licensed within the city of London; and that the bills were accepted by the defendant, and received by the plaintiff, on account of money due from the defendant to the plaintiff for his having entered into the contracts, and paid such moneys,—is bad on general demurrer, on the ground that as the words incidental thereto were ambiguous, it did not appear by the plea that the payment of the moneys was a necessary part of the plaintiff's duty as broker, and forasmuch as the contract in such case was not void; and although the plaintiff could not recover any recompense for his services, yet he was entitled to recover the money he had paid at the defendant's request. *Pidgeon v. Burslem*, 3 Ex. 465; 18 L. J., Ex. 193.

A dealer in London in shares in a public company (whether British or foreign) is a broker within 6 Ann. c. 16, and incapable of suing for his commissions unless duly licensed. *Smith v. Lindo*, 4 C. B., N. S. 395; 27 L. J., C. P. 196. Affirmed on appeal, 5 C. B., N. S. 587; 27 L. J., C. P. 335; 4 Jur., N. S. 974—Ex. Ch.

But, where an unlicensed person assumed to act as a broker in the purchase of such shares:—Held, that he might recover from his principal the price which, pursuant to a usage of the share market, he had been obliged to pay, the 6 Ann. c. 16, not making the contract void, but merely preventing the unlicensed broker from recovering any remuneration for his services in making it. *Ib.*

See PRINCIPAL AND AGENT—STOCK.

## BUILDING.

- I. METROPOLITAN.—See METROPOLIS.
- II. CONTRACTS.—See WORK AND LABOUR.
- III. UNDER PUBLIC HEALTH ACTS.—See HEALTH.
- IV. DESTROYING.—See CRIMINAL LAW.

## BUILDING SOCIETY.

1. *Constitution.*
2. *Liability of Directors and Officers*, 1913.
3. *Relations between Societies and their Members.*
  - a. *Stamps*, 1917.
  - b. *Mortgages*, 1918.
  - c. *Conveyances to Members*, 1928.
  - d. *Shares*, 1929.
  - e. *Fines*, 1930.
  - f. *Determination of Disputes*, 1931.
4. *Winding-up*, 1936.

### 1. CONSTITUTION.

**When duly Constituted.]**—A building society is duly constituted, and is entitled to all the advantages conferred upon such societies, from the time when the certified rules are framed, and not from the date of the certificate. *Williams v. Hayward*, 22 Beav. 220; 25 L. J., Ch. 289; 1 Jur., N. S. 128.

**Power of Lending Money.]**—A building society may lend money upon mortgage security to one of its own members, and such security will be within 10 Geo. 4, c. 56, s. 21, and therefore vested in the trustees or treasurer for the time being. *Morrison v. Glover*, 4 Ex. 430; 19 L. J., Ex. 20.

A member of a building society may hold shares exceeding 100l. in value. *Ib.*

By a rule of a society, if the committee is satisfied that the premiums offered by any member to whom shares have been awarded are a sufficient security, they are to direct the trustees to pay to such member the money he is entitled to receive, on his executing a deed in trust to sell, or other valid conveyance, mortgage, or assurance:—Held, that the society might lend money on mortgage to its own members, as well as to strangers. *Cutbill v. Kingdom*, 1 Ex. 494; 17 L. J., Ex. 177.

**Power of Borrowing Money.]**—The directors of a building society, the rules of which gave no power to borrow money, borrowed a sum of money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a petition for an order to wind up the company:—Held, that the transaction was ultra vires, and that the petitioner had no legal or equitable debt against the company, and the petition was accordingly dismissed. *National Permanent Benefit Building Society, In re, Williamson, Ex parte*, 5 L. R., Ch. 309; 22 L. T. 284; 18 W. R. 338.

A building society has no power to borrow except for the purposes and to the extent specified in its rules. *Moye v. Sparrow*, 22 L. T. 154; 18 W. R. 400.

The officers of a building society have no power to deposit the mortgages held by it as security for a loan from its bankers. *Ib.*

The persons who authorize are jointly liable with those who actually give a security for an improper loan. *Ib.*

Though bankers are also treasurers of a building society, an account will not be decreed against them if their pass-book has been in-

spected and approved in the usual manner as between banker and customer. *Ib.*

A rule of a building society authorizing the borrowing of money by the society to an unlimited amount is illegal under 6 & 7 Will. 4, c. 32. *Victoria Permanent Benefit Building Investment and Freehold Land Society, In re, Hills' Case, Jones' Case*, 9 L. R., Eq. 605; 39 L. J., Ch. 628; 22 L. T. 777; 18 W. R. 967.

The rules of a society contained no express power of borrowing money, but provided that "persons merely joining the society to invest or deposit money" should not be entitled to vote at meetings, nor be called upon to serve any office, and that "investors not in the building branch" might withdraw their deposits on giving a month's notice, if no other time was agreed upon when the deposits were made, and should be entitled to interest on all moneys which should have been in the hands of the society more than one month. The rules also provided that any member having received advances on his shares should be held as legally discharged from all connection with the society as soon as he had discharged all subscriptions and moneys due from him on account of his shares, according to the rules. The directors received money on deposit from persons who did not subscribe for shares in the society, and gave to each depositor a book which contained printed rules purporting to be rules of the deposit branch, one of which provided that the general rules of the society should be binding on all persons who might make deposits. The society was wound up, and the advanced shareholders, under an order in the winding-up, redeemed their shares:—Held, that the rules of the society, if and so far as they authorized borrowing money on deposit, were illegal, as no limit was fixed to the amount which might be borrowed; and that the depositors were not entitled to have a call made upon the members for the repayment of their deposits. *Ib.*

Held, also, that the rules did not authorize the borrowing of money from persons who were not members of the society, and that the depositors were bound by the rules of the society, by which the advanced shareholders who had redeemed their shares were discharged from all connection with the society; and, consequently, on that ground also were not entitled to have a call made on the advanced shareholders for the repayment of their deposits. *Ib.*

The objects of a building society on the permanent principle, as stated in its certified rules, were to raise a fund for the purpose of enabling its members to purchase freehold land or other real or leasehold estate, to erect suitable cottages and other buildings thereon, to provide the means for the profitable investment of small savings, and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their shares at the time of death. The rules contained no borrowing power, but in 1867 an alteration in the rules, giving the directors "power from time to time to borrow for the purposes of the society such sums and at such rates of interest and under such terms and conditions as they might think proper and expedient," was certified by the barrister:—Held, that the borrowing power conferred by this altered rule was strictly limited to the purposes of the society as stated



in the 1st rule, and that persons who had lent money to the directors, which was employed in a loan to another society, could not enforce their claim under the winding-up of the society. *Durham County Permanent Investment, Land, and Building Society, In re, Duris's case, Wilson's case*, 12 L. R., Eq. 516; 41 L. J., Ch. 124; 25 L. T. 83.

A loan to a building society was secured by the promissory note of the trustees, and by a deposit of the mortgage deeds executed by members of the society:—Held, that the official liquidator was not entitled, without payment of the money advanced, to deprive the lender of his securities. *Ib.*

— **Society not authorized to borrow—Overdrawing Banker's Account—Lien.**—A benefit building society which had no power to borrow money, were permitted by their bankers to overdraw their account to a large amount; and in 1876 a memorandum of agreement was signed by the officers of the society and confirmed by the directors, stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody but as a security for the balance from time to time due. In 1881 an order for winding up the society was made, and the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was advanced by the bankers; but the solicitors on both sides signed an admission that some part was applied in payment of members withdrawing from the society and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property:—Held, that the overdrawing of the bankers' account was ultra vires, being a borrowing unauthorized either by the rules or the objects of the society, and therefore that the bankers had no lien on the deeds either under the agreement or by the course of dealing with the society; but that they were entitled to hold the deeds as a security for such part of the money advanced by them as had been applied in payment of the debts and liabilities of the society properly payable and had not been repaid to the bankers; but that in ascertaining what had been so applied the bankers could not rely on the rule in *Clayton's case* (1 Mer. 572). *Blackburn Building Society v. Cunliffe*, 22 Ch. D. 61; 52 L. J., Ch. 92; 48 L. T. 33; 31 W. R. 98—C. A.

Held, also, that the admission by the solicitors of the society that some part of the money had been applied in payment of lawful expenses was sufficient to entitle the bankers to a declaration and an inquiry as to the amount so applied. *Ib.*

**Extension of Business.**—When a plaintiff alleged in a bill misconduct against the directors of a building society in extending the business of the society to that of a bank of deposit, but did not state when the extension was made, and prayed no relief on the ground of the alleged misconduct, the court, on demurrer, treated the allegation as immaterial. *Thompson v. Planet Benefit Building Society*, 15 L. R., Eq. 333.

**Purchase of Lands by.**—A registered benefit building society, having employed its funds in the purchase of an estate, a member, to whom a portion of the estate had been allotted, subse-

quently refused to pay the amount of fines and subscriptions due from him, upon the ground that, in making such purchase, the society had acted ultra vires, and had in consequence ceased to exist. A. was aware when he took shares in the society that one of its objects was the purchase of land. An award having been made against him, in pursuance of 10 Geo. 4, c. 56, s. 27:—Held, that the misapplication (if any) of the funds had not the effect of putting an end to the society; that such misapplication might be remedied by a court of equity; and that, therefore, justices had jurisdiction, under 10 Geo. 4, c. 56, s. 27, to enforce compliance with the award. *Hughes v. Layton, or D'Eyncourt*, 4 B. & S. 820; 35 L. J., M. C. 89; 10 Jur., N. S. 513; 9 L. T. 712; 12 W. R. 408.

A building society is not precluded from investing its funds in the purchase of a real estate. *Mullock v. Jenkins*, 14 Beav. 628; 21 L. J., Ch. 63.

A society whose rules are certified as a benefit building society is not justified in acting as a freehold land society. *Grimca v. Harrison*, 26 Beav. 435; 28 L. J., Ch. 823; 5 Jur., N. S. 528; 33 L. T., O. S. 115.

A rule of a building society directed that un-employed money should be invested "in such a manner and upon such legal security" as the board of directors should deem necessary:—Held, that it might be invested in the purchase of freeholds. *Ib.*

**Transactions with Members.**—In support of an avowry by G. for a distress for rent due under a demise to L., at a yearly rent of 200*l.*, a deed was given in evidence, whereby L., a member of a building society, assigned to G. and others, trustees thereof, a lease of premises, as security for the monthly contributions payable in respect of his shares, and agreed to become tenant to the trustees of the premises, thenceforth, during their will, at the net yearly rent of 200*l.*, payable quarterly, subject to a power of re-entry for non-payment, and to all usual covenants in leases of the like property; and it was declared that the assignment should not be for security for a greater sum than 840*l.*:—Held, that this did not amount to a demise to the trustees, at a yearly rent of 200*l.*, so as to support the avowry; for that, if it did, L. must be deemed to have contracted to pay his contributions, and rent of 200*l.* a year as well, which was contrary to the intention of the parties. *Walker v. Giles*, 6 C. B. 622; 18 L. J., C. P. 323; 13 Jur. 753.

Trustees of a building society purchased a piece of freehold land. The conveyance was executed by the vendor, who signed a receipt for the purchase-money. Only one-fourth of the purchase-money was in fact paid, and the conveyance was retained in the possession of the vendor, the trustees agreeing to execute a legal mortgage, if required so to do, the vendor in the meantime to have an equitable charge thereon. Immediately after the conveyance, the land was allotted to the members of the society, who, without inquiring into the title, paid their purchase-money, and took a conveyance of their lots. The trustees failing to pay the balance of the purchase-money, the vendor filed a bill against the allottees of the land and their several sub-purchasers. A decree was made for payment by the allottees of the balance of the purchase-money, otherwise the estate to be sold; in case any of the allottees redeemed the plaintiff, the

others to contribute towards the money paid for redemption, otherwise their portions of the land to be sold to discharge what was due in respect thereof. *Peto v. Hammond*, 30 Beav. 495; 31 L. J., Ch. 354; 8 Jur., N. S. 550.

Members of a building society, and purchasers claiming through them, are bound, as in a case of other purchasers of land, to examine into the title; and if the trustees, from whom they take their conveyance, do not give a good title, they are affected with all the consequences. *Ib.*

**Certificate of Incorporation—Power of Court to declare Certificate Void.**—The court has no power to declare the certificate of incorporation of a building society, given by the registrar under the provisions of the Building Societies Act, 1874, void on the ground that it has been obtained irregularly. *Glover v. Giles*, 18 Ch. D. 173; 50 L. J., Ch. 568; 45 L. T. 344; 29 W. R. 603.

**Bankruptcy of Treasurer—Priority.**—A benefit building society is not entitled, on the bankruptcy of its treasurer, to priority over the other creditors. *Bailey, Ex parte*, 5 De G., Mac. & G. 380; 23 L. J., Bk. 36; 18 Jur. 988.

**Rules—Validity of.**—The principal and interest of a mortgage debt lent by a building society was payable by equal instalments. By the rules of the society incorporated in the mortgage, there was a fine of a shilling per month per pound on all instalments due and unpaid:—Held, first, that the rule was not void as being unreasonable. *Parker v. Butcher*, 3 L. R., Eq. 762; 16 L. J., Ch. 552.

Held, secondly, that the fines were not interest in the way of a penalty for unpunctual payment, against which a court of equity would relieve. *Ib.*

A rule empowering the trustees of a building society to borrow a limited amount of money for the purposes of the society is not illegal. *Laing v. Reed*, 5 L. R., Ch. 4; 18 W. R. 76.

The certificate of the barrister appointed to certify rules under 6 & 7 Will. 4, c. 32, is not conclusive as to the legality of a rule. *Ib.* See further *Guardian Permanent Building Society, In re, post*, col. 1939.

## 2. LIABILITY OF DIRECTORS AND OFFICERS.

**Directors—Borrowing Money against Rules of Society.**—A person lent 70*l.* to a building society, and received a receipt signed by two directors of the society, certifying that he had deposited 70*l.* with the society for three months certain, to be repaid with interest after fourteen days' notice. The society was formed under 6 & 7 Will. 4, c. 32, and had no power to borrow money; and the lender being unable to get her money back from the society, sued the two directors:—Held, that they were liable to the lender in damages for a breach of warranty of authority, they having, by signing the receipt, in effect represented that they had authority to make a binding contract of loan on behalf of the society, and so induced her to part with her money. *Richardson v. Williamson*, 6 L. R., Q. B. 276; 40 L. J., Q. B. 145.

**Deposits against Rules of Society.**—The directors of a building society deposited money, in a manner unauthorized by its rules, with a finance company, the manager of which was also

manager of the building society. Afterwards the deposit was called in, and the directors of the finance company gave a cheque for the amount to their manager, to be paid by him to the building society. He appropriated it to his own use. A bill was afterwards filed by the trustees of the building society to recover the money from the finance company:—Held, that the manager held the money as agent for the finance company until he should pay it to some person competent to give a receipt on behalf of the building society; and that as he never had paid it over, the money must be taken to be still in the hands of the finance company, who was liable to repay it to the building society. *Hardy v. Metropolitan Land and Finance Company*, 7 L. R., Ch. 427; 41 L. J., Ch. 257; 26 L. T. 407; 20 W. R. 425. Reversing 12 L. R., Eq. 386.

Held, also, that as it was trust money a suit to recover it was maintainable, and the finance company was accordingly ordered to repay the money, with interest. *Ib.*

**Deposits or Loans in excess of Limits prescribed by the Act.**—By sect. 15 of the Building Societies Act, 1874, any society under the act may receive deposits or loans at interest from the members or other persons within the limits provided by the section; and in a terminating society the total amount so received on deposit or loan and not repaid may either be a sum not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force. By s. 16 the rules of every society shall set forth whether the society intends to avail itself of the borrowing powers contained in the act, and if so within what limits not exceeding the limits prescribed by the act. By s. 43, if any society receives loans or deposits in excess of the limits prescribed by the act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess. Where by the rules of a terminating society the amount to be received upon deposit or loan was limited to an amount not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members:—Held, in an action against the directors under s. 43, that they were personally liable in respect of sums received by the society on deposit or loan in excess of the limit prescribed by the rules, notwithstanding that the amount received on deposit or loan did not exceed the other of the alternative limits prescribed by s. 15. *Looker v. Wrigley*; *Leigh v. Wrigley*, 9 Q. B. D. 397; 46 J. P. 758.

**Overdrawn Banking Account, whether a "Loan" within Building Societies Act.**—Held, also, that a loan at interest to the society from its bankers, secured by deposit of title-deeds, and made by allowing the society to overdraw its account at the bank, was a "loan" within the meaning of sect. 15. *Ib.*

**On holding out Agent as authorized to borrow Money in excess of prescribed Limit.**—By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were

made to the society through its secretary in accordance with advertisements, issued with the authority of the directors, that such loans might be so made by bringing the money to the office of the secretary. In each case a receipt was given by the secretary for the money as a loan to the society, with a written undertaking by him "to procure the promissory note of the directors for the loan," and afterwards, in pursuance of such undertaking, the receipt was exchanged for such note, which always bore the date of the receipt. After an amount had been so borrowed, exceeding the limit prescribed by the rules, the plaintiffs, who had on several previous occasions lent money to the society according to the above mode, paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory note of the directors was ever afterwards given, and the secretary absconded, appropriating that sum, with other moneys of the society, to his own use. In an action against the society and directors, the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:—Held, that such finding was bad in point of law as against the society, and that, as the limit for borrowing, prescribed by the rules, had been exceeded when the loan was made by the plaintiffs, the society, which had derived no benefit, was not liable for such loan. *Chapleo v. Brunswick Permanent Building Society*, 6 Q. B. D. 696; 50 L. J., Q. B. 372; 44 L. T. 449; 29 W. R. 529—C. A.

Held (*Bramwell, L. J.*, doubting), that although there was no fraud on the part of the directors they were personally liable to the plaintiffs for the money which had been so advanced. *Ib.*

— **On Orders given by Secretary.**—A benefit building society is bound by orders for necessary repairs given by the secretary, though not sanctioned by the number of trustees required by the rules for transacting the ordinary business of the company, or entered in the minute-book. *Allard v. Bourne*, 15 C. B., N. S. 468.

— **To Surveyor of Society.**—A. was a surveyor of a building society, the object of which was to advance money to its members to enable them to buy or build houses, but not itself to buy or build. By one of the rules of the society, the surveyor was to look only to the funds of the society for his compensation. By resolutions at general meetings, at which the directors were present, the surveyor was directed to prepare plans for houses which the society was building, the compensation being a per-centage upon the outlay. Upon the society becoming insolvent, the surveyor sued one of the directors for this per-centage:—Held, that the surveyor was bound by the rules of the society to seek his compensation from the funds of the society solely. *Alexander v. Worman*, 6 H. & N. 100; 30 L. J., Ex. 198; 3 L. T. 477.

— **On Promissory Note.**—A note was made in the following form: "Midland Counties Building Society, Birmingham, March 12, 1858. Two months after demand, in writing, we promise to pay to T. P. 100*l.* W. H. and J. T., trustees; W. F., secretary":—Held, that the parties who signed the note were personally liable upon it,

and that the right of the holder to sue them was not affected by 6 & 7 Will. 4, c. 32, and 10 Geo. 4, c. 56, s. 21. *Price v. Taylor*, 5 H. & N. 540; 29 L. J., Ex. 381; 6 Jur., N. S. 402.

A promissory note in this form: "On demand we promise to pay Mr. James Allan 200*l.*, value received for the Second Gateshead Provident Benefit Building Society, and interest thereon at 5 per cent. per annum, payable half-yearly," signed thus: "G. M., C. D. G., J. N., trustees: T. N., secretary":—Held, that the trustees were personally liable on the note. *Allan v. Miller*, 22 L. T. 825.

— **On Purchases of Land.**—Directors of a building society had power to invest unemployed moneys in the purchase of freeholds. Having only 621*l.* in hand, they contracted for the purchase of an estate for 2,300*l.*, payable by instalments. In the treaty they held themselves out as a land society, and they paid 800*l.* on account, in cheques signed, by their order, by the trustees, who were not directors:—Held, first, that the directors had committed a breach of trust, and were liable to replace the 800*l.* *Grimes v. Harrison*, 26 Beav. 435; 28 L. J., Ch. 823; 5 Jur., N. S. 528.

Held, secondly, that the vendor was under no liability. *Ib.*

Held, thirdly, that the trustees, who had only acted ministerially, under the directors, were not liable, notwithstanding there was some informality in the authority given to them by the directors. *Ib.*

A society was enrolled as a benefit building society; its rules did not indicate an intention that it should act as a benefit freehold land society. The directors bought land, and mortgaged it, to secure money borrowed for the purchase, and certain members, acting as trustees, covenanted to pay the mortgage debt, and under that covenant they had to pay money. It did not appear that every member acquiesced in or was even cognizant of the transaction:—Held, that the act of the directors and trustees was ultra vires, and the trustees could not compel contribution among the shareholders to recover their loss. *Kent Benefit Building Society, In re*, 1 Drew. & Sm. 417; 30 L. J., Ch. 785; 7 Jur., N. S. 1045; 4 L. T. 610; 9 W. R. 686.

Unless a transaction by the committee, which is beyond the rules of the society, is authorized by each individual member, it cannot, as between the committee and the society, bind the society. *Ib.*

**Officers.**—The members of a society whose rules have been duly confirmed according to 10 Geo. 4, c. 56, have no right to compel the secretary, or other chief officer of the society, to sign a notice to convene a general meeting for the purpose of considering the question of altering the rules of the society, but such officers have a discretionary power to give or withhold their signatures to any such notice. *Reg. v. Bannistyne*, 20 L. J., Q. B. 210.

By the rules of a building society, all matters in dispute should be referred to two justices of the peace:—Held, on motion for a *mandamus* to the judge of a county court to proceed and hear a plaint brought by one of the members against the officer of the society, that the jurisdiction of the county court did not extend to any disputes arising between the members of any such society.

*Payne, Ex parte*, 5 D. & L. 679; 18 L. J., Q. B. 197; 13 Jur. 634.

— **To replace Money Stolen from.**—A treasurer of a building society is only a bailee of moneys which he receives on account of the society, and does not become a debtor to the society; and consequently where he is robbed of the society's moneys, he is discharged from liability to repay the amount by the robbery. *Walker v. British Guarantee Association*, 18 Q. B. 277; 21 L. J., Q. B. 257; 16 Jur. 885.

— **Liability of Deceased Officer's Estate.**—The secretary and manager of a building society, established and certified under 6 & 7 Will. 4, c. 32, with rules providing for the inspection and auditing of its officers' accounts, having as such officer obtained possession of moneys of the society and misappropriated them, and having died insolvent:—Held, that his estate was liable under 4 & 5 Will. 4, c. 40, s. 12, to discharge the claim of the society for the moneys so misappropriated in priority to the claims of the other creditors; and that the negligence of the society in not examining and auditing his accounts as prescribed by the rules was no bar to the claim. *Marriott, In re, Moors v. Marriott*, 7 Ch. D. 543; 47 L. J., Ch. 331; 26 W. R. 626.

### 3. RELATIONS BETWEEN SOCIETIES AND THEIR MEMBERS.

#### a. Stamps.

**On Drafts.**—The rules of a building society enabled members after twenty-eight days' notice to withdraw their shares, in the order of the notices, as the society had money in hand enough to pay. The withdrawal was effected by drafts payable to bearer furnished by the society, and signed by the member. Members holding uncompleted shares might in the same way withdraw any part of their money. Such drafts were usually paid a few days after the notice of withdrawal. Drafts payable to bearer were also sent by the society for signature to those members entitled to interest on their shares. The society did not purchase land, but merely advanced money on mortgage:—Held, that these drafts were liable to stamp duty as cheques or orders for the payment of money, and were not within the exemption in 10 Geo. 4, c. 56, s. 37, which is to be regarded as limited to drafts or orders drawn by an officer of the society for its purposes, or by a member of the society payable to himself only. *Att.-Gen. v. Gilpin*, 6 L. R., Ex. 193; 40 L. J., Ex. 134; 19 W. R. 1027.

**On Mortgage Deed.**—A mortgage to the trustees of a building society by a stranger to secure the repayment of money advanced to him out of the surplus funds, was exempt from stamp duty. *Thorn v. Croft*, 36 L. J., Ch. 68; 3 L. R., Eq. 193; 15 L. T. 205; 15 W. R. 54.

A mortgage given to a building society by one of its members, to secure the payments to become due upon his shares, is exempt from stamp duty. *Walker v. Giles*, 6 C. B. 662; 18 L. J., C. P. 323; 13 Jur. 588; *S. P., Barnard v. Pilsworth*, 6 C. B. 698, n.

A building society took a mortgage from a member before its rules had been certified and deposited. These formalities having afterwards

been complied with:—Held, that the deed was exempt from stamp duty. *Williams v. Hayward*, 22 Beav. 220; 25 L. J., Ch. 289; 1 Jur., N. S. 128.

**On Receipts.**—The secretary of a building society received 12*l.* from K., and gave an unstamped receipt for that amount. The sum mentioned was paid for rent of a cottage and premises. K. had been the occupier of the cottage and premises as tenant to the owner, who, being a duly inrolled member of the society, had mortgaged it to the trustees of the society as security for an advance made to him out of the funds of the society. The mortgage deed contained a provision that, if three of the monthly subscriptions should be in arrear, the trustees might enter into possession of the mortgaged property or the receipt of the rents. At the time when the receipt was given the mortgage was in force, and the member had made default in the payments by the deed covenanted to be made by him to the trustees, who had entered into the receipt of the rents, and K. had attorned tenant to the trustees:—Held, that the receipt was liable to stamp duty, and was not exempt by reason of the provisions contained in 10 Geo. 4, c. 56, s. 37, and 6 & 7 Will. 4, c. 32, s. 4. *Att.-Gen. v. Phillips*, 24 L. T. 832; 19 W. R. 1146.

#### b. Mortgages.

**Members' Qualification to Vote.**—The monthly payments secured by mortgage to the trustees of a building society constitute a charge upon the estate within 8 Hen. 6, c. 7. *Copland v. Bartlett*, 6 C. B. 18; 18 L. J., C. P. 50.

A member of a building society purchased land of the yearly value of 6*l.*, and mortgaged it to the society for 84*l.* 14*s.* By the rules of the society he was bound to pay the annual sum of 11*l.* 14*s.*, of which the sum of 8*l.* 18*s.* was appropriated in part liquidation of the mortgage debt, 6*s.* for incidental expenses of the society, and 2*l.* 10*s.* for interest due on the principal remaining unpaid. By the mortgage deed, a power was reserved to the society, in case of neglect to fulfil the covenants therein, to receive the rents, sell the premises, and retain all moneys due or to become due to the society:—Held, that the entire sum of 11*l.* 14*s.* must be deducted from the annual value of the estate, and that therefore he had not an estate worth 40*s.* a-year, within 8 Hen. 6, c. 7, and 6 & 7 Vict. c. 18, s. 74, and was not entitled to a vote for a county. *Beamish v. Stoke*, 2 Lutw. Reg. Cas. 189; 11 C. B. 29; 21 L. J., C. P. 9; 16 Jur. 597.

A member of a building society purchased freehold land of the society, in which he held one share. The society advanced the purchase-money of the land, the member mortgaging the land as a security. The member was bound to make monthly payments to the society, which amounted annually to 4*l.*, and upon his failure to do so, the society might re-enter and take possession of the land. The land would have been clear of all payments when the member had paid instalments to the amount of 73*l.*, of which he had paid 71*l.* on the 31st of January, 1863. The annual value of the property unincumbered was 3*l.*:—Held, that the member had an interest of the clear yearly value of 40*s.*, and

was entitled to vote as a freeholder. *Robinson v. Dunkley*, 15 C. B., N. S. 478; 1 H. & P. 1; 33 L. J., C. P. 57.

**By Executors.**—An executor effected a mortgage of leasehold property, for executorship purposes, with a power of sale, to a building society, to secure the repayment of the money advanced, as well as all fines, premiums, and interest on certain advanced shares in the society, taken by the executor for the purpose of obtaining the loan:—Held, that the executor might legally effect a mortgage with power of sale and with the incidents of a building society mortgage on advanced shares. *Cruikshank v. Duffin*, 13 L. R., Eq. 555; 41 L. J., Ch. 317; 26 L. T. 121; 20 W. R. 354.

**Costs.**—A building society made an advance on mortgage of 900*l.*, to be repaid with interest by 120 monthly payments. These payments, as well as the payment of certain fines, were, under the rules of the society, secured by the mortgage deed. A sum of 300*l.* became due to the society for such fines beyond the amount due for principal. The sum due to the society was found on taking the accounts to be about 517*l.* The master allowed costs on the lower scale only:—Held, that he was right. *Cotterell v. Stratton*, 9 L. R., Ch. 514; 43 L. J., Ch. 573; 30 L. T. 589; 22 W. R. 607.

On an ordinary taxation the master had disallowed the costs of a deed of re-conveyance from a benefit building society of property in a registered county, thinking that a receipt was sufficient under 6 & 7 Will. 4, c. 32, s. 2. The decision was reversed by the court. *Page, In re*, 32 Beav. 485.

A member of a building society mortgaged leaseholds to the society to secure an advance, which was to be repaid by monthly instalments. The payments being in arrear, the society entered into possession. The mortgagor disputed the amount claimed by the society, but offered to deposit the amount claimed till the accounts were settled. The society then gave notice of its intention to sell, whereupon the mortgagor filed a bill for redemption, and for an injunction to restrain the sale. In taking the accounts, it was found that a smaller sum than that claimed was due to the society:—Held, that the society was entitled to costs, of which a mortgagee will be deprived only when he has been guilty of vexatious and oppressive conduct. *Cotterell v. Stratton*, 8 L. R., Ch. 295; 42 L. J., Ch. 417; 28 L. T. 218; 21 W. R. 234.

**By One of Three Trustees to other Two.**—A mortgagor, being one of three trustees of the society, executed the mortgage to the other two, one of whom subsequently resigned, and a successor was appointed:—Sembles, that the interest of the original mortgagees vested, without assignment, in the remaining trustee and the successor, exclusively of the mortgagor. *Walker v. Giles*, 6 C. B. 662; 18 L. J., C. P. 323; 13 Jur. 588.

**Covenant to consolidate Mortgages in Rules.**—A. mortgaged two leasehold plots of land, and the houses in course of erection thereon, to a building society to secure 500*l.* On the same day he executed a second mortgage of the same property to B. Subsequently A. mortgaged three other plots of land and houses to the society to

secure 600*l.* B. had a charge on this property. The first mortgage contained a covenant by A. to observe all the rules of the society. One of such rules provided that if the society held more than one mortgage from any member, such member should not have power to redeem one property alone without the consent of the board. B. acted as A.'s solicitor in the matter of the first mortgage, and was the witness to his execution thereof. A. having become bankrupt, and the society having taken possession of all the houses, B. brought a redemption action. The society claimed to consolidate their mortgages as against him:—Held, that the covenant to observe the rules amounted to an express covenant that the society should have power to consolidate, and B. having notice of that covenant had expressly taken his mortgage subject to the risk of consolidation, and that the society had a right to consolidate. *Andrews v. City Permanent Benefit Building Society*, 44 L. T. 641.

**Retaining Proceeds of Sale.**—A member of a permanent building society obtained an advance in respect of his shares on his executing a mortgage in the form prescribed by the rules, by which he was to pay the principal and interest at 5*l.* per cent. by monthly subscriptions, extending over seven years. The deed contained a power of sale by the trustees of the society in case of default in payment of the subscriptions, and it was declared that the trustees should retain out of the purchase-money, after payment of expenses, "all such subscriptions, fines, and other sums of money and payments which should be then due, or which should afterwards become due, in respect of the shares during the remainder of the period of seven years, it being agreed that in case of any such sale all the moneys which would at any time afterwards become due from the mortgagor in respect of the shares, according to the rules of the association, should be considered as then immediately due and payable, and should pay the residue of the purchase-money to the mortgagor." The mortgagor paid a few of the subscriptions and then fell into arrear, and the mortgaged property was sold by the trustees:—Held, that the trustees of the society were entitled to retain out of the proceeds of the sale all subscriptions and fines payable up to the time of the completion of the sale, and such further sum as represented the balance of the principal sum remaining at that time unpaid, but that they were not entitled to any payment in respect of interest accruing after the principal had been all repaid. *Osborne, Ex parte Goldsmith, In re*, 10 L. R., Ch. 41; 44 L. J., Bk. 1; 31 L. T. 366; 23 W. R. 49. But see *Matteron v. Elderfield*, 4 L. R., Ch. 207; 20 L. T. 503.

**Foreclosure.**—A building society is entitled to a foreclosure of mortgages to members made in respect of their shares, although the deeds and rules contain only powers of sale in case of default in payment of subscriptions. *Ingelby v. Riley*, 28 L. T. 55.

A decree for foreclosure in such a case properly includes an account of all subscriptions "due and owing and payable, and hereafter to become due and owing and payable," and an account of the mortgagor's share of profits made by the

society, if the rules provide for their distribution. *Ib.*

Fines secured by covenant in a mortgage to a building society form part of the principal in taking the account of principal, interest, and costs in a foreclosure suit by the building society, and are payable with interest. *Provident Permanent Building Society v. Greenhill*, 9 Ch. Div. 122; 38 L. T. 140; 27 W. R. 110.

The form of foreclosure decree in the case of a mortgage to a building society does not differ from that in the case of an ordinary mortgage. *Ib.*

Property was conveyed by a member of a building society to the trustees, on trust for sale, to secure the moneys due to the society:—Held, that the trustees were not entitled to a foreclosure, but to a decree for sale. *Seewitzer v. Mayhew*, 31 Beav. 37.

— **Charge upon "all the Funds, Assets, and Effects of the Society."**—The defendants were an incorporated society established under the Building Societies Act, 1874. The directors being empowered by the rules of the society to borrow money, accepted a loan from the plaintiff, giving as security a bond, by which it was declared that "all the funds, assets, and effects of the society shall be held liable for the repayment." The defendants failing to repay the loan, the plaintiff sued them on the bond, and having recovered judgment, commenced an action of foreclosure in the Court of Chancery, which action was pending when a petition was filed in the county court, and an order was made for the winding up of the defendant society. The county court judge having refused to grant the plaintiff leave to continue the action of foreclosure:—Held, that the action of foreclosure ought not to be allowed to proceed, for that the society did not amount to a mortgage. *Andrew or Jones v. Swansea Cambrian Benefit Building Society*, 50 L. J., Q. B. 428; 44 L. T. 106; 29 W. R. 382; 45 J. P. 507.

**Effect of Statutory Receipt as to vesting Legal Estate.**—When the legal estate in land has been vested in a building society as mortgagees, and the society, on being paid off, indorses a receipt on the mortgage deed, as provided by s. 42 of the Building Societies Act, 1874, the effect of the receipt is to vest the legal estate in the person who in equity is best entitled to call for it, and not necessarily in the person who actually paid off the society. Thus, where there are successive equitable mortgages, and the society is paid off by the mortgagor, the effect of the statutory receipt is to vest the legal estate in the equitable mortgagee who is first in point of time; unless the society is paid off by an equitable mortgagee who had no notice of prior incumbrances, in which case the legal estate vests in that mortgagee, notwithstanding that there are incumbrances prior to his in point of date. *Pease v. Jackson* (3 L. R., Ch. 576) considered; *Fourth City Mutual Benefit Building Society v. Williams, Marson v. Cox*, 14 Ch. D. 140; 49 L. J., Ch. 245; 42 L. T. 615; 28 W. R. 572.

A., having made a lease of lands to B. for a term of years, the latter, for the purpose of obtaining a loan, mortgaged the lands to a building society, and having subsequently applied to A. for a further loan, for the purpose of paying

off the money advanced by the society, and A. having agreed to lend, upon the security of the premises, a memorandum of agreement was indorsed upon the deed of mortgage, whereby B. purported to transfer to A. the premises in consideration of a loan of 100l., A. agreeing to accept the mortgage. This memorandum was signed by both parties, but was not under seal. The trustees of the society subsequently indorsed upon the mortgage deed a receipt for the money secured thereby:—Held, that the receipt of the trustees, so indorsed, was effectual under 6 & 7 Will. 4, c. 32, s. 5, to pass the legal estate to A., although the memorandum of agreement was not under seal. *Stamers v. Preston*, 9 Ir. C. L. R. 351.

Some property was mortgaged to a building society, and afterwards to A. The mortgagor borrowed money from B., to pay off the building society, and a receipt was indorsed on the mortgage. Fourteen days afterwards the mortgagor executed a new mortgage to B.:—Held, that the legal estate vested, under 6 & 7 Will. 4, c. 32, in A., and not in B. *Prosser v. Rice*, 28 Beav. 68.

A member of a building society executed a mortgage to the trustees of the society for securing subscriptions and other moneys due in respect of his shares. He afterwards executed a second mortgage to P., and then J., without notice of the second mortgage, paid off the mortgage to the building society, and received from them the original mortgage deed, with a receipt indorsed, and the other title-deeds of the estate, and at the same time the member executed a mortgage to J. for a sum slightly exceeding the money so paid off:—Held, that the operation of 6 & 7 Will. 4, c. 32, s. 5, was to vest the legal estate in J., as the person entitled to the equity of redemption, and that he was the first incumbrancer in respect of the mortgage money paid. *Pease v. Jackson*, 3 L. R., Ch. 576; 37 L. J., Ch. 725; 17 W. R. 1.

Held, secondly, that he was not entitled to tack his further advance against P., the second incumbrancer. *Ib.*

A. being possessed of houses held by two underleases borrowed money from a building society, and in order to secure repayment demised the houses to the society by two leases, each ten days short of the term out of which it was derived. A. afterwards obtained an assignment of the lease which had been granted to his own lessor, and then, concealing the mortgage of the underleases, mortgaged the houses to B. for a term one day short of the original lease. Subsequently C. paid off the building society and made a further advance to A., C. at the same time took from the building society a receipt in conformity with 6 & 7 Will. 4, c. 32, and from A. two leases similar to those which had been granted to the building society. B., on discovering C.'s mortgage, commenced an action of ejectment against A. & C. for breaches of covenants contained in the leases to C.:—Held, that the action must be restrained, C. being entitled to priority over B. in respect of the sum paid to the building society, though not in respect of the further advance. *Lawrence v. Clements*, 31 L. T. 670.

**Powers of Distress.**—On a mortgage of premises to secure repayment of money advanced by a building society, it was agreed that upon non-payment the trustees of the society might distress for the amount in arrear as for rent in

arrear upon a common demise. The mortgagor took possession of the premises with the consent of the trustees, but afterwards let them for three years at a quarterly payment, without the consent of the trustees, and the lessee had no knowledge of the mortgage. The mortgagor's payment and the lessee's rent were in arrear, and the trustees distrained upon the lessee's goods:—Held, that the trustees of the society were not justified in distraining. *Gibbs v. Cruikshank*, 28 L. T. 104.

By a deed between T., proprietor of shares in a building society, and the trustees of the society, reciting that T. had, pursuant to the rules of the society, agreed to pay unto the society, for the term of fourteen years, the quarterly sum of 16l. 3s. 2d. in respect of his shares, and that for securing the quarterly payments he had agreed to execute the security intended to be effected by that deed, T. conveyed a house of which he was seised in fee to the trustees in fee. The deed contained a proviso for quiet enjoyment by T. if he paid the quarterly sums, and observed the rules of the society and the covenants in the deed; but that in case he made default, the trustees might enter and lease or sell the house, and out of the proceeds retain the amount of payments in arrear, and pay the surplus, if any, to T.; and a clause by which T. agreed to become tenant of the house to the trustees, their heirs or assigns, or other the trustee or trustees for the time being of the society thenceforth during their will, at the clear net yearly rent of 66l., payable on the usual quarterly days, subject to the powers of distress and entry for non-payment, and to all usual remedies as in leases of like property. T. died, leaving payments in arrear; the trustees distrained upon the goods in the house, which was in the occupation of his widow, who subsequently took out administration:—Held, that the tenancy under the mortgage being at most only a tenancy at will, the distress was not made during the possession of the tenant from whom the rent became due within the proviso in 8 Ann. c. 4, s. 7, and therefore was not justified under s. 6. *Turner v. Barnes*, 2 B. & S. 435.

**Incorrect Recitals.**—The surveyor to a building society purchased land from the trustees of the society, and then mortgaged it to the trustees to secure the purchase-money. The mortgage, which was a filled-up printed form prepared by the society's solicitor, recited that the surveyor was the holder of eleven shares in the society, whereas he had never applied for shares, nor had he in fact ever been treated by the society as a shareholder. He did not read over the deed, nor were its contents explained to him by the society's solicitor prior to execution. The society having been ordered to be wound up, he was placed on the list of contributories:—Held, that as the recital was incorrect, and as he was ignorant of its existence at the time he executed the deed, he was not liable as a contributory. *Victoria Permanent Benefit Building Investment and Freehold Land Society of Birmingham and the Midland Counties, In re, Empson's case*, 9 L. R., Eq. 597; 22 L. T. 855; 18 W. R. 565.

**Assignment by Mortgagor, "Subject to the Mortgage to the Building Society"—Effect of.**—A member of a building society received an advance from the funds of the society, and deposited the lease of his land with the trustees as

security for repayment, at the same time signing an agreement to execute a mortgage. He afterwards executed a mortgage to the trustees containing a power of sale, under which they sold the property for the remainder of the term. Previously, however, to the execution of the mortgage, the mortgagor assigned the premises, "subject to the mortgage to the building society," to the defendant for valuable consideration, who thereby became possessed of the legal estate:—Held, that the defendant must be taken to have had notice that the mortgage would contain a power of sale, and he was declared to be trustee of the property for the plaintiff. *Leigh v. Lloyd*, 2 De G., J. & S. 330.

**Liability of Members to New Rules.**—A building society advanced to members the amount of their shares, taking mortgages to secure the sums advanced, with premiums and interest. Each mortgage deed contained a covenant by the member to pay, at the times and in manner prescribed by the rules for the time being applicable thereto respectively, the sum payable periodically by way of subscription or otherwise in respect of the shares until the shares, with interest, should be realized and paid, and the premium, with interest, should be paid, and that in the meantime (except where varied by the deed) the rules for the time being of the society should, in respect of the same shares, be observed by the member. The proviso for redemption was on due realization and payment of the said shares, premiums, and interest according to the covenant. Afterwards new rules were adopted by the society, which subjected the equity of redemption of advanced members to certain additional payments towards meeting the society's losses; and Rule I. of the new rules declared that, so far as the rules of law and equity would permit, those rules should apply to all the members as well present as future, and to all its transactions as well past as future:—Held, that members advanced prior to the adoption of the new rules were entitled to redeem their securities on payment of those sums which they were liable to pay according to the rules existing at the date of their advances. *Norwich and Norfolk Provident Permanent Building Society, In re, Smith, Ex parte*, 1 Ch. D. 481; 45 L. J., Ch. 143; 24 W. R. 103.

Held, also, that the covenant to make certain payments and in the meantime to observe the rules did not involve a liability to further payments imposed by subsequent rules. *Id.*

Held, also, that Rule I. exempted from the application of the new rules existing members whose contracts with the society would, by the new rules, be substantially varied. *Id.*

**Covenants of Members to repay Advances.**—The trustees of a building society advanced to a member 4,000l., to be repaid by monthly instalments, and he by deed, for securing such payments and the observance of the rules of the society, demised leasehold premises to the trustees. It was agreed that upon non-payment of three successive instalments, or non-observance of the rules, they might sell the premises, and upon any sale the whole amount thereinbefore stipulated to be paid by instalments as aforesaid, and remaining unpaid, should be held immediately payable, and be retainable accordingly from the proceeds of sale, subject to such dis-

count as the directors of the society for the time being might think proper to allow. The member also covenanted to pay the instalments. Upon non-payment, the trustees exercised their power of sale, and brought an action upon the deed to recover the whole of the difference between the proceeds of sale and the amount of unpaid instalments:—Held, that these words implied a covenant to pay the whole amount upon non-payment of three instalments. *Sherriff v. Glenton*, 28 L. T. 65.

Another deed for acquiring a further sum on the same terms, incorporated all powers and authorities given by the deed for the recovery of the moneys thereby made payable:—Held, also, that these words implied the same covenant. *Ib.*

**Repayment of Advances.**—A member of a building society, in May, 1873, obtained from it as advanced shares a loan of 3,000*l.*, repayable by way of annuity in thirteen years by 156 monthly subscriptions or instalments of 30*l.* each, together with certain fines in default of punctual payment. One of the rules provided that "should any member desire to pay off or satisfy the money due by him to the society, he shall be at liberty to do so by paying all subscriptions, fines and other moneys which may be then in arrear, as well as the present value of all future payments, to be computed at the rate of 5*l.* per cent. on all annuities having not more than five years unexpired of the original term . . . and at the rate of 6*l.* per cent. when there shall be more than ten, and not more than fifteen years unexpired." The loan was secured by a mortgage deed of the 30th January, 1874, whose terms were in accordance with those directed by another rule, and which stipulated that in case of the borrowers being two months in arrear, the society's trustees might sell the mortgaged premises, and after paying all expenses, should "retain in trust for the society all repayments, fines and other payments and sums then due to the society in respect of the shares and the then present value of the future repayments to be made in respect of the shares to the society, calculated to the end of the term for which the shares have been advanced, and which future payments shall be discounted after the rate of 5*l.* per cent. per annum interest on such repayments upon the principle of repayments made at the end of each year." The mortgaged premises were subsequently sold in the Landed Estates Court, on the petition of an incumbrancer puisne to the society, the borrower being over two months in arrear at the date of its being filed; and in July, 1875, on the settlement of the final schedule, the society claimed besides twenty-three months' instalments, which were then in arrear, and the fines upon them, "the present value of future payments at 6*l.* per cent. discount, as per rule." This mode of estimating the future instalments was objected by puisne incumbrancers, and the judge of the court decided that (in addition to arrears and fines) the future principal remaining due to the society at the date of the sale was to be ascertained, and interest thereon calculated from that date at a rate to be fixed by an actuary, having regard to the terms of the mortgage and the rules. The society having appealed:—Held, that the society was entitled (in addition to arrears and fines) to the value, at the date of payment, of the future repayments in respect of the mortgage, calculated

from such date, to the end of the term for which the mortgage was originally taken in pursuance of the rule under which the deed was framed, subject to a rebate or discount at the rate of 5*l.* per cent. per annum. *O'Donohoe, In re*, 10 Ir. R., Eq. 221.

**Redemption.**—In a suit in equity by a borrowing member of a building society against the trustees of the society to redeem his mortgage:—Held, first, that in taking the accounts the member was entitled to be given credit for the same proportion of profits (bonus) to which, at the date of his notice to redeem, a withdrawing but unadvanced member would have been entitled. *Fleming v. Self*, 3 De G., Mac. & G. 997; 3 Eq. B. 14; 24 L. J., Ch. 29; 1 Jur., N. S. 25.

Held, secondly, that in taking the accounts of the monthly payments, which would have to be paid by him as the price of redemption, the possible and not the probable duration of the society must be considered. *Ib.*

The decision in *Fleming v. Self*, *supra*, extends to the deduction of redemption-moneys paid in by a mortgagor, although that point is not expressly referred to in the judgment. *Smith v. Pilkington*, 1 De G., F. & J. 120; 29 L. J., Ch. 227.

Trustees of a building society, acting on the rules of the society, declared a bonus of 23*l.* per share, calculating the amount in forgetfulness, as they alleged, of the decision in *Fleming v. Self*, and therefore on the assumption that advanced members, that is, members who had borrowed money of and executed mortgages to the society, could not be entitled, on redeeming those mortgages, to anything on account of bonuses. A., an advanced member, then gave notice of his desire to redeem:—Held, that he was entitled to have credit for the bonus of 23*l.* on each of his shares, and that the court would not interfere to relieve the society from the consequences of the act of the trustees. *Archer v. Harrison*, 7 De G., Mac. & G. 404; 3 Jur., N. S. 194.

A member of a benefit building society obtained an advance on his shares, on executing a mortgage in the form prescribed by the rules, by which he covenanted to repay the advance with interest by monthly subscriptions, calculated to extend over a certain number of months. The mortgage contained a power of sale in the event of the subscriptions falling into arrear for three months, and the purchase-money was to be applied in satisfaction of all moneys then due or thereafter to become due from the mortgagor in respect of subscriptions, fines, insurance or otherwise, under the mortgage deed, and the surplus to be paid to the mortgagor. The mortgagor paid a few of the subscriptions, and then fell into arrear, and the mortgaged premises were sold by the directors:—Held, that the mortgagor was not entitled to any rebate or discount upon the amount of subscriptions not due at the time of the sale, although the rules prescribed that such an allowance should be made in case of a mortgagor redeeming his mortgage before the expiration of the full period of payment. *Matterson v. Elderfield*, 4 L. R., Ch. 207; 20 L. T. 503; 17 W. R. 422.

In such a case there is no difference between a permanent society, and one intended to be wound up after a definite period. *Ib.*

— **Before Period fixed—Premium to be Paid.**—A building society may properly, if in accord-



arrear upon a common demise. The mortgagor took possession of the premises with the consent of the trustees, but afterwards let them for three years at a quarterly payment, without the consent of the trustees, and the lessee had no knowledge of the mortgage. The mortgagor's payment and the lessee's rent were in arrear, and the trustees distrained upon the lessee's goods:—Held, that the trustees of the society were not justified in distraining. *Gibbs v. Cruikshank*, 28 L. T. 104.

By a deed between T., proprietor of shares in a building society, and the trustees of the society, reciting that T. had, pursuant to the rules of the society, agreed to pay unto the society, for the term of fourteen years, the quarterly sum of 16l. 3s. 2d. in respect of his shares, and that for securing the quarterly payments he had agreed to execute the security intended to be effected by that deed, T. conveyed a house of which he was seised in fee to the trustees in fee. The deed contained a proviso for quiet enjoyment by T. if he paid the quarterly sums, and observed the rules of the society and the covenants in the deed; but that in case he made default, the trustees might enter and lease or sell the house, and out of the proceeds retain the amount of payments in arrear, and pay the surplus, if any, to T.; and a clause by which T. agreed to become tenant of the house to the trustees, their heirs or assigns, or other the trustee or trustees for the time being of the society thenceforth during their will, at the clear net yearly rent of 66l., payable on the usual quarterly days, subject to the powers of distress and entry for non-payment, and to all usual remedies as in leases of like property. T. died, leaving payments in arrear; the trustees distrained upon the goods in the house, which was in the occupation of his widow, who subsequently took out administration:—Held, that the tenancy under the mortgage being at most only a tenancy at will, the distress was not made during the possession of the tenant from whom the rent became due within the proviso in 8 Ann. c. 4, s. 7, and therefore was not justified under s. 6. *Turner v. Barnes*, 2 B. & S. 435.

**Incorrect Recitals.**—The surveyor to a building society purchased land from the trustees of the society, and then mortgaged it to the trustees to secure the purchase-money. The mortgage, which was a filled-up printed form prepared by the society's solicitor, recited that the surveyor was the holder of eleven shares in the society, whereas he had never applied for shares, nor had he in fact ever been treated by the society as a shareholder. He did not read over the deed, nor were its contents explained to him by the society's solicitor prior to execution. The society having been ordered to be wound up, he was placed on the list of contributories:—Held, that as the recital was incorrect, and as he was ignorant of its existence at the time he executed the deed, he was not liable as a contributory. *Victoria Permanent Benefit Building Investment and Freehold Land Society of Birmingham and the Midland Counties, In re, Empson's case*, 9 L. R., Eq. 597; 22 L. T. 855; 18 W. R. 565.

**Assignment by Mortgagor, "Subject to the Mortgage to the Building Society"—Effect of.**—A member of a building society received an advance from the funds of the society, and deposited the lease of his land with the trustees as

security for repayment, at the same time signing an agreement to execute a mortgage. He afterwards executed a mortgage to the trustees containing a power of sale, under which they sold the property for the remainder of the term. Previously, however, to the execution of the mortgage, the mortgagor assigned the premises, "subject to the mortgage to the building society," to the defendant for valuable consideration, who thereby became possessed of the legal estate:—Held, that the defendant must be taken to have had notice that the mortgage would contain a power of sale, and he was declared to be trustee of the property for the plaintiff. *Leigh v. Lloyd*, 2 De G., J. & S. 330.

**Liability of Members to New Rules.**—A building society advanced to members the amount of their shares, taking mortgages to secure the sums advanced, with premiums and interest. Each mortgage deed contained a covenant by the member to pay, at the times and in manner prescribed by the rules for the time being applicable thereto respectively, the sum payable periodically by way of subscription or otherwise in respect of the shares until the shares, with interest, should be realized and paid, and the premium, with interest, should be paid, and that in the meantime (except where varied by the deed) the rules for the time being of the society should, in respect of the same shares, be observed by the member. The proviso for redemption was on due realization and payment of the said shares, premiums, and interest according to the covenant. Afterwards new rules were adopted by the society, which subjected the equity of redemption of advanced members to certain additional payments towards meeting the society's losses; and Rule I. of the new rules declared that, so far as the rules of law and equity would permit, those rules should apply to all the members as well present as future, and to all its transactions as well past as future:—Held, that members advanced prior to the adoption of the new rules were entitled to redeem their securities on payment of those sums which they were liable to pay according to the rules existing at the date of their advances. *Norwich and Norfolk Provident Permanent Building Society, In re, Smith, Ex parte*, 1 Ch. D. 481; 45 L. J., Ch. 143; 24 W. R. 103.

Held, also, that the covenant to make certain payments and in the meantime to observe the rules did not involve a liability to further payments imposed by subsequent rules. *Ib.*

Held, also, that Rule I. exempted from the application of the new rules existing members whose contracts with the society would, by the new rules, be substantially varied. *Ib.*

**Covenants of Members to repay Advances.**—The trustees of a building society advanced to a member 4,000l., to be repaid by monthly instalments, and he by deed, for securing such payments and the observance of the rules of the society, demised leasehold premises to the trustees. It was agreed that upon non-payment of three successive instalments, or non-observance of the rules, they might sell the premises, and upon any sale the whole amount thereinbefore stipulated to be paid by instalments as aforesaid, and remaining unpaid, should be held immediately payable, and be retainable accordingly from the proceeds of sale, subject to such dis-

position as himself, as the sole defendant thereto, and seeking to have the benefit of the restrictive covenants entered into by the defendant, and to restrain him from building in contravention thereof, and a mandatory injunction to compel him to take down buildings already erected by him in contravention thereof, and for damages:—Held, that the trustees of the society were necessary parties to the suit. *Eastwood v. Lever*, 4 De G., J. & S. 114.

#### d. Shares.

**Forfeiture of.**—By a rule of a building society, each member was to pay 10s. per share per month, together with certain fines in case of default; and any member not having executed a mortgage to the society, "thereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions for six consecutive monthly months, should thereupon cease to be a member of the society, and forfeit all his or her interest therein." By other rules the management was vested in twelve directors, a meeting of quorum of whom was to consist of five. A., a member of the society (not having executed a mortgage), neglected for seven successive months to pay his monthly subscriptions in respect of a share held by him, but afterwards tendered the amount of his subscriptions, and the fines payable thereon, to two of the directors, who were in attendance for the purpose of receiving payments, and who accepted the same. At the first monthly meeting of the directors after the money was so paid, it was resolved that A. had, on the sixth default, ceased to be a member of the society, and forfeited all his interest therein; and it was ordered that his name should be erased, and the money received from him by the two directors be returned to him:—Held, that the share was properly forfeited; that the acceptance of the money by the directors did not amount to a waiver of the forfeiture; and that the rule was not unreasonable. *Card v. Carr*, 1 C. B., N. S. 197; 26 L. J., C. P. 113.

Where a rule of a society provided that if any member shall for any cause whatever permit any monthly subscription on any share or shares held by him or her to be in arrear for six months, such share or shares and all moneys paid in respect thereof shall at the expiration of such six months become absolutely forfeited to the company:—Held, that the neglect of a member to pay his subscriptions and fines for six months operated a forfeiture of his share or shares at the option of the directors. *Moore v. Rawlins*, 6 C. B., N. S. 289.

**Extinguishment of.**—A plaintiff, a member of a benefit building society, received the amount of his shares in advance, and executed a mortgage to the society as a security. He afterwards conveyed the property to the defendant, subject to the mortgage, and the defendant covenanted to pay all subscriptions and other payments to become due in respect of the shares by the rules of the society. The shares were not assigned, but remained in the name of the plaintiff. By one of the rules, the managers were to have power to determine the amount of money to be paid by any mortgagor in full for the claims of the society upon his property, on payment of which the shares in respect of which the security might be made should be wholly extin-

guished. The society having resolved that members might redeem their mortgages on payment of so much per share, the defendant paid the amount, and the usual receipt was indorsed on the mortgage deed as under 6 & 7 Will. 4, c. 32, s. 4:—Held, that the shares were thereby extinguished, and the plaintiff released from any further liability to the society, and consequently that the defendant could not be called on under the covenant to pay to the plaintiff money which he had paid to the society in respect of the shares subsequently in consequence of the sum fixed by the managers for the payment in full not being found sufficient to meet the exigencies of the society. *Priestly v. Hopwood*, 10 L. T. 646; 12 W. R. 1031.

A rule declared, that "the minutes of the managers entered in the minute-book and signed by the managers concurring therein, shall be sufficient authority for the execution of any of the aforesaid powers:—Held, that the omission of the managers to sign, in conformity with the above rule, did not invalidate their execution of the powers intrusted to them. *Ib.*

**How far within Mortmain Act.**—Shares in a company, of which the object was to purchase land, and build upon or otherwise improve it and sell or let it, and shares in a building society are not within the Mortmain Act, 9 Geo. 2, c. 36. *Entwistle v. Davis*, 4 L. R., Eq. 272; 36 L. J., Ch. 825.

#### e. Fines.

**Amount of.**—An action was brought for the redemption of a mortgage made to the trustees of a building society by one of their borrowing members, who was the holder of twenty-eight shares. The question was, what amount of fines the trustees were entitled to charge the mortgagor, under the rules of the society, for non-payment of his subscriptions. Table IV. at the end of the society's book of rules purported to shew the fines which borrowing members were liable to pay on default of payment of their monthly subscriptions and interest on shares from one to ten, for a period of from one to six months, the fines being progressive from month to month; but there was no express charge of fines for the seventh and subsequent months:—Held, that according to the true construction of Table IV., the fines were not to increase in amount after the sixth month. *Looejoy v. Mul-karn*, 46 L. J., Ch. 630; 37 L. T. 77—C. A.

Held, also, that the claim of the society was not restricted to fines for instalments due during the first six months, but that they were entitled to charge a fine of 5s. for each instalment of each share during the five years during which the instalments were payable. *Ib.*

**Construction of Rules, as to.**—The trustees of a building society, established for the purpose of raising by monthly subscriptions a fund from which money might be advanced to its members to enable them to erect or to purchase freehold or leasehold property, such money to be secured by mortgages of such property, and to be repaid by monthly instalments, were, under one of its rules, empowered to charge borrowing members, as a penalty in case of such repayments being in arrear, "fines at the rate of threepence per share for the first month, and for each and every suc-

ceeding month threepence per share additional on such repayments." The trustees having charged a borrowing member fines as cumulative in arithmetical progression:—Held, that on such computation the fines would not be reasonable within 6 & 7 Will. 4, c. 32, s. 1, and that the rule of the society, admitting of different constructions, was to be construed in favour of the party who had incurred the penalty. *Tierney, 1a re, 9 Ir. R., Eq. 1.*

Four months after ruling of the final schedule of incumbrances and allocation of the funds, a puisne incumbrancer, who had had notice of all the proceedings in the matter, applied to have the claim of the petitioners re-examined, on the ground that they had erroneously computed certain charges against the estate of the owners. A considerable portion of the funds, though allocated, being still in court undistributed, and it appearing that the computation of the petitioners had been erroneous, the application was granted on condition of the applicant paying all the costs consequent upon his laches. *Ib.*

**Interest on.]**—No interest is chargeable upon fines imposed upon the mortgagor for default, or for acting in contravention of the rules of the society. *Ingoldby v. Riley, 28 L. T. 55.*

## 2. Determination of Disputes.

**By Arbitration.]**—It is contrary to the language of the statute, and against the policy of the law, that internal disputes between the members or office-holders of a building society and the society should be the subject of actions at law and suits in equity. *Thompson v. Planet Benefit Building Society, 15 L. R., Eq. 333; 42 L. J., Ch. 364; 28 L. T. 549; 21 W. R. 474.*

A bill, filed by a member of a building society against the society, its trustees and directors, stated that the rules were duly certified, and were, "so far as material," as followed. It then set out certain rules, numbered 12, 13, and 14; but no rule as to referring disputes to arbitration. It set out a letter containing an offer by the directors to refer all matters in dispute between the member and them to arbitration under the rules, and stated that the defendants sometimes alleged that the dispute ought to be referred to arbitration, but that the plaintiff charged that, having regard to the relief therein-after prayed, he was not bound to refer the dispute to arbitration, and prayed, amongst other things, that it might be declared that the plaintiff was entitled to the benefit of the 12th and 13th rules of the society. The act requires that the rules of every building society shall contain a rule for referring disputes to arbitration. The defendants demurred:—Held, that the court was able to take judicial notice of the rule of the society for referring disputes to arbitration, though it was not set out in the bill. *Ib.*

A bill by a holder of shares in a building society against the society and their directors alleged misconduct against the directors in respect of acts which, for anything that appeared, might have been authorized by the rules of the society as stated by the bill; prayed that the plaintiff was not bound by certain new rules that had been passed; and prayed the benefit of certain of the original rules, and for relief against the directors personally:—Held, that this was a dis-

pute for the decision of which arbitrators were the proper authority; and demurrers by the society and by the directors allowed. *Ib.*

To bring a dispute within the arbitration clause of the rules of a building society, it must be one which arises between the trustees and the party claiming as a member of the society. *Prentice v. London, 10 L. R., C. P. 679; 44 L. J., C. P. 353; 33 L. T. 251.*

The plaintiff was a transferee for value of shares in a building society. The transferor had been the secretary of the society, and in that capacity had incurred liabilities to the trustees to a considerable amount. The latter, after the transfer, but before they had notice of it, passed a resolution to forfeit the shares of the transferor, and appropriated their value towards the deficit. The plaintiff sued the trustees for refusing to admit him to the benefits to which he claimed to be entitled as a member of the society and as the holder of shares therein. The trustees pleaded that the cause of action was a dispute between them as trustees, and the transferor as a member and the plaintiff as a person claiming on account of a member of the society, and was a dispute which, according to the rules of the society and the statutes, ought to be settled by arbitration:—Held, that, as the trustees denied the right of the plaintiff to be a member of the society, they were estopped from saying that the dispute was a dispute between them and him as a member, within the rule. *Ib.*

The rules of a building society incorporated under the Building Societies Act, 1874, provided, pursuant to s. 16, sub-s. 9, that disputes between the society and any of its members should be settled by reference to arbitration. A member of the society having commenced an action for account against the society:—Held, that the jurisdiction of the court was ousted, and that the matters in dispute must be referred to arbitration. *Wright v. Monarch Investment Building Society, 5 Ch. D. 726; 46 L. J., Ch. 649.*

The defendants were trustees of a benefit building society, inrolled pursuant to 6 & 7 Will. 4, c. 32, and the statement of claim alleged that the plaintiff became a member of the society, and was the holder of first-class shares, and during his membership paid his subscriptions; that by a rule of the society any member holding first-class shares, desiring to withdraw from the society, should, after giving three months' notice, receive back the whole amount paid by him for subscriptions; that the plaintiff gave the requisite notice of withdrawal, and there then became due to him from the society the sum of 35l. 8s. 6d., which the plaintiff was entitled to be paid according to the rule:—Held, that the statement of claim was bad; for it alleged a dispute between a building society and a member, and a rule must be assumed to exist referring disputes of that kind to arbitration or justices, pursuant to 10 Geo. 4, c. 56, s. 27, incorporated by 6 & 7 Will. 4, c. 32, s. 4, and the mere notice of withdrawal given and assented to would not prevent the application of the rule. *Huckle v. Wilson, 2 C. P. D. 410; 26 W. R. 98.*

A rule of a building society, which requires that all disputes which may arise between the society and any member thereof shall be referred to arbitration, relates only to disputes between the society and a member as member. *Morrison v. Glover, 4 Ex. 430; 19 L. J., Ex. 20.*

A rule of a building society provided that any member who should be desirous of withdrawing from the society any share or shares should be allowed to do so on giving two months' notice in writing of such his intention to the secretary, subject to the payment of all fines then due, and to a certain deduction as a proportionate share of expenses incurred: provided that the deduction should not extend to widows and children of deceased members, who should always have priority in cases of withdrawal. Another rule provided, that the board of management for the time being should determine all disputes which might arise respecting the construction of the rules or of any of the clauses, matters or things therein contained, and also of any additions, alterations or amendments which should or might thereafter arise between the board and any member, and in the event of their decision being unsatisfactory, then to be referred to arbitration. A member of the society gave notice of his intention to withdraw, and claimed the amount of his shares. The board refused to pay it, on the ground that previously to the notice other members had given notice of withdrawal, and were therefore entitled to priority of payment, and that the society had no funds to pay the claim. The member brought an action:—Held, that his claim was a dispute between the board and a member of the society respecting the construction of a rule, and therefore the action was not maintainable, but the dispute must be determined by the board or arbitrators. *Wright v. Deley*, 4 H. & C. 209.

— **Summons to refer to Arbitration and to Stay the Action—Dispute between Society and Member.**—By the rules of a building society incorporated under the Building Societies Act, 1874, it was provided, pursuant to s. 16, sub-s. 9 of the act, that a reference of every matter in dispute between the society and any member of the society should be referred to the arbitration of the registrar of friendly societies. The plaintiff, who was an advanced member of the society and had executed a mortgage for securing his subscriptions and fines in respect of the advance, commenced an action against the society for an account in respect of the mortgage transaction:—Held, that the jurisdiction of the court was ousted, and that the society was entitled to have the dispute referred to arbitration. *Wright v. Monarch Investment Building Society* (5 Ch. D. 726) approved. *Hack v. London Provident Building Society*, 23 Ch. D. 103; 52 L. J., Ch. 541; 48 L. T. 247; 31 W. R. 392.—C. A. Affirming 52 L. J., Ch. 225; 31 W. R. 378.

— **Validity of Awards.**—Where the rules of a society authorized the directors to invest the funds on mortgage for ten years at any rate of interest, or in building on or improving land mortgaged to them, and authorized members to withdraw their shares upon giving notice, and provided that such members should not be liable to any future fines, but should be entitled to receive the net amount of their subscriptions paid, with interest, and also a share of profits, but no time was specified for making such payments; and the directors had power to pay such claims in the order in which they arose: the amount payable to a withdrawing member having been referred:—Held, that it was competent to the arbitrator to consider, when, consistently with the due prosecution of the

other objects of the society, such payment should be made, and to fix a time for such payment accordingly. *Armitage v. Walker*, 2 K. & J. 211; 2 Jur., N. S. 13.

Held, also, that a court of equity had no jurisdiction to alter the award, unless there was error upon the face of it, or it was shewn to have been corruptly obtained. *Ib.*

Therefore, where principal and interest only were awarded, the court would not calculate whether the amounts were correct according to the rules, or whether the principal included profits or not. *Ib.*

The award directed a sum to be paid for costs, which the arbitrator had no power to do, except by a rule made after a member had given notice to withdraw:—Held, that this part of the award was bad, but, being separable, it did not vitiate the rest. *Ib.*

— **By Action—To Recover Amount of Subscriptions.**—The rules of a building society formed under 6 & 7 Will. 4, c. 32, provided that the directors should determine all disputes which might arise concerning the affairs of the company, or respecting the construction of the rules or any of the clauses or things contained, and also of any bye-laws, additions, alterations or amendments which should or might arise between the trustees, officers, or other shareholders of the company, and the decision of the board if satisfactory should be conclusive, but if not satisfactory, reference should be made to arbitration pursuant to 10 Geo. 4, c. 56, s. 27:—Held, that a claim by the trustees of the company for subscriptions on shares under a covenant entered into by a shareholder with them to pay the subscriptions and interest on his shares according to the rules of the society, and to perform the rules thereof in respect of the shares, was not a dispute within the meaning of the statute or rule, and therefore that the shareholder was properly sued in a court of law. *Farmer v. Giles*, 5 H. & N. 753; 30 L. J., Ex. 65; 8 W. R. 649.

Held, also, that the covenant was absolute, and that it was no answer that the covenantor had ceased to be a shareholder of the society at the time the subscriptions became due. *Ib.*

A building society was established to enable parties to purchase freehold or leasehold property within twenty-five miles of London; and actions and suits were to be brought and defended in the names of the trustees; but no such proceedings were to be taken or defended until the approbation of a majority of the members present at a special meeting should have been obtained. The president had power to call a special meeting of the committee; and, on receiving a written request, signed by twelve of the members, to convene a special general meeting, he was, within three days after, to convene such meeting:—Held, that an action brought with the approbation of the majority of the members present at a special general meeting was well brought within the meaning of the rule. *Cutbill v. Kingdom*, 1 Ex. 494; 17 L. J., Ex. 177.

By a rule, the committee was to determine all disputes which might arise respecting the construction of their rules, or any of the clauses, matters or things therein contained; the decision to be conclusive if satisfactory; but, if not satisfactory, reference to be made to arbitration:—Held, that this rule referred only to disputes respecting the construction of the rules, and did not

prevent the trustees suing for the recovery of subscriptions and fines. *Ib.*

Action upon a mortgage between trustees of a building society and a member, whereby, in consideration of a sum of money the amount appropriated in respect of his shares, and paid to him by the trustees, he mortgaged lands to the trustees, for the use of the society, and covenanted to make the payments required by the rules of the society, and to perform all the rules in respect of his shares. Breach; the non-payment of certain monthly instalments, and of certain subscriptions and fines. Pleas, first, that by a rule the directors should decide upon all disputes that might arise between the society and any member respecting any matter relating to the society and such member, and the decision of the directors, if satisfactory to both parties, should be conclusive, but if not satisfactory, such dispute should be referred to arbitrators, pursuant to 10 Geo. 4, c. 56, s. 27; and that arbitrators had been appointed, and that the member had never assented to any decision of the directors. Secondly, that by a rule, if, after the execution of a mortgage, a member failed for six monthly nights to pay all subscriptions, the directors should appoint a person to collect the rents of the premises, and if insufficient, or the member refused to allow or to empower such collection, then the directors to sell the property; that the causes of action were in respect of certain subscriptions, which were for more than six calendar months after the execution of the mortgage due; that the defendant had failed for six monthly nights; and that the mortgaged premises were a sufficient security.—Held, first, that the declaration shewed a right of action in the trustees, under 6 & 7 Will. 4, c. 32, s. 4, and 10 Geo. 4, c. 56, s. 21. *Reeves v. White*, 17 Q. B. 995; 21 L. J., Q. B. 169; 16 Jur. 637.

Held, secondly, that the first plea was good, inasmuch as the summary remedy provided by the statutes for settlement of the disputes by arbitration is conclusive, and ousts the courts of jurisdiction. *Ib.*

Held, also, that the trustees were entitled to judgment, inasmuch as the power to collect rents, or to sell, given to the directors, did not prevent their bringing an action on the express covenant to pay the subscriptions. *Ib.*

— **In respect of Accounts under a Mortgage.**—A benefit building society made certain rules, one of which was, that in case of any dispute arising between the society and any member thereof, reference should be made to arbitration, pursuant to the 10 Geo. 4, c. 56. L. became a member of the society and executed certain mortgages to the persons who acted as its trustees. In these mortgages he covenanted, among other things, to observe the rules of the society. L. did not keep up the payments secured by the mortgages, and the trustees took possession of some of the mortgaged premises, and sold them. L. brought an action praying for accounts, and an injunction to prevent future sales, &c. The trustees insisted that he was, by the rules, precluded from any right of action, and must proceed by arbitration under these rules.—Held, that the rules did not preclude him from a right of action, for that proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such

disputes, between the society and a member, as the statutes had contemplated. *Mulhern v. Lord*, 4 App. Cas. 182; 48 L. J., Ch. 745; 40 L. T. 594; 27 W. R. 510.

Per Lord O'Hagan:—The onus of shewing that a complaining party has lost the ordinary right to maintain an action lies on him who denies such right. *Ib.* Affirming 47 L. J., Ch. 228; 38 L. T. 265; 26 W. R. 319—C. A.

A member of a building society had, upon having the amount of his shares advanced to him, executed a mortgage of premises to the trustees, under the rules of the society, to secure the payments of the subscriptions, interest and bonus, payable by the rules of the society in respect of those shares. Subsequently he claimed to redeem his mortgage for a less sum than the trustees, as mortgagees, were willing to accept, and upon their refusal to refer the dispute to arbitration, obtained an order of two justices for the delivery to him of the mortgage deed.—Held, that this was not a dispute which could be referred to arbitration; and therefore the court granted a certiorari to remove the order of the justices in order to be quashed for want of jurisdiction. *Reg. v. Trafford*, 4 El. & Bl. 122; 24 L. J., M. C. 20; 1 Jur., N. S. 252.

By a rule, disputes between the society and any of its members were to be referred to arbitration. A member, borrowing the amount of his share from the society, gave the trustees a mortgage of premises held by him on lease, which contained a clause of forfeiture on non-payment of rent, and he covenanted, by the mortgage deed, to pay his dues to the society, and to pay his landlord the rent reserved by his lease.—Held, that on default by the mortgagor in payment of the dues, and of the rent, the trustees might proceed at law, and were not bound by the arbitration clause. *Doe d. Morrison v. Glover*, 15 Q. B. 103.

#### 4. WINDING-UP.

**Jurisdiction of Court.**—The Court of Chancery has jurisdiction to wind up a building society under the Companies Act, 1862. *Midland Counties Benefit Building Society, In re*, 4 De G., J. & S. 468; 33 L. J., Ch. 739; 11 Jur., N. S. 229; 13 W. R. 339.

Building societies are quite distinct from friendly and also industrial or provident societies, and are not affected by the provisions of the statutes regulating the latter two classes of companies. *Ib.*

The winding-up provisions of the Companies Acts, 1862 and 1867, are applicable to societies registered under the Building Societies Act, 1874. *Andrew or Jones v. Scahsea Cambrian Benefit Building Society*, 50 L. J., Q. B. 428; 44 L. T. 106; 29 W. R. 382; 45 J. P. 507.

A building society of the ordinary kind, certified under 6 & 7 Will. 4, c. 32, was within the winding-up acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108. *St. George's Building Society, In re*, 4 Drew. 154; 27 L. J., Ch. 96; 3 Jur., N. S. 683.

**On whose Petition.**—An order to wind up a building society whose rules do not give it express power to borrow, may be obtained on the petition of a person, who, under the rules of the society, has deposited money therein with a view of becoming a shareholder, but before becoming

one, has given proper notice to withdraw the money and been unable to obtain it. But such petition must not be a mere creditors' petition, but must express that the petitioner is a creditor in respect of money advanced by him as a member of the society which he has given notice to withdraw. *Queen's Benefit Building Society, In re*, 6 L. R., Ch. 815; 40 L. J., Ch. 381; 24 L. T. 346; 19 W. R. 597, 762.

A petition was presented by four members of a permanent building society, whose shares had been advanced on mortgage, for winding up the society. One of the rules of the society gave the trustees powers to borrow any money that might be necessary for the purposes of the society, under which considerable sums of money had been borrowed on deposit, and some of the depositors pressed for their money, which the society was unable to pay without calling on their members. The committee of the society had accordingly proposed that the business should be transferred to another company and the society wound up, to which the great majority of the shareholders had agreed. After the petition was presented, the creditors of the society executed a release to the petitioners from their debts, and the committee offered to effect a transfer of their mortgages:—Held, that, as the release of the petitioners operated as a release to the whole society, the petitioners were under no direct or indirect liability in respect of the existing debts; that the society being one of unlimited liability, and the rule as to borrowing *ultra vires*, the insolvency was not proved; and that the interest which the petitioners had in the profits, as advanced members, was not sufficient to induce the court to make a winding-up order contrary to the wishes of the great majority of the other members, and the petition was therefore dismissed, but without costs. *Professional, Commercial and Industrial Benefit Building Society, In re*, 6 L. R., Ch. 856; 25 L. T. 397; 19 W. R. 1153.

Directors of a building society, the rules of which gave no power to borrow, borrowed a sum of money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a petition for an order to wind up the company:—Held, that the transaction was *ultra vires*, and that the petitioner had no legal or equitable debt against the company, and the petition was accordingly dismissed. *National Permanent Benefit Building Society, In re, Williamson, Ex parte*, 5 L. R., Ch. 309; 22 L. T. 284; 18 W. R. 388.

By the rules of a building society it was provided that any member holding investment shares who should be desirous of withdrawing his investment should be allowed to do so upon giving a month's notice in writing, and that if several members should give notice at one time they should be paid in rotation according to priority of notice. Provisions were also made for the reference of disputes to arbitration. A., the holder of five investment shares representing 250*l.*, gave notice of withdrawal. The society had previously received notices from a large number of members of their desire to withdraw their investment shares to the amount of about 350,000*l.*, which sum then remained to be paid. Subsequently alterations were made in the rules, and it was provided that payment to withdrawing members of their shares should be made by instalments. A., not having been paid, at the expiration of the month, gave the statutory notice under the 199th section of the Companies Act, 1862, and subsequently presented a petition for winding up the society. The society was perfectly solvent, but time was required to realize the assets:—Held, that the petitioner as a withdrawing member was in a different position to an outside creditor, and was not entitled *ex debito justitiæ* to an order for winding up the society; and the court, in the exercise of its discretion, dismissed the petition with costs. *Planet Benefit Building and Investment Society, In re*, 14 L. R., Eq. 441; 41 L. J., Ch. 738; 27 L. T. 638; 20 W. R. 935.

**Winding-up Order—Position of Members—Compulsory Withdrawal.**—A building society, registered under the Building Societies Act, 1874, had for its objects—(1) to form a good investment for investors; (2) to advance to shareholders money for building and other purposes, to a not greater extent than the amount of their shares, on their granting a bond for the same over heritable security. The rules provided that the shares were to be limited to 25*l.*; that a shareholder who had not received an advance was to pay up his shares by monthly instalments; and when such instalments with profits amounted to 25*l.* per share he was to be paid out. As to a member who had received an advance, it was provided that he should pay up his advance by monthly instalments on his shares with interest at the rate of 5 per cent. on the loan. It was also provided that members could withdraw on giving a month's notice. On withdrawal by an unadvanced member, he was to receive the whole instalments paid on his shares with interest. On withdrawal by a borrowing member, he was to pay up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares with interest calculated thereon. A. took shares for the sole purpose of obtaining an advance. He executed a bond in common form as security; and the society granted him a backletter, to the effect that they agreed not to enforce the bond so long as the regular payments of the instalments, interest, and other sums due upon his shares were paid. A. regularly paid his instalments with interest charged on the whole sum lent. Losses having been incurred, the society was in February, 1880, ordered to be wound up voluntarily. There were no outside creditors. In July, 1880, A. gave notice, under the rules, of withdrawal to the liquidators, and claimed a discharge of his bond on his paying to them the difference between his loan and the amount in cumulo of the instalments paid by him, with interest added. The liquidators denied his right to withdraw after liquidation, unless he paid up the whole loan and left the instalments to be refunded according to the result of the liquidation:—Held, that the advance had pro tanto been extinguished by the total amount of the instalments paid by A.; that from and after the date of the winding-up order A. had a right to redeem his security by paying to the liquidators the difference between his advance and his instalments, with interest added thereon, as against excess of interest which he had been charged; and on payment of such difference, with interest thereon, he was entitled to be relieved of all further liability as a contributory

or otherwise. *Brownlie v. Russell*, 8 App. Cas. 235; 48 L. T. 881; 47 J. P. 757—H. L. (Sc.).

— **Unlimited—Advanced and Unadvanced Members—Priority.**—A rule giving an unlimited power of borrowing money to the directors of a building society is void, although it was certified by the certifying barrister. And persons advancing money under it on the security of the deposit of the title-deeds of borrowing members, must, in the winding up of the society, give up their securities, and prove against the residue of the assets after payment of the outside creditors and unadvanced members. *Guardian Permanent Benefit Building Society, In re*, 23 Ch. D. 440; 52 L. J., Ch. 857; 48 L. T. 134; 32 W. R. 73—C. A.

A rule giving the directors power to issue deposit or paid-up shares at a fixed rate of interest, with the right to withdraw the money in preference to the ordinary unadvanced members, is valid, and the holders will be entitled in the winding up of the society to be paid in preference to the unadvanced members. *Ib.*

The effect of s. 1 of the Building Societies Act, 1875, repealing s. 8 of the Building Societies Act, 1874, is that all deposits with and loans to a building society certified under 6 & 7 Will. 4, c. 32, made in the interval between the 2nd of November, 1874, and the 22nd of April, 1875, are valid; but deposits and loans made before the 2nd of November, 1874, if otherwise invalid, are not made valid thereby, although they may be continued during that interval. *Ib.*

Securities given by a building society may be enforced against the society, although ss. 14 and 15 of the Building Societies Act, 1874, are not indorsed thereon; the enactment in s. 15 directing this to be done being only directory. *Ib.*

The certifying barrister struck out a rule of a building society, but the directors notwithstanding printed and acted upon it. Some years afterwards the rule was amended, and the barrister certified the amendment:—Held, that the effect of his certificate was to make valid the whole rule as amended. *Ib.*

— **Withdrawal of Members—Notice of Withdrawal—Power to claim Payment “provided the Funds permit”—Applicability of Rules to a Winding-up.**—One of the rules of a building society gave power to the investing members to withdraw their money, provided the funds permitted, on giving notice according to a prescribed form printed in the schedule. The society was ordered to be wound up, and the assets were insufficient to pay the investing members in full. Several of the investing members had given notice to withdraw all their money, and their notices had expired before the commencement of the winding-up, but they had not been paid. Some of them had not used the printed form of notice prescribed by the rules, but their notices had been accepted by the directors:—Held, that the rule as to the withdrawal of members must not be confined to the society as a going concern, but was applicable to adjust the rights of the withdrawing and continuing members inter se in the winding-up; that the members who had given notice to withdraw, either in the prescribed form or otherwise, and whose notices had expired before the commencement of the winding-up, were entitled to be paid out of the assets next to the outside

creditors, and in priority to the other investing members who had not given notice of withdrawal, notwithstanding that at the date of the winding-up there were no funds in hand for their payment. *Blackburn and District Benefit Building Society, In re*, 24 Ch. D. 421; 52 L. J., Ch. 894; 32 W. R. 159—C. A. *S. P., Mutual Society, In re*, 24 Ch. D. 425, n.

Whether the members who had given notice of withdrawal but had not been paid before the commencement of the winding-up remained members of the society, *quære. Ib.*

**Two Classes of Members—Rights of.**—By the rules of a building society realized members, who had by their subscriptions with interest and bonuses, made up the full amount of their shares, were entitled to payment, or certificates for payment in rotation, of such amount, and withdrawal members, who had not made up the full amount of their shares, but had given notice to withdraw, were entitled to like payment or certificates for the amount of their subscriptions with interest. In the winding up of the society:—Held, that these two classes stood in the position of creditors entitled to be paid in priority to investing members, who had not made up their shares, and had given no notice of withdrawal. *Norwich and Norfolk President Building Society, In re, Rackham, Ex parte*, 45 L. J., Ch. 785—C. A.

**Incorrect Recitals.**—The surveyor to a building society purchased land from the trustees of the society, and then mortgaged it to the trustees to secure the purchase-money. The mortgage, which was a filled-up printed form prepared by the society's solicitor, recited that the surveyor was the holder of eleven shares in the society, whereas he had never applied for shares, nor had he in fact ever been treated by the society as a shareholder. He did not read over the deed, nor were its contents explained to him by the society's solicitor prior to execution. The society having been ordered to be wound up, he was placed on the list of contributories:—Held, that as the recital was incorrect, and as he was ignorant of its existence at the time he executed the deed, he was not liable as a contributory. *Victoria Permanent Benefit Building Investment and Freehold Land Society of Birmingham and the Midland Counties, In re, Empson's case*, 9 L. R., Eq. 597; 22 L. T. 855; 18 W. R. 565.

**Society not authorized to Borrow—Overdrawing Banking Account—Lien of Bankers.**—A building society not authorized to borrow money, from time to time overdrew their banking account, and deposited deeds and other documents with the bank as security for the overdraft, it being agreed that the amount overdrawn should never exceed 25,000*l.* A portion of this overdraft was applied in the necessary payments of the society. The society was subsequently wound up by order of the court:—Held, that the bankers had a lien upon the deeds in their possession for such part only of the overdrafts as had been so applied in necessary payments, and had not been covered by subsequent payments into the bank, all of which must be appropriated to reduce such lien, and an account was ordered upon that footing from the date when the balance last turned against the society, and so continued. *Blackburn Benefit Building Society (Liquidator) v.*

*Cunliffe*, 22 Ch. D. 61; 52 L. J., Ch. 541; 48 L. T. 33; 31 W. R. 98.

— **Payments to Bankers during Winding-up Proceedings.**—The bankers had, between the date of the presentation of the winding-up petition and the winding-up order, received payments from certain borrowing members and delivered up to them their securities:—Held, that the bankers must account to the society for the sums so received by them. *Id.*

---

## BURGESS.

*See* CORPORATION.

---

## BURGLARY.

*See* CRIMINAL LAW.

---

## BURIAL.

*See* ECCLESIASTICAL LAW.

---

## BYE-LAW.

**Imposing Fine, must be Clear.**—A bye-law, creating an offence for which it imposes a fine or other punishment, must be clear and unambiguous in its language. *Foster v. Moore*, 4 L. R., Ir. 670.

**Enforcing.**—For the breach of a duty imposed by a bye-law made under the authority of a statute, the only remedy is that specifically prescribed by the statute. *Norton v. Kearon*, 6 Ir. R., C. L. 126.

**Of Municipal Corporations.**—*See* CORPORATION.

**Of Improvement Commissioners.**—*See* HEALTH.

**Of Railway Companies.**—*See* RAILWAYS.

**Of School Boards.**—*See* SCHOOLS.

**Under Commons Act.**—*See* COMMONS.

**On Metropolitan Commons.**—*See* METROPOLIS.

**Under Public Health Act.**—*See* HEALTH.

---

## CAB.

*See* HACKNEY CARRIAGE.

---

## CALLS.

*See* COMPANY.

---

## CAMBRIDGE.

*See* UNIVERSITY.

---

## CAMPBELL'S (LORD) ACT.

*See* NEGLIGENCE.

---

## CANADA.

*See* COLONY.

---

## CANAL.

*See* WATER AND WATER COURSE.

---

## CAPE OF GOOD HOPE.

*See* COLONY.

---

## CAPIAS.

I. AD SATISFACIENDUM.—*See* EXECUTION—SHERIFF.

II. ON BAILABLE PROCESS.—*See* ARREST.



**CARGO.**

See SHIPPING.

**CARRIERS.****I. WHO ARE, 1944.****II. PASSENGERS AND THEIR LUGGAGE.**

1. *The Contract.*
  - a. Generally, 1947.
  - b. Taking Ticket, Effect of, 1951.
  - c. Duty of Passenger as to Tickets, under Bye-Laws and Otherwise, 1954.
2. *Duty of Carrier under Contract.*
  - a. Accident to Passenger. *Primâ facie* Evidence of Negligence, 1961.
  - b. Condition of Carriages, &c., 1963.
  - c. Management of Carriages, 1966.
  - d. Management of Trains.
    - i. Overshooting Platform, &c., 1968.
    - ii. In other Cases, 1974.
  - e. Condition of Premises of Railway Company, 1975.
  - f. Condition of Line, 1978.
  - g. Crossing the Line, 1983.
  - h. Unpunctuality and Non-starting of Trains, 1990.
  - i. Contributory Negligence, 1994.
  - j. Measure of Damages, 1995.
3. *Passenger's Luggage.*
  - a. What is, 1997.
  - b. Receiving Luggage, 1999.
  - c. Notices and Special Contracts, 2001.
  - d. Delivering Luggage, 2005.
  - e. Deposit in Cloak-room, 2006.

**III. CARRIAGE OF GOODS AND ANIMALS AT COMMON LAW.**

1. *Common Carriers of Goods*, 2009.
2. *Railway Companies*, 2010.
3. *Notices and Special Contracts*, 2015.
4. *Animals*, 2020.
5. *Dangerous Goods*, 2028.
6. *Fraud or Concealment*, 2029.
7. *Gross Negligence*, 2031.

**IV. CARRIERS ACT.**

1. *Protection conferred by*, 2033.
2. *Declaration of Value*, 2035.
3. *Booking offices*, 2040.
4. *Felony of Serrants*, 2041.

**V. RAILWAY AND CANAL TRAFFIC ACT.**

1. *Limitation of Railway and Canal Companies by Special Contract and Conditions*, 2044.
2. *Signing Contract*, 2044.
3. *What are Just and Reasonable Conditions.*
  - a. As to Goods.
    - i. Generally, 2047.
    - ii. Alternative Rates, 2050.
  - b. As to Animals.
    - i. Alternative Rates, 2052.
    - ii. In other Cases, 2057.

**4. Undue Preference.**

- a. In Respect of Goods, &c., 2062.
- b. In Respect of Persons, 2076.

**VI. DELIVERY OF GOODS BY CARRIER.**

1. *Liability for Safe Delivery*, 2078.
2. *Orders as to*, 2083.
3. *Refusal of Consignee to Accept*, 2086.

**VII. LIEN AND REMUNERATION.**

1. *Generally*, 2087.
2. *Tolls and Charges*, 2090.

**VIII. MEASURE OF DAMAGES FOR NEGLIGENCE, 2099.****IX. ACTIONS AGAINST CARRIERS.**

1. *Notice of*, 2108.
2. *Form and Nature of*, 2110.
3. *Parties to Suc.*, 2111.
4. *Pleadings and Evidence*, 2114.

**X. CARRIERS BY SEA.—See SHIPPING.****I. WHO ARE.**

**Undertaker of Casual Jobs is not.**—A town carman, not conveying goods from any one known terminus to another, nor at any fixed rate, nor the goods of several persons at the same time; but plying in the streets, and undertaking jobs as he can get them, is not a common carrier. *Brind v. Dale*, 2 M. & Rob. 80; 8 C. & P. 327.

If goods are delivered to A., under a contract that the owner should go with them, and take care of them, that is not a delivery of the goods to A. as a common carrier. *Id.*

**Ferry—Owners of.**—Declaration against owners of a ferry stated that they were possessed of a ferry across the river Mersey, from Woodside to Liverpool, and that the plaintiff delivered to them a phaeton, and jewellery and watches contained in it, to be by the defendants, for reward, taken care of and carried in a steamboat from Woodside to Liverpool, and there landed for the plaintiff; that the defendants accepted and received the carriage so containing the jewellery and watches from the plaintiff, and it became their duty to take proper care of them while they remained in their custody, and in and about the carriage, conveyance, and landing of the same. Breach, that they took such bad care of the carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, conveyance, and landing of the same, that they were injured:—Held, that a contract to carry and land the carriage and jewellery, as stated in the declaration, could not be implied from the mere character of the defendants as owners of the ferry. But that it was a question for the jury, whether there was in fact a contract between the parties, either express or implied from usage, to receive the carriage on board, and to land it again at the end of the transit across the river. *Walker v. Jackson*, 10 M. & W. 161; 12 L.J. Ex. 165.

**Lighterman.**—One who exercises the ordinary employment of a lighterman by carrying goods in his flats for reward, although not bound as a common carrier to receive the goods of all comers indifferently, nevertheless incurs the liability of

a common carrier for the safety of goods carried by him. *Liver Alkali Company v. Johnson*, 9 L. R., Ex. 338; 43 L. J., Ex. 216; 31 L. T. 95—Ex. Ch.

Such person is not a common carrier, but, in the absence of any special agreement, is, by a custom adopted and recognized by the courts, liable as a shipowner upon an implied undertaking to carry at his own absolute risk, the act of God and the Queen's enemies alone excepted. *Ib.*

If a person holds himself out to carry goods for every one as a business, and he thus carries from the wharves to the ships in harbour, he is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for every one. If he holds himself out to do it for every one who asks him he is a common carrier, but if he carries for particular persons only, that is matter of special contract. *Ingate v. Christie*, 3 C. & K. 61.

The liability of a wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighters, is similar to that of a carrier. *Maving v. Todd*, 1 Stark. 72; 4 Camp. 225.

A hoyman who undertakes to carry goods must deliver them safely at all events, except damaged by the act of God or by the King's enemies. *Dale v. Hall*, 1 Wils. 281.

On a declaration against a lighterman in the common form for negligence, the plaintiff cannot recover if it appears that the loss was not occasioned by a neglect of the common and ordinary duty of the defendant. *Whalley v. Wray*, 3 Esp. 74.

Where a declaration stated an undertaking to carry safely goods by water, with an exception of all accidents arising from the act of God, the King's enemies, fire, pirates and all other dangers and accidents of seas, rivers and navigation of what nature and kind soever:—Held, that this exception being beyond the common law exception, must be specially proved. *Richardson v. Sewell*, 2 Smith, 205.

A carrier of goods by water is liable for damage occasioned by running against an anchor to which no buoy appeared to be fastened. *Trent Navigation v. Wood*, 3 Esp. 127; Abb. Ship. 256; 4 Dougl. 287; 1 T. R. 28, n.

Where a man undertook to carry goods from London to Amsterdam, and they were accidentally damaged in being let down into the hold of the ship:—Held, that he was liable for such damage. *Goff v. Clinkard*, 1 Wils. 282.

**Packers of Goods—Special Contract.**—A contractor who undertakes to pack goods as well as to carry them, and who enters into an express contract by which he undertakes "risk of breakages (if any) not exceeding 5l. on any one article," is not liable as a common carrier. *Seafie v. Farrant*, 44 L. J., Ex. 36; 32 L. T. 563; 23 W. R. 469. Affirmed on appeal, 10 L. R., Ex. 358; 44 L. J., Ex. 234; 33 L. T. 278; 23 W. R. 840—Ex. Ch.

The defendant was the agent of a railway company for collecting and delivering goods and parcels, and also carried on upon his own account the business of a carrier, removing goods and furniture for hire for all persons indifferently who applied to him, in his own vans, which he sent by road or rail to all parts of England, the goods and furniture being previously inspected before any contract was made. Generally in such contracts the van or vans were hired by and

filled with the goods of one person only. The plaintiff having applied to the defendant to remove his furniture from one town to another, and the defendant's foreman having inspected it, the parties agreed that the defendant should remove the furniture for 22l. 10s., the defendant "undertaking risk of breakages (if any) not exceeding 5l. on any one article." After the furniture was placed in the defendant's vans, and while in transit, it was burnt without any negligence on his part. The plaintiff having brought an action for the loss, contended that the defendant was liable as a common carrier:—Held, that the special contract shewed that the parties intended to limit the defendant's liability to loss by breakage or by his negligence, and excluded any question of liability as a common carrier; and that the plaintiff could not recover. *Ib.*

**Partners.**—Before 11 Geo. 4 & 1 Will. 4, c. 68, s. 5, in an action on the case against the proprietor of a coach as a common carrier, for not safely conveying a passenger, he could not plead in abatement the non-jointure of a co-proprietor. *Ansell v. Waterhouse*, 2 Chit. 1; 6 M. & S. 385. See *Powell v. Layton*, 2 N. R. 365.

A. and B. were partners in the business of public carriers; by contract between them, A. found horses and drivers for certain stages, and B. supplied them for the remaining stages. They were, notwithstanding this division of the concern between them, responsible for the misconduct and negligence of their drivers and servants throughout the whole distance, and it was no defence to B. that the servant by whom an injury was committed was the special servant of A., and hired and paid by A. alone. *Weyland v. Elkins*, Holt, 227; *S. C.*, nom. *Waland v. Elkins*, 1 Stark. 272.

— **Who are Partners.**—If several persons horse, with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road. *Barton v. Hanson*, 2 Taunt. 49; 2 Camp. 97.

Where two persons contracted to assist the defendant with their respective horses, but to give in their accounts separately:—Held to be separate contracts. *Smith v. Taylor*, 2 Chit. 142.

Where the plaintiff and defendant ran a stage-coach from Bath to London, the former providing horses for one part of the road, and the latter for another, and the profits of each party were calculated according to the number of miles his horses went; and the plaintiff received the fares of the passengers, and gave a weekly account thereof to the defendant:—Held, that they were partners. *Fremont v. Coupland*, 9 Moore, 319; 2 Bing. 170; 1 C. & P. 276.

A special contract made by one of several joint coach proprietors for the carriage of parcels, is binding upon them all, though some of them became proprietors after the contract was made. *Helsby v. Mears*, 8 D. & R. 289; 5 B. & C. 504.

If a party recovers damages against one of two joint proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he proves at the trial that he was not personally present when

the accident happened. *Wooley v. Batte*, 2 C. & P. 417. But see *Merryweather v. Nison*, 8 T. R. 186.

— **Verdict found against Part of those Sued.**—In an action against ten, the plaintiff declared, that they were proprietors of a stage-coach, for the conveyance of passengers for hire from A. to B.; and that being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from A. to B. for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskilfulness, and default of themselves and their servants, the coach was upset, by means whereof the plaintiff was hurt, and sustained other injuries: a jury having found a verdict against eight only, and in favour of the other two, and judgment being entered accordingly:—Held, that as the action was founded on a breach of duty, imposed by the custom of the realm, which was a breach of the law; and as the declaration was framed on a misfeasance; such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber. *Bretherton v. Wood (in error)*, 6 Moore, 141; 3 B. & B. 54; 9 Price, 408. See *Pozzi v. Shipton*, 1 P. & D. 4; 8 A. & E. 963.

**Telegraph Company.**—See TELEGRAPH.

**Cab Proprietors, Liability of.**—See HACKNEY CARRIAGE.

**Railway Companies.**—See cases, *infra*.

## II. PASSENGERS AND THEIR LUGGAGE.

### 1. THE CONTRACT.

#### a. Generally.

**Nature of Duty.**—To enable the plaintiff to maintain an action for negligence, it is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and defendant. *Collett v. London and North-Western Railway Company*, 16 Q. B. 984; 20 L. J., Q. B. 411; 15 Jur. 1053.

However the duty may arise, if it exists and is neglected to the injury of the plaintiff, he has a right to sue for damages. *Id.*

Where a duty was cast by 1 & 2 Vict. c. 98, upon a railway company to carry any officer of the post-office whom the postmaster-general might elect, for which service the company was to be remunerated by the postmaster-general, and the plaintiff was the officer elected, and he was injured by the negligence in carrying him of a railway company:—Held, that it was the duty of the company to carry him with proper care and diligence, and that for a breach of such duty, to his injury, he might well sue the company, though there was no contract between him and the company, but the duty arose only from the obligation imposed upon the company by the act of parliament. *Id.*

**Independent of Contract.**—A declaration alleged that the mails from L. to T. were

carried on a railway, pursuant to 1 & 2 Vict. c. 98. That the plaintiff was an officer of the post-office, whom the railway company had been reasonably required by the postmaster-general to take up and carry, and had taken up and was carrying, as such officer, in and upon the carriage of the company in which the mails were being conveyed. That the plaintiff was lawfully in and upon the carriage, and that thereupon it became and was the duty of the company to use due and proper care and skill in and about the carrying and conveying the plaintiff. Breach, that the company omitted and neglected to use due and proper care and skill, and so negligently and unskilfully conducted themselves in and about carrying and conveying the plaintiff, and in conducting, managing and directing the carriage, and the engine and other carriages, and the railway itself, that the carriages sustained a violent concussion, and the plaintiff was thereby injured, and prevented from attending to his business:—Held, that a duty as alleged arose out of the obligation imposed upon the company by the 1 & 2 Vict. c. 98, and that the action was maintainable. *Id.*

**Duty to Receive—Refusal.**—If a declaration states that the defendant, being the owner of a stage-coach, undertook to carry the plaintiff, her children, and servants together, in and by a stage-coach, evidence that the whole inside of the coach was taken for the plaintiff and her three daughters, and two outside places for her servants, will support the declaration; and the defendant having sent a double-bodied coach, and refusing to take them, unless one of them would travel in one body and the others in the other body, is a breach of this agreement. *Long v. Horne*, 1 C. & P. 610.

A person paying the whole fare of a stage-coach may take his place at any stage of the journey; aliter if he pays only a deposit. *Kerr v. Mountain*, 1 Esp. 27.

Though a postmaster cannot be compelled to let a chaise, if he does so, and the passenger takes his seat in it, the postmaster must proceed if his fare is tendered. *Massiter v. Cooper*, 4 Esp. 260.

Where the conductor of an omnibus, by means of a fraud, or by making use of a false statement, induces a person not to persist in his attempt to be carried as a passenger, this does not amount to such a refusal to carry him, as will entitle the person so deceived to maintain an action against the proprietor of the omnibus. *Marshall v. Matson*, 15 L. T. 514.

An allegation in a declaration that an omnibus plies between D. and C., will not be supported by evidence which shews that the omnibus, although running from D. to C., yet starts from a point beyond D., and runs to a point beyond C. *Id.*

**Carriage by Land and Sea.**—A carrier who enters into a contract with a passenger to convey him from A. to B., part of the journey to be performed by land in England, and the rest by sea, is entitled to the protection of the Carriers Act, 11 Geo. 4, & 1 Will. 4, c. 68. *Le Conteur v. South-Western Railway Company*, 1 L. R., Q. B. 54; 35 L. J., Q. B. 40; 6 B. & S. 961; and see *Doolan v. Midland Railway Company*, 2 App. Cas. 792.

**Gratuitous Carriage—Non-transferable Ticket**—["**Lawful Journey.**"]—A railway company was in the practice of allowing the reporters of a London newspaper, when going to the country races on their line, for the purpose of framing their reports, to travel on the line carriage free. The reporter was for such purpose supplied with a ticket by the company, which had written upon it the name of a person in the reporting department. The ticket also purported on the face of it to be not transferable; and there was also a memorandum on it to the effect that any party other than the person named in it using the pass would be liable to the penalty which a person incurs by travelling without having paid his fare, or that he should be liable to pay the fare; but it did not distinctly appear which of the two liabilities was stated in the memorandum; and if the former, it did not appear what the penalties were which were alluded to. H. acting *bonâ fide*, and going on the business of the journal, and entitled by the usage to have the benefit of a ticket with his name on it, went to the station with a ticket such as described. His name was not upon it, but there was that of another person, who was also a reporter, and in the same department with himself. H. shewed this ticket to the porter at the station, whose business it was to examine the passengers' tickets, who said it was all right, and placed him in a carriage. There was no distinct evidence that the porter knew personally who H. was. H. and other reporters had on several occasions before travelled with similar tickets, not bearing the names on them of those who used them; and there was evidence that the persons whose names were on the tickets were personally known to some of the officers and servants at the station. In an action by H. against the company for an injury received on their line, whilst travelling in one of the company's carriages, in which the declaration alleged that he "then lawfully was," and which allegation was denied by the plea, the question having been left to the jury, and a verdict having been found for the plaintiff:—Held, that there was evidence for the jury in support of the issue, and that the question was rightly left to them. *Great Northern Railway Company v. Harrison (in error)*, 10 Ex. 376; 2 C. L. R. 1136; 23 L. J., Ex. 308—Ex. Ch.

**Special Conditions.**—A declaration alleged that the plaintiff was received by a railway company as a passenger to be safely carried on their railway on a journey from Piel Pier to Carlisle, and that the company so negligently managed the railway and the traffic upon it that a collision took place, by which he was injured. Plea, that he was received as a passenger under an agreement that he should travel at his own risk. Replication, that it was by reason of gross and wilful negligence and mismanagement of the company that the collision took place:—Held, that the replication was bad, for the agreement stated in the plea must be taken to include the negligence mentioned in the replication. *Macaulay or McCauley v. Furness Railway Company*, 8 L. R., Q. B. 57; 42 L. J., Q. B. 4; 27 L. T. 485; 21 W. R. 140.

A railway passenger took a ticket containing a printed condition, which stated that, inasmuch as the holder would travel in a passenger carriage attached to a goods train, the company should be relieved from responsibility for any personal

injury to him consequent on or in any way arising from such passenger carriage being attached to a goods train. In an action by the passenger for personal injuries sustained by him whilst alighting from a carriage attached to a goods train, which, after certain goods waggons had been shunted, stopped short of the platform of the station to which he was travelling:—Held, that he, though in fact unaware of this condition, was bound by it, and that the company was exempted from liability for injuries from any accident within the scope of the condition. *Johnson v. Great Southern and Western Railway Company*, 9 Ir. R., C. L. 708.

**Drover's Ticket—Own Risk.**—A condition in a cattle ticket that persons in charge of cattle, who travel without payment, shall travel at their own risk, applies to the whole of a through railway journey. *Hall v. North-Eastern Railway Company*, 10 L. R., Q. B. 437; 44 L. J., Q. B. 164; 33 L. T. 306; 23 W. R. 860.

A cattle drover booked stock at a station on the North British line to a station on the North-Eastern line, taking from the North British Company a free pass to travel by the same train with the stock at his own risk, and exonerating the company from all responsibility for injury or loss to himself however occasioned on the journey for which it was issued or used. By the negligence of the North-Eastern Company a train of that company ran into the train in which he was on the North-Eastern line, and injured him:—Held, that the North-Eastern Company was free from liability to the passenger by reason of the contract, and that he could not recover against them. *Id.*

A drover, who had travelled with cattle by a railway on the terms that he was to be free of charge, but, at his own risk, was, in consequence of the negligence of the servants of the company, injured, after leaving the train, in the course of his departure from the premises of the company:—Held, that he took upon himself the risks incidental to the whole transaction, the access to and departure from the train as well as the actual transition, and therefore that the company was not liable. *Gallin v. London and North-Western Railway Company*, 10 L. R., Q. B. 212; 44 L. J., Q. B. 89; 32 L. T. 550; 23 W. R. 308.

A drover in charge of his cattle signed a contract with a railway company which stated that the cattle were to be conveyed upon the conditions mentioned upon the back of the invoice handed to him, and on the back of the invoice there was printed, amongst other conditions, the following:—"That, as a drover is allowed to attend the cattle during transit, they will allow such drover to travel free of charge, upon condition that he so travel at his own risk." On the face of the invoice there was nothing referring to passengers except the words, "Drover in charge free;" and at the foot of it were the words, "For conditions of carriage, see back hereof." The drover did travel free, and in consequence of a collision occurring on the journey, he received personal injuries, for which he brought an action against the railway company:—Held, that the condition allowing a drover in charge of his cattle to travel free, provided he did so at his own risk, was part of the written contract signed by the drover, and that, as he had elected to travel free, he was bound by the conditions, and could not recover damages

for the personal injuries sustained. *Duff v. Great Northern Railway Company*, 4 L. R., 1r. 178; 41 L. T. 197.

**Agreement as to Passes—Uncertainty.]**—A merchant residing at B., and carrying on business in the towns and throughout the district traversed by a railway, in 1846 entered into an agreement with the company that he would, in consideration of the company granting him yearly, during so long a time as he should carry on business at B., a free pass over their line, between the towns of B. and C., and should have, for so long a time as the scale of charges of the company, and of a canal company, should bear the same proportion to each other as they then bore, all his goods carried by the railway company, in preference to the canal company. That arrangement continued to 1849, when the merchant, at the request of the company, to prevent the annoyance to them of constant applications for free passes, consented to pay 5*l.* as a nominal consideration for such free pass. This arrangement continued to 1857, when the company refused to renew it. The agreement of 1845 was not executed by or on behalf of the company:—Held, that the agreement, being uncertain in its terms, could not be specifically enforced in equity against the company. *Sturge v. Midland Railway Company*, 4 Jur., N. S. 273.

**Evidence of Acceptance for Carriage.]**—In an action for negligence, the declaration stated that the plaintiff agreed to become a passenger by the defendant's omnibus, and that the defendant received the plaintiff as such passenger. The plaintiff held up his finger to the driver of the omnibus, who stopped to take him up; and just as the plaintiff was putting his foot on the step of the omnibus, the driver drove on, and the plaintiff fell on his face on the ground:—Held, that this was evidence in support of the declaration, as the stopping of the omnibus implied a consent to take the plaintiff as a passenger. *Brien v. Bennett*, 8 C. & P. 724.

#### b. Taking Ticket, Effect of.

**Master and Servant.]**—A servant took a ticket and travelled on a railway, and was injured on his journey through the negligence of the railway company. The master brought an action against the company for the loss of his servant's services through their negligence; but there was no contract between the railway company and the master:—Held, that inasmuch as the servant was injured, not by a simple wrong, but by a wrong arising out of a breach of duty imposed on the railway company by their contract with the servant, the action was founded on the contract, and would not lie. *Alton v. Midland Railway Company*, 19 C. B., N. S. 213; 34 L. J., C. P. 292; 11 Jur., N. S. 672; 13 W. R. 918.

Where a master took tickets for himself and his three servants, keeping the tickets in his own care but telling the guard that he had the servants' tickets, and the servants were allowed to enter the train:—Held, that the company was estopped from pleading in an action for trespass that they had not paid their fare. *Jennings v. Great Northern Railway Company*, 1 L. R., Q. B. 7; 35 L. J., Q. B. 15; 12 Jur., N. S. 331; 13 L. T. 231; 4 W. R. 28. *And see cases infra, under 3. PASSENGER'S LUGGAGE.*

**Contract limiting Liability—Conditions inside Book of Coupons.]**—Outside the cover of a paper book of coupons forming a railway ticket, issued to the plaintiff by the defendants, was printed the name of their railway, the words "Cheap return ticket, London to Paris and back, second class," and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains. The plaintiff having been injured while travelling by virtue of the ticket, in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it. The jury were directed that if it was brought to his notice it would afford a defence, and on being asked the question, suggested in *Parker v. South-Eastern Railway Company* (2 C. P. D. 416), whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff, answered that it was not, and found a verdict in his favour. He moved for judgment:—Held, distinguishing *Henderson v. Stevenson* (2 L. R., H. L., Sc. 470), that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for the defendants. *Burke v. South-Eastern Railway Company*, 5 C. P. D. 1; 49 L. J., C. P. 107; 41 L. T. 554; 38 W. R. 306; 44 J. P. 283. *And see Zuz v. South-Eastern Railway, 4 L. R., Q. B. 359, &c., infra, as to PASSENGER'S LUGGAGE.*

**Action against—Which Company.]**—Plaintiff travelled with a ticket issued by the D. company over defendants' railway in a carriage belonging to the D. company. By the defendants' act of parliament, the D. company had running powers over the line, the defendants receiving a percentage on the traffic receipts, such percentage to include the cost of all services connected with manning the lines, use of stations, and services of station staff necessary for despatch of business connected with the traffic. The plaintiff was injured at a station belonging to the defendants by the negligence of a porter employed on a platform which was exclusively allotted to the D. company's traffic:—Held, that the porter was acting as the defendants' servant, and that therefore the defendants were liable. *Self v. London, Brighton, and South Coast Railway Company*, 42 L. T. 173; 44 J. P. 344—C. A.

**Duty of Contracting Company.]**—Where a railway company, being in connexion with another company, undertakes to carry a passenger to a place on the other company's line, and an accident happens on the latter company's line, by reason of the negligence of the second company's servants, and the passenger is thereby injured, he has a right of action against the company from whom he takes the ticket. *Great Western Railway Company v. Blake*, 7 H. & N. 987; 31 L. J., Ex. 346; 8 Jur., N. S. 1013; 10 W. R. 388—Ex. Ch. *See John v. Bacon*, 5 L. R., C. P. 439; *Francis v. Cockerell*, 5 L. R., C. P. 215.

The contract into which a railway company enters with a passenger on giving him a ticket between two places is the same, whether the journey is entirely over their own line or partly

over the line of another company, and whether the passage over the other line is under an agreement to share profits, or simply under running powers—viz., that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management. *Thomas v. Rhymney Railway Company*, 6 L. R., Q. B. 266; 40 L. J., Q. B. 89; 24 L. T. 145; 19 W. R. 477—Ex. Ch. Affirming 5 L. R., Q. B. 226; 39 L. J., Q. B. 141; 22 L. T. 297; 18 W. R. 668.

The plaintiff took a ticket of the R. Railway Company, entitling him to be carried from A. to B. An intermediate portion of the journey was over the line of the T. V. Company, over which the R. Company had running powers on payment of tolls, the whole of the traffic arrangements over the T. V. line being left by the special act in the control of the T. V. Company. On that portion of the line the train in which the plaintiff was ran into a train of the T. V. Company, and he was injured by the collision. The collision was owing solely to the negligence of the servants of the T. V. Company, in sending on their own train without the proper tail-light, and allowing the R. Company's train to proceed on the same line of rails too soon after their own train, without giving any warning to the driver of the train:—Held, that the R. Company was liable for the negligence of the T. V. Company. *Id.*

Under statutory powers the London and North Western Railway Company ran passenger trains over a certain portion of the Midland line of railway, paying to the Midland Company a fixed mileage rate. The times of the passing of these trains over the Midland line were regulated by that company, and the signals, at the point of junction between the two lines of railways, were under their control and management. In consequence of the driver of a London and North Western train negligently disobeying the signal duly given to him by the Midland Company's servants, such train, whilst running under the above-mentioned powers, and without any negligence on the part of any of their servants, came into collision, on the above-mentioned portion of the Midland Company's line, with a train of the Midland Company, in which the plaintiff was travelling as a passenger under a contract with the company, and caused the injury to him, for which an action was brought:—Held, that the action was not maintainable against the Midland Railway Company, inasmuch as the London and North Western Railway Company's servants, through whose negligence alone the collision occurred, were not concerned in the carrying of the plaintiff, and were not either in the employment or under the control of the Midland Company, who consequently were not liable for the injuries resulting from such collision. *Wright v. Midland Railway Company*, 8 L. R., Ex. 137; 42 L. J., Ex. 89; 29 L. T. 436; 21 W. R. 460.

**Liability of Company not issuing Ticket.]**—The defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond Station of the South Western Railway Company. Above the booking office at the New Richmond Station are the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff

took from the clerk there employed by the South Western Railway a return ticket to Hammersmith and back. The ticket was not headed with the name of either company, but bore on it the words "Via District Railway." On his return journey from Hammersmith to Richmond the plaintiff travelled with this ticket in the carriage of a train belonging to the defendants and under the management of their servants. The plaintiff, on alighting at Richmond, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:—Held, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, even assuming the ticket not to have been issued by or for them, but by the South Western Company. *Foulkes v. Metropolitan District Railway Company*, 4 C. P. D. 267; 48 L. J., C. P. 555; 41 L. T. 95. Affirmed, 5 C. P. D. 157; 49 L. J., C. P. 361; 42 L. T. 345; 28 W. R. 526—C. A.

**Purchase of Tickets for Excursion.]**—See *Skinner v. London, Brighton, and South Coast Railway Company*, 5 Ex. 787, *infra*, col. 1962.

**Season Tickets—Performance of Contract—Condition precedent to Right to recover Deposit.]**

—The plaintiff bought from the defendant company a season ticket entitling him to travel by their railway for one month, paying the usual charge for such a ticket, and 10s. deposit, and agreed to be bound by certain conditions. The fourth condition was, the ticket "is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry or on forfeiture." The sixth condition was "That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company, if it shall be lost, or in case of any breach of any of the above conditions." Some few days after the expiry of the month, but within a reasonable time, the plaintiff delivered up the ticket, and claimed the deposit; and on the company's refusal brought an action to recover it:—Held, that the performance of every one of the conditions was a condition precedent to the right to a return of the deposit; and that as the ticket had not been delivered up "on the day after expiry" the conditions had not been performed, the deposit was forfeited, and the plaintiff could not maintain the action. *Cooper v. London, Brighton and South Coast Railway Company*, 4 Ex. D. 88; 48 L. J., Ex. 434; 40 L. T. 324; 27 W. R. 474.

**Passenger Travelling at Own Risk.]**—See cases under preceding head.

**c. Duty of Passengers as to Tickets under Bye-laws and otherwise.**

**Proof of Bye-laws.]**—The original bye-laws of a railway company, framed under 8 & 9 Vict. c. 20, are documents of a public nature, and provable, as such, under 14 & 15 Vict. c. 99, s. 14. *Mottram v. Eastern Counties Railway Company*, 7 C. B., N. S. 58; 29 L. J., M. C. 59; 6 Jur., N. S. 583.

The 8 & 9 Vict. c. 20, s. 110, provides that the substance of the bye-laws shall be painted on

boards, and affixed on the front of every wharf or station, so as to give public notice thereof to the parties interested therein or affected thereby, and that no penalty under any bye-law shall be recoverable unless the same shall have been published as aforesaid; and s. 111 makes it sufficient, for proof of the publication of bye-laws, to shew that a copy of them was affixed as by this act directed. Upon an information before justices for a penalty for infringing a bye-law, it was proved that a copy of the bye-law was affixed at the stations at which the passengers got into and left the train respectively:—Held, sufficient proof of publication, without shewing that copies of every bye-law were affixed at all the other stations between the termini of the line. *Ib.*

**Obtaining Tickets by False Pretences.]—**A railway ticket is a chattel, and the obtaining of it by false pretence from a servant of the company, so as to enable the holder to travel on the line, is an obtaining a chattel by false pretences. *Reg. v. Boulton*, 3 New Sess. Cas. 705; 2 C. & K. 917; 1 Den. C. C. 508; T. & M. 201; 13 Jur. 1034.

**Season Tickets.]—**A bye-law of a railway company ran thus: "each passenger booking his place will be furnished with a ticket which he is to shew and deliver up when required to the guard," and "each passenger not producing or delivering up his ticket when required, is hereby subjected to a penalty not exceeding 40s.:"—Held, that holders of annual tickets for travelling on the line were bound to produce their tickets to the railway officers as much as ordinary passengers. *Woodard v. Eastern Counties Railway Company*, 30 L. J., M. C. 126; 7 Jur., N. S. 971; 4 L. T. 336; 9 W. R. 660; and see *Cooper v. London, Brighton and South Coast Railway*, *supra*, col. 1954.

**Estoppel.]—**A railway company, in order to enforce a bye-law as to the production of tickets, must bring themselves strictly within the terms of such bye-law. *Jennings v. Great Northern Railway Company*, 1 L. R., Q. B. 7; 35 L. J., Q. B. 15; 12 Jur., N. S. 331; 13 L. T. 231; 14 W. R. 28.

A master took tickets for himself and three servants, keeping the tickets in his own care, but telling the guard that he had the servants' tickets, and the servants were allowed to enter the train without each having or shewing his own ticket:—Held, that by so doing the company was estopped from pleading, as a defence to an action by the master against the company for afterwards expelling the servants from the train and refusing to carry them, the bye-law: "No passenger will be allowed to enter any carriage or travel therein without having paid his fare and obtained a ticket, which ticket such passenger is to shew when required, and to deliver up before leaving the company's premises." *Ib.*

**Recovery of Penalties—Unreasonable Bye-laws—Intention to Defraud.]—**The 8 & 9 Vict. c. 20, s. 103 (Railway Clauses Act), has only reference to persons travelling without a ticket, and with fraudulent intent. *Dearden v. Townsend*, 1 L. R.,

Q. B. 10; 35 L. J., M. C. 50; 12 Jur., N. S. 120; 13 L. T. 323; 14 W. R. 52.

By a bye-law of a railway company passengers not delivering up their tickets when required were made liable to pay the fare from the place where the train started, or in default a penalty of 40s. D. took a return ticket, but after returning to the place from which he started, did not get out, but went on to a further station, without, however, any intention to defraud, and offering to pay the fare for the excess of the distance:—Held, that he was not liable to be convicted under such bye-law, which only applied to the case of a person wilfully refusing to shew his ticket when he had one. *Ib.*

Held also, that if the bye-law did apply to D., then it was unreasonable and void, and unwarranted by 8 & 9 Vict. c. 20. *Ib.*

A bye-law of a railway company provided that "any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey:"—Held, that, as against a person who had, in good faith, travelled a short distance upon the line without having procured a ticket, this bye-law was unreasonable and void, inasmuch as it was in substance an attempt to inflict a penalty for doing without fraud that which, by the joint operation of ss. 103 and 109 of 8 & 9 Vict. c. 20, can be punished only if done fraudulently. *London and Brighton Railway Company v. Watson*, 3 C. P. D. 249; 47 L. J., C. P. 634; 39 L. T. 199; 26 W. R. 856.

Held, on appeal, that inasmuch as the penalties contained in the bye-law could by s. 145 be recoverable only before justices, there was no debt which could be recovered in a court of civil jurisdiction. *Ib.* 4 C. P. D. 118; 48 L. J., C. P. 316; 40 L. T. 183; 27 W. R. 614—C. A.

**—Travelling with Non-transferable Ticket.]**

—The respondent who was travelling on the G. W. Railway in a train going to N. produced the "forward half" of a tourist return ticket from L. to N. and back. This ticket had been originally issued to another person and was stated on the back thereof to be not transferable. The original taker had used the ticket as far as H. on the way from L. to N., and then proceeded on a different route, and, consequently not having given up the forward half of the ticket, sold it to the respondent who was travelling with it between H. and N.:—Held, that the respondent was liable to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid his fare with intent to avoid payment thereof. *Langdon v. Howells*, 4 Q. B. D. 337; 48 L. J., M. C. 113; 40 L. T. 880; 27 W. R. 657.

**—Refusing to shew Ticket—Penalty varying with Distance Train has travelled.]—**A bye-law of the respondents' company provided "that a passenger should shew and deliver up his ticket to any duly-authorized servant of the company whenever required to do so for any purpose, and that any person travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, should be required to pay the fare from the station whence the train originally

started to the end of his journey." The appellant had a ticket entitling him to travel on the lines of the respondents and the London and South Western Railway Company from Charing Cross or Cannon-street to Windsor and back. Having come to the Waterloo Junction station on the respondents' line, where he had to change trains, he had for this purpose to go from the respondents' station to that of the London and South Western Railway Company. On passing out of the respondents' station he was asked to shew his ticket but refused to do so. There was no intention to defraud on the appellant's part. The respondents summoned him under the above bye-law, and he was convicted in the amount of the fare from the station whence the respondents' train by which he travelled had started.—Held, that the conviction must be quashed. *Saunders v. South Eastern Railway Company*, 5 Q. B. D. 456; 49 L. J., Q. B. 761; 43 L. T. 281; 29 W. R. 56; 44 J. P. 781.

By Cockburn, C. J., assuming that the power given by the 108th section of the Railways Clauses Consolidation Act, to make bye-laws for "regulating the travelling upon or using and working the railway," applied to persons travelling in the company's carriages, which he was inclined to think it did not, it was not competent to the company by their bye-law to make the refusal to shew the ticket an offence in the absence of a fraudulent intention; secondly, the bye-law was void for unreasonableness, because the penalties thereunder for offences of equal criminality would vary with the distances from which the train might originally have started; and thirdly, the bye-law was inapplicable to the case, as the power to make bye-laws was confined to the case of persons travelling on the railway, which the appellant was not doing when required to shew his ticket. *Ib.*

By Lush, J.: The bye-law was void for unreasonableness, because the penalty for not shewing the ticket varied according to the distance the train had travelled, and also because the passenger was required not only to shew but to deliver up his ticket whenever required for any purpose. *Ib.*

A railway company was empowered to make bye-laws for the good government of the affairs of the company, and for the management of the undertaking, and of the officers and servants of the company, in all respects whatever, and to impose and inflict reasonable fines and forfeitures upon persons offending against the same, not exceeding 5*l.* for any one offence, to be levied and recovered as any penalty might by the act be levied and recovered; such bye-laws to be binding upon and be observed by all parties, provided that they were not repugnant to the laws of England, or the directions of the act. It was also enacted, that it should be lawful for the company to make orders and regulations for regulating the travelling upon and use of the railway, and for or relating to travellers upon the line, such orders and regulations to be binding upon travellers and passengers passing upon the railway, upon pain of forfeiting and paying a sum not exceeding 5*l.* Penalties and forfeitures imposed by the act, of which there were several, or by any bye-law, might be recovered in a summary way by the adjudication of justices, half the penalty to go to the informer, and the other half to the company. And it should be lawful for any officer or agent of

the company to seize any person whose name and residence should be unknown to such officer or agent, who should commit any offence against that act, and to convey him before a justice, without any warrant or other authority than that act. The company made a bye-law, whereby a passenger not producing or delivering up his ticket was to be required to pay the fare from the place where the train originally started:—Held, that this was not a bye-law imposing a penalty or forfeiture, and that the arrest of a passenger not producing his ticket, and refusing to pay the fare from the place where the train originally started, was illegal. *Chilton v. London and Croydon Railway Company*, 5 Railw. Cas. 4; 16 M. & W. 212; 16 L. J., Ex. 89; 11 Jur. 149.

— **Travelling in Superior Class.**—By a bye-law of a railway company, "any person travelling, without special permission of some duly-authorized servant of the company, in a carriage or by a train of a class superior to that for which his ticket was issued is hereby subject to a penalty not exceeding 40*s.*, and shall, in addition, be liable to pay his fare, according to the class of carriage in which he is travelling, from the station where the train originally started, unless he shews that he had no intention to defraud." The defendant, with the intention of defrauding the company, travelled in a carriage of a superior class to that for which his ticket was issued, and having been charged under the bye-law, was convicted in a penalty of 10*s.* and costs:—Held, that the bye-law was illegal and void, for assuming that it could be divided after the words "penalty of 40*s.*," and that each part was capable of being enforced apart from the other, the first part was repugnant to 8 & 9 Vict. c. 20, s. 103, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare, and that, if taken as a whole and indivisible, it was unreasonable according to *Watson v. London and Brighton Railway Company* (4 C. P. D. 118), and *Saunders v. South Eastern Railway Company* (5 Q. B. D. 456). *Dyson v. London and North Western Railway Company*, 7 Q. B. D. 32; 50 L. J., M. C. 78; 44 L. T. 609; 29 W. R. 565; 45 J. P. 650.

Held, further, that the conviction must be quashed, for it was founded upon the bye-law, and could not be upheld as disclosing an offence under 8 & 9 Vict. c. 20, s. 103. *Ib.*

A passenger who has paid a fare and taken a ticket, but who travels in a carriage of a class superior to that in which his ticket entitles him to travel, with intent to defraud the railway company of the difference between the fares for the two classes, is liable to be convicted under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid his fare. *Gillingham v. Walker*, 44 L. T. 715; 29 W. R. 896; 45 J. P. 470.

A bye-law was made by a railway company under the powers of 8 & 9 Vict. c. 20, in the terms following:—"All passengers travelling without the special permission of some duly authorized servant of the company in a carriage or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40*s.*, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from



the station where the train originally started, unless he shews that he had no intention to defraud." B. was convicted under the bye-law of travelling in a first-class carriage between Stacksteads and Bacup with a second-class ticket. The justices found, as a fact, that he had no intention to defraud:—Held, that the conviction was wrong, and that in order to constitute an offence under the bye-law, an intention to defraud must exist, inasmuch as otherwise the bye-law itself would be unreasonable and repugnant to the provisions of 8 & 9 Vict. c. 20, s. 103. *Bentham v. Hoyle*, 3 Q. B. D. 289; 47 L. J., M. C. 51; 37 L. T. 753; 26 W. R. 314.

— **Demand of Fare Necessary.**—A bye-law was made by a railway company, under the powers of their special act, and of 8 & 9 Vict. c. 20, in these terms: "No passenger will be allowed to enter any carriage on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket, specifying the class of carriage and the stations for conveyance between which such ticket is issued. . . Any person travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of the journey":—Held, that in order to entitle the company to take proceedings under this bye-law, a notice of demand for the fare due must have been first made to the passenger who refused or was unable to produce his ticket. *Brown v. Great Eastern Railway Company*, 2 Q. B. D. 406; 46 L. J., M. C. 231; 36 L. T. 767; 25 W. R. 792.

— **Fare charged for between Stations, though Fare from Station of Departure same to both.**—A railway return ticket only entitles the passenger to travel to and from the stations named in the ticket. If the passenger goes beyond the stations named to another station he must pay the additional fare, even though the price of a return ticket from the departure station to the further station be the same. A. took a return ticket from W. to D., but on the return journey he did not alight at W., but went on to P.:—Held, that A. was liable for the fare between W. and P. on the return journey, notwithstanding that the price of a return ticket from W. to D. and from W. to P. was the same. *Great Western Railway Company v. Pocock*, 41 L. T. 415; 28 W. R. 49; 44 J. P. 40.

— **Less Payment for greater Distance.**—A. intending to go by railway from C. to D. which is an intermediate station between C. and N., took a ticket for N., and upon his arrival at D. left the railway. The fare from C. to D. exceeded in amount the fare from C. to N., and the difference was demanded of A., but he refused to pay it. By a bye-law of the company, every passenger was to pay his fare previously to entering a carriage of the company, upon payment of which he would be furnished with a ticket specifying the class of carriage and distance for which the fare was paid; and any passenger who entered a carriage without having paid his fare was subject to a penalty. Under this bye-law A. was convicted by the borough justices of C. for having within the borough unlawfully and wilfully

entered the carriage of the company for the purpose of travelling upon the railway from C. to D., not having previously paid his fare for so travelling:—Held, that the borough justices had jurisdiction over the alleged offence, but that the conviction could not be sustained, as A. had paid his fare within the meaning of the bye-law. *Reg. v. Freere*, 4 El. & Bl. 598; 24 L. J., M. C. 68; 1 Jur., N. S. 700.

— **Distress Warrant—Non-payment—Committal.**—By 6 & 7 Will. 4, c. cvi. s. 237 (Eastern Counties Railway Act), penalties are recoverable before a justice, who is authorized to summon before him any person against whom complaint is made for any offence against a bye-law, and to proceed therein. By s. 238 any officer of the company is empowered to seize and detain any person whose name and residence shall be unknown to him, who shall commit any offence against the act, and to convey him before a justice, without any warrant; and the justice is required to proceed immediately to the conviction or acquittal of the offender. A person having been seized and detained by an officer of the company on the 21st of September, was brought before a justice for an offence against a bye-law. He committed the plaintiff to the house of correction by a warrant in the form (D. 1) in the Schedule to 11 & 12 Vict. c. 43. The warrant stated that the party had been charged on oath before the justice for having travelled on the railway without having paid his fare, contrary to a bye-law of the company, and commanded him to be taken to the house of correction, and there kept until the 27th, and to be then brought before the justices at petty sessions to answer the charge. On the 25th the justice, having ascertained that no offence had been committed, sent to the house of correction and caused the plaintiff to be discharged:—Held, first, that the justice was justified by 11 & 12 Vict. c. 43, s. 16, in committing the plaintiff to the house of correction. *Gelen v. Hall*, 2 H. & N. 379.

Held, secondly, that under ss. 237 and 238 of the above act a justice has no authority to issue a warrant before conviction; that the authority to arrest in the first instance is confined to the officer of the company, and that the duty thereby imposed upon the justice is forthwith, upon an offender being brought before him, to proceed to the determination of the case. *Ib.*

— **Summary Jurisdiction Act, 1879—Sum of Money "claimed to be due."**—The penalty imposed by s. 103 of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), for travelling in a railway carriage without having paid the fare and with intent to avoid the payment of it, is not "a sum of money claimed to be due and recoverable on complaint to a court of summary jurisdiction" within the meaning of s. 6 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and is not subject to the procedure for the recovery of civil debts in a court of summary jurisdiction prescribed by s. 35 of the same act. *Reg. v. Paget*, 8 Q. B. D. 151; 51 L. J., M. C. 9; 45 L. T. 794; 30 W. R. 336; 46 J. P. 151.

— **Removal from Carriage.**—A. took a return ticket from H. to D., and got out at D. On his

return, instead of getting in at D., he went to S., which was a station next to D., but further than D. from H. Before getting into the train there he was told that he would not be allowed to travel without getting a ticket from S. to D. He refused to take a ticket from S. to D., but he shewed his return ticket, and offered to pay the fare from S. to D. The servants of the railway company refused to accept the difference in fare, and removed him forcibly from the carriage. One of the bye-laws of the company provided that "no passenger will be allowed to enter any carriage without having first paid his fare, and obtained a ticket, which ticket such passenger is to shew whenever required. Any passenger not producing his ticket will be required to pay the fare from the place whence any part of the train originally started, or in default of payment shall forfeit and pay a sum not exceeding 40s." :—Held, that the company was entitled to remove A. from the carriage. *McCarthy v. Dublin, Wicklow and Wexford Railway Company*, 18 W. R. 762.—Ir. Ex. Ch.

**Liability for Acts of Servants in Removing.]—**  
See MASTER AND SERVANT.

## 2. DUTY OF CARRIER UNDER CONTRACT.

### a. Accident to Passenger. *Prima facie* Evidence of Negligence.

**Exclusive Management.]—**A passenger injured on a railway proves a *prima facie* case of negligence against the company, by shewing that, when the accident occurred, the train and railway were exclusively under their management. *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747; D. & M. 608; 3 Railw. Cas. 692; 13 L. J., Q. B. 138; 8 Jur. 464.

Assuming it is *prima facie* evidence of negligence on the part of a railway company that a train has got off the line, such evidence is entirely rebutted by proof that the accident arose from the wilful and wrongful act of a stranger. *Litch v. Rumner Railway Company*, 27 L. J., Ex. 155.

**Onus on whom.]—**In an action against a railway company for negligence, the fact of the occurrence of an injury not necessarily importing negligence, even if it is *prima facie* proof, is not conclusive proof of negligence. *Bird v. Great Northern Railway Company*, 28 L. J., Ex. 3.

Merely proof of an accident having happened to a train, does not cast upon the railway company the burthen of shewing the real cause of the injury. *Hammack v. White*, 11 C. B., N. S. 594.

When an accident happens to a passenger on a railway, either by the carriage breaking down or running off the rails, that is *prima facie* evidence of negligence on the part of the company. Such evidence, if not rebutted by evidence on the company's part, will justify a verdict against the company. *Dawson v. Manchester, Sheffield, and Lincolnshire Railway Company*, 5 L. T. 682.

It is evidence of negligence in the conduct of the carrying, that the train was run over a rail known to have been defective and fractured: the jury considering that this was the cause of

the accident. *Pym v. Great Northern Railway Company*, 2 F. & F. 619.

A declaration against a railway company alleged that the plaintiff, at the request of the company, became a passenger for hire in one of their trains; and that in consequence of the carelessness, negligence, and want of skill of the company and their servants, the train ran against another train on the line, whereby he was injured. At the trial it appeared that the train in question was hired of the company by a society for an excursion, the tickets of which were sold and distributed by the secretary of the latter body, from whom the plaintiff purchased his, and that the accident was occasioned by the train running, in the dark, against another train which was standing still at an intermediate station on the line :—Held, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the company. *Skinner v. London, Brighton and South Coast Railway Company*, 5 Ex. 787; 15 Jur. 299.

Held, secondly, that there was evidence to go to the jury in support of the allegation that the plaintiff became a passenger for hire with the company. *Id.*

A goods train and a passenger train met, and were passing each other on a double line of railway. Some timber on a truck in the goods train projected and struck the passenger train, injuring a passenger. The timber had been loaded on the truck without stanchions, and was secured by a chain only, which broke, and there was evidence that the breakage was caused by a latent flaw in the chain. There was also evidence that it would have been safer to load the timber with stanchions, but that the use of them for that purpose was comparatively recent, and there was no evidence of any accident having happened from not using stanchions. In an action by the passenger against the railway company to recover for the injury :—Held, that it was for him to shew that the accident was caused by the negligence of the company, and that the company was not bound to shew how the accident happened. *Hanson v. Lancashire and Yorkshire Railway Company*, 20 W. R. 297.

**— Train leaving Line.]—**Where a plaintiff sustained injuries in consequence of a portion of the train in which she was travelling having left the rails, and the railway, the engine and the carriages were under the management of the company :—Held, that the fact of the accident was sufficient evidence to cast upon the company the burthen of shewing that there was no negligence on their part; and that as they declined to afford any explanation of the cause of the accident, there was a case for the plaintiff proper to be submitted to the jury. *Flannery v. Waterford and Limerick Railway Company*, 11 Ir. R., C. L. 30.

**Stage-Coach breaking down.]—**In an action against a proprietor of a stage-coach for negligence, whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt, to prove negligence, it is *prima facie* enough to give evidence of the coach having broken down; from which negligence will be presumed. *Christie v. Griggs*, 2 Camp. 79.

**b. Condition of Carriages, &c.**

**Sufficiency of Stage-Coach.]**—Every stage-coach proprietor impliedly undertakes that his coach shall be sufficiently secure to perform the journeys which he undertakes by it, and he ought to examine its sufficiency previously to each journey, and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against him for negligence, though the coach has been examined previously to the second journey before the accident, and though it has been repaired at the coachmakers' only three or four days before. *Bremner v. Williams*, 1 C. & P. 414.

If through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger is placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned. *Jones v. Boyce*, 1 Stark. 493.

If a declaration in an action against coach proprietors, for an injury received by the overturning of a coach, states that it was their duty to carry the plaintiff safely for a certain hire, it does not mean to carry safely at all events, but will be sufficiently supported by proof of the want of due care. *Harris v. Costar*, 1 C. & P. 636.

**Concealed Defect.]**—And if an accident happens from a defect in the original construction, the proprietor is liable, although the defect is out of sight, and not discoverable upon ordinary examination. *Sharp v. Gray*, 9 Bing. 457; 2 M. & Scott, 621. See *Redhead v. Midland Railway Company*, and cases *infra*, col. 1964.

**Too many Passengers.]**—Proof that at the time of the accident there were more passengers than the statute allows, is conclusive evidence of negligence. *Israel v. Clark*, 4 Esp. 259.

**Improper Construction.]**—In an action against a coach proprietor for negligence, it appeared that the plaintiff became an outside passenger; that there was luggage on the roof of the coach, and no iron railing between the luggage and passengers; and that the plaintiff, being seated with her back to the luggage, was, by a sudden jolt, thrown from the coach, and her leg was thereby broken. The judge directed the jury to find for the plaintiff, if of opinion that the injury sustained was occasioned by the negligence of the defendant. The jury found for the plaintiff, and stated that they so found on account of the improper construction of the coach, and of the luggage being on the seat:—Held, that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence. *Curtis v. Drinkwater*, 2 B. & Ad. 169.

In an action by a passenger in a coach, against the owner, for an injury done to him by the coach overturning, if the declaration states that the servant of the defendant negligently "drove, conducted, and managed the coach," the plaintiff cannot recover, if the negligence was in sending out an insufficient coach. *Mayor v. Humphries*, 1 C. & P. 251.

**— Liability of Owner to Servant for Injuries**

caused by.]—A. contracted with the postmaster-general to provide a mail coach to convey the mail bags along a certain line of road; and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C. to drive the coach:—Held, that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. *Winterbottom v. Wright*, 10 M. & W. 109.

**Railway Companies—Reasonable Precautions.]**

—A railway company is bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested. And if there are several grounds of negligence suggested, the jury must be satisfied that some one or other of them existed, and caused damage to the party injured, though they need not be able to ascribe the whole injury to either. *Ford v. London and South Western Railway Company*, 2 F. & F. 730.

Railway companies who undertake to carry passengers for hire, although bound to use the utmost care, skill, and vigilance in everything that concerns the safety of the passengers, do not warrant the roadworthiness of the carriages they use, and consequently are not responsible for an accident to a passenger arising from a latent defect in the wheel of one of their carriages, such as no care or skill could detect. Per Mellor and Lush, J.J., dissentiente Blackburn, J. *Redhead v. Midland Railway Company*, 2 L. R. Q. B. 412; 36 L. J., Q. B. 181; 16 L. T. 485; 15 W. R. 831; 8 B. & S. 371. Affirmed, 4 L. R. Q. B. 379; 38 L. J., Q. B. 169; 17 W. R. 737; 9 B. & S. 519—Ex. Ch.

From an imperfect weld in the formation of a driving-wheel used to a carriage on the line of a railway company, the wheel gave way and caused serious injury to a passenger. When that wheel was new, and before using it, it had been properly and regularly tested by hammering it all round and all over, and although this was a test not absolutely fixed and certain to discover defect, yet it was the best known and useful course pursued; no defect was then discoverable. The wheel was afterwards much used, and by it reduced in thickness and considerably worn; after this, and after the tire had been re-turned, it was not again tested or hammered all round; if it had been after it had been so worn, according to the evidence, the defect which in fact existed in the wheel would in all probability have been discovered. The jury found that the company should have again tested the wheel after it had been so worn and re-turned, and was, under the circumstances, guilty of negligence and liable for not doing so:—Held, that the question of the company's liability was properly left to the jury upon the evidence given. There was evidence in favour of the plaintiff's case, and a rule for a new trial was refused. *Manser v. Eastern Counties Railway Company*, 3 L. T. 585.

**Possibility of Discovery.]**—It is the duty of a railway company to see that trucks coming on their line to be forwarded are in such a state as to travel safely; but a minute examination of such trucks would defeat the purposes of through traffic, and, therefore, cannot be required. Nor

does it become the duty of the company to make a minute examination of the whole of a truck merely because a defect has been discovered in it. *Richardson v. Great Eastern Railway Company*, 1 C. P. D. 342; 35 L. T. 351; 24 W. R. 907—C. A. Reversing the judgment of the Court of Common Pleas, 10 L. R., C. P. 480; 32 L. T. 248.

Therefore, where after a company had discovered two defects in a truck, and had caused the only one which was of any importance to be remedied by the owners, and had examined the truck in the usual way after the owners had sent it back, an accident was caused by another defect, in no way connected with or to be expected from either of the two discovered defects, and which could only have been found out by a minute examination, the company was held not to be liable for negligence to a person injured by the accident. *Ib.*

The Great Eastern Railway Company has a junction at Peterborough, at which junction they receive from other lines merchandize in trucks to the extent of more than 20,000 weekly, to be conveyed by them to London. In the course of a journey from Peterborough to London, one of these foreign trucks, laden with coal, broke down in consequence of the fracture of an axle, and caused the break-van to come into collision with a passenger train, whereby a passenger sustained injury. The truck belonged to a waggon company, whose duty it was to keep it in repair. The course of business at Peterborough was, that every truck, before coming on to the line, underwent some kind of examination as to its general fitness to travel. The particular truck, when submitted to such examination, was found to have a defective spring, and a serious crack in one of its main timbers, and it was accordingly taken into a siding, and was detained there four or five days, for the purpose of having a new spring put on. The truck (which had not been unloaded) was then sent on, with a direction chalked on it by a servant of the waggon company, that it should "stop at Peterborough for repairs when empty." Upon a minute examination of the truck after the accident, it was found that the fore-axle, which was 3½ inches thick, had across it, near the wheel, an old crack an inch and a quarter deep, and this was admitted to have been the sole cause of the breakdown. There was conflicting evidence as to whether or not, regard being had to the extent of the traffic at the junction, it was possible to have discovered this defect in the axle by any practical examination at Peterborough; and the following questions were submitted to the jury:

—1. Would the defect in the axle which was the cause of the accident have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? 2. Was it the duty of the railway company to examine this axle by scraping off the dirt and minutely looking at it, so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? 3. If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defect (*i. e.* in the spring and in the sole of the truck), they ordered it to be repaired, and it remained four or five days upon their premises for the purpose? The jury answered the first question in the affirmative and the second in the negative; and to the third question they answered, "It was their duty to

require from the waggon company some distinct assurance that it had been thoroughly examined and repaired." The judge thought the last answer immaterial, and directed a verdict for the company, reserving leave to the plaintiff to move to enter a verdict for him for an agreed sum, if upon the facts and findings of the jury the court should be of opinion that the company had been guilty of negligence; and this ruling was upheld by the Court of Appeal, as such a duty was not incumbent on the company. *Ib.*

In an action against a railway company for an injury alleged to have been caused by negligence, the negligence being the use of engines or machinery with a flaw or a defect which ought to have been observed, the question is not whether, according to evidence of a scientific and speculative nature, it might possibly have been detected, but whether practically and by the use of ordinary and reasonable care it ought to have been observed. *Stokes v. Eastern Counties Railway Company*, 2 F. & F. 691. And compare the following case.

#### Defect in Carriage—Warranty of Fitness.]—

The plaintiff hired from the defendant, a job-master, for a specified journey, a carriage, a pair of horses, and a driver. During the journey a bolt in the underpart of the carriage broke, the splinter-bar became displaced, the horses started off, the carriage was upset, and the plaintiff injured. In an action against the defendant for negligence, the jury were directed that, if in their opinion the defendant took all reasonable care to provide a fit and proper carriage, their verdict ought to be for him. The jury found a verdict for the defendant, and in particular that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention:—Held, that the direction was wrong, for that it was the duty of the defendant to supply a carriage as fit for the purpose for which it was hired as care and skill could render it, and the evidence was not such as to shew that the breakage of the bolt was, in the proper sense of the word, an accident not preventable by any care or skill, or to warrant the finding of the jury that the carriage was reasonably fit for the purpose for which it was hired. *Hyman v. Nye*, 6 Q. B. D. 685; 44 L. T. 919; 45 J. P. 554. See *Jones v. Page*, 15 L. T. 619; *Warner v. Banks*, 17 L. T. 147.

#### c. Management of Carriages.

**Injury to Hand by Shutting Door.]—**The plaintiff was a passenger by railway, and at one station, though all the seats in the carriage in which he was were filled, three more persons got in and stood up. There was no evidence that the servants of the company were aware of this, but the plaintiff remonstrated with the persons who had so got in. At the next station, the door of the carriage was opened by persons who tried to get in, and the plaintiff rose and held up his hand to prevent them. After the train had started, a porter pushed away the persons who were trying to get in and slammed the door, which caught and injured the hand of the plaintiff, who had been thrown forward by the motion of the train:—Held, that there was no evidence from which the jury might infer negligence on

the part of the company so as to entitle the plaintiff to recover damages. *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193; 47 L. J., C. P. 303; 37 L. T. 679; 26 W. R. 175. Reversing the judgment of the Court of Appeal. 2 C. P. D. 125; 46 L. J., C. P. 376; 36 L. T. 485; 25 W. R. 661—C. A.; and the judgment of the Common Pleas, 10 L. R., C. P. 49; 44 L. J., C. P. 83; 31 L. T. 475; 23 W. R. 78.

— **Evidence of Negligence—Duty of Judge and Jury.**—In an action for negligence it is for the judge to say whether any facts have been proved from which a case of negligence may reasonably be inferred, and then it is for the jury to say whether from those facts negligence ought to be inferred; and *Bridges v. North London Railway Company* (7 L. R., H. L. 213) does not lay down any new rule as to what is evidence for the jury. *Ib.*

The plaintiff was a passenger by railway, booking at one of the metropolitan stations, accompanied by his son. On the arrival of the train at the platform, the son entered the carriage first, followed by the father. After the plaintiff had completely entered the carriage, but before he had taken his seat, or passed the passenger sitting next the door, a servant of the company shut the door without warning. The father's thumb was in the hinge, and received injuries, to recover damages for which the action was brought. The jury found for the plaintiff with 20*l.* damages:—Held, that there was no evidence of negligence to go to the jury. *Mad-dox v. London, Chatham, and Dover Railway Company*, 38 L. T. 458.

— **Negligence of Passenger.**—A passenger in getting into a carriage put his hand on the hinge side of the door, which was standing open, and before he had got quite in, the guard of the train came, and, without any warning, slammed the door upon his hand, and so jammed it between the door and door-post. There was no handle to get into the carriage by, or at least none which could be seen, it being after dark, and no light sufficiently near. In an action against the railway company for the negligence of the guard in so shutting the door:—Held, that there was not such clear evidence of contributory negligence on the part of the passenger that the judge ought to have withdrawn the case from the jury. *Fordham v. London, Brighton, and South Coast Railway Company*, 3 L. R., C. P. 368; 37 L. J., C. P. 176.

But where a passenger, after getting into a carriage of a train, left his hand for about half a minute on the door-jamb; the guard, after crying out to the passengers to take their places, shut the doors of the carriages of the train, and not seeing the passenger's hand, injured his thumb in shutting the door:—Held, that there was no evidence of negligence by the railway company, and that there was evidence of negligence by the passenger. *Richardson v. Metropolitan Railway Company*, 37 L. J., C. P. 300.

**Door opening.**—A passenger by railway, without necessity for so doing, leant against the carriage door, which flew open; he fell out and was injured:—Held, that there was evidence of the liability of the company to go to the jury. *Gee v. Metropolitan Railway Company*, 8 L. R., Q. B.

161; 42 L. J., Q. B. 105; 28 L. T. 282; 21 W. R. 584—Ex. Ch.

Semble, when there is more than a scintilla of evidence of contributory negligence the court will not go into the question of degree, that being for the jury. *Ib.* Affirming 25 L. T. 822.

A railway company ought to take reasonable care to see that the handles of the carriage doors are fastened, and if they neglect to do so, they are guilty of negligence. But if a passenger leans too heavily upon a door and meets with an accident by its opening, he will be guilty of contributory negligence. *Warburton v. Midland Railway Company*, 21 L. T. 835.

The fact of the door of a railway carriage being imperfectly fastened, is evidence of negligence on the part of the company, even when the train was not in a state of motion at the time when the accident happened. *Richards v. Great Eastern Railway Company*, 28 L. T. 711.

A woman, on arriving at a station at which it was her intention to alight, left her seat for the purpose of taking up her child, which was sitting on the seat opposite to her. In turning round to sit down again and wait till the porter should open the door, she "touched" the door which flew open, and she fell out and injured herself:—Held, that these facts were evidence of negligence on the part of the railway company, proper for the consideration of the jury. *Ib.*

A passenger having taken a ticket by a train which stopped at short intervals, not exceeding five minutes each between each station, and having entered a carriage, sat by the door, which flew open and was shut by him between the point of departure and each of the first three stations at which the train stopped. At the third station he called for a porter, but the train started too quickly for one to come. The passenger held the door, but getting tired let it go, and it again flew open. He then pulled it to with one hand and put his other arm out to fasten the lock, which was on the outside, and put some of his weight on the door in doing so. The door opened and he fell out. It would have taken only two or three minutes to arrive at the next station, and only about five minutes more to finish his journey:—Held, that there was no evidence of liability on the part of the company. *Adams v. Lancashire and Yorkshire Railway Company*, 4 L. R., C. P. 739; 38 L. J., C. P. 277; 20 L. T. 850; 17 W. R. 884.

**Falling of Window.**—The mere fall of a railway carriage window from the ledge upon which it rests, while closed, into the receptacle it occupies when lowered, is not evidence of negligence which will support an action against the company for personal injury caused to a passenger in the carriage by the sudden descent of the window. *Murray v. Metropolitan District Railway Company*, 27 L. T. 762.

#### d. Management of Trains.

##### i. Overshooting Platform, etc.

##### Invitation to Alight before Stopping—What is.]

—A female was a passenger by railway from Manchester to Huddersfield, which was due at the latter place at 7.55 p.m. Upon the arrival at the station, several porters, who were servants of the company, ran up to the train before it stopped and unlocked and threw open the doors of the

carriages and called out, "All out for Huddersfield." She supposing that the train had come to a stand, began to get out, and had placed her foot on the first step for that purpose, when the break, which had been applied to stop the train, was suddenly taken off, which caused an increase of speed; whereby she fell on the platform of the station and broke her leg:—Held, that these facts constituted actionable negligence on the part of the railway company. *London and North-Western Railway Company v. Hellewell*, 26 L. T. 557.

The carriage of a train in which the plaintiff travelled overshot the platform of the station at which it stopped. The name of the station was called out. The train was not backed. The plaintiff descended from the carriage in a dark place, and alighting on rough ground, sprained his foot. He had not been requested to alight there:—Held, that the company was not liable. *Plant v. Midland Railway Company*, 21 L. T. 836.

A long train was stopped at a platform so that part of it was alongside the parapet of a bridge; in the dark W., after the train had stopped, and the servants had called out the name of the station, stepped upon the parapet, believing it was the platform, and fell over:—Held, in an action to recover damages for the injuries he sustained by his fall, that the judge was right in leaving the jury to determine whether the circumstances amounted to an invitation to the passenger to alight; and that there was evidence of negligence on the part of the company to justify the verdict which the jury had found for W. *Whittaker v. Manchester, Sheffield and Lincolnshire Railway Company*, 22 L. T. 545.

A train arrived at a terminus, and was stopped fifteen or twenty feet short of the fixed buffers placed at the extreme limit to which it might have gone. The platform of the station, at the end which would be first reached by an arriving train, instead of having its edge parallel with the line of rails used by the arriving trains, was bevelled off into a curve so as to allow space for a siding which there joined that line of rails. A passenger sat in the last compartment of the last carriage, which was drawn up opposite the curved part of the platform, so that a space of eighteen inches or two feet was left between the carriage and the platform. A guard opened the door but said nothing. It was a dark evening, and the station was dimly lighted. The passenger stepped out, expecting to alight on the platform, and fell between the carriage and the platform, thereby sustaining injuries, in respect of which he brought his action against the company:—Held, that there was evidence of negligence on the part of the company, inasmuch as there was a clear invitation to the passenger to alight, and no warning given, although in consequence of the insufficiency of light the danger was not apparent. *Praeger v. Bristol and Exeter Railway Company*, 24 L. T. 105—Ex. Ch.

A traveller by train arrived at the railway station for which he was bound at night. The part of the platform at that station at which passengers could alight was of sufficient length for the whole train to have been drawn up alongside of it, but, in addition to that part, the platform extended some distance gradually receding from the rails. When the train drew up the body of it was alongside the platform; but the last carriage, in which the passenger rode, was opposite the receding part of the platform

and about four feet from it. The night was very dark, and the place where the last carriage stopped was not lighted, though the rest of the station was well lighted with gas. There was no express invitation given to the passengers by the company's servants to alight, but the train had been brought to a final standstill and did not move on again until it started on its onward journey. No warning was given to the passenger that the carriage was not close to the platform, or that care would be necessary in alighting. The passenger opened the carriage door, and stepping out, fell into the space between the carriage and the platform, and sustained injuries for which she brought an action against the company:—Held, that there was evidence of negligence on the part of the servants of the company to go to the jury. *Cockle v. London and South-Eastern Railway Company*, 7 L. R., C. P. 321; 41 L. J., C. P. 140; 27 L. T. 320; 20 W. R. 754—Ex. Ch.

Bringing a railway carriage to a standstill at a place at which it is unsafe for a passenger to alight under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, in the absence of contributory negligence on the part of the passenger, an action may be maintained. *Id.*

An invitation to railway passengers to alight on the stopping of a train without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible or apparent, amounts to negligence on the part of the railway company; and the bringing up a train to a final standstill for the purpose of the passengers alighting amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station. *Id.*

A person who had for many years been a frequent traveller on a railway, on arriving, on a winter evening, at the station at which he was to alight, heard the name of the station called out two or three times by one of the railway porters. The part of the train in which he was was drawn up at a place about thirty-five feet from the end of the platform. There were no lights there, and he, in stepping out, fell upon his head and was injured. In an action against the railway company for negligence, the jury having found a verdict in his favour:—Held, that there was evidence of negligence on the part of the company to go to the jury. *Gill v. Great Eastern Railway Company*, 26 L. T. 945—Ex. Ch.

A train in which a woman was travelling, having arrived at the end of the journey, was drawn up so as to leave some of the carriages, including that in which she was travelling, beyond the platform. She waited some time, and looked out for assistance, and was seen by the station-master, who was then helping passengers out of the other carriages, and gave her no caution; whereupon she alighted, and, doing so, received injuries:—Held, that there was evidence of negligence which ought to be submitted to the jury. *Thompson v. Belfast, Holywood, and Bangor Railway Company*, 5 Ir. R., C. L. 517.

When that part of a railway train, including

the carriage in which a passenger rode, overshot the platform in daylight, and a porter called out several times the name of the station, and let out some of the passengers, who were departing from the station, and a reasonable time for backing the train had elapsed, and there was, apparently, no intention to back it, and there was at hand no servant of the company whom the passenger could request to have the train backed, and he, though cautiously attempting to alight, fell and was injured in the attempt:—Held, that there was evidence of negligence on the part of the company. *Nicholls v. Great Southern and Western Company*, 7 Ir. R., C. L. 40; 21 W. R. 387.

In an action against a railway company, for negligently causing the death of one of their passengers, it appeared that deceased, who was short-sighted, was in the habit of travelling daily from Highbury station to Broad Street station, and back. One evening after dark he arrived at the Highbury station in one of the company's trains. The train was stopped when part of it was brought up to the platform and part of it was in a tunnel, through which the station is approached from the Broad Street station. Part of the platform runs a short distance into the tunnel, and from the end of the platform a slope leads down to the level of the line. On the night in question there was a quantity of hard rubbish from one to two feet high lying along beyond the slope. The carriage in which he was riding was pulled up opposite this rubbish, at the distance of twenty-seven feet from the mouth of the tunnel. After the train had stopped, a passenger in the next carriage gave evidence that he heard the company's servant call out "Highbury;" that he got out; that he then heard called out, "Keep your seats;" that he then heard a groan, and going to the sound, found the deceased, lying partly on the rubbish, and partly with his legs on the rails between the wheels, and having sustained such internal injuries in attempting to alight from the carriage that he died soon afterwards. The wheels of the carriage had not gone over the deceased, the train must therefore have been at a standstill long enough for the passenger who gave evidence to alight, and then to proceed in the darkness, and to find the deceased in the situation described. The tunnel was dark, being filled with steam, but there was a lamp at the end of the tunnel. The judge having on this evidence directed a nonsuit:—Held, that, without laying down any rule as to the effect in all cases of the company's servant calling out the name of the station, the evidence of the calling out the name in this case, coupled with the stopping of the train, and the interval of time which elapsed before it was again moved on, was evidence which ought to have gone to the jury, as it was, in the absence of rebutting evidence on the part of the company, sufficient to authorize their finding a verdict for the plaintiff. *Bridges v. North London Railway Company*, 7 L. R., H. L. 213; 43 L. J., Q. B. 151; 30 L. T. 844; 23 W. R. 62. Reversing 6 L. R., Q. B. 377; 40 L. J., Q. B. 188; 24 L. T. 835; 19 W. R. 824. The mere stopping of a train and calling out the name of a station, is no evidence of an invitation to alight. *Lewis v. London, Chatham and Dover Railway Company*, 9 L. R., Q. B. 66; 43 L. J., Q. B. 8; 29 L. T. 397; 22 W. R. 153.

The plaintiff was a passenger from St. Mary's

Cray to Bromley. While the train was passing through Bromley Station, the company's servants called out the name of the station, and shortly afterwards the train stopped. The carriage in which he travelled stopped a little way beyond the platform, and several carriages and the engine, which were in front of that carriage, stopped at some distance from the platform. The plaintiff, who was well acquainted with the station, in alighting from the carriage, was thrown down and injured in consequence of the train being backed into the station for the purpose of bringing the carriages alongside the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station:—Held, that there was no evidence of negligence on the part of the company to render them liable to an action. *1b.*

On the approach of a train to a station, a porter called out the name of the station, and the train was brought to a standstill. Hearing carriage-doors opening and shutting, and seeing a person alight from the next carriage, a season-ticket holder, accustomed to stop there, stepped out of a carriage; but the carriage in which he was having overshot the platform, he fell on to the embankment and was hurt. It was night, and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the driver intended to back the train:—Held, that there was evidence from which a jury might reasonably find negligence on the part of the company's servants, and no evidence of contributory negligence on the part of the passenger. *Weller v. London, Brighton and South Coast Railway Company*, 9 L. R., C. P. 126; 43 L. J., C. P. 137; 29 L. T. 888; 22 W. R. 302.

A railway train consisting of six carriages drew up at a small station with the last carriage beyond the platform. The platform was adapted for five carriages only, but on market days the train usually consisted of six carriages; the plaintiff, who frequently travelled by the train, was in the last carriage. The train was drawn up as far as possible, the engine being against a dead end, and the porters called out, "All change here." The plaintiff's son got out and took her parcels across to a train waiting on the other side of the platform. The plaintiff knew the carriage was not at the platform; she, however, did not call for assistance, but proceeded to get out as quickly as she could. She put one foot on the iron step, and as she was about to put the other on the wooden step, the first slipped, and she fell:—Held, that the above circumstances did not constitute any evidence of negligence for the jury. *Owen v. Great Western Railway Company*, 46 L. J., Q. B. 486; 36 L. T. 850.

**Reasonable Means for Alighting.**—When a passenger by a railway is invited to alight at a spot where there is no platform, so that the usual means of descent are absent, the duty of the railway company not to expose the passenger to undue danger requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the passenger in alighting. *Robson v. North Eastern Railway Company*, 10 L. R., Q. B. 271; 44 L. J., Q. B. 112; 32 L. T. 551; 23 W. R.

791. Affirmed, 2 Q. B. D. 85; 46 L. J., Q. B. 50; 35 L. T. 535; 25 W. R. 418—C. A.

A female was a passenger by railway to a very small station; on the arrival of the train at the station, the engine and part of the carriage in which she was riding, were driven past the end of the platform, which is short, and came to a standstill; the door of the compartment in which she was being beyond the end of the platform. Upon the train stopping she rose and opened the door, and stepped on to the iron step: she looked out and saw the station-master, who was the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst endeavouring to get the other foot on to the footboard she lost her hold of the carriage-door, and slipped, and fell, and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff with leave to move to enter a verdict for the plaintiff:—Held, first, that there was evidence from which a jury might have properly found that she was invited or had reasonable ground for supposing she was invited to alight by the company's servants; and that the company had failed in their duty towards the plaintiff, and had not provided a reasonable substitute for a platform. *Id.*

Held, secondly, that the jury might not improperly have found that the expectation of being carried beyond the station was reasonably entertained by her, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the company was therefore liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty. And that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff. *Id.*

A railway train drew up at a station with two of the carriages beyond the platform. The servants of the company called out to the passengers to keep their seats, but were not heard by the plaintiff and other passengers in one of these carriages. After waiting some little time, and the train not having put back, the plaintiff got out, and in so doing fell and was injured; for which injury she brought an action against the company:—Held, that there was evidence of negligence on the part of the railway company to go to the jury. *Rose v. North Eastern Railway Company*, 2 Ex. D. 248; 46 L. J., Ex. 374; 35 L. T. 693; 25 W. R. 205—C. A. Reversing the judgment of the Exchequer Division, 34 L. T. 761.

An excursion train, in which husband and wife were passengers to Rhyl, arrived at the Rhyl station, and the train being too long for the platform, the carriage in which they were overshot it. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform; nor was it in fact so backed; nor did it move until it started for Bangor. After waiting

a short time the husband, following the example of other passengers, alighted, without any request to the railway servants to back the train or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in doing so strained her knee. There was a foot-board between the iron step and the ground which she did not use, but there was no evidence of any carelessness or awkwardness on her part in the manner of descent. In an action brought for the injury:—Held, that there was no evidence of negligence in the railway company, and that the accident was entirely the result of the passenger's own acts. *Siner v. Great Western Railway Company*, 4 L. R., Ex. 117; 38 L. J., Ex. 67; 20 L. T. 114; 17 W. R. 417—Ex. Ch.

On the arrival of a train at a railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground about three feet. In so alighting, a lady, instead of availing herself of the two steps, with the assistance of a gentleman jumped from the first step to the ground, and sustained a spinal injury from the concussion. The jury having found that the company was guilty of negligence in not providing reasonable means of alighting, and that the lady had not by any misconduct on her part contributed to the injury, and having awarded her 500*l.*, the court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages. *Foy v. London, Brighton, and South Coast Railway Company*, 18 C. B., N. S. 225; 11 L. T. 606; 13 W. R. 293.

See also *Cockle v. London and South Eastern Railway Company*, ante, col. 1970.

## ii. In other Cases.

**Collision with Permanent Buffers.]**—A passenger train proceeding from one station to another three hundred yards distant, at which permanent buffers were erected, jolted, and so injured the plaintiff. The train stopped after the jolt and near the buffers:—Held, that there was evidence of negligence. *Burke v. Manchester, Sheffield and Lincolnshire Railway Company*, 22 L. T. 442; 18 W. R. 694.

**Collision while Loading Truck.]**—A first count alleged that the plaintiff was engaged in loading a truck with stones, and was standing in the truck for that purpose, and a railway company by their servants so negligently backed, shunted, and managed certain trucks under the care and management of the company by their servants, that they were by the negligence and carelessness, breach of duty, and improper conduct of the company in that behalf, driven with great force and violence against the truck in which the plaintiff was standing, and he was thereby with force and violence cast out of the truck in which he was standing, and was greatly hurt. A second count repeated the allegations in the first count, with the addition that the plaintiff was "lawfully engaged in loading the truck:—Held, that the first count could not be supported; but that on the second count, although it would probably have been set aside as embarrassing, yet, inasmuch as it contained allegations showing some duty of care on the part of the company



towards the plaintiff, to which he was entitled by being "lawfully" there, and a breach of that duty by an act of active negligence of the company, the plaintiff was entitled to judgment. *Bulman v. Furness Railway Company*, 32 L. T. 430.

**Communication between Passengers and Guard.**—A railway train is or is not within the operation of the Railways Regulation Act, 1868, s. 22 (which required railway companies to provide communication between passengers and guard when a train runs twenty miles without stopping), according to the actual instructions as to stopping given to the company's servants in charge of the train. And, therefore, where the primary cause of an accident to a train not provided with such means of communication was the breaking of a wheel-tire (without any negligence on the part of the company or their servants), and several minutes elapsed between the first shock felt by the passengers and the actual disaster resulting in the mischief complained of, it was properly left to the jury to say, first, what was the effect of the company's time tables, taken together with the special instructions given to their servants, with regard to the train in question; and, secondly, whether the absence of the statutory precaution was conducive to the accident which occurred. *Blamires v. Lancashire and Yorkshire Railway Company*, 8 L. R., Ex. 283; 42 L. J., Ex. 182—Ex. Ch.

#### e. Condition of Premises of Railway Company.

**Condition of Station—Prima facie Evidence of Negligence.**—The plaintiff went to the station of a railway company, intending to travel by their line to C. A train had started previously, and upon inquiring of a porter when the next train for C. would start, the plaintiff was directed to go to a time bill which was hanging outside the door of the booking office and under a covering or a portico. While standing looking at the time bill, he received an injury from a plank and a roll of zinc which fell through the covering, and upon looking up he saw the legs of a man protruding through the covering.—Held, that, there being nothing to show that the railway company knew that the covering was insecure, or that the man who was upon it was employed by them, there was no evidence of negligence to go to the jury, and that the plaintiff must be non-suited. *Welfare v. London and Brighton Railway Company*, 4 L. R., Q. B. 693; 38 L. J., Q. B. 241; 20 L. T. 743; 17 W. R. 1065.

**Obstruction on Platform.**—A party being at a railway station in the daylight, with a crowd of persons, awaiting the arrival of a train, caught his foot against the edge of a weighing-machine, the base of which was raised a few inches above the level of the platform, and falling, broke his knee-cap. The machine was of a description in use at railway stations, and was in its usual place, adjoining the end of a counter on which passengers' luggage was placed on the arrival of trains, and was used for weighing luggage.—Held, that there was no evidence of negligence. *Corrigan v. Eastern Counties Railway Company*, 4 H. & N. 781; 29 L. J., Ex. 94; 4 Jur., N. S. 657.

A passenger being in the waiting-room at a railway station at night, and being told by a porter that her train had just drawn up at the station, left the room with a great number of other passengers, and as she went in the direction of the train, which had drawn up past the door, she caught her foot against the edge of a weighing-machine (the base of which was raised a few inches above the level of the platform), fell, and injured herself. The weighing-machine was of the ordinary description for weighing luggage, and stood with its back to the ticket office window, through which a light was thrown on the top of it. The machine was placed between two lamps, ten yards apart, which were suspended from the roof of the platform.—Held, that there was no evidence of negligence to go to the jury. *Blackman v. London, Brighton and South Coast Railway Company*, 17 W. R. 769.

**Ice.**—A person, while waiting for a train, was walking by daylight up and down the platform of one of the stations; a strip of ice nearly an inch thick extended half way across the platform, and he, slipping on the ice, fell, and sustained injuries, in respect of which he sued for damages. The presence of the ice was unexplained.—Held, that there was evidence of negligence on the part of the company. *Shepherd v. Midland Railway Company*, 25 L. T. 879; 20 W. R. 705.

**Dangerous Place adjacent to.**—On the platform of a railway station there were two doors, in close proximity to each other, the one for necessary purposes, had painted over it the words "for gentlemen," the other had over it the words "lamp room." The plaintiff having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the lamp room, and fell down stairs, and was injured.—Held, that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was no evidence of negligence on the part of the company. *Toomey v. London, Brighton and South Coast Railway Company*, 3 C. B., N. S. 146; 27 L. J., C. P. 39.

**Condition of Staircase.**—A railway company had a staircase at one of their stations for the use of passengers; it led from the arrival platform to the street, was about six feet wide, had walls on each side, and had wooden steps nosed with brass, which had become smooth from use. A passenger, who together with large numbers of others had used these stairs without accident for months, slipped and hurt himself, and in an action for negligence against the company, he relied on the evidence of a builder, who said that he thought brass dangerous, that lead would be proper and less slippery, and that there should be a hand-rail.—Held, that there was no evidence of negligence. *Crafter v. Metropolitan Railway Company*, 1 L. R., C. P. 300; 35 L. J., C. P. 132; 12 Jur., N. S. 272; 14 W. R. 334; 1 H. & R. 164.

In an action against a railway company for an injury by a passenger sustained through falling down some stairs at their station, it is not enough to shew that the stairs were of improper condition or construction unless the

fall was caused thereby. *Davis v. London and Brighton Railway Company*, 2 F. & F. 588.

**Opinion as to Dangerous Place—Evidence.]—**A railway company had a platform extending from their station to their steam-boat pier on a river, 4 ft. 3 in. in width. On one side the platform was protected by railings, but on the side next the railway, which ran parallel with it for some distance, there was a guard of wood 9 in. high. In an action against the company for the injury of a passenger, two witnesses stated they considered it a dangerous platform:—Held, that this was merely an expression of opinion, and that there was no evidence of negligence. *Rigg v. Manchester, Sheffield and Lincolnshire Railway Company*, 12 Jur., N. S. 525; 14 W. R. 834.

**Obstruction on Bridge—Licensee.]—**A railway porter was standing, in broad daylight, upon a plank thrown across from parapet to parapet of a footbridge connecting the two platforms of a station, cleaning a lamp, when the plaintiff accompanying her daughter to a train, in crossing the bridge, struck her head against the plank and was injured:—Held, that the plaintiff was not a mere licensee; but that there was no evidence of negligence on the part of the railway company. *Watkins v. Great Western Railway Company*, 46 L. J., C. P. 817; 37 L. T. 193; 25 W. R. 905.

The question whether there was, or was not, negligence on the part of the company should have been left to the jury. *Id.*

**Condition of Bridge.]—**A railway company, for the more convenient access for passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous:—Held, that the company was liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about 100 yards farther round, which the deceased might have used. *Longmore v. Great Western Railway Company*, 19 C. B., N. S. 183.

**Injury by Portmanteau falling.]—**The stations of the Bristol and Exeter Railway Company and another railway company adjoined and were open to each other, and the passengers by either railway had long been permitted to reach it by passing through the station of the other company. A party, while so passing across the platform of the Bristol and Exeter station to get to the other, was injured by a portmanteau, which fell from a truck, owing to the negligence of a porter of the company:—Held, without deciding what would have been the case if the accident had happened through the condition of the Bristol and Exeter Company's premises, that they were liable, as the injury was caused by the misfeasance of one of their servants in the course of his employment, and there was no presumption that the injured party had agreed to undergo greater risks than if he had been one of their passengers. *Tebbutt v. Bristol and Exeter Railway Company*, 6 L. R., Q. B. 73; 40 L. J., Q. B. 78; 23 L. T. 772.

**Crowd on Platform.]—**The plaintiff was one of a crowd of passengers assembled at a railway station. The crowd, caused by special excursion traffic, of which the company had previous notice,

had been allowed to enter the station and to disperse over the platform at will. No precautions were taken to regulate its movements. On the approach of a train the plaintiff was, through the pressure caused by the swaying of the crowd, thrust off the platform and hurt. An action for negligence being brought against the company in respect of the injury thus occasioned, she was nonsuited on the ground that the facts were no evidence of negligence:—Held, that the nonsuit must be set aside, as the precautions to be taken by the company, the character of the crowd, and all the other circumstances, were questions for the jury. *Hogan v. South Eastern Railway Company*, 28 L. T. 271.

See also *Jackson v. Metropolitan Railway Company*, in C. A. and C. P., *supra*, col. 1967.

In an action under Lord Campbell's Act, to recover damages for death through the alleged negligence of a railway company, it appeared that on the occasion of the accident the deceased had taken a ticket for a special train at a cheap rate for harvest-men. There being no room in the special train, the deceased remained on the platform until the arrival of the next ordinary train, together with a crowd composed of harvest-men, who had also taken tickets for the special train, and of other persons, a large number of whom had entered the station without permission. The company had an extra number of porters at the station, but in consequence of great disorderliness of the persons so assembled on the platform, and by a sudden and violent rush of the crowd, the deceased was pushed on the line, and was killed by the engine of the ordinary train as it approached. At the trial the jury found that the deceased was not entitled to proceed by the ordinary train; that the accident was caused by the rush of the crowd; that the company had not taken due precautions to prevent injuries from the crowding on the platform; and that, by using due precautions, they might have prevented the rush of the crowd:—Held, that even assuming the deceased to have been lawfully on the platform, the company were not liable for the accident. *Cannon v. Midland Great Western Railway Company*, 6 L. R., Ir. 199—C. A.

**Number of Porters necessary.]—**A railway company is not bound to provide at a station (even when an unusually large number of passengers by a special train is expected) a staff of servants sufficient not merely for the guidance and assistance of passengers and the preservation of order amongst them, but adequate to control the violence of an assemblage of persons entering the station without permission, and overcrowding the platform. *Id.*

#### f. Condition of Line.

**Primâ facie Evidence of Improper Construction.]—**Where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to primâ facie evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. *Great Western Railway Company of Canada v. Fawcett*, 1 Moore, P. C. C., N. S. 101; 9 Jur., N. S. 339; 8 L. T. 31; 11 W. R. 444.

A railway company, in the formation of its line, is bound to construct its works in such a manner as to be capable of resisting all violence of weather which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur. *Id.*

In an action against a railway company to recover compensation for injuries resulting to a passenger from an accident caused by the giving way of a portion of the railway, it was proved, that the company had always employed skilful engineers in the construction of its works, and that the giving way of the railway was caused by a storm of unusual violence. The judge, in directing the jury, never explained to them the effect of such evidence upon the question of negligence:—Held, that the jury ought to have had their minds distinctly and pointedly directed to this question. *Id.*

In an action against a railway company for compensation for injury received by a party by the breaking down of a bridge over which he was passing in a passenger train:—Held, that it was a proper question for the jury, whether the company engaged the services of a competent engineer, who had adopted the best method, and had used the best materials, and that if the company had done so, they would not be liable; but that the mere fact of their having engaged the services of such a person, would not relieve them from the consequences of an accident arising from a deficiency in the work. *Grote v. Chester and Holyhead Railway Company*, 2 Ex. 251; 5 Rail. Cas. 649.

— **Knowledge by Company of Defective Condition.**—In an action by a passenger against a railway company for an injury sustained while travelling on their line, the declaration complained that the company kept and maintained their line in an insecure state, the evidence being, that the embankment ran through a country subject to floods, and had, five years before, been constructed of sandy soil, with insufficient culverts to carry off water; that an extraordinary fall of rain had caused a flood, which had washed away the soil, or a part of the embankment, leaving the sleepers unsupported, so that the earth gave way, and the train, an express train, passing over it at night, at the ordinary express rate, went off the line. There being no evidence that the water was seen on the line, or that there had been anything to indicate danger, and no engineer or skilled witness having been called to prove that the nature of the soil of the embankment was such that water would wash it away in ordinary floods:—Held, that although the evidence as to the construction and condition of the line at the time of the accident, and of the rate of speed at which the trains had been going, had been properly admitted, as these were circumstances which might have shewn negligence if it had been proved that the line was known, or ought to have been known, to be in an insecure state, yet that as there was nothing to shew that it was so known, there was no evidence of negligence, or so little, that the verdict was against the weight of evidence. *Withers v. North Kent Railway Company*, 27 L. J., Ex. 417; S. C., at Nisi Prius, nom. *Withers v. Great Northern Railway Company*, 1 F. & S. F. 165; S. P., *Wyborn v. Great Northern Railway Company*, 1 F. & F. 162.

— **Fall of Girder.**—A party, while travelling on a railway, was injured by the fall of a girder through the negligence of the workmen employed by a contractor (unconnected with the railway company), whilst placing it across the retaining walls of the railway. It was proved that the work in question was extremely dangerous, though none of the witnesses had ever known of a girder falling; that it was the practice, when such work was being done over railways, for the company to place a man to signal to the work-people the approach of a train, and that this precaution was not adopted on the occasion in question, but there was no evidence that the company's servants knew that the girder was in the course of being moved at the time the train was passing, or of the means used by the contractor for moving it:—Held, that as a fact the company was not guilty of negligence, although the evidence of negligence was such that it could not have been withdrawn from the jury. *Daniel v. Metropolitan Railway Company*, 3 L. R., C. P. 591; 37 L. J., C. P. 280—Ex. Ch. Affirmed, 5 L. R., H. L. 45; 40 L. J., C. P. 121; 24 L. T. 815; 20 W. R. 37—H. L.

The Corporation of London was authorized to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were therefore works in the execution of which danger was involved, but which were often executed elsewhere without mischief. The railway company had no control over these works, which were executed by contractors engaged by the corporation. Several girders had been safely put in their places by manual labour, but on this occasion, the contractors brought into use for one of the girders a monkey steam-engine which moved the girder with a jerk, and so caused it to over-balance and fall. It fell on a passing train, and injured the plaintiff:—Held, that this was not a mischief the occurrence of which the railway company was bound to anticipate, and against which it was bound to take precautions, and consequently that the railway company was not liable. *Id.*

— **Condition of Switch.**—The defendants' line ended at a station which belonged to another company; but for the use of it and for the use of a switch (which was self-acting) for entering the station the defendants paid a rent. A servant of the defendants' company was employed to look after some neighbouring gates, and also to see that the switch acted correctly. He omitted to do so on the occasion of the approach of the train in which the plaintiff's husband was riding. The switch did not act and the defendants' train ran into the trucks of another company and the passenger was killed. In an action by the widow a verdict was given for the plaintiff:—Held, that there was evidence of negligence to affect the railway company, and the verdict was upheld. *Birkett v. Whitehaven Junction Railway Company*, 4 H. & N. 730; 28 L. J., Ex. 348.

**Train Colliding with Cattle.**—A passenger by railway sustained injuries by the collision of a train with cattle which were trespassing from adjoining lands, and had come on the line at a private level crossing through a gate open at the time of the accident. Two other private cross-

ings and a public crossing were within 300 yards ; and the train, when approaching, could not be seen at a distance of more than twenty perches from the place where the accident occurred. Evidence was given that the gate had been left unlocked on previous occasions, and that the post to which it should be locked was loose at the time of the accident :—Held (per Pigot, C. B., and Deasy, B.), that there was evidence of negligence on the part of the railway company ; but (per Fitzgerald, B.), that, in the absence of any evidence that the gate was open in consequence of the looseness of the post, or of the post having been loose previously to the accident, the plaintiff was properly nonsuited ; and (per Hughes, B.), that, in the absence of evidence as to the nature or degree of the looseness of the post, or the length of time during which it was loose, there was no evidence of negligence on the part of the railway company to be left to the jury. *Patchell v. Irish North-Western Railway Company*, 6 Ir. R., C. L. 117.

**Coal-shed—Licensee—Usual Practice.**—[At a railway station it was the practice to unload coal waggons by shunting them, and tipping the coal into cells ; it was also the practice for the consignees or their servants to assist in the unloading, and for that purpose to go along a flagged path by the side of the waggons. A consignee of a coal waggon could not unload it in the usual way on account of all the cells being occupied. With the permission of the station-master, he went to his waggon, which was shunted in the usual place, took some coal from the top of the waggon, and descended on to the flagged path. The flag he stepped on gave way and he fell into one of the cells and was injured :—Held, that, although not getting his coal in the usual mode, he was not a mere licensee, but was engaged, with the consent of the company, in a transaction of common interest to both parties, and was therefore entitled to require that the premises should be in a reasonably secure condition. *Holmes v. North Eastern Railway Company*, 6 L. R., Ex. 123 ; 40 L. J., Ex. 121 ; 24 L. T. 69—Ex. Ch.

**No Fence.**—[A man went with a cart and team, by implied invitation, to fetch lime from a railway yard. While in the yard he unharnessed a mare that was leading his team. A passing train frightened the mare ; she backed some considerable distance, and, in spite of his efforts to hold her, fell over a dwarf wall of the company's, and was hurt. An action having been brought in the county court by him against the company for not having a sufficient fence to the yard, it was proved at the trial that he knew the place well, and had been there often before. The county court judge found that the fence was insufficient, and decided in his favour :—Held, that there was no proof of want of reasonable care on the part of the company to prevent damage from unusual danger to persons visiting the premises with full knowledge of the state of the place, and that, therefore, he was not entitled to recover. *Manchester, Sheffield and Lincolnshire Railway Company v. Woodcock*, 25 L. T. 333. *And compare the following cases.*

**Brick Falling from Bridge.**—[A person was walking on a highway under a bridge forming part of a line of railway, when a brick fell from

its place in the perpendicular pier of the bridge, and injured him. He at the time heard a noise as of a train passing above :—Held, that these facts were sufficient evidence of negligence on the part of the railway company. *Kearney v. London, Brighton and South Coast Railway Company*, 6 L. R., Q. B. 759 ; 40 L. J., Q. B. 285 ; 24 L. T. 913 ; 20 W. R. 24—Ex. Ch. Affirming 5 L. R., Q. B. 411 ; 39 L. J., Q. B. 200 ; 22 L. T. 886 ; 18 W. R. 1000.

**Footbridge over Railway.**—[A railway company, in lieu of and substitution for an old public footpath crossing their line on the level, built a footway bridge over the railway, and also over an adjoining road running parallel therewith, at a height of about 15 feet from the ground. This bridge was fenced on both sides with close wooden boarding 6 feet high, where it crossed the railway, and with open ornamental iron work 4 feet high, with triangular apertures 3 feet 3 inches high by 1 foot 6 inches wide, where it crossed the road. There was no interval between the wooden boarding and the iron work, nor any aperture than those above mentioned, in the fencing or the bridge. A child four and a half years old, together with another child seven years old, went upon the bridge to cross over, when he, instead of walking straight forward in the ordinary way, placed his back against the wooden boarding, and slid or edged himself along against it until he came to the iron work, when he fell backwards, through one of the above-mentioned triangular apertures, on to the road, and was injured. In an action to recover damages, the county court judge ruled that there was evidence of negligence in the company, and asked the jury whether they thought the bridge was reasonably safe for all her Majesty's subjects, and whether the child materially contributed to the accident :—Held, that there was no evidence of negligence on the part of the company, and that the plaintiff ought to have been nonsuited. The only duty upon the company was to keep the bridge, which they had substituted for the old public footpath, in a state ordinarily safe for persons using it for the purpose of crossing over it in the ordinary way, and that the plaintiff's user of it in this instance was not such a user. *Lay v. Midland Railway Company*, 30 L. T. 529. *See infra.*

A railway company, in place of a public footway crossing their line on the level, built a bridge over the line, and also over a roadway adjoining. The bridge was fenced with wooden hoardings where it crossed the rails, and with open ornamental work with triangular openings where it crossed the road. A child about four years of age went upon the bridge, in company with another child, for the purpose of crossing over, and instead of walking straight forward, he placed his back against the hoardings and slid along until he came to the ornamental ironwork, when he fell through backwards on to the road and was injured. In an action to recover compensation, evidence was adduced as to the dangerous character of the bridge. The jury found that the child was lawfully using the bridge when the accident occurred, and that the bridge was not reasonably safe for all her Majesty's subjects :—Held, that there was evidence of negligence, and that it was the duty of the company to keep the bridge in such a state as not to be dangerous to any one using it

in a lawful manner, and that there was no negligence on the part of the child contributory to the accident. *Ib.*, 34 L. T. 30. And see further, NEGLIGENCE.

#### g. Crossing the Line.

**At the Station, no Invitation—Alternative Method.]**—W. was in the habit of travelling by the last train from K. to L., which departs from the up platform. Adjoining the down platform at the K. station was a booking-office and waiting-room; but there was no office or room or any shelter whatever on the up platform. In the middle of the station opposite the booking-office the ground between the rails was covered with wood for the width of several feet, over which passengers used to cross when there was no train standing in the station. Near the south end of the station there was also a covered wooden bridge over the rails, the steps leading to which opened on to the causeway of a highway, so that any person who wished to cross over from one platform to another by the bridge would have to go from the station to the high road, ascend the steps, cross the bridge, descend again to the high road, and then re-enter the station. On the 1st May, 1875, W. arrived in time for his train, and went to the waiting-room. Shortly before his train approached the up platform a porter called out, "All the other side for L." At that time there was no train in the station, so that passengers could safely use the middle crossing. W., however, had not then taken his ticket, and by the time he had done so a train had entered the station, and was standing on the down line, thereby blocking up the middle crossing. W., therefore, being in a hurry to catch his train, did not cross over the rails by the bridge, but walked along towards the end of the platform, and then jumped on to the rails for the purpose of reaching the up platform. In doing so he sustained considerable injury, the ground between the rails at that point having been excavated, and the ballast removed. At the trial several witnesses were called to prove that when the middle crossing was blocked they were in the habit of getting across from one platform to the other as best they could, and did not make use of the bridge. The company's officials denied, however, that they had ever sanctioned such a proceeding:—Held, that as a proper place had been provided for crossing, of which W. was aware, and there was no evidence of an invitation on the part of any servant of the railway company to cross where he did, the company was not liable for the injuries which he had sustained. *Wilby v. Midland Railway Company*, 35 L. T. 244.

**— Crossing in Common Use.]**—A wife having arrived at a station proceeded to cross the rails, to a platform on the opposite side, by a path which the railway company had always allowed the passengers to use for that purpose. While in the act of crossing she was knocked down and killed by a train, which had been suddenly, and without any warning, driven backwards along the line of rails which she was so crossing. In an action by her husband against the company:—Held, that there was evidence of negligence on the part of the company. *Rogers v. Rhymney Railway Company*, 26 L. T. 879; 21 W. R. 21.

**Where no Crossing.]**—A passenger, travel-

ling by railway, whose train, from which he had alighted at a junction, was shunted to an unusual siding, out of sight from the platform, on a dark night, was killed while crossing the main line:—Held, that although there was no accommodation by a bridge for the passengers, and no servant of the company at hand to direct them, there was no evidence of positive negligence on the part of the company. *Falkiner v. Great Southern and Western of Ireland Railway Company*, 5 Ir. R., C. L. 213.

**Evidence of Negligence and Contributory Negligence.]**—At a railway station trains were in the habit of crossing twice a day, the entrance to the station and the ticket-office being situated at the down side of the line. The platform on the other side was not directly opposite, and was reached by an oblique level crossing, which met it at a point where it gradually sloped to the line. The space between the double lines of rail, where intersected by the crossing, was about eighteen feet, and there was a lamp midway in the space. A gate, which was usually left open, was at the end of the down platform. The plaintiff, an intending passenger by an up-train, sought to cross the line while a down-train was standing at the platform; he was unacquainted with the station, and was not warned against crossing. He passed through the gate which was open. While running across he saw the up-train, but had not heard any whistle, and, in endeavouring to jump on the siding, he was struck by this train and severely hurt. If he had remained on the spot at which he first saw the approaching train, he would have escaped injury, as there was sufficient room for him to have stopped safely in the space between the trains. The accident occurred on a dark and misty evening, and there was at the time much smoke and noise from the down-train, which was standing in the station. At the close of the case some of the jury, speaking apparently from their personal knowledge of the station, suggested that the crossing was dangerous from its obliqueness, and that the plaintiff might have been misled by running straight across to a steep part of the up-platform, instead of the place where it sloped to meet the crossing. This point was not referred to in the opening statement, or in the evidence, nor much pressed in reply. The jury found a verdict for the plaintiff, but stated, in the first instance, that both parties were to blame, and, in answer to the learned judge, it appeared that their verdict was really based on the ill construction of the crossing. In answer to specific questions, they, however, found that there was no contributory negligence on the part of the plaintiff (which had been pleaded), and that the company had not been guilty of negligence, either in leaving the gate at the down-platform open, or in not having a porter to warn persons against crossing at a dangerous time, or in the train not having whistled. The judge, having directed the verdict to be entered for the plaintiff, with liberty for the defendants to move to have it changed into a verdict for them:—Held, that the verdict could not be sustained, because, per Morris, C. J., and Lawson, J., it was both unsatisfactory and against the weight of evidence on the plea of contributory negligence. *Wright v. Great Northern Railway Company*, 8 L. R., Ir. 257. Affirmed in C. A.

Held, further, per Harrison, J., that there was no evidence of negligence on the part of the defendants which could be legitimately connected with the accident; that the injury to the plaintiff was solely caused by his own negligence; and that the verdict and judgment should, therefore, be entered for the defendants. *Ib.* And see *Darcy v. London & South-Western Railway*, 12 Q. B. D. 70; 53 L. J., Q. B. 58.

— **Direction by Servant of Company.**—A railway passenger was set down after dark on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at this place, and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to pass on. The passenger passed down the train to cross behind it, and from the want of light stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company:—Held, that these facts disclosed evidence of negligence on the part of the company. *Nicholson v. Lancashire and Yorkshire Railway Company*, 3 H. & C. 534; 34 L. J., Ex. 84; 12 L. T. 391.

— **Swing Gate open.**—A railway intersected a public foot and carriage way upon the level close to a station on the line. At the place of intersection spring carriage gates opened both ways, and there was also a swivel gate on each side of the line for persons on foot. A return ticket holder, while crossing the line at this place to reach the passenger station, was killed by an overdue express. At the time of the accident one of the swing gates was partially open, and there was no gatekeeper:—Held, that this circumstance (which was in contravention of the provisions by statute, and by the company's rules for the protection of carriage traffic along the road) constituted an invitation to the ticket holder to cross the line, and evidence of the company's negligence. *Stapley v. London, Brighton and South Coast Railway Company*, 1 L. R., Ex. 21; 35 L. J., Ex. 7; 11 Jur., N. S. 954; 13 L. T. 406; 14 W. R. 132; 4 H. & C. 93.

And compare the following cases.

**Accidents to Licensees.**—The defendants' railway crossed a level crossing which was some twenty yards distant from a foot-bridge. Both the crossing and the bridge were private crossings, intended for the use of persons employed in a neighbouring manufactory. About thirty yards from the crossing was a box where a railway man was commonly stationed, who was sometimes shouted to by persons wishing to pass the level crossing with carts, and answered "All right." The plaintiff, a boy of eleven years of age, who was employed at the manufactory, having occasion to go over the line, was waiting at the level crossing until one train had passed, but was knocked down and severely injured, when in the act of crossing, by another train which he had not observed, and which was passing in the opposite direction immediately afterwards. At the trial there was evidence that the bridge was dirty and not lighted at the time of the accident; that the train did not whistle; that the plaintiff knew the bridge, having crossed it several times; and that the

man at the box used to bring out a stick to stop him from going over the bridge, but that when the accident happened he was not present. There was no evidence to shew what the man's special duties were, or whether he had any duties in respect to foot passengers. Upon this evidence the learned judge was asked to nonsuit the plaintiff:—Held, on further consideration, that there was evidence of negligence to go to the jury, and that the conduct of the railway man was a distinct breach of duty which amounted to negligence and contributed to the accident. *Clarke v. Midland Railway Company*, 43 L. T. 381.

S. attempted to cross the line of railway at night at a spot where persons were in the habit of crossing with the acquiescence of the company. At the time that he attempted to cross there was a train standing still on the up line in such a position as to prevent a person on the line behind it from seeing anything approaching on the down line. S. came from behind the train on the up line, and, on crossing on to the down line, was struck by an express train and killed. It was a rule of the company that express trains should whistle at that point, but evidence was produced that the train had not in fact whistled on that occasion. This evidence was contradicted by the servants of the company, who also proved that the train carried lights, and might have been seen by S. before he stepped on to the down line:—Held, that there was evidence of negligence on the part of the company, and that the case was properly left to the jury. *Dublin, Wicklow and Wexford Railway Company v. Slattery*, 3 App. Cas. 1155; 39 L. T. 365; 27 W. R. 191. Affirming 10 Ir. R., C. L. 256—Ex. Ch.

**Notices not to Cross, Effect of.**—When notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury. *Ib.*

**Told not to Cross.**—A public footway crossed a railway on a level. The plaintiff while crossing on the footway in the evening, after dark, was knocked down and injured by a train on the crossing. He stated at the trial, that he did not see the train until it was close upon him; that he saw no lights on the train and heard no whistling. He stated also that he did not hear any caution or warning given to him by any servant of the company. The driver and fireman of the engine were called on behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course on the night in question, at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by anyone standing at the crossing. A porter also stated that he had seen the plaintiff at the crossing on the night in question, and had called to him not to cross. The judge ruled that there was evidence to go to the jury of negligence on the part of the company which caused the injury to the plaintiff:—Held, that there was no evidence of negligence. *Ellis v. Great Western Railway Company*, 9 L. R.,

C. P. 551; 43 L. J., C. P. 304; 31 L. T. 874—Ex. Ch.

**Company acquiescing in Use.]**—There is no duty upon a railway company acquiescing in persons crossing a portion of its line in no definite track to use care for the protection of those persons. *Harrison v. North-Eastern Railway Company*, 29 L. T. 844; 22 W. R. 335. *See cases above.*

A railway company drove trains over a line belonging to a dock company, and running between the dock and a public promenade. The public was allowed to cross the line at all points, but there was one regular crossing where they more usually crossed. The plaintiff crossed the line at a point some distance from the regular crossing, and was knocked down and injured by a train of the railway company driven at four miles an hour. There was a short curve at the spot, but no whistle or other warning was given:—Held, no evidence of negligence. *Id.*

**State of Level Crossing—Passage of Carriages.]**—When a railway company constructs its line across a highway on a level under the sanction of an act of parliament, it is the duty of the company to keep the crossing in a proper state for the passage of carriages across the rails; and if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company is liable. *Oliver v. North-Eastern Railway Company*, 9 L. R., Q. B. 409; 43 L. J., Q. B. 198.

**Gates open.]**—A railway crossed a highway at a level. There were gates to stop carriages, horses and cattle, and a watch-box and a person to close the gates as soon as such horses, &c., should have passed. There were also swing-gates for foot passengers. A boy, aged fourteen, came to the crossing soon after a cart had passed over the line; the gates were still open, and he went through and got on the line; but, seeing an up train approaching, he waited on the down line till it had passed. While he was thus waiting, a down train approached, but the boy did not see it, though he might have done so if he had been on the look-out for it, or if his attention had not been engrossed by the up train. The up train having passed, the boy was just leaving the down line to cross, when the train knocked him down:—Held, that there was evidence of negligence; for the company being bound by 8 & 9 Vict. c. 20, s. 47, to have closed the gates at the time, the fact that they were open was an invitation to the boy to cross, whereby he was put off his guard, and so, perhaps being embarrassed by the train which he did see, he was injured by the other, which, in consequence of that embarrassment, he failed to see. *North-Eastern Railway Company v. Wanless*, 7 L. R., H. L. 12; 43 L. J., Q. B. 185; 30 L. T. 275; 22 W. R. 561. Affirming 6 L. R., Q. B. 481; 25 L. T. 103—Ex. Ch.

A railway crossed diagonally on a level by a public road, and also diagonally by a private road, the two roads converging and forming a right angle. A gate placed by the company on that side of the railway on which the roads met, in pursuance of s. 47 of the Railways Clauses Act, served for both, and was under the control of the company, who placed a gatekeeper in charge thereof. The private road led to a stone-

yard on the opposite side of the railway, abutting thereon, and communicating therewith by means of a private gate. A carman, having occasion to cross the line from the stoneyard, called to the gatekeeper to know if the line was clear, and receiving an answer in the affirmative, attempted to cross with a lorry and two horses, which were run into by a train:—Held, that it was the duty of the gatekeeper placed in charge of the gate, not merely to open it when required for the passage of horses and carriages, but there was an implied duty on him to exercise reasonable caution and discretion in doing so; and that the fact that the private road to the stoneyard was only available by means of the gate serving the public road, placed the carman in the same position with respect to the gatekeeper, as if he was using the public road, and that the company was therefore liable for the damage occasioned by his negligence. *Low v. London and North-Western Railway Company*, 1 L. R., Q. B. 277; 35 L. J., Q. B. 105; 12 Jur., N. S. 409; 14 L. T. 225; 14 W. R. 497.

**Evidence of Negligence—Neglect to Fence.]**—A line crossed a public footpath on the level; but the railway company had not erected any gate or stile, as provided by 8 & 9 Vict. c. 20, s. 61. A child of four years and a half old, having been sent on an errand, was shortly afterwards found lying on a level crossing, a foot having been cut off by a passing train:—Held, that there was evidence that the accident was caused by the neglect of the company to fence. *Williams v. Great Western Railway Company*, 9 L. R., Ex. 157; 43 L. J., Ex. 105; 31 L. T. 124; 22 W. R. 531.

Where persons are in the habit of crossing a railroad at a particular place, though there is no right of way there, it throws upon the company the responsibility of taking reasonable precautions in their use of such place. *Barrett v. Midland Railway Company*, 1 F. & F. 361.

**Contributory Negligence—Deafness.]**—A railway crossed a footway on the level, and on each side of the railway the company put a swing-gate which closed of its own accord, and on the top of the post of each gate was a ring, which a pointsman at an adjoining signal-box was able, by working a lever there, to raise or let fall. When it so fell, it would ordinarily fall over the post so as to keep the gate securely closed; and this was usually done when a train was approaching. There were several lines of railway running over this crossing, and a foot passenger standing at the gate could only see about twenty yards up or down the lines; but when he had crossed to the first line he could see a distance of 300 yards; and when he had reached the six-foot way, being a space between the two sets of rails, he could see as far as 500 or 600 yards. A foot passenger came to the gate when the ring was up and the gate capable of being opened, but a goods train was standing on the first line, in the way of the crossing, and the passenger waited until the train had moved off. He then opened the gate and attempted to cross the railway; but after he had reached the six-foot way he was run over and killed by a train. The pointsman and another person called out to him before the accident to warn him of his danger, and he might have escaped had he heard

them, but he was deaf :—Held, that the company was not liable, as he had contributed by his negligence to the accident. *Skelton v. London and North-Western Railway Company*, 2 L. R., C. P. 631 ; 36 L. J., C. P. 249 ; 16 L. T. 563 ; 15 W. R. 925. And see *Stubley v. London and North-Western Railway Company*, *infra*.

**Opening Gates—Illegal Act.**—A declaration alleged that a railway crossed on a level a turnpike road, and gates were erected and maintained by the company across the turnpike road, and were so constructed that when open they would shut themselves by their own weight, and which gates the company kept constantly closed, except when horses were passing ; that the company not regarding their duty, did not employ or have proper persons to open and shut the gates, and negligently left the gates wholly without any person to open and shut the same, and that during the time while there was no person to open and shut the gates the plaintiff was travelling along the turnpike road with a carriage and horse, and necessarily had occasion to cross the railway through the gates, and by reason of the company's neglect of duty was unable to cross the railway without himself necessarily opening the gates ; that he waited a reasonable time for some person to come and open the gates, and used all reasonable means to make known his desire to pass through the gates ; but no person came to open the gates, and by reason thereof he was obliged to and did open the gates and pass through, and it being night-time and dark, and having passed through one of the gates, the gate, without any default on his part, by its own weight flew back and struck the horse, which became unmanageable, whereby he was thrown out of the carriage and hurt :—Held, that the declaration disclosed no cause of action, for the plaintiff had no right to open the gates himself, and the injury was caused by his own act in doing so. *Wyatt v. Great Western Railway Company*, 6 B. & S. 709 ; 34 L. J., Q. B. 204 ; 11 Jur., N. S. 825 ; 12 L. T. 568 ; 13 W. R. 837.

**Negligent Whistling at Level Crossing.**—Where a railway crosses a highway on a level at a place where there is considerable traffic, the fact of the engine driver blowing off the steam from the mudcocks at that spot, so as to frighten horses waiting to pass over the line, is sufficient to warrant the conclusion that the company has been guilty of actionable negligence. *Manchester South Junction Railway Company v. Fullarton*, 14 C. B., N. S. 54 ; 11 W. R. 754.

**Duty to post Watchmen.**—There is no general duty on railway companies to place watchmen at public footways crossing the railway on a level, but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company. *Stubley v. London and North-Western Railway Company*, 1 L. R., Ex. 13 ; 35 L. J., Ex. 3 ; 11 Jur., N. S. 954 ; 13 L. T. 376 ; 14 W. R. 133 ; 4 H. & C. 83.

A railway crossed on a level a public footway, and on each side of the line were swing-gates through which passengers entered. At one of these gates the view up and down the line was obstructed by the piers of a railway bridge which crossed it, but near the line there was a clear

view of 300 yards in each direction. A woman who approached the line by that gate waited until a luggage train passed, and immediately afterwards proceeded to cross the line, when a person on the other side twice called out to her, but being deaf she did not hear, when an express train which the luggage train prevented her from seeing, knocked her down and killed her. Thirty-six passenger trains passed along the line daily, besides luggage trains. No person was stationed at the crossing to warn passengers of danger, but caution-boards were placed there :—Held, that there was no evidence of negligence on the part of the company. *Ib.*

A railway crossed a highway on a level. At the crossing there was a swing-gate for foot passengers. It was proved that 100 trains passed this crossing daily, and that there was no attendant at the crossing. A person, in crossing the line at this point, was knocked down and injured by a train :—Held, that there was evidence of negligence on the part of the company. *Bilbee v. London, Brighton and South Coast Railway Company*, 18 C. B., N. S. 584 ; 34 L. J., C. P. 182 ; 11 Jur., N. S. 745 ; 13 L. T. 146 ; 13 W. R. 779.

C., while passing along an occupation road which crossed a railway on a level, was knocked down and injured by a train, owing, as was alleged, to the negligence of the railway company. There were gates across the road left unfastened, and the company had at one time kept a gatekeeper, but had ceased to keep one some time before the accident. About three years before the accident the company had obtained powers under an act to make a new road and discontinue the level occupation road ; the powers of the act were to be exercised within five years and then to cease ; and nothing had been done as to the road till after the accident. The jury negatived negligence in the driver of the engine ; but found for the plaintiff on the ground generally of "negligence as to the crossing." The judge, in summing up, left to the jury, as evidence of negligence in the company, the omission to keep a gatekeeper, and the omission to exercise the powers of their act :—Held, a misdirection. *Cliff v. Midland Railway Company*, 5 L. R., Q. B. 258 ; 22 L. T. 382 ; 18 W. R. 456.

#### **h. Unpunctuality and Non-Starting of Trains.**

**No Implied Warranty of Punctuality.**—The mere taking of a ticket for a railway journey by railway does not amount to a contract on the part of a railway company, or impose upon the company a duty, to have a train ready to start at the time at which the passenger is led to expect it. *Hurst v. Great Western Railway Company*, 19 C. B., N. S. 310 ; 34 L. J., C. P. 264 ; 11 Jur., N. S. 730 ; 12 L. T. 634 ; 13 W. R. 950.

A. took a ticket at C. on a railway for N., via Midland Railway, having been told that by a train about to start he could travel on to N. by that route ; on arriving at G. the train was late, and the corresponding train from G. to N. had started. A. was compelled to stay at G. for the night, and was put to various expenses. In an action for these expenses, he declined to put in the time-bills of the company, but relied on the ticket, on which was printed in the ordinary



**Of Infant's Attendant.**—A child of five years old was under the care of his grandmother, who purchased a ticket for him, and another for herself, to go from A. to B., on the railway of the company. While crossing the line at A., to be ready for their train, they were both knocked down and injured by another train. The accident was partly owing to the company's negligence, and partly to such negligence on the part of the grandmother as would disentitle her to recover damages from the company for injury:—Held, that the infant not being able to take care of himself, and being under his grandmother's care, there was such an identification between the grandmother and the child that, by reason of her negligence, he was unable to maintain an action for the injury to himself. *Waite v. North-Eastern Railway Company*, El., Bl. & El. 719; 27 L. J., Q. B. 417; 4 Jur., N. S. 1300. Affirmed on appeal, El., Bl. & El. 719; 28 L. J., Q. B. 258; 5 Jur., N. S. 936; 7 W. R. 311—Ex. Ch. And see *Skelton v. London and North-Western Railway Company*, ante, col. 1988.

**Of Fellow-Servant.**—A travelling inspector of the carriage department of the London and North-Western Railway Company was travelling with a free pass of that company in a train of theirs upon a journey on the railway of the Lancashire and Yorkshire Railway Company over which the London and North-Western Company had running powers, and whilst so travelling the train in which he was came into collision with a number of coal trucks of the Lancashire and Yorkshire Railway Company, which were being shunted on their line by their servants, and the inspector received bodily injuries. Either in consequence of the hazy state of the weather and the slippery state of the rails the driver of the train was unable to stop the train when he came in sight of the distance signal, which had been put up at "danger" by the servants of the Lancashire and Yorkshire Railway Company, or he disregarded it. The jury, in an action by the plaintiff against the Lancashire and Yorkshire Railway Company, found that the accident was due to the joint negligence of them in shunting the trucks when a passenger train was due, and of the London and North-Western Railway Company in their driver running past the danger signal:—Held, that the contributory negligence of the driver of the London and North-Western Railway Company's train, with whom the plaintiff must for the purpose of the action be identified, disentitled him to maintain an action for damages against the Lancashire and Yorkshire Railway Company for their negligence. *Armstrong v. Lancashire and Yorkshire Railway Company*, 10 L. R., Ex. 47; 44 L. J., Ex. 89; 33 L. T. 228; 23 W. R. 295.

But see now, Employers' Liability Act, 1880, and MASTER AND SERVANT.

#### J. Measure of Damages.

**Loss of Profits of Trade or Profession.**—In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a

lucrative professional practice. *Phillips v. London and South-Western Railway Company*, 5 C. P. D. 280; 49 L. J., C. P. 233; 42 L. T. 6; 44 J. P. 217—C. A.

The directions proper to be given to a jury as to the damages to be awarded to the plaintiff further considered. A new trial will be granted in an action for personal injuries sustained through the defendant's negligence, where the award of the jury is so small as to shew that they must have omitted to take into consideration some of the elements of damage. *S. C.*, 5 Q. B. D. 78; 41 L. T. 121; 28 W. R. 10—C. A.

A person in business, travelling to meet his customers, booked himself by railway as a passenger from London to Hull by a train, which the company advertised to arrive at Hull the same night. On reaching Grimsby, where the company's line ended, it was found that the Hull train had left, and although the party might have reached Hull that night by taking a special conveyance and hiring a boat to cross the Humber, he remained at Grimsby and proceeded by train the next morning; but he was too late to reach Driffield and other places by the hour he had previously appointed for meeting his customers, and in consequence he was obliged to hire conveyances to see some of his customers elsewhere, and was detained several days waiting for the market days to see others. He having brought an action against the company for breach of their contract to convey him to Hull:—Held, that he was only entitled to recover the amount of hotel expenses at Grimsby, and the railway fare next day to Hull, and was not entitled to recover for any damage occasioned by his not reaching Driffield and other places by the time he might have reached them if the company had performed their contract. *Hamlin v. Great Northern Railway Company*, 1 H. & N. 408; 26 L. J., Ex. 20; 2 Jur., N. S. 1122.

**Put into wrong Train by Porters.**—A husband took tickets at Wimbledon for himself, wife, and two children of five and seven years of age respectively, to go to Hampton Court station by the last train at night; by the negligence of the porters they were put into the wrong train and carried to Esher; being unable to obtain accommodation for the night at Esher or a conveyance, they walked home, a distance of between four and five miles, and the night being wet the wife caught cold, and medical expenses were incurred:—Held, that the husband was entitled to recover damages in respect of the inconvenience suffered by being compelled to walk home, but that the illness of the wife was a consequence too remote from the breach of contract for damages to be recoverable for it. *Hobbs v. London and South-Western Railway Company*, 10 L. R., Q. B. 111; 44 L. J., Q. B. 49; 32 L. T. 352; 23 W. R. 520.

See also *Macmahon v. Field*, 7 Q. B. D. 591; 50 L. J., Q. B. 852; 45 L. T. 381.

**Expenses of Special Train.**—See cases ante, col. 1991.

**Deduction of Insurance Money.**—In an action against a railway company for negligence, the company cannot deduct from the damages awarded by the jury the amount of money received under an insurance in an accidental insurance office as compensation for the same injuries. *Bradburn v. Great Western Railway*

*Company*, 10 L. R., Ex. 1; 44 L. J., Ex. 9; 31 L. T. 464; 23 W. R. 468.

### 3. PASSENGER'S LUGGAGE.

#### a. What is.

Those articles only, which travellers usually carry with them as part of their luggage, come within the definition of ordinary or personal luggage, which a railway company is bound to carry with a passenger free of charge. A railway company refused to carry a spring horse for a child to ride on, weighing 78 lbs., and measuring 44 inches in length, tendered to them by a passenger, who was entitled to take with him 112 lbs. weight of ordinary or personal luggage:—Held, that the spring horse was not ordinary or personal luggage, and the company was justified in refusing to carry it free of charge. *Hudston v. Midland Railway Company*, 4 L. R., Q. B. 366; 38 L. J., Q. B. 213; 20 L. T. 526; 17 W. R. 705.

Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, is to be considered as personal luggage. *Macrow v. Great Western Railway Company*, 6 L. R., Q. B. 612; 40 L. J., Q. B. 300; 24 L. T. 618; 19 W. R. 873.

**Furniture.**—A passenger by railway from Liverpool to London took with him in a trunk, as his personal luggage, six pairs of sheets, six pairs of blankets, and six quilts. He had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself with a home in London. The trunk having been lost, he sought to recover the value of the articles from the company:—Held, that the articles, being intended for the use of his household when permanently settled, could not be considered as personal or ordinary passengers' luggage. *Id.*

**Miscellaneous Articles.**—A carpenter had with him as a passenger by railway a box containing a concertina, a rifle, a revolver, two gold chains, a locket, two gold rings, a silver pencil-case, a sewing machine, and a quantity of tools of his trade, such as chisels, planes, &c. The box having been lost while in the care of the railway company:—Held, that the articles in *italics* were ordinary personal luggage, for which the company was responsible, but that the other articles were not: Wilson, J., dissenting as to the concertina. *Bruty v. Grand Trunk Railway Company of Canada*, 31 Upper Canada R. 66.

Held, also, that the fact of the other articles being in the box could not prevent the passenger from recovering for such as were personal luggage. *Id.*

**Articles of Clothing—Exemption by Special Act.**—A railway company whose act enabled every passenger to take with him his articles of clothing not exceeding a specified weight and dimensions, and absolved the company from all liability or responsibility for the safe carriage of articles so carried, and who by one of their published regulations, required passengers, after taking their tickets, to claim their luggage on

the platform, and to see it marked with the company's labels, and declared that no luggage would be placed in the train until it was so marked, and that they would not be responsible for any article of luggage that was not so marked, could not refuse to place in their van, and convey as passengers' luggage, a package brought by a passenger, and made up in a railway wrapper or a horse rug, on the ground that it consisted of articles of clothing, nor could they oblige the passenger to take it along with him in the carriage in which he sat, so as to throw on him the responsibility of its safe carriage. *Munster v. South-Eastern Railway Company*, 4 C. B., N. S. 676; 27 L. J., C. P. 308; 4 Jur., N. S. 738.

**Sketches of Artist.**—Pencil sketches of an artist, placed in his portmanteau, do not form part of his ordinary luggage, so as to entitle them to be conveyed free of charge. *Mytton v. Midland Railway Company*, 28 L. J., Ex. 385.

**Title-Deeds.**—Ordinary luggage for which a railway company is responsible does not include title-deeds belonging to a client, which an attorney is carrying with him in his bag or portmanteau for the purpose of producing on a trial in a local court; or bank-notes (to a considerable amount) carried by him for the purpose of meeting the contingencies or exigencies of the case. *Phelps v. London and North-Western Railway Company*, 19 C. B., N. S. 321; 34 L. J., C. P. 259; 11 Jur., N. S. 652; 12 L. T. 496; 13 W. R. 782.

**Concealed Merchandise.**—A railway company is not liable for the loss of merchandise delivered to them by a passenger as his personal luggage, without notice that the luggage contained merchandise. *Cahill v. London and North-Western Railway Company*, 10 C. B., N. S. 154; 30 L. J., C. P. 289; 7 Jur., N. S. 1164; 4 L. T. 246; 9 W. R. 653. Affirmed on appeal, 13 C. B., N. S. 818; 31 L. J., C. P. 271; 8 Jur., N. S. 1063; 10 W. R. 321. *S. P., Belfast and Ballymena Railway Company v. Keys*, 9 H. L. Cas. 556; 8 Jur., N. S. 367; 4 L. T. 841; 9 W. R. 793.

**Duty as to.**—A carrier of passengers for hire is, at common law, only bound to carry their personal luggage. *Shepherd v. Great Northern Railway Company*, 8 Ex. 30; 7 Railw. Cas. 310; 21 L. J., Ex. 286.

Therefore if a passenger has merchandise among his personal luggage, or so packed that the carrier has no notice that it is merchandise, he is not responsible for its loss. *Id.*

But if the merchandise is carried openly, or so packed that its nature is obvious, and the carrier does not object to it, he will be liable. *Id.*

A passenger, on his arrival by a train, left his luggage at a railway cloak-room on Saturday night. On Sunday night he called for it, but found the room closed, and no one in attendance to deliver it. After a delay of forty minutes he got it, but too late to go by another railway that night:—Held, that he had a cause of action against the company for the delay in the delivery of it. *Stallard v. Great Western Railway Company*, 2 B. & S. 419; 31 L. J., Q. B. 137; 8 Jur., N. S. 1076; 6 L. T. 217; 10 W. R. 488.

**Amount.**—The rule that each passenger by a

third-class parliamentary train may carry with him 50 lbs. weight of luggage, permits a husband and wife travelling together to take 112 lbs. weight of luggage between them. *Great Northern Railway Company v. Shepherd*, 21 L. J., Ex. 114.

**Liability for Loss apart from Contract.]**—The G. W. R. issue through tickets from Stourbridge on their line to Euston (via Birmingham) on the defendants' line. The journey from Stourbridge to Birmingham is by the G. W. R., and from Birmingham to Euston by the defendant railway. The plaintiff travelled with one of these tickets, and his portmanteau was labelled and carried in the van of the G. W. R. as far as Birmingham. At Birmingham he changed into the defendants' train, and his portmanteau was seen to be transferred into the van of the defendants' train, but at Euston it was not forthcoming, and was not recovered till three months afterwards, when its contents were injured by contact with some perishable articles he had packed inside it. The plaintiff having sued the defendant company for the delay and injury to his goods, it was held, that the action was maintainable in accordance with the principle of *Foulkes v. Metropolitan Railway Company* (5 C. P. D. 157), for the defendants, having received the portmanteau to forward it, had committed a breach of duty in neglecting to do so, for which they were responsible, apart from any question of contract. *Hooper v. London and North-Western Railway Company*, 50 L. J., Q. B. 103; 43 L. T. 570; 29 W. R. 241; 45 J. P. 223.

**Master and Servant—Luggage.]**—A servant travelling with his master on a railway may have an action in his own name against the company for the loss of his luggage, although the master took and paid for his ticket. *Marshall v. York, Newcastle and Berwick Railway Company*, 11 C. B. 655; 21 L. J., C. P. 34; 16 Jur. 124.

The liability of the company in such a case is independently of the contract. *Ib.*

But the owner of a portmanteau who allows his servant to carry it by train as his own personal luggage, the servant taking and paying for his ticket, and the owner travelling by a later train, cannot maintain an action against the company for the loss of the portmanteau. *Becher v. Great Eastern Railway Company*, 5 L. R., Q. B. 241; 39 L. J., Q. B. 122; 22 L. T. 299; 18 W. R. 627.

#### b. Receiving Luggage.

**When given into Charge of Porter.]**—When a porter receives luggage at the entrance of a station for the purpose of labelling it and putting it in a train, he receives it as agent of the company, and the company is liable for its safety although the passenger has not taken a ticket. *Lovell v. London, Chatham, and Dover Railway Company*, 45 L. J., Q. B. 476; 34 L. T. 127; 24 W. R. 394.

A traveller arrived at a station twenty-five minutes before the train started by which she intended to travel; a porter took her luggage, which she left with him while she went to the ticket office. The ticket office was not open. She waited till it was opened and then took her ticket. On returning to the platform she found that part of her luggage was missing.—Held, that these facts were evidence that the porter

had received the luggage as agent of the company; and that the company was not protected by a notice to the effect that the company would not be answerable for luggage left in the custody of porters, but was liable for the loss as a common carrier. *Ib.*

**— With Directions not to Label.]**—L., on his arrival at the station, handed his bag to a porter, at the same time telling him he was going to Woolwich. The porter took the luggage to the platform and was about to have it labelled, when L. told him he would take it with him in the carriage. The porter then left suddenly, leaving the bag on the platform, and L. went to get his ticket. On his return the bag was found to be missing. At the trial L. was nonsuited:—Held, that the nonsuit was wrong, and that there was evidence to go to the jury that the bag was entrusted to the servant of the railway company to go to Woolwich as passenger's luggage; also that there was no evidence of the bailment having been determined. *Leach v. South-Eastern Railway Company*, 34 L. T. 134.

**Luggage placed in Carriage.]**—When a passenger's luggage is at his request placed by the company's servants in the carriage in which he is travelling, the contract to carry it safely is subject to an implied condition that the passenger takes ordinary care of it, and if his negligence causes its loss the company is not responsible. *Talley v. Great Western Railway Company*, 6 L. R., C. P. 44; 40 L. J., C. P. 9; 23 L. T. 413; 19 W. R. 154.

A passenger whose portmanteau had been placed at his request in the carriage with him got out at an intermediate station on his journey, and having negligently failed to find the same carriage again, finished his journey in a different one; the portmanteau having been stolen during the latter part of the journey by persons in the carriage without any negligence of the company:—Held, that the company was not responsible for the loss. *Ib.*

The luggage of a passenger by railway, though never delivered to any servant of the company, but kept by the passenger during the journey, is nevertheless, in point of law, in the custody of the company, so as to render them responsible for its loss. *Great Northern Railway Company v. Shepherd*, 8 Ex. 30; 7 Railw. Cas. 310; 21 L. J., Ex. 286.

A railway company has been held liable for the loss of a passenger's luggage, though carried in the carriage in which he himself is travelling. *Le Conteur v. London and South-Western Railway Company*, 1 L. R., Q. B. 54; 35 L. J., Q. B. 40; 12 Jur., N. S. 266; 13 L. T. 325; 14 W. R. 80.

A railway company is not an insurer in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and the company will not be liable to compensate him if luggage so placed is lost or stolen without any negligence on his part. *Bergheim v. Great Eastern Railway Company*, 3 C. P. D. 221; 47 L. J., C. P. 318; 38 L. T. 160; 26 W. R. 301—C. A.

B. went to the station some time before the train started. A porter, by B.'s direction, placed his bag in the carriage. B. went away for a short time, and on his return the bag was gone. In an action to recover the value of the bag, the

jury found that neither the railway company nor B. had been guilty of negligence:—Held, that the company was not liable as a common carrier.

### c. Notices and Special Contracts.

**Notice.]**—A common travelling trunk of a large size, containing apparel and jewels, having been lost by a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely:—Held, that he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office limiting his responsibility to five pounds, in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing. *Brooke v. Pickwick*, 4 Bing. 218; 12 Moore, 447.

**Statutory Liability—Bye-law Limiting.]**—A section of an act, incorporating a railway company, enacted, that, without extra charge, it should be lawful for every passenger travelling upon the railway to take with him articles of clothing, not exceeding forty pounds in weight, and four cubic feet in dimensions; and that the company should in no case be responsible for any thing whatsoever carried upon the railway with any passenger, other than such passenger's articles of clothing, not exceeding the weight and dimensions aforesaid; provided that nothing therein contained should extend to make liable the company further than where, according to law, stage-coach proprietors and common carriers would be liable. Another section enabled the company to make bye-laws for the good government of the affairs of the company, and for the management of the undertaking. The company made a bye-law, that every first-class passenger should be allowed to carry 112 lbs. of luggage free of charge, but that the company would not be responsible for the care of the same, unless booked, and the carriage thereof paid for:—Held, that the company had no power to make the bye-law, since it was in contravention of the first section. *Williams v. Great Western Railway Company*, 10 Ex. 15.

See *Munster v. South-Eastern Railway Company*, 4 C. B., N. S. 676; 27 L. J., C. P. 108.

**Carriage by Sea—At Common Law—Power to Limit.]**—A passenger by an English vessel belonging to an English company, from Southampton to the Mauritius, via Alexandria and Suez, took and signed a ticket, in the body of which the engagement of the company was stated to be subject to the conditions and regulations indorsed thereon, among which was this clause: "The company does not hold itself liable for damage to, or loss or detention of, passengers' baggage." A package of baggage being lost during the voyage, the passenger sued the company in the Supreme Court at Mauritius for damages for the loss:—Held, first, that it was a contract to be interpreted by the law of England, the place where the contract was made. *Peninsular and Oriental Steam Navigation Company v. Sand*, 3 Moore, P. C. C., N. S. 272; 13 W. R. 1049. See *Truman v. Pacific Steam Navigation Company*, 26 L. T. 704.

Held, secondly, that (as neither the 11 Geo. 4

& 1 Will. 4, c. 68, nor the 17 & 18 Vict. c. 31, applied) the company, as carriers, at common law, had power to limit their common law liability by special agreement, and that the limitation imposed by the stipulations indorsed on the ticket with respect to any loss, exempted the company from responsibility for the loss of the baggage. *Id.*

**By Sea and Land.]**—When a carrier makes one contract for carriage, partly by land and partly by water, the contract is divisible so as to bring that part which applies to carriage by land within the 11 Geo. 4 & 1 Will. 4, c. 68. *Le Conteur v. London and South-Western Railway Company*, 1 L. R., Q. B. 54; 35 L. J., Q. B. 40; 12 Jur., N. S. 266; 13 L. T. 325; 14 W. R. 80.

**Special Contract Notice on Ticket.]**—Z. took a through ticket from the Charing Cross station of the South-Eastern Railway Company to Paris: the ticket was in three coupons: 1, from London to Dover; 2, from Dover to Calais; 3, from Calais to Paris. His luggage consisted of a portmanteau and a hat-box, which were registered through to Paris. Upon the ticket was printed the following condition: "The company is not responsible for loss or detention of or injury to luggage of the passenger travelling by this through ticket except while the passenger is travelling by the company's trains or boats." The portmanteau was lost on the journey between Calais and Paris. In an action for the loss:—Held, that the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), only applied to the traffic of the company on their own line, and therefore the company was at liberty to make the special contract contained in the ticket. *Zunz v. South-Eastern Railway Company*, 4 L. R., Q. B. 359; 38 L. J., Q. B. 209; 20 L. T. 873; *S. C.*, nom. *Turner v. South-Eastern Railway Company*, 17 W. R. 1096; 10 B. & S. 594.

Passengers' luggage is within s. 7 of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), and therefore railway companies are liable for loss or injury to such luggage in the receiving, forwarding or delivering thereof, occasioned by the neglect of such companies or their servants, notwithstanding any notice or condition made and given by them in anywise limiting such liability. *Cohen v. South-Eastern Railway Company*, 2 Ex. D. 253; 46 L. J., Ex. 417; 36 L. T. 130; 25 W. R. 475—*C. A.* Affirming 1 Ex. D. 217; 45 L. J., Ex. 298; 35 L. T. 213; 24 W. R. 522.

The provisions of that 7th section are by 31 & 32 Vict. c. 119 (The Regulation of Railways Act, 1868), s. 16, extended to the conveyance by water of such luggage by railway companies using steam vessels for the purpose of carrying on a communication between any towns or ports. *Id.*

C. was an English subject, and the railway company was an English railway company subject to the English statutes as to railways, and authorized to have and work steamers between Boulogne and Folkestone. He took a ticket at an office of the company in Boulogne, for a through journey from Boulogne to London, by the company's steamer to Folkestone, and thence by their railway to London. On the ticket was:—"Each passenger is allowed 120 lbs. of luggage free of charge." "The company is in no case responsible for luggage of the passenger travelling by this through ticket of greater value

than 6l." C. had a box with her, which was given in charge of the servants of the company, and in transferring it from the boat to the train it fell into the sea, owing to the negligence of their servants, and the contents were damaged to the amount of 73l. :—Held, that, assuming the contract to be governed by English law, the condition on the ticket was void by reason of the above sections, and the company was liable for the loss. *Ib.*

**Notice of Conditions.]**—A passenger on paying his fare received a ticket from the clerk of the steam company, on the back of which was printed a notice exonerating them for liability for loss, injury, or delay to the passenger or his luggage, however caused. There was no evidence that the passenger had been made aware of this condition before or at the time when he took the ticket. During the voyage the steamer was lost by the negligence of the servants of the company, and the passenger lost his luggage and suffered other damage and inconvenience :—Held, that in the absence of proof that the passenger had assented to be bound by the condition indorsed on the ticket, it was no defence to the action by him, to recover the loss he had sustained. *Henderson v. Stevenson*, 2 H. L., Sc. App. Cas. 470 ; 32 L. T. 709. Distinguished in *Burke v. South-Eastern Railway* (3 C. P. D. 1), *ante*, col. 1952. And in *Parker v. South Eastern Railway*, and *Harris v. Great Western Railway*, *post*, col. 2006.

**Special Contract—Loss "off the Line of" Company.]**—A passenger took a through ticket from Bath to Chester at the office of the Midland Company at Bath, the ticket containing on the back a statement that it was issued subject to the conditions in the company's time tables, one of those conditions being that the company should not be responsible for any delay, detention, "or other loss or injury arising off its lines." Part of the journey, viz., from Birmingham to Chester, is by the London and North-Western Railway, the station at Birmingham being the property of that company, and all the porters and other servants there employed being paid by it ; but by an agreement between that company and the Midland Railway Company, authorized by act of parliament, the latter company, on payment of an annual sum, has a right to the use of the station and the services of the porters. The passenger arrived at the Birmingham station safely with his luggage, which had originally been delivered to the Midland Company. There he saw a porter wheeling his luggage on a truck across to that part of the platform whence the London and North-Western Company's trains departed for Chester. It was never seen afterwards. An action having been brought against the Midland Railway Company for the loss :—Held, that, assuming and without deciding that the passenger was bound by the condition exempting the company from liability for "loss off its lines," his luggage could not be said to be "off the lines" of the Midland Company until it was "out of their custody," that the onus of shewing that the loss took place after the luggage had ceased to be in their custody lay upon the company, and, as they had failed to shew that, they were liable for the loss. *Kent v. Midland Railway Company*, 10 L. R., Q. B. 1 ; 44 L. J., Q. B. 18 ; 31 L. T. 430 ; 23 W. R. 25.

**— With whom made.]**—Where, by a traffic arrangement between two railway companies, passengers are booked through, the contract is one entire contract between the passenger and the company issuing the ticket. *Mytton v. Midland Railway Company*, 4 H. & N. 615 ; 23 L. J., Ex. 385.

A traffic arrangement for booking passengers through existed between the South Wales Railway Company and the Midland Company. The South Wales Company issued a through ticket to a passenger from Newport to Birmingham, the words "via Midland from Gloucester" being printed on the ticket. His portmanteau was lost on the Midland line, between Gloucester and Birmingham. Under the South Wales Company's Act a passenger's ordinary luggage is conveyed at his own risk. The fares paid are divided between the companies according to the mileage :—Held, that he had no cause of action against the Midland Company, the contract entered into by him being with the South Wales Company for the whole distance. *Ib.*

**By Excursion Trains excluding Luggage.]**—By a railway company's act, every passenger travelling upon the railways may take with him his ordinary luggage, not exceeding 150 lbs. in weight for first-class passengers, and 100 lbs. in weight for second and third class passengers, without any extra charge being made for the carriage :—Held, that this did not preclude the company from making special arrangements for the exclusion of luggage by cheap excursion trains. *Rumsey v. North-Eastern Railway Company*, 14 C. B., N. S. 641 ; 32 L. J., C. P. 244 ; 10 Jur., N. S. 208 ; 8 L. T. 666 ; 11 W. R. 911.

A. took an excursion ticket for a journey from Scarborough to Whitby, for which he paid 5s., knowing that the company declined to carry any luggage for passengers travelling with excursion tickets, and that if he went (as he might have done by the same train) as an ordinary passenger, with luggage, the price of the ticket would be 9s. Before taking his ticket he had procured one of the company's porters to place his portmanteau in the luggage-van, not informing the porter how he was going to travel. On arriving at Malton, an intermediate station, he requested that his portmanteau might be taken out of the van to await his return from Whitby on his way to York. The guard, however, refused to allow this to be done, the portmanteau not being booked ; and it was accordingly carried on to Whitby, where the company's servants refused to deliver it up without being paid for the carriage from Scarborough to Whitby :—Held, that the circumstances raised an implied contract for the carriage of the portmanteau for hire, and therefore that the company was justified in detaining it. *Ib.*

A passenger, who took a ticket for an excursion train, referring him to bills on which it was announced that luggage taken by the train was at the passenger's risk, is not entitled to sue for loss of his luggage by negligence, though he did not see the hand-bills or know of the condition. *Stewart v. London and North-Western Railway Company*, 3 H. & C. 135 ; 33 L. J., Ex. 199 ; 10 Jur., N. S. 805 ; 10 L. T. 302 ; 12 W. R. 689.

By an excursion train from Liverpool to London and back at greatly reduced fares, there was printed on the railway company's ticket issued for it, "Ticket as per bill ;" and on the back of

the tickets, "This ticket is issued subject to the conditions contained in the company's time and excursion bills." On such bills (to be obtained where the tickets were issued) was this notice: "Luggage under 60 lbs. free, at passengers' own risk."—Held, to be a special contract between plaintiff and the railway company, not void under the Railway and Canal Traffic Act, 1854; that notice was given that the luggage of passengers under 60 lbs. should by that train be at their own risk; and that the railway company was not liable. *Ib.*

But see *Cohen v. South-Eastern Railway Company, supra.*

**Evidence of Knowledge.**—A passenger on a railway to a station thereon, having taken and paid for a second-class ticket, delivered her luggage to a porter of the company, telling him to what station she was going, and after seeing him label it, took her seat in the train. On her arrival at her destination one of her boxes was missing. By their act the company was empowered to make bye-laws, which were to be painted on a board and hung up at the stations, and were to be binding on all parties. One of the bye-laws was as follows: "Every first-class passenger will be allowed 112 lbs., and every second-class passenger 56 lbs., of luggage, free of charge, but the company will not be responsible for the care of the same unless booked and paid for accordingly." It did not appear that the passenger knew of the bye-law, or that it had been affixed at the stations as required by the act. It was admitted by the company that the box had been stolen. The passenger having sued the company in a county court for the loss, the judge, on these facts, held the company liable, and gave a verdict for the full value of the box:—Held, on appeal, that the judgment must be affirmed, as the *prima facie* liability of the company was not conclusively rebutted, and there was, therefore, evidence to support the finding. *Great Western Railway Company v. Goodman*, 12 C. B. 313; 21 L. J., C. P. 197; 16 Jur. 862. And see *Henderson v. Stevenson, supra.*

#### d. Delivering Luggage.

**Duty as to.**—A carrier who undertakes to convey a passenger with his luggage, is bound to deliver it to him at the end of the journey, though it may be in the same carriage with him, and under his personal care; and if the usual course of delivery is at a particular spot, that is the place of delivery. *Richards v. London and South Coast Railway Company*, 7 C. B. 839; 6 Railw. Cas. 49; 18 L. J., C. P. 251; 13 Jur. 986.

A railway company, as a common carrier of passengers and their luggage, is bound on the arrival of a train at the terminus of the journey to deliver a passenger's luggage into a carriage, to be conveyed from the station, if required so to do, and if such is their usual practice. *Butcher v. London and South-Western Railway Company*, 16 C. B. 13; 3 C. L. R. 805; 24 L. J., C. P. 137; 1 Jur., N. S. 427.

A., a passenger, brought with him into the carriage a carpet-bag containing a large sum of money, and kept it in his possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his

hand he permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter, having obtained a cab (within the station), placed the carpet-bag on the foot-board thereof, and then returned to the platform to get some other luggage belonging to A., when the cab disappeared, and the carpet-bag and its contents were lost:—Held, that this was a loss by negligence of the company, for which the company was responsible in damages. *Ib.*

**Evidence of Delivery.**—A., a passenger by the Midland Railway from Gloucester to Bristol, on arriving at the terminus at Bristol, told a porter there that he wished to proceed by the Bristol and Exeter Railway (whose station closely adjoined that of the Midland Railway) to Torquay. The porter thereupon placed A.'s portmanteau on a truck with other luggage, entered the Bristol and Exeter station with the truck, passed down an incline from the arrival platform, crossed the lines of the railway, and ascended an incline to the departure platform of the Bristol and Exeter Railway. There was no evidence that the portmanteau was ever afterwards seen; and it never reached Torquay. In an action against the Midland Railway Company for the loss:—Held, that there was no evidence of a breach of their contract to deliver either to A., or at the departure platform of the Bristol and Exeter Railway. *Midland Railway Company v. Bromley*, 17 C. B. 372; 25 L. J., C. P. 94; 2 Jur., N. S. 140.

In an action against a railway company for not delivering luggage to another railway company at B., to be carried by such last-mentioned company from B. to C., the plaintiff must give such evidence of a non-delivery at B. as preponderates over the presumption of a delivery. It is not enough to shew that the luggage never reached C., or to give evidence of a loss, which is equally consistent with a loss by the one company as by the other. *Ib.*

**Delivery on Platform.**—It is the duty of a railway company with regard to the luggage of a passenger, which travels by the same train with him but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; and the liability of the company does not cease until a reasonable time has been allowed to the owner to do so. *Patscheider v. Great Western Railway Company*, 3 Ex. D. 153; 38 L. T. 149; 26 W. R. 268.

**As to Liability of Cab Proprietor for Negligence of Driver.**—See HACKNEY CARRIAGE.

#### e. Deposit in Cloak-room.

**Conditions on Ticket—Knowledge of, by Customer.**—If a cloak-room ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back, the person taking such ticket is bound by the conditions, whether he has made himself acquainted with them or not. *Harris v. Great Western Railway Company*, 1 Q. B. D. 515; 45 L. J., Q. B. 729; 34 L. T. 647; 25 W. R. 63.

H. having been a passenger by railway, her luggage (consisting of two packages) was deposited with a clerk of the railway company, at

their cloak-room; and the person depositing it received a ticket which was headed "Luggage and cloak office," and on the face of which was printed, in type easily legible, "left, subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." And on the other side, after a statement of the "sums to be paid for warehousing passengers' luggage," there was a notice that "the company will not be responsible for loss of, or injury to, any package beyond the value of 5*l.*, unless at the time of the delivery of such package the true value and nature thereof . . . shall have been declared, . . . and a sum at the rate of 1*d.* per pound sterling . . . be paid . . . in addition to the before-mentioned ordinary warehouse charges. The company will not be responsible for loss of, or injury to, articles except left in the cloak-room." The value of each package was more than 5*l.*, but no declaration of value or additional payment was made. The person who deposited the luggage knew that there were conditions on the back of the ticket, but did not know what those conditions were. The luggage was not put by the servants of the company into the cloak-room, but was left in a vestibule, without any other protection, and was stolen owing to this negligence of the servants of the company.—Held, that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket. *Ib.*

Held, also, by Blackburn and Mellor, J.J., that the conditions were applicable to the loss, and protected the company, although the luggage was not deposited in the cloak-room. But, by Lush, J., that the contract was to warehouse the luggage in the cloak-room, and that the conditions only protected the company as to a deposit in the cloak-room. *Ib.*

When a person delivers a parcel at the cloak-room of a railway company, and receives a ticket with conditions on the back limiting the company's liability, he is not bound if he does not know there is writing on the ticket; but if he knows there is writing containing conditions he is bound; if he knows there is writing, but does not know it contains conditions, he is bound, if in the opinion of the jury reasonable notice is given that it contains conditions. *Gabell v. South-Eastern Railway Company, Parker v. South-Eastern Railway Company*, 2 C. P. D. 416; 46 L. J., C. P. 768; 37 L. T. 540; 25 W. R. 564—C. A.

A person delivered a parcel of a value exceeding 10*l.* at a cloak-room of a railway company, paid 2*d.*, and received a ticket, on which were the words "See back." On the back was a condition that the company would not be responsible for packages exceeding the value of 10*l.* The parcel was lost, and the owner sued for its value. The jury was asked whether he knew of the condition, and whether he was under any obligation in the exercise of reasonable caution to make himself aware of it. The jury answered in the negative, and found a verdict for him.—Held, that there was a misdirection, and there must be a new trial. *Ib.* Reversing the judgment of the Common Pleas Division, 1 C. P. D. 618; 45 L. J., C. P. 515; 34 L. T. 654.

— Company are not Liable as Carriers in respect of.]—A passenger coming off a journey

by a railway, deposited her travelling bag in the cloak-room at a station, taking a ticket for it, and paying 2*d.* On returning to reclaim it, she found that it had been delivered to some one else. It was afterwards recovered, but without several articles of value that had been in it when it was deposited. On the back of the ticket was printed, "The company will not be responsible for articles left by passengers at the station, unless duly registered, for which a charge of 2*d.* per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d.* per diem in addition will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of 10*l.*" It did not appear whether the passenger had read the ticket or not, but she brought it back to the cloak-room on applying for the return of her luggage.—Held, in an action against the company for not safely keeping the bag, first, that 17 & 18 Vict. c. 31, s. 7, did not apply, the company not receiving the bag as a carrier. *Van Toll v. South-Eastern Railway Company*, 12 C. B., N. S. 75; 31 L. J., C. P. 241; 8 Jur., N. S. 1213; 6 L. T. 244; 10 W. R. 578.

Held, secondly, that the inference was that the passenger assented to the terms of the notice on the ticket, and therefore, as the value of the articles missing exceeded 10*l.*, the company was not liable for the loss. *Ib.*

A. travelled to London by a railway; deposited a box at the cloak-room; paid a charge of 2*d.*, and received a ticket, on the back of which were printed conditions; but it contained no notice of the hours the cloak-room was kept open, or of the time the box was to be redelivered:—Held, that there was an implied contract on the part of the company to deliver the box to A. on reasonable request, and in reasonable time. *Stallard v. Great Western Railway Company*, 2 B. & S. 419; 31 L. J., Q. B. 137; 8 Jur., N. S. 1076; 6 L. T. 217; 10 W. R. 488.

**Loss of Patterns Deposited—Actual Value.]**—Where a commercial traveller deposited a case of patterns in a waiting-room of a railway company, and it was lost:—Held, that he, in an action against them as warehousemen for negligence, could not recover damages beyond the actual value of the article lost. There is no undertaking on the part of warehousemen to be answerable beyond the actual value of the article, except by special contract. *Anderson v. North-Eastern Railway Company*, 4 L. T. 216; 9 W. R. 519.

**Protection under Conditions.]**—Where an article deposited in the cloak-room of a railway company exceeds 10*l.* in value, a notice on the ticket given to the depositor that "the company will not be responsible for any package exceeding the value of 10*l.*" protects the company from liability, not only for the loss of such an article, but also for delay in delivering it, at least where the delay is caused by no wilful act or default of the company, and without its privity or knowledge. *Pepper v. South-Eastern Railway Company*, 17 L. T. 469.

Compare also cases ante, col. 2002.

**Military Baggage.**—“Public baggage, stores, and arms,” &c., sent by railway, in charge of any of Her Majesty's forces, specified in 7 & 8 Vict. c. 85, s. 12, is “their baggage,” no matter what may be the disproportion between the amount of baggage and the number of the forces in charge of it, and must be carried by a railway company at the rates imposed by that section. *Att.-Gen. v. Great Southern and Western Railway Company*, 14 Ir. C. L. R. 447.

### III. CARRIAGE OF GOODS AND ANIMALS AT COMMON LAW.

#### 1. COMMON CARRIERS OF GOODS.

**Implied Contracts.**—When goods are delivered to carriers for conveyance, the implied contract of the carriers is, safely and securely to convey the goods, and within a reasonable time. *Raphael v. Pickford*, 2 D. N. S. 916; 5 M. & G. 551; 6 Scott, N. R. 478; 12 L. J., C. P. 176; 7 Jur. 815.

The duty of common carriers to carry safely is independently of any contract made by them, and no contract need be proved in an action founded on the custom of the realm. *Pozzi v. Skipton*, 1 P. & D. 4; 8 A. & E. 963; 1 W., W. & H. 624.

**Reward.**—A carrier is not bound to convey goods except on payment of the full price for the carriage, according to their value; and if that is not paid, it is competent to him to limit his liability by special contract. *Wyld v. Pickford*, 8 M. & W. 443.

But he is not exempted thereby from all responsibility; but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care. *Ib.*

**Insurer of Goods.**—A carrier was held at common law to be an insurer of the goods which he carried; he was obliged for a reasonable reward to carry any goods to the place to which he professed to carry goods, which were offered him, if his carriage would hold them, and he was informed of their quality and value; he was not obliged to take a package, the owner of which would not inform him what were its contents, and of what value they were; if he did not ask for his information, or if, when he asked, and was not answered, he took the goods, he was answerable for their amount, whatsoever that might be; he might limit his responsibility as an insurer by notice, but that notice would not protect him against the consequences of a loss by gross negligence. *Macklin v. Waterhouse*, 2 M. & P. 319; 5 Bing. 212; *S. P., Riley v. Horne*, 5 Bing. 217, 224; 2 M. & P. 331.

— **Exceptions.**—A common carrier must make good a loss though not in fault, as, if he is robbed. *Gibbon v. Paynton*, 4 Burr. 2298.

A carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the king's enemies; even though the jury expressly find that they were destroyed

without any actual negligence of the carrier. *Forward v. Pittard*, 1 T. R. 27; *S. P., Hyde v. Trent and Mersey Navigation Company*, 5 T. R. 389; 1 Esp. 86.

Where an order is given to a carrier, antecedently to the delivery of goods, who assents to deal with them when delivered in a particular manner, a duty is imposed on him on the receipt of the goods to deal with them according to the order previously given; and the law implies a promise by him to perform such duty. *Streeter v. Horlock*, 7 Moore, 283; 1 Bing. 34.

**When Customer accompanies.**—If A. sends goods by B., who says, “I will warrant they shall go safe;” B. is liable for any damage sustained by the goods, notwithstanding A. sends one of his servants in B.'s cart to look after them. *Robinson v. Dunmore*, 2 B. & P. 416.

**By Water.**—Common carriers by water were conveying goods for hire in a boat towed by one of their steam-packets. As the steam-packet approached a pier to take in passengers, the captain of the packet stopped its course, in order to allow another vessel to clear away from the pier. This was a proper course on the part of the captain, but the day being boisterous and the tide running strong, with a good deal of sea, though there was nothing unusual in the weather, the effect of the stoppage was that the tow-boat was driven by the wind and tide against the rudder of the steam-packet, so that it was injured and the goods damaged. There was no negligence on the part of any one:—Held, that though there was no negligence, the carriers were liable to indemnify the owner of the goods for the damage caused by the accident, since it could not be said to be imputable immediately to the act of God, for the proximate cause of the injury was the stoppage of the steam-packet. *Oakley v. Port of Portsmouth and Ryde United Steam-packet Company*, 11 Ex. 618; 25 L. J., Ex. 99. And see *Nugent v. Smith* (under CARRIERS OF ANIMALS), *infra*.

**Where Contract in Foreign Country.**—Where the contract was made in a foreign country and there was no question raised as to the *lex loci contractus*, it was left to the jury to say whether there had been negligence, and what would be reasonable care and diligence under the circumstances. *Cohen v. Gaudet*, 3 F. & F. 455.

**Carriages—Ferry.**—The owner of a ferry is bound to convey carriages and their contents. *Walker v. Jackson*, 10 M. & W. 16; 12 L. J., Ex. 165.

#### 2. RAILWAY COMPANIES.

**Delay—Ordinary Diligence—Vis major.**—A carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God, as a fall of snow. *Briddon v. Great Northern Railway Company*, 28 L. J., Ex. 51; 32 L. T., O. S. 94.

A common carrier of goods is not, in the absence of a special contract, bound to carry within any given period of time, but only within a time which is reasonable, regarding all the circumstances of the case; and he is not respon-



sible for the consequences of delay arising from causes beyond his control. *Taylor v. Great Northern Railway Company*, 1 L. R., C. P. 385; 35 L. J., C. P. 210; 12 Jur., N. S. 372.

A railway company was prevented by an unavoidable obstruction on its line from carrying goods within the usual time. The obstruction was occasioned by an accident resulting solely from the negligence of another company, having parliamentary running powers over the line:—Held, that the railway company was not liable to the owner of the goods for damage to them caused by the delay. *Ib.*

In the absence of an express contract, the obligation of a carrier of goods is to carry them according to the usual route professed by him to the public, and to deliver them within a reasonable time. *Hales v. London and North-Western Railway Company*, 4 B. & S. 66; 32 L. J., Q. B. 292; 8 L. T. 421; 11 W. R. 856.

A railway company undertaking to carry goods from A. to B., must deliver them within a reasonable time, having reference to the means at their disposal for forwarding them; and they are not justified in delaying the delivery by adopting a particular mode of forwarding the goods, merely because that is the usual mode adopted. *Ib.*

**Effect of 8 & 9 Vict. c. 20, s. 86.**—The Railway Clauses Act, 8 & 9 Vict. c. 20, s. 86, does not impose on railway companies acting as carriers any further liabilities than those which attached to common carriers. *Johnson v. Midland Railway Company*, 6 Railw. Cas. 61; 4 Ex. 367; 18 L. J., Ex. 366.

**Intermediate Stations.**—Therefore, although a company carries coals and other goods for hire from one end of their line to the other, and carries goods other than coals from an intermediate station, they are not bound to carry coals from that station unless they have publicly professed to do so; and even if they have held themselves out as carriers of coals from that station, no action for refusing to carry coals from it will lie, unless it is shewn that the company has conveniences at the station for receiving and carrying the coals. *Ib.*

**Unreasonable Conditions.**—A railway company acting as a common carrier is bound to carry such goods as are tendered to it for the purpose of being carried, together with the proper charge for such carriage; and the company cannot insist upon the sender signing such conditions as are unreasonable. *Garton v. Bristol and Exeter Railway Company*, 1 B. & S. 112; 30 L. J., Q. B. 273; 7 Jur., N. S. 1234; 9 W. R. 734.

A railway company has no right to close its offices, and refuse to receive goods which are tendered to it with the proper amount for carriage, while at the same time they continue to receive goods, prepared, assorted and packed in the same manner, from a particular individual. *Ib.*

**No Obligation to Carry except as Advertised.**—There is no obligation on railway companies, whether at common law or under 17 & 18 Vict. c. 31, to carry goods otherwise than according to their profession. *Oxlade v. North-Eastern Railway Company*, 15 C. B., N. S. 680.

Therefore, it is competent to a railway com-

pany to restrict its coal traffic to the carriage of coals for colliery owners, from the pit's mouth to stations where such colliery owners have cells or depôts appropriated to them for the reception and sale of their coals, and to decline to carry coals from station to station, or for coal merchants, such arrangement being essential to the regulation of the large traffic in that article, and the company not being common carriers of coal. *Ib.*

**Posting up Tolls.**—A railway company posting up tolls, including those charged for coals, do not thereby hold themselves out as common carriers of coals. *Oxlade v. North-Eastern Railway Company*, 3 L. T. 671; 9 W. R. 272.

**Beyond Limits of Line.**—A parcel was delivered at Lancaster, to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed on the receipt of it. The Lancaster and Preston Junction Railway Company were known to be proprietors of the line only as far as Preston, where the railway united with the North Union line, and that, afterwards, with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston:—Held, that the Lancaster and Preston Railway Company was liable for its loss. *Musehamp v. Lancaster and Preston Junction Railway Company*, 8 M. & W. 421; 2 Railw. Cas. 607; 5 Jur. 656.

One who holds himself out as a carrier of goods between two places, one of which is beyond the confines of England, is still subject to the common law liability of a carrier for hire, and is bound to accept all goods which are reasonably tendered to him for conveyance between these limits. *Crouch v. London and North-Western Railway Company*, 14 C. B. 255; 7 Railw. Cas. 717; 2 C. L. R. 188; 23 L. J., C. P. 73; 18 Jur. 148.

Where a railway company receives goods for reward to carry from one station to another, they are answerable for a loss occurring between them during the transit, though it may happen on a line of railway belonging to another company. *Scotthorn v. South Staffordshire Railway Company*, 8 Ex. 341; 22 L. J., Ex. 121; 7 Railw. Cas. 810.

**Under Special Contract.**—The Great Northern Railway Company agreed with A. to carry for him, at the rate of 170 tons a day, 30,000 tons of coal from a colliery to London, the York and Berwick Railway Company undertaking to haul the waggons from the colliery to York; and it was agreed that the contract was founded on the basis that there should be no unreasonable detention of the waggons by the York and Berwick Company:—Held, that it was a condition precedent to the Great Northern Company's obligation to carry the coal, that there should be no unreasonable delay by the York and Berwick Company in hauling the waggons. *Johnassohn v. Great Northern Railway Company*, 10 Ex. 434; 24 L. J., Ex. 31.

F. delivered at Bristol to a railway company goods, and took from them a receipt note, which

stated that the goods were received to be conveyed by the company, and on the conditions stated on the other side. Then followed a statement that Bristol was the station from which, and Paddington the station to which, the goods were to be carried, and that F.'s address was at Brompton. One of the conditions stated, that goods addressed to consignees resident beyond the immediate vicinity of the company's goods stations would be forwarded by public carrier or otherwise, as opportunity might offer, but that the delivery of the goods by the company would be considered as complete, and the responsibility of the company cease, when such carriers received the goods, and that the company would not be responsible for loss or damage to goods beyond the limits of their railway. The goods were safely conveyed by the company to their London terminus at Paddington, and then given over to a person specially appointed by them for the collection and delivery of goods; and, through the negligence of his servant, were damaged on their delivery at F.'s house at Brompton. The company made one entire charge for the carriage from Bristol to Brompton:—Held, that the company was not liable for the damage; and consequently a declaration, which stated that they as common carriers received the goods to be carried from Bristol to Brompton could not be supported. *Fowles v. Great Western Railway Company*, 7 Ex. 699; 7 Railw. Cas. 421; 22 L. J., Ex. 76; 17 Jur. 214.

At the Bath station of the Great Western Railway Company goods were received for the purpose of being forwarded to Torquay. The line of that company ends at Bristol, at which place the line of the Bristol and Exeter Company begins. The goods would have to be put on a third railway before reaching Torquay. The receipt note given at Bath was thus headed: "To the Great Western Railway Company: Receive the undermentioned goods on the conditions stated on the other side, to be sent to Torquay station, and delivered to C., consignee, or his agent." The Great Western Company received the carriage-money for the whole distance from Bath to Torquay. On the arrival of the goods at Bristol they were put on the line of the Bristol and Exeter Company, where they were destroyed by fire. An action was brought against this latter company to recover compensation for the loss:—Held, that the contract was with the Great Western Company alone, and that the Bristol and Exeter Company was not liable. *Bristol and Exeter Railway Company v. Coblins*, 7 H. L. Cas. 194; 29 L. J., Ex. 41; 5 Jur., N. S. 1367.

After a verdict for the plaintiff a rule to enter a nonsuit was obtained, and the grounds were stated to be "that the goods lost or damaged were received and carried under a contract, by the conditions of which the company was not liable for loss or damage by fire." A judgment was given, which was reversed in the Exchequer Chamber, and the case was brought up to the House of Lords:—Held, that it was competent to the Bristol and Exeter Company on the hearing of the case to discuss the question, whether any contract whatever existed as between itself and the plaintiff. *Id.*

— **Damage on other Lines.**—A. delivered to P., at Worcester, a package addressed to him

to be carried from Worcester to Chester. P. (who acted as agent for receiving goods both of the Great Western Railway Company and London and North-Western Railway Company) wrote under the address "Viâ Stafford," and delivered the package to the Great Western Railway, who carried it on their line to Stafford, whence it was carried in the Great Western Railway Company's waggons on the line of the London and North-Western Railway to Chester:—Held, that there was evidence of a contract with the Great Western Railway Company to carry the whole distance from Worcester to Chester, and therefore the Great Western Railway Company was liable for damages done to the contents of the package during the journey. *Webber v. Great Western Railway Company*, 34 L. J., Ex. 170; 12 L. T. 498; 13 W. R. 755; and 4 H. & C. 582—Ex. Ch.

Where a railway company receives goods at one terminus to carry them to another, they are answerable for any loss that may occur between them, although it may be on a line of railway that does not belong to such company; and the receipt of goods so to be carried is *prima facie* evidence of such liability. *Watson v. Ambergate Railway Company*, 15 Jur. 448.

— **By Sea and Land.**—When a carrier makes one contract for carriage partly by land and partly by water the contract is divisible so as to bring that part which applies to carriage by land within 11 Geo. 4 & 1 Will. 4, c. 68. *Le Conteur v. London and South-Western Railway Company*, 1 L. R., Q. B. 44; 35 L. J., Q. B. 40; 12 Jur., N. S. 266; 13 L. T. 825; 14 W. R. 80.

The principle that where a railway company undertakes the carriage of goods to a specified place, and the goods are lost at a point beyond the terminus of its line, the company is responsible, applies when a portion of the transit is to be effected by water, or even by sea. *Wilby v. West Cornwall Railway Company*, 2 H. & N. 703; 27 L. J., Ex. 181; 4 Jur., N. S. 284.

A parcel was delivered at Penzance to the West Cornwall Railway Company, addressed to a person at Wolverhampton "per first steamer from Hayle." The company's railway only extends from Penzance to Truro; but their practice is to send goods for Bristol, or places above it, to a seaport called Hayle, and there deliver them to the steamboats, and to send parcels for Bristol, or places above it, to Truro, and there deliver them to other carriers, who carry them from Truro to Plymouth (for which distance there is no railway), and from Plymouth they are sent by railway to Wolverhampton. The company carried the parcel by their railway to Hayle, where they delivered it to a steamboat, by which it was conveyed to Bristol, and thence by railway to Wolverhampton. The goods in the parcel having been damaged after the delivery to the steamboat:—Held, that, under these circumstances, a jury might infer a contract by the company, as common carriers, to carry the whole distance from Penzance to Wolverhampton; and, consequently, that they were liable for the damage to the goods. *Id.*

Held, also, that it was not *ultra vires* for the company to carry beyond their own line by sea or by coach. *Id.*

See also cases, sub tit, PASSENGERS AND THEIR LUGGAGE, *supra*.

## 3. NOTICES AND SPECIAL CONTRACTS.

**Before the Carriers Act—Effect of Notice.]—**Before this statute a carrier might not only limit, but exclude all responsibility by notice. *Maving v. Todd*, 1 Stark. 72; 4 Camp. 225.

As well against a loss by robbery, as against an accidental loss. *Corington v. Willan*, Gow, 115.

Where a carrier gave notice that he would not be liable for goods lost, beyond the value of 5*l.*, that extended to the property of passengers going by the coach or other carriage, and not to goods sent to be carried only. *Clarke v. Gray*, 6 East, 564; 2 Smith, 622; 4 Esp. 177.

Where a carrier receives valuable goods to carry after notice to the bailor that he will not be responsible for loss or damage to them unless a higher rate than usual is paid for the carriage, he receives them on the terms of the notice which amounts to a special contract. *Wyld v. Pickford*, 8 M. & Co. 443.

**— Two Notices.]—**A carrier, who gave two notices limiting his responsibility, was bound by that which was least beneficial to himself. *Munn v. Baker*, 2 Stark. 255.

A carrier placed a board in his office, giving notice that he would not be answerable for jewels, however small their value, unless entered as such; but circulated handbills, stating generally, that he would not be answerable for any article above the value of 5*l.*, unless entered as such:—Held, that he was answerable for the loss of jewels not entered as such, if under the value of 5*l.* *Cobden v. Bolton*, 2 Camp. 108.

**— Commencement of Liability.]—**In an action against a carrier for not taking care of, and safely conveying goods according to his promise, it appeared that he had limited his responsibility as such, by means of a notice of which the plaintiff was cognizant:—Held, that he having declared against the defendant as a carrier, could not insist that the goods were lost from his warehouse, before the actual carriage of the goods commenced. *Roskell v. Waterhouse*, 2 Stark. 461.

A keeper of a booking-house could not set up a notice, that he would not be answerable for goods, if above a certain value, as a defence against the effect of negligence in himself or his servants. *Newborn v. Just*, 2 C. & P. 76.

**— To whom to be given.]—**A carrier's notice limiting his liability was not available, if it appeared that it did not come to the knowledge of the customer. *Kerr v. Willan*, 6 M. & S. 150; 2 Stark. 53.

A notice given to the vendor was equivalent to notice to the vendee who directed the goods to be sent. *Maving v. Todd*, 1 Stark. 72; 4 Camp. 225.

So notice to the principal was in law notice to all their agents. *Mayhew v. Eames*, 4 D. & R. 484; 3 B. & C. 601; 1 C. & P. 550.

The carrier's agent telling the female servant of the owner of a parcel above the value of 5*l.*, that it ought to be insured, was not a sufficient notice of the limitation of the carrier's responsibility. *Macklin v. Waterhouse*, 5 Bing. 212; 2 N. & P. 319.

When a parcel was delivered by the plaintiff's agent at W., to the defendant, to be carried to

the plaintiff, who resided in London, it was sufficient for the defendant to prove that the plaintiff received notice in London, that the defendant would not be responsible for goods exceeding 5*l.* in value, unless entered and paid for, without proving any notice to the agent in the country. *Alford v. Horne*, 3 Stark. 136.

**— Whether Read or not.]—**In an action against carriers for the loss of goods intrusted to their care, there was contradictory evidence as to whether a ticket limiting their responsibility had been delivered by them to the plaintiff at the time of taking the goods in charge:—Held, that the jury was rightly directed to say, whether that ticket had been delivered to the plaintiff; and that it was not necessary to leave to them whether or not it had been read over or explained to him. *Palmer v. Grand Junction Railway Company*, 4 M. & W. 749; 7 D. P. C. 232; 3 Jur. 559.

**— By whom given.]—**Where it was agreed between the plaintiff and one of the proprietors of a stage-coach, to carry certain parcels for the plaintiff free of expense, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other proprietors; and they had given notice that they would not be accountable for parcels above the value of 5*l.*, unless entered and paid for:—Held, that they were not liable for the loss of a parcel of above the value of 5*l.* sent by the plaintiff under this agreement, of the value of which no notice had been given to the proprietors. *Big-nold v. Waterhouse*, 1 M. & S. 255.

A notice that the proprietor of a general coach office would not be responsible for the carriage of parcels of more than 5*l.* value, unless entered as such, would not avail the proprietor of a coach who took a parcel from the office, unless otherwise shewn that he was connected with the office. *Macklin v. Waterhouse*, 5 Bing. 212; 2 N. & P. 319.

**— Posted in Office.]—**A notice stuck in the office, to be of any avail, must have been in such large characters that a person delivering goods at the office could not fail to read, without gross negligence. *Clayton v. Hunt*, 3 Camp. 27.

It was not sufficient notice to paste upon the door of the office a bill blazoning the advantages of his conveyances, and stating in small characters, at the bottom of it, that he would not be answerable for goods above the value of 5*l.* unless entered as such, and paid for accordingly. *Butler v. Heane*, 2 Camp. 415.

It was not sufficient to shew that a printed notice was exhibited in the carrier's office, where the goods were delivered by a porter, although the porter could read, and had seen the notice, if in fact he had never read it. *Kerr v. Willan*, 2 Stark. 53; 6 M. & S. 150; *S. P.*, *Davis v. Willan*, 2 Stark. 279.

A notice of certain limitations on a general liability, suspended at the termini of the journey, would not attach upon the delivery of goods at intermediate places, where no such notice was given. *Gouger v. Jolly*, Holt, 317.

**— By Advertisement.]—**In an action against a carrier for negligence, he could not read in evidence the advertisement in a newspaper, by which he limited his responsibility, unless he first proved

that the plaintiff was in the habit of reading that paper. *Leeson v. Holt*, 1 Stark. 186.

To fix a party with knowledge of a general notice by which a coach proprietor limited his responsibility, it was proved that he had taken in for three years a newspaper in which the notice had been advertised once a week; the jury having, nevertheless, found a verdict against the proprietor, the court refused a new trial. *Rowley v. Horne*, 3 Bing. 2; 10 Moore, 247.

#### Articles outside Notice—Knowledge of Value.]

—A notice given by carriers exempted them from their liability for the loss of goods above the value of 5*l.*, unless the appearance of the goods necessarily indicated that they were above that value. *Down v. Fromont*, 4 Camp. 40.

A public notice given by carriers that they would not be answerable for certain specified articles, or any other goods of what nature or kind soever, above the value of 5*l.*, if lost, stolen or damaged, unless a special agreement was made, and a premium paid, such value to be entered at the time of delivery, seemed not to extend to goods which did not fall within any of the specified articles, and which from their bulk and quality communicated to the carriers at the time of delivery, must be known to them to exceed the value of 5*l.* *Beck v. Evans*, 16 East, 244; 3 Camp. 267.

Notwithstanding a notice by carriers that they would not be accountable for goods of a particular description above the value of 5*l.*, unless specified and paid for as such when delivered, they were liable for damage done to an article of this description, much above the value of 5*l.*, although not paid for as such when delivered, their book-keeper having been then informed of its value, and desired to charge for it what he pleased, which should be paid, provided it was taken care of. *Wilson v. Freeman*, 3 Camp. 527.

Notice was not defeated by proof that the book-keeper who received the goods was conscious of or might have inferred their value. *Leri v. Waterhouse*, 1 Price, 280.

If a carrier gave notice that he would not be accountable for goods above the value of 20*l.* unless entered, and an insurance paid, over and above the price charged for carriage, according to their value: a person who entered silk exceeding the value of 20*l.* and did not pay the insurance could not recover any part of the value of the goods if lost. *Harris v. Packwood*, 3 Taunt. 264.

A person, who knew that the carrier had given a notice, delivered to him a parcel containing goods (much exceeding the value of 5*l.*) to be carried, and the carrier accepted them for that purpose. The price of the carriage was not then paid. The carrier knew the parcel contained goods much exceeding 5*l.* The parcel was lost:—Held, that the carrier was not responsible. *Marsh v. Horne*, 5 B. & C. 322; 8 D. & R. 223.

**Other Contracts.]**—A railway company published a printed notice, which was fixed over the door of the station for the reception of goods in Liverpool, that all goods received after 4 o'clock P.M. would be forwarded on the next working day. Long after the publication of this notice goods were brought to the station, about half-past 5 P.M., to be forwarded to Birmingham by the railway. The person who brought them (a servant of the owner) saw the company's

weigher, and asked if there was time, i.e. for the goods to proceed that evening; he said there was, and the goods were placed by the company's porters, on the trucks on which goods are carried upon the railway. The same person had on former occasions taken goods of the same kind to the station at a later hour, which were never refused for being too late, and which had been forwarded the same evening:—Held, that there was evidence to go to the jury of a special contract by the company to forward the goods on the same evening on which they were delivered. *Pickford v. Grand Junction Railway Company*, 12 M. & W. 766.

In an action against a railway company for not delivering cattle at a certain time, according to agreement, the question left to the jury was "whether such an agreement had been entered into:—Held, that that question was proper, and that it was unnecessary to direct the jury to say further "whether the cattle were carried under the bargain," that point not having been made at the trial. *Brown v. Bristol and Exeter Railway Company*, 4 L. T. 830; 9 W. R. 872.

**Evidence to explain Contract.]**—M. signed a consignment note, stating that goods were delivered by him to a railway company to be carried to N., but the charge for carriage was not inserted, and oral evidence was given that the company's agreement with M., before the note was signed, was to carry to K., a greater distance; that M. did not read the note; and that the sum to be charged, and which was paid, was for the carriage to K.:—Held, that the note was not conclusive of the contract, and that the evidence was properly received, as proving a contract additional to, and not at variance with, the agreement in writing. *Malpas v. London and South-Western Railway Company*, 1 L. R., C. P. 336; 35 L. J., C. P. 166; 12 Jur., N. S. 271; 13 L. T. 710; 14 W. R. 391; 1 H. & R. 227.

An averment of a contract to carry goods from London to Bath is supported by evidence of a contract to carry from Westminster to Bath; London must be taken in the enlarged and popular sense of a collective name, and not in a limited sense, applicable to the city only. *Beckford v. Crutwell*, 1 M. & Rob. 187; 5 C. & P. 242.

In an action against a carrier for negligence in the conveyance of goods by water, whereby they became wetted and spoiled, it appeared that the goods were put on board his boat under one entire contract, for their conveyance from Boston to Leeds, one half to be delivered there, the other to be conveyed to and delivered at Bradford. At the trial the plaintiff proved the contract and its execution by oral testimony; but, it appearing from the examination of one of his witnesses, that, at the time of the receipt of the goods by the carrier, two notes were delivered by him to the plaintiff (each applying to a moiety of the goods), which ascertained the destination of the goods, and the terms upon which they were to be carried, and only one of these being produced, and the absence of the other not satisfactorily accounted for,—Held, that this was a ground for a nonsuit. *Thompson v. Travis*, 8 Scott, 85.

**Before 17 & 18 Vict. c. 31—Special Contract.]**—In an action by A. against a railway company to recover damages for not car-

rying cattle with reasonable despatch, the evidence was that A. engaged trucks for the cattle and paid the carriage money; that the station clerk gave a ticket to A., and thereupon took up the money which had been paid; and that the ticket stated that the cattle was received by the company, subject to the conditions on the back of the ticket, and which were there stated to be that the company was not responsible for the non-delivery of cattle within any certain or reasonable time. The ticket was not read to A., nor was his attention directed to its contents. The judge did not direct the jury as to the legal effect of the ticket, but left it to them to say whether the company were common carriers for hire, and whether they received the cattle as common carriers for hire for carriage, or whether they received them under the special contract set forth in the ticket:—Held, a misdirection, there being no evidence of the company having received the cattle otherwise than under a special contract. *York, Newcastle, and Berwick Railway Company v. Crisp*, 14 C. B. 527; 2 C. L. R. 1367; 23 L. J., C. P. 125; 18 Jur. 606.

— **Delay.**—Declaration against a railway company for non-delivery of pigs within a reasonable time, according to the terms on which the company had received them. Pleas—first, not guilty; secondly, that the pigs were not received on those terms; thirdly, that they were delivered within a reasonable time; and fourthly, that they were received on the terms that the company would not be liable for their delivery within any certain or definite time, or in time for any particular market. Evidence, that the pigs were received on the terms stated in the fourth plea, and that they were forwarded by the first practicable train, according to the company's arrangements (which were unknown to the plaintiff). This, however, involved a detention of a day, from which the pigs suffered damage. The judge expressed an opinion that the pigs had been delivered within a reasonable time, and the plaintiff was nonsuited, without any expressed opposition on the part of his counsel. On a motion for a new trial, on the ground that the question ought to have been left to the jury, the court refused to disturb the nonsuit, as the plaintiff's counsel had not insisted on the case going to the jury, and as, if it had gone to the jury, the judge would have been bound to direct them to find for the company on the traverse of the terms alleged in the declaration. *Hughes v. Great Western Railway Company*, 14 C. B. 637; 2 C. L. R. 1360; 23 L. J., C. P. 153; 18 Jur. 1001.

— **Practice as to Receipt of Goods.**—The regular practice with respect to the receipt and carriage of goods and cattle on a railway was that the cattle were taken to a porter appointed for the purpose, who received them, and gave the sender a consignment note for them, which was signed by him and the sender, and contained a notice respecting the receipt, carriage, and delivery of goods; that the company would not be accountable for any articles unless signed for as received by their clerks or agents. The consignment note was taken to the goods clerk, who made out from it a cattle ticket, which was signed by him and the sender, and handed to the latter as his voucher for the delivery of the cattle

at their destination. The carriage was generally but not always prepaid. The plaintiff, being well acquainted with this practice, booked some pigs in the regular way at one of the company's stations, and while they were waiting there he sent six other pigs by L., who had also some of his own. L. booked his own regularly, and told the proper porter that the six were the plaintiff's, and were to go with his others. The porter replied that he would take care of them, and put them with the others. No consignment note or cattle ticket was signed or received for them:—Held, in an action against the company for the non-delivery of the pigs, charging them with having received them to be carried for hire, that the company was not liable, as there was no evidence of any authority from the company to the porter, or of his having held himself out as having authority to receive or contract for the carriage of the pigs in any other than the usual manner. *Slim v. Great Northern Railway Company*, 14 C. B. 647; 2 C. L. R. 864; 23 L. J., C. P. 166; 8 Jur. 1119.

— **Extent of Protection.**—C. having some cattle to be carried on a railway, saw them put into a truck; and on paying for the carriage, received and signed a ticket, containing at the foot of it the following notice: "This ticket is issued, subject to the owner undertaking all risks of conveyance whatever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon their railway, or in their carriages." During the journey some of the cattle became alarmed, and escaped from the truck, owing to its being so defectively constructed as to be unfit and unsafe for conveying cattle:—Held, in action against the company for the injury so caused to the cattle, that the company was protected from liability under the circumstances by the terms of the ticket, as they were such as to exclude any implied stipulation that the truck was fit for the purpose for which it was to be used. *Chippendale v. Lancashire and Yorkshire Railway Company*, 7 Railw. Cas. 824; 12 L. J., Q. B. 22; 15 Jur. 1106.

M. took a horse to a station of a railway company, who were common carriers of horses, to be conveyed along their railway. On paying for the carriage, he received the following ticket: "This ticket is issued, subject to the owner undertaking to bear all the risk of injury by conveyance and other contingencies. The company will not be responsible for any damage, however caused, to horses travelling on their railway or in their vehicles." The horse was injured by a collision on the railway from want of due care, but without any wilful misconduct or gross negligence on the part of the servants of the company:—Held, that there was a special contract between the parties which was valid under 11 Geo. 4 & 1 Will. 4, c. 68, s. 6, and that the ticket was not a mere public notice within s. 4, and that by the terms of the contract the company was protected from liability in respect of the injury done to the horse. *Great Northern Railway Company v. Morville*, 7 Railw. Cas. 830; 21 L. J., Q. B. 319; 16 Jur. 528.

— **Owners' Risk.**—Declaration stated that defendants were proprietors of a railway, and of carriages for the conveyance of passengers, cattle and goods upon the railway; that they received

nine horses of the plaintiff to be safely and securely carried in their carriages by the railway for hire; and that thereupon it was their duty safely and securely to carry and convey and deliver the horses; and averred the loss of one by reason of the insufficiency of one of the carriages. When the horses were received, a ticket was given to the plaintiff, stating the amount paid by him for the carriage of the horses, and the journey they were to go, and having at the bottom the following memorandum:—"N.B. This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, however caused, occurring to horses or carriages while travelling, or in loading or unloading."—Held, that the terms contained in the ticket formed part of the contract for the carriage of the horses; and that the alleged duty safely and securely to carry and convey the horses did not arise upon that contract. *Shaw v. York and North Midland Railway Company*, 6 Railw. Cas. 87; 13 Q. B. 347; 18 L. J., Q. B. 181; 13 Jur. 385.

A declaration alleged that the defendants were proprietors of a railway and carriages for the conveyance of passengers, cattle, &c., for hire; that the plaintiff delivered to, and they received, horses from the plaintiff, to be carried for the plaintiff, in their carriages, for reward, and that one of the wheels of a carriage in which some of the horses were being conveyed, caught fire from friction; that the plaintiff, at the next station, requested the defendants to change such carriage and not to persist in further conveying his horses in the same; that, in spite of such request, they did so persist; that the wheel afterwards, from want of precaution against friction, and not otherwise, was snapped asunder, whereby the carriage was thrown off the rails and the horses were injured. It appeared that the plaintiff, at the time of agreeing for the carriage of the horses, was informed by the station master that he would have to run all risks of carriage, to which he assented, and he also signed a ticket in the ticket-book of the company, which contained a memorandum that the owner of the horses was to be required to see to the efficiency of the carriages; that the company was not to be responsible for any alleged defects in their carriages or trucks, unless complaint was made at the time of booking, or before leaving the station, nor for any damage, however caused, to horses, &c., travelling upon the railway:—Held, that whether the declaration was founded upon the common-law liability of the defendants as carriers, or upon a special contract, there was a variance; in the former case because there was proof of a special contract; in the latter case, because the declaration alleged an unqualified contract to carry, whereas the contract proved was to carry, the defendants not being answerable for certain risks; that the allegation traversed by the plea was a material allegation, as the extent of the defendants' liability depended upon the nature of the bailment to them; and that the allegation of a delivery to be carried was equivalent to an allegation of a delivery to be safely and securely carried, subject to such exceptions as the law will create. *Austin v. Manchester, Sheffield and Lincolnshire Railway Company*, 16 Q. B. 600; 20 L. J., Q. B. 440; 15 Jur. 670.

— **Company's Negligence.**—A railway com-

pany letting trucks for hire for the conveyance of horses delivered to the owner of the horses a ticket, in which it was stated that the owners were to undertake all risks of injury by conveyance and other contingencies, and further stipulated that the company would not be liable for any damages, however caused, to horses or cattle:—Held, that the owner of the horses could not recover for damage done to them through the breaking of an axle, which was attributable to the culpable negligence of the company's servants. *Austin v. Manchester, Sheffield and Lincolnshire Railway Company*, 10 C. B. 454; 7 Railw. Cas. 300; 21 L. J., C. P. 179; 16 Jur. 763.

A contract entered into with a common carrier by the party who delivers goods to be conveyed, by which contract the carrier was exempted from all liability for any loss occasioned by his negligence, was binding upon both parties. *Carr v. Lancashire and Yorkshire Railway Company*, 7 Ex. 707; 7 Railw. Cas. 426; 21 L. J., Ex. 261; 17 Jur. 397.

— **Special Notice to Customer.**—Action against a railway company for not duly carrying fish from S. to M., averred to be received at S., to be carried as common carriers to M. Pleas, that the company did not receive the fish as common carriers, and that they received the fish on certain terms set out in the plea. At the trial there was evidence that the company printed many notices, declaring that they would not carry fish, except on terms relieving them from all liability, and declaring also that none of their servants had power to vary those terms; that a parcel of these notices was sent to S., and served on the fish merchants there; that they generally threw down the notices, and that plaintiff told the company's station master at S. that they were not of any use, after which the fish were sent by railway, and were not duly carried. The judge advised the jury if they were satisfied that plaintiff was served with the notice, to infer as a fact that he sent the fish on a special contract, embodying the terms contained in it, unless the plaintiff, before he sent the fish, unambiguously dissented from the terms, and the company acquiesced in his dissent:—Held, that the direction was, under the circumstances, right; that 11 Geo. 4 & 1 Will. 4, c. 68, s. 4, is confined to public notices, and that the jury might rightly infer from the plaintiff having special notice that fish would not be taken except on certain terms, and that no one had power to vary the terms, and from his afterwards persisting in sending his fish, that he assented to a special contract to carry on these terms, and the company was in that case protected by this special contract under s. 6. *Walker v. York and North Midland Railway Company*, 2 El. & Bl. 750; 23 L. J., Q. B. 73; 18 Jur. 143.

#### 4. ANIMALS.

**General Liability.**—*Quære*, whether the common-law liability of railway companies as carriers extends to livestock conveyed by them. *M'Manus v. Lancashire and Yorkshire Railway Company*, 2 H. & N. 693; 27 L. J., Ex. 201; 4 Jur., N. S. 144.

A railway company carrying living animals is not bound to provide fences or guards at the station where the animals may be landed, between the line and the station-yard, so as to prevent them straying on to the line. *Roberts*

*v. Great Western Railway Company*, 4 C. B., N. S. 506; 27 L. J., C. P. 266; 4 Jur., N. S. 1240.

Railway companies are responsible for the safe treatment of animals intrusted to them for carriage from the moment that they receive the animals into their charge till the carriages that have conveyed those animals are unloaded. *Moffatt v. Great Western Railway Company*, 15 L. T. 630.

A railway company was incorporated by act of parliament, with authority, if they should think fit, to carry goods and passengers on the railway, they to be bound to keep and repair the fences of the same. The company undertook to carry some horses by the railway, to be delivered safely at a particular place: but, in consequence of some of the fences having been broken down, the train was overset by contact with a horse which had strayed from a neighbouring field, whereby one of the horses was killed and the rest injured. The owner having brought an action, and declared against the company as common carriers:—Held, that although it was in the first instance optional with the company whether they would trade at all as common carriers, or not, still, if they elected to do so, they were subject to all the liabilities of carriers at common law, viz., responsible for all accidents not arising from the act of God or of the Queen's enemies. *Palmer v. Grand Junction Railway Company*, 4 M. & W. 749; 7 D. P. C. 232; 1 H. & H. 489; 3 Jur. 559.

**By Ferry.**—The lessees of a ferry across a river conveyed, as ferrymen for hire, passengers and animals, but it was not their practice to take charge of animals while on board their boats. For the landing of passengers and animals they used movable slips, with light hand-rails, which, though suitable for foot passengers, were apparently too slight for horses. They received on board their boat a horse of the plaintiff, who paid the usual charge, and remained with his horse until the boat was moored alongside the landing-stage on the opposite side of the river. In leading the horse over the movable slip which was placed from the boat to the landing-stage, the horse pressed against the hand-rail, which parted in consequence, and an iron spike, which it covered, severely injured the horse. The hand-rail had been, shortly before the accident, twice broken by the pressure of horses, and the ferrymen had been cautioned against using the slip, but they, however, continued to do so, merely tying the rail together with a piece of cord:—Held, that it was their duty, as ferrymen, to provide proper means of landing from their boats, and that they were liable for the injury done to the horse, through their negligence in not providing a proper slip, although the horse was at the time under the charge of its owner. *Willoughby v. Horridge*, 12 C. B. 742; 22 L. J., C. P. 90; 17 Jur. 323.

**Defect in Thing carried—Vis major.**—A common carrier by sea from London to Aberdeen received a mare to be carried to Aberdeen for hire. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the conduct

of the mare herself by reason of fright and consequent struggling, without any negligence of the carrier's servants:—Held, that the carrier was not liable for the death of the mare. *August v. Smith*, 1 C. P. D. 423; 45 L. J., C. P. 697; 34 L. T. 827; 25 W. R. 117—C. A. Reversing 1 C. P. D. 19; 45 L. J., C. P. 19; 33 L. T. 731; 24 W. R. 237.

A carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can shew that either the act of nature or the defect of the thing itself, or both taken together, formed the sole direct and irresistible cause of the loss, he is discharged. *Ib.*

In order to shew that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented. *Ib.*

A shipowner, who is not a common carrier, is not subject to the liability of a common carrier—i. e. does not insure the goods bailed to him for carriage. *Ib.*

In order to come within the exception of loss by the act of God as applied to the liability of a common carrier, the loss need not have been caused directly and exclusively by such a direct and violent, and sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or (if he could foresee it) could not by any amount of care and skill resist so as to prevent its effect. *Ib.*

A loss is a loss by the act of God if it is occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and a common carrier is entitled to immunity in respect of loss so occasioned if he can shew that it could not have been prevented by any amount of foresight, pains and care reasonably to be required of him. *Ib.*

If the loss is occasioned partly by the act of God as above defined, and partly by some other cause, which, if it had been the sole cause of the loss, would have furnished a defence, the carrier will be entitled to immunity in respect of such loss if he can shew that it could not have been prevented by any amount of foresight, pains and care reasonably to be required of him; and per Cockburn, C. J., in such cases a common carrier has done all that is reasonably to be required of him, if he has used all the means to which prudent and experienced carriers ordinarily have recourse to ensure the safety of goods intrusted to them under similar circumstances. *Ib.*

The liability of a railway company as common carriers of live animals, as well as of goods, is, in the absence of any negligence, subject not only to the exemption of the act of God or of the Queen's enemies, but to the further exemption of any act wholly attributable to the development of a latent inherent vice in the animal itself. *Great Western Railway Company v. Blower*, 7 L. R., C. P. 655; 41 L. J., C. P. 268; 27 L. T. 883; 20 W. R. 776.

A bullock, one of a number of cattle delivered to a railway company, was properly loaded into a proper truck by the company. The truck was properly fastened and secured, but in the course of its journey the bullock escaped from the truck and was found lying dead on the railway. There was no negligence on the part of the railway company; and the fact was that the escape of the

bullock was wholly attributable to the efforts and exertions of the animal itself:—Held, that the company was not liable for the loss of the animal. *Ib.*

— **Proof of.**—A saddled horse, delivered to a railway company to be carried on a journey, was placed by their servants in a proper horse-box in the usual manner. - The saddle was left on the horse, according to the usual custom in such cases, with the stirrups hanging down. At the journey's end the horse was found to be injured in the forearm and fetlock. The horse was proved to be free from vice, and it was shewn by the company that nothing unusual occurred to the train during the journey:—Held, by Martin, B., and Bramwell, B., that, in the absence of further proof of the cause of the mischief, the company was not liable. *Contra*, by Pigott, B., on the ground that, in order to relieve the company from its common-law liability, the company must shew affirmatively the mischief arose from the act of the animal itself. *Kendall v. London and South-Western Railway Company*, 7 L. R., Ex. 373; 41 L. J., Ex. 184; 26 L. T. 735; 20 W. R. 886.

— **Beyond Limits of Line—Condition.**—C. sent some oxen to the Craven Arms Station of the Shrewsbury and Hereford Railway, to be carried to Birmingham. The railway from that station to Shrewsbury belonged to the Shrewsbury and Hereford Company, and the railway from Shrewsbury to Birmingham belonged to the Great Western Company. C.'s drover signed a waybill which contained the following condition:—"For the convenience of the owner, the company will receive the charges payable to other companies for conveyance of such cattle over their lines of railway, but the company will not be subject to liability for any loss, delay, default or damage arising on such other railway." One sum was charged for the carriage, which was to be paid at Birmingham. The oxen were placed in trucks belonging to the Great Western Company, and on the arrival of the train at Wolverhampton it was found that the bottom of one of the trucks was broken, and one of the oxen dead, and others injured. In an action by C. against the Great Western Railway Company:—Held, that this was one contract with the Shrewsbury and Hereford Railway Company, for the entire journey from the Craven Arms Station at Birmingham, and consequently that the Great Western Railway Company was not liable for the injury to the oxen. *Coxen or Coxon v. Great Western Railway Company*, 5 H. & N. 274; 29 L. J., Ex. 165; 1 L. T. 442.

— **Contract with whom.**—A. caused pigs to be shipped upon a steamer belonging to B., which plied between Cork and Milford Haven. He paid to the agent of B. a through freight for the conveyance of the pigs to London, for the South Wales and Great Western Railways. Over the door of the office in Cork, where the freight was paid, a sign-board was fixed, with the words "South Wales Railway Company's Office" painted on it, and a similar one was over the entrance to the cattle-yard adjoining. The freight receipt-note was also headed with the words "South Wales Steam Navigation Company." It was also proved, by persons who had sent cattle to London, that they had been forwarded for freights

paid at this office, and that claims made upon the South Wales Company had been discharged at the office in Cork by the shipping agent. B. proved that the steamer was his property; that the shipping agents were paid by him, and the words painted on the boards referred to him, and were not sanctioned by the railway company; but he admitted having made an agreement with the latter, for running his boat in conjunction with their line, and dividing the through freights:—Held, that, upon the evidence, the judge was bound to have directed the jury to find that the company were joint contractors with B., in respect of the entire journey, and were accordingly liable for breaches of contract, committed in the conveyance of the pigs by the steamer from Cork to Milford. *Hayes v. South Wales Railway Company*, 9 Ir. C. L. R. 474.

Held, also, that independently of the written agreement, there was evidence to go to the jury of such joint liability. *Ib.*

A sum of money having been realized by the sale of the carcasses of the pigs destroyed on the voyage:—Held, also, that the company was liable for the same in an action for money had and received. *Ib.*

— **Insufficient Truck.**—C. sent off some horses from W., a station on one company's line, in horse-boxes belonging to that company, in charge of a groom, who was to take them to F., a station on the London and South-Western line. At G. was the junction with the London and South-Western Railway, where it was necessary to book again, and whence there are two routes to F. The groom, on going to take tickets, was told, in answer to his inquiries, that the train direct to F. did not go for some hours, but that by paying a little higher fare he could go on by a train which was about to start immediately, and went round a longer way. He said he would go on at once, and he and the horses proceeded in the same trucks in which they had come from W. At F. two porters came to unload the trucks, and the groom told them of the danger of an accident, arising from a wide space between the flap and the body of the horse-box, and how at W. it had been stopped up for the horses to be put in. They accordingly tried to stop it up with straw, while the groom kept the horses quiet inside. When done they said "All right," and he then led out a mare, her foal following. The latter put its foot through the opening and broke its leg:—Held, that the London and South-Western Railway Company was bound to provide a truck reasonably fit for the conveyance of C.'s horses, and there was evidence that this was unfit, and that the company had adopted it from the other company at G., and by sending it on to F. became liable for an accident caused by its defects. *Combe v. London and South-Western Railway Company*, 31 L. T. 613.

Held, also, that the company was bound to deliver safely at F., and that the facts proved were evidence of negligence in the company's servants in delivering, and not necessarily of any contributory negligence in C., arising from the groom's advice how to remedy the defect. *Ib.*

— **Insufficient Fastening.**—A greyhound was delivered by its owner to the servants of a railway company, to be carried, and the fare de-



manded was paid. At the time of delivery the greyhound had on a leathern collar with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another, it was fastened by means of the strap and collar to an iron spout on the open platform of one of the company's stations, and while so fastened it slipped its head from the collar and ran upon the line and was killed:—Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company. *Richardson v. North-Eastern Railway Company*, 7 L. R., C. P. 75; 41 L. J., C. P. 60; 26 L. T. 131; 20 W. R. 461.

A greyhound was delivered to a carrier, who gave a receipt for it, the greyhound being afterwards lost:—Held, that the carrier could not set up as a defence that the dog was not properly secured when delivered to him. *Stuart v. Crawley*, 2 Stark. 323.

**Injury to, caused by Compliance with Order in Council.**—The statement of claim alleged that the plaintiff delivered certain pigs to the defendants, a railway company, to be carried from M. to L. for reward to the defendants, and first, that at the M. station the defendants placed the pigs in a certain pen, and that the defendants had so negligently kept the said pen, and so negligently permitted it to be covered with lime or some preparation thereof, that the pigs were injured; secondly, that it was the duty of the defendants to provide fit and proper pens, or other accommodation at the said station for keeping the said pigs until they should be carried by the defendants, and that the defendants neglected to provide fit and proper pens or other fit and proper accommodation during the period aforesaid, whereby the said pigs were injured; and thirdly, that at the request, and by the invitation of the defendants, the plaintiff, pending the delivery to and the receipt of the said pigs by the defendants for the purpose of being carried by them, placed the said pigs in a pen of the defendants at the said station at M., pending such delivery and receipt, and that the defendants so negligently kept the said pen for the reception and penning of the said pigs, and so negligently permitted the same to be covered with lime, or some preparation thereof, that by reason of the said pigs coming and being in contact with the said pen while so confined therein, they were injured. The statement of defence stated an order of the lord lieutenant in council, made on the 20th of September, 1878, under the provisions of the Contagious Diseases (Animals) Act, 1878, duly published in the Dublin Gazette, whereby it was inter alia ordered that every loading pen of a railway company should be disinfected before the using thereof, by the application to all parts of the loading pen, with which animals or their droppings had come in contact, of a coating of lime-wash, as in said order prescribed; and alleged that it was necessary for the defendants in the due and ordinary course of traffic, to pen the plaintiff's pigs, and that the defendants, in accordance with the provisions of the said order, carefully, and within a reasonable and proper time for the purpose of carrying out the provisions of the said order, before using the pen in the statement of claim mentioned for the plaintiff's pigs, disinfected

the said pen, and duly and carefully applied to the said parts thereof the said preparation of chloride of lime, and that the said pigs were injured by coming in contact with the said preparation, and not otherwise, and that, save by reason of the application of the said lime-wash, the said pen was in a fit and proper condition for the reception of and penning the said pigs; similar defences, mutatis mutandis, were pleaded to the second and third causes of action:—Held, on demurrer, that the statement of defence was bad. *Shaw v. Great Southern & Western Railway Company*, 8 L. R., Ir. 10—C. A.

**Charge of Cost of Cleansing Trucks.**—By the Consolidated Cattle Plague Order of August, 1867, made under 11 & 12 Vict. c. 107, it was ordered that "every carriage truck required to be cleansed and disinfected should be cleansed and disinfected once in every twenty-four hours during the time when it is used for any animal" in a prescribed manner; and by a clause in their railway act a railway company was empowered to receive a certain rate as a maximum rate of carriage for the conveyance of animals, inclusive of every expense incidental to such conveyance, except for any extraordinary services performed by the company, in respect of which they ought to make a reasonable extra charge:—Held, that the railway company who had carried a cow on their railway for the owner had no right to charge him, in addition to the charge for carriage, with the cost of cleansing the truck, as such cleansing was not a service performed for the owner of the cow within the meaning of the clause of their railway act. *Cox v. Great Eastern Railway Company*, 4 L. R., C. P. 183; 38 L. J., C. P. 151.

**Liability under Carriers Acts and Railway and Canal Traffic Act.**—See those titles.

##### 5. DANGEROUS GOODS.

**Statutory Exemptions, 29 & 30 Vict. c. 69.**—One who employs a carrier to carry an article of such a dangerous nature as to require extraordinary care in its conveyance, must communicate the fact to the carrier, or he will be responsible for any injury which may result to the carrier or his servants from his omission to do so. *Farrant v. Barnes*, 11 C. B., N. S. 553; 31 L. J., C. P. 137; 8 Jur., N. S. 868.

Where, therefore, a person caused a carboy, containing nitric acid, to be delivered to a servant of a carrier, in order that it might be carried by such carrier for him, and he did not take reasonable care to make the servant aware that the acid was dangerous, but only informed him that it was an acid, and he was burnt and injured by reason of the carboy bursting whilst, in ignorance of its dangerous character, he was carrying it on his back from the carrier's cart:—Held, that he was liable to the servant in an action for damages for such injury. *Id.*

**Guilty Knowledge.**—A railway act enacted that every person who shall send or cause to be sent by the railway any vitriol or other good of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package, or give notice in writing to the servant of the company with whom the same are left, at the time of sending, on pain of for-

feiting 10*l.* for every default, or being imprisoned.—Held, that the act made the sending of dangerous goods, without notice, a criminal offence; and that therefore a guilty knowledge on the part of the sender was necessary to render him liable under the act. *Hearne v. Garton*, 2 El. & El. 66; 28 L. J., M. C. 16; 5 Jur., N. S. 648; 33 L. T. 256.

A. received from N. some cases containing vitriol, and sent them by the railway. The nature of the goods was not marked on the packages or known to A. when A. received the packages. N., in answer to an inquiry by A., informed A. that the cases contained gun-stocks and other goods of a harmless nature; and A. so described them in the receiving note sent by him with the goods to the railway, in which note he described himself as the consignor.—Held, that, as A. had been misled by N. as to the nature of the goods, and had no guilty knowledge of their dangerous character, he was not liable as a sender of the goods, within the meaning of the act. *Id.*

**As to Unequal Charges in respect of.**—See *Bristol Railway Company v. Garton*, 4 H. & N. 33.

#### 6. FRAUD OR CONCEALMENT.

**Liability of Carrier in Case of.**—A carrier who had given notice that he would not be answerable for money sent by him was, nevertheless, responsible if stolen by his servants. But if the sender gave no notice of the value, but attempted to disguise it, and had done so sufficiently to prevent the carrier from taking particular care of the parcel, yet not sufficiently to conceal its nature effectually from the carrier's servants: he could maintain no action against the carrier for the value if the parcel was stolen. *Bradley v. Waterhouse*, M. & M. 154; 3 C. & P. 318.

A parcel containing two hundred sovereigns, inclosed in six pounds of tea, was sent by coach, and paid for as of ordinary value, both the party sending and the owner of the parcel being aware of a notice by the coach proprietors limiting their responsibility to 5*l.* The parcel was stolen by one of the porters of the coach, while it was standing in the street, at a manufacturing town, in the course of its journey. In an action to recover the value from the coach proprietors, they had a verdict, on the ground that the loss was occasioned by the improper mode in which the parcel had been committed to their care. *Id.*

The plaintiff went on board the steamboat, with his horse and carriage, paying the charge for a light four-wheeled phaeton; jewellery and watches of great value, which much increased its weight, were contained in a box under the seat, and he made no communication of that fact to the defendants. The carriage was taken safely across the river, and on the arrival of the boat at the pier head at Liverpool, two of the defendants' servants put the carriage out upon the slip, and commenced drawing it up the slip towards the quay, but in doing so were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured.—Held, that the plaintiff's right of action for this injury was not affected by his not

having communicated the fact of the jewellery and watches being contained in the carriage. *Walker v. Jackson*, 10 M. & W. 161; 12 L. J., Ex. 165.

Held, also, that it was a further question for the jury (supposing a contract to land were established) whether the landing was complete under the circumstances. *Id.*

Held, also, that to rebut evidence of a usage to take on board and land the carriages of passengers, a notice stuck up at the door of entrance for foot passengers to the slip at Woodside, but not visible to those who came with carriages, nor shewn to have been known to the plaintiff, that the defendant did not undertake to load or discharge horses or carriages, and would not be responsible for loss or damage thereto, was not admissible. *Id.*

Where a carrier gave notice by printed proposals that he would not be answerable for certain valuable goods, if lost, "of more than the value of a specified sum, unless entered and paid for as such;" and goods of that description were delivered to him by A., who knew the conditions, but, concealing the value, paid no more than the ordinary price of carriage and booking; on a loss, the carrier was held, before the statute, to be neither liable to the extent of the sum specified, nor to repay the price actually paid for the carriage or booking. *Clay v. Willan*, 1 H. Bl. 298; *S. P.*, *Izett v. Mountain*, 4 East, 370.

**Question for Jury.**—A carrier gave notice that he would not be answerable for parcels of value, unless entered and paid for as such, and a party, with a knowledge of this circumstance, delivered a parcel containing bank-notes to a large amount, without informing the carrier of its contents, which was afterwards stolen.—Held, that the question whether the person had been guilty of unfair concealment by not informing the carrier of the nature and value of the parcel, was properly left for the determination of the jury. *Batson v. Donovan*, 4 B. & A. 21.

**Fraud—Violence of Mob.**—A common carrier to and from B., through W. to R., employed distinct boats to carry to and from B. to R., and to and from B. to W., which passed on different days; the plaintiff knowing this, and having corn at W., which was threatened to be seized by a mob, wrote to the carrier at R. to send a private boat quickly, on account of the state of the country, to take the corn to B., to which he not returning any answer, and the plaintiff fearing to wait till the boat would, in the usual course of employment, go from W. to B., stopped the boat passing by from R. to B., and without disclosing the circumstances to the boatman, prevailed on him to take the corn on board, and then despatched him forward in the night, having privately sent orders to open the lock at any time when he should pass. After verdict for the carrier, negating that the corn was delivered in the usual course of dealing as a common carrier.—Held, that the verdict might be sustained either on the general ground of fraud in the plaintiff; or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation on the part of the carrier to do the best he could, but not to be answerable as a common carrier for the violence of the mob; or

titled to the protection of the 11 Geo. 4 & 1 Will. 4, c. 68, in respect of so much of the transit as is to be performed by land. *Le Conteur v. London and South-Western Railway Company*, 1 L. R., Q. B. 54; 35 L. J., Q. B. 40; 12 Jur., N. S. 266; 13 L. T. 325; 14 W. R. 80.

**Pleading.**—To a count alleging a railway company to be common carriers by railway from London to Southampton, and thence to Jersey by steam vessels, charging them with the loss of a passenger's portmanteau, a plea that the goods contained in the portmanteau were writings, silks, furs and lace, and exceeded the value of 10*l.*, and were delivered by the plaintiff to the company, "then being common carriers by land for hire, to be carried by them as such carriers by land over their railway;" that such delivery was made to their servants; that at the time of such delivery the value and the nature of the goods were not declared by the plaintiff, and that the non-delivery of the goods to the plaintiff complained of was by reason of the same being lost by the company out of their possession while the same were upon their railway, and in their possession and under their care as such carriers by land as aforesaid, is a good plea. *Pianciani v. London and South-Western Railway Company*, 18 C. B. 226.

To a count alleging that the plaintiff became a passenger by the company's railway and steam-vessel from London to Jersey, and charging that the company refused to carry his portmanteau, containing articles of wearing apparel, paper writings and documents, a similar plea is bad, the count not alleging the loss of the package. *Id.*

## 2. DECLARATION OF VALUE.

**Effect of.**—By 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, a common carrier by land is exempted from liability for the loss of or injury to any article of the description therein specified, being above the value of 10*l.*, delivered to him to be carried, where such loss or injury has been occasioned by the negligence of his servant, unless the value of such article has been declared, and an increased charge paid. *Hinton v. Dibbin*, 2 G. & D. 36; 2 Q. B. 646; 6 Jur. 601.

**What Sufficient.**—It is not essential that a declaration of value within the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, should be express and formal. *Bradbury v. Sutton*, 21 W. R. 128—Ex. Ch.

There must be an express formal declaration of the value of pictures, &c., to the value of more than 10*l.* sent by a carrier; and it is not enough that the carrier has a conviction as to what the contents of the package were. *Boys v. Pink*, 8 C. & P. 361.

**Omission to affix Notice.**—A person who delivers to a carrier goods of the description mentioned in the 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, must, in order to fix the carrier with responsibility for their loss, declare to him the nature and value of the goods at the time of their delivery, whether it takes place at his office, or on the road, or elsewhere; and if no such declaration is made, the omission of the carrier to affix in his office the notice required by the statute will not render him responsible. *Hart v. Baren-*

*dale*, 6 Ex. 769; 21 L. J., Ex. 123; 16 Jur. 126—Ex. Ch.

The notice to be affixed in the office by the carrier is required only for the purpose of his making an increased charge for the conveyance of such goods, after having received notice of their value and nature from the sender. *Id.*

H. requested B., a carrier, to send to H.'s place of business (away from the carrier's office) for some goods to be conveyed by B., as such carrier, for H. B. did so, and his servant received the goods, which came within the classes of goods mentioned in 11 Geo. 4 & 1 Will. 4, c. 68, and exceeded 10*l.* in value; but H. did not declare their value or nature. The notice stating the increased rates of charges required by B. for such classes of goods was affixed in his office, but was not in any way brought to the knowledge of H. The goods having been lost:—Held, that although they had been delivered away from the carrier's office, and therefore the sender had not an opportunity of seeing the notice affixed therein, yet the carrier was not liable, as the sender had not declared the value and nature of the goods at the time of delivery. *Id.*

**Demand of Increased Charge.**—Where a carrier receives goods of the description mentioned in the 11 Geo. 4 & 1 Will. 4, c. 68, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand, the increased charge mentioned in the notice affixed in his office, warehouse or receiving-house, whether the goods are there delivered, or to a servant sent to fetch them; and if no such demand is made, the carrier is liable for the loss of or injury to the goods, although the increased charge has not been paid. *Great Northern Railway Company v. Behrens*, 7 H. & N. 950; 31 L. J., Ex. 299; 8 Jur., N. S. 567; 8 L. T. 323; 10 W. R. 389—Ex. Ch. Affirming 6 H. & N. 366; 30 L. J., Ex. 153; 3 L. T. 863; 9 W. R. 338.

**Carriers by Sea and Land—Exemption.**—To a declaration alleging a contract by a railway company to carry, from Rotterdam to Harwich and London, goods delivered to them for that purpose, and also alleging the loss of such goods, the company pleaded, in substance, that the goods were articles and property of the description mentioned in the 1st section of the Carriers Act, and were delivered to the company, then being common carriers by land for hire between Harwich and London, to be by them, as such carriers by land, carried from Harwich to London; that the goods were in one parcel, and exceeded in value 10*l.*; that the value and nature of the goods were not declared to the company at the time of delivery to them; that the goods were lost while in the course of being carried from Harwich to London, and whilst the same were in possession of the company as such carriers:—Held, that the plea was a good answer to the declaration. *Barendale v. Great Eastern Railway Company*, 4 L. R., Q. B. 244; 38 L. J., Q. B. 137; 17 W. R. 412—Ex. Ch.

A railway company were owners of a railway from Harwich to London, and also of a ship, the *Avalon*, lying at Rotterdam. They carried on the business of carriers between Rotterdam and London via Harwich. A case of pictures was

delivered to their agents at Rotterdam and a bill of lading was signed by them, the goods "to be delivered at the port of London via Harwich (the act of God, as also railway accidents, being excepted), and the owners being in no way liable for any consequences of the causes above excepted." The case was placed on board the ship, was unshipped at Harwich, and was sent off by the railway to London, but was lost in the course of transit from Harwich to London. No declaration of the value of the pictures was ever made, but they were found at the trial to have been of above the value of 10*l.* :—Held, that the bill of lading contemplated a conveyance of the case partly by land, and that the fact of there being such a bill of lading was no ground for saying that the plea referred to above was not proved. *Id.*

Held, also, that although the bill of lading constituted a special contract between the owner of the goods and the company, it was not such a special contract as would, under s. 6, deprive the company of the protection afforded to them by the neglect to declare the value of the case at the time of the delivery. *Id.*

See *Le Conteur v. South-Western Railway Company*, 1 L. R., Q. B. 54, *supra*; and 31 & 32 Vict. c. 19, s. 14.

**Value of Goods, what is.]**—The plaintiff purchased certain articles of jewellery from the manufacturers of the value of 11*l.* 14*s.*, but on the condition that if the price were paid within a month a discount of 15 per cent. would be allowed, reducing the value to 9*l.* 19*s.* The price was paid by the plaintiff within the month. The plaintiff consigned these articles to a customer in J. by the defendant railway without having declared their value, and they were lost in transit. The price charged to the customer exceeded the sum of 11*l.* 14*s.* The plaintiff sued the defendants in the county court of B. for 9*l.* 19*s.*, but the judge gave a verdict for the defendants on the ground that, as the value of the goods exceeded 10*l.* and had not been declared, the defendants were protected by 11 Geo. 4 & 1 Will. 4, c. 68, s. 1 :—Held, on appeal, that the county court judge was right, and that in such cases value means the value to the consignor of the goods, which is the price his consignee has contracted to pay for the goods, and that as the price contracted to be paid was over 10*l.*, the plaintiff under these circumstances could not recover. *Blankenshaw v. London and North-Western Railway Company*, 45 L. T. 761.

**Estoppel.]**—Horses, above the value of 10*l.* each, were delivered to a railway company to be conveyed by them for hire, the owner having previously signed a declaration that the horses were under the value of 10*l.* each. The horses were injured by the negligence of the company. In an action against the company for the damage actually sustained :—Held, that the parties having agreed to act upon an assumed state of facts, both parties were bound by it, and the owner was, therefore, concluded by his statement of value. *McCance v. London and North-Western Railway Company*, 3 H. & C. 343; 34 L. J., Ex. 39; 10 Jur., N. S. 1058; 11 L. T. 426; 12 W. R. 1086—Ex. Ch.

**Nature of Articles.]**—The 11 Geo. 4 & 1 Will. 4, c. 68, extends to all the articles enumerated in s. 1,

although not within the words of the preamble, "an article of great value in small compass." *Owen v. Burnett*, 2 C. & M. 335; 4 Tyr. 133.

To entitle a party to recover for loss of or injury to any article of such description, he must give express notice to the carrier of the value and nature of the article. *Id.*

A looking-glass exceeding the value of 10*l.* was packed up in a case, and sent to a carrier's office, to be conveyed from A. to the house of S., near L. A notice was fixed up in the office. The words "Plate glass," "Looking glass," "Keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from L. to the place of its ultimate destination on a brewer's truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken :—Held, that the carrier was not liable for the damage occasioned by the breaking of the glass. *Id.*

**Pictures contained in Package.]**—Pictures exceeding the value of 10*l.* were laid upon one another without any covering or tie in the owner's waggon, which had sides but no top; and the waggon was delivered to a railway company, and placed by their servants on one of their trucks for carriage by the railway :—Held, that the pictures were "contained in a parcel or package" within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 68, s. 8, so as to give the company the protection of that statute. *Whaite or Waite v. Lancashire and Yorkshire Railway Company*, 9 L. R., Ex. 67; 43 L. J., Ex. 47; 30 L. T. 272; 22 W. R. 374.

**What are Paintings or Pictures.]**—The word "paintings" in the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, is used in its ordinary and popular sense to denote works of art. *Woodward v. London and North-Western Railway Company*, 3 Ex. D. 121; 47 L. J., Ex. 263; 38 L. T. 321; 26 W. R. 354.

Coloured imitations of rugs and carpets and coloured working designs, each of them valuable and designed by skilled persons and hand-painted, but having no value as works of art, are not paintings within the Carriers Act. *Id.*

**Pictures and Frames.]**—If a package containing pictures in frames exceeding 10*l.* in value is delivered to a carrier to be carried for hire, without any declaration as to the value and nature of the articles, the picture and frame are to be considered as one article; and the carrier is protected from liability as well in respect of damage done to the frames as in respect of damage done to the picture itself. *Anderson or Henderson v. London and North-Western Railway Company*, 5 L. R., Ex. 90; 39 L. J., Ex. 55; 21 L. T. 756; 18 W. R. 352.

**Silks.]**—A silk dress, forming part of the wearing apparel of a railway passenger, is within 11 Geo. 4 & 1 Will. 4, c. 68, s. 1. *Flowers v. South-Eastern Railway Company*, 16 L. T. 329.

Silk dresses made up for wearing are not "silk"

within 11 Geo. 4 & 1 Will. 4, c. 68. *Darey v. Mason*, Car. & M. 45.

"Elastic silk webbing" is a woven fabric, each yard of which contains an ounce of silk, an ounce and a quarter of india rubber and three-quarters of an ounce of cotton, the silk being of greater value than the two other materials:—Held, as a matter of fact (the question being reserved for the court, with power to draw inferences), that this webbing was "silks wrought up with other materials." *Brunt v. Midland Railway Company*, 2 H. & C. 889; 33 L. J., Ex. 187; 10 Jur., N. S. 181; 9 L. T. 690.

**Lace in Frame.**—A lace corporal in a gilt frame, covered with glass, being intended for an exhibition, was enclosed in a packing-case, and sent, without any declaration, by railway, and lost:—Held, by Bovill, C. J., and Byles, J. (Wilkes, J., dubitante), that as a matter of fact the gilt frame was distinct from and not accessory to the lace, and the packing-case accessory to both or to the frame only, and that the carrier therefore was not protected by the Carriers Act from liability as respected either the gilt frame or the packing-case. *Treadwin v. Great Eastern Railway Company*, 3 L. R., C. P. 308; 37 L. J., C. P. 83; 17 L. T. 601; 16 W. R. 365.

**Furs.**—Bodies, which are made partly of the soft substance which is taken from the skins of rabbits, and partly from the wool of sheep, do not come under the description of furs. *Mayhew v. Nelson*, 6 C. & P. 58.

**Trinkets.**—An eye-glass with a gold chain attached to it for the purpose of its being hung round the neck of the wearer is not a trinket. *Darey v. Mason*, Car. & M. 45.

But it is impracticable, with precise accuracy, to define what are trinkets within 11 Geo. 4 & 1 Will. 4, c. 68. *Bernstein v. Barendse*, 6 C. B., N. S. 251; 28 L. J., C. P. 265; 5 Jur., N. S. 1056; 7 W. R. 396.

But, semble, that the closest approximation is this, that they must be articles of mere ornament, or if ornament and utility are combined, the former must be the predominating quality. *Ib.*

Bracelets, shirt-pins, rings, brooches and ornamented tortoiseshell and pearl portmonnaies, however small their intrinsic value, are trinkets. *Ib.*

So, silk watch-guards are "silks in a manufactured state" within the act. *Ib.*

So, smelling-bottles, and the like, are "glass" within the act. *Ib.*

**Monetary Securities.**—C. being indebted to G. in more than 10*l.*, framed a document directed to himself, ordering himself, three months after date, to "pay to my order" the amount. The document had a stamp proper for a bill of exchange of that amount and length of time, and was in all respects like a bill of exchange, except that there was no drawer's name. C. wrote on it his acceptance, and caused it to be forwarded in a parcel, directed to G., by a carrier, in order that G. might add his name as drawer. In an action against the carrier for the loss of other goods of less value than 10*l.*, contained in the same parcel, the defence was, that the parcel contained "a bill, order, note, security for pay-

ment of money or writing of value exceeding 10*l.*," and that no notice had been given of the contents, or increased rate of carriage paid or contracted for, though the carrier had publicly exhibited in his office a notice requiring such increased rate for articles. The jury found that the incomplete bill was not at the time of the delivery to the carrier of any value:—Held, that it was not a bill, order, note, security for payment of money, nor writing of any value at the time of such delivery. *Stoeniger v. South-Eastern Railway Company*, 3 El. & Bl. 549; 2 C. L. R. 1595; 23 L. J., Q. B. 293; 18 Jur. 605.

### 3. BOOKING-OFFICES.

**What is.**—An inn where a book is kept for booking parcels by a particular coach, which stops regularly there to take in and deliver parcels, is a receiving-house for parcels, within the 11 Geo. 4 & 1 Will. 4, c. 68, although other coaches stop at the same inn for the same purpose, and the innkeeper sends the parcels by which coach he pleases. *Syms v. Chaplin*, 1 N. & P. 129; 5 A. & E. 634; 2 H. & W. 411.

**Negligence at.**—The contract entered into by a booking-office keeper, who takes in parcels to be forwarded by carriers, is only to deliver safely to a carrier. *Gilbert v. Dale*, 1 N. & P. 22; 5 A. & E. 543; 2 H. & W. 383.

In an action against the keeper of such an office, where the declaration alleges that a parcel was delivered to D., and that he promised to take care of it, that it might be forwarded to its destination, and avers that it was lost through his negligence, on which issue is joined; it is not sufficient evidence of negligence, to shew that the parcel was delivered to D. and that it had not reached its destination. *Ib.*

A booking-office keeper, who also keeps a wine vault, is guilty of negligence, if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be conveniently taken into the bar, behind the counter. *Docer v. Mills*, 5 C. & P. 175.

A box was sent by A. to an inn kept by B., who booked parcels for carriers, but did not receive anything for so doing. The person who took the box told B. to keep it till A. called for it, to which B. answered "Very well." On A.'s calling for it, the box was missing, and B. said, he supposed that some carrier had taken it by mistake:—Held, in an action of trover by A., and against B., that this was no evidence of a conversion. *Williams v. Gesse or Jessey or Gessary*, 3 Bing. N. C. 849; 7 C. & P. 777; 5 Scott, 56; 3 Hodges, 131.

Trover does not lie against the keeper of a booking-office for the mere loss of a parcel deposited at the office for the purpose of being forwarded by a carrier. *Ib.*

Evidence, that, at the door of a booking-office, there is a board on which is painted "Conveyances to all parts of the world," and a list of names of places, is not sufficient proof that the owner of the office is a common carrier, so as to charge him for the loss of a box that was booked there. *Upston v. Slark*, 2 C. & P. 598.

If a common carrier demands a certain sum for booking, and refuses to take charge of goods unless such sum is paid, he is not liable to an action if they are left without being paid for

and are lost. — *v. Jackson*, Peake's Add. Cas. 185.

If a carrier directs goods to be sent to a particular booking-office, he is answerable for the negligence of the booking-office keeper. *Colepepper v. Good*, 5 C. & P. 380.

**Evidence of Acceptance at Office.**—If a message is left at the booking-office of a carrier from N. to L. for his van to call for luggage at another inn for the purpose of its being carried to L., and the carrier's servant and van go into the other inn, and the luggage is there put into the carrier's van, and afterwards lost therefrom, the carrier is liable for the loss, just as he would be if the luggage had been taken to the regular booking-office of the carrier. *Davey v. Mason*, Car. & M. 45. And see *Williams v. Gessac*, *supra*.

If, in an action against a carrier for the loss of a parcel, he pleads that it was not delivered to him to be carried, it is sufficient for the plaintiff to shew that it was delivered to a person and at a house where parcels were in the habit of being left for the carrier; and it is immaterial whether this person was paid any money or not; and in such an action the person who so left the parcel may be asked, on cross-examination, what direction was on the parcel. *Burrell v. North*, 2 C. & K. 681.

If in an action against a carrier it appears that the agent of the plaintiff went to the carrier's booking-office, and desired that a man should be sent to the agent's house to fetch a package, and one of the carrier's men did accordingly fetch the package from the agent's house, and bring it to the booking-office, this is a delivery by the plaintiff to the carrier; as, for this purpose, the carrier's man is to be considered as the plaintiff's servant. *Boys v. Pink*, 8 C. & P. 361.

#### 4. FELONY OF SERVANTS.

**Who are Servants.**—Every person employed by a common carrier, whether by the name of sub-contractor, agent, servant, or otherwise, to perform any part of the work which the carrier has undertaken to perform, and every person employed by such person for that purpose, is a servant in the employ of the carrier within the 8th section. *Machu v. London and South-Western Railway Company*, 2 Ex. 415; 5 Railw. Cas. 302; 17 L. J., Ex. 271; 12 Jur. 501.

Where a plaintiff gave a parcel directed to F., in London, to the carrier at B., who drove a mail-cart between B. and M.; and the carrier booked it at M. at an inn where the defendant's coach stopped to take in parcels, and received the carriage for it from the innkeeper, who was in the habit of booking parcels for the defendant's coach, and did book this parcel to London, and delivered it to the coachman:—Held, that the carrier was the agent of the plaintiff, and the innkeeper the servant of the defendant; and therefore that the plaintiff might recover damages from him for the loss of the parcel. *Syms v. Chaplin*, 1 N. & P. 129; 5 A. & E. 634; 2 H. & W. 411.

A parcel delivered to the guard of a mail-coach, and by him to the porter of the inn where the mail stops, whose business is to carry out the parcels brought by the coach, receiving for such duty a portion of the sum demanded for carriage,

does not make such porter personally responsible for its loss. *Cavenagh v. Such*, 1 Price, 328.

**— Estoppel.**—To an action for the loss of pictures delivered to be carried by a railway company, they pleaded the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, s. 8, and the plaintiff replied that the loss arose from the felonious acts of the servants of the company. The pictures were loaded in a van in the yard of the company ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M., who carried for the railway company, and their delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person:—Held, that the railway company was not estopped from denying that the thief was their servant. *Way v. Great Eastern Railway Company*, 1 Q. B. D. 692; 45 L. J., Q. B. 874; 35 L. T. 253.

**Proof of.**—In an action against a carrier for loss of goods, upon an issue that the loss, under 11 Geo. 4 & 1 Will. 4, c. 68, s. 8, arose from the felonious act of the carrier's servants, it is sufficient to prove facts which render it more probable that the felony was committed by some one or other of his servants than by any one not in his employment; and it is unnecessary to give such evidence as would suffice to convict any particular servant. *Vaughton v. London and North-Western Railway Company*, 12 Cox. C. C. 580; 9 L. R., Ex. 93; 43 L. J., Ex. 75; 30 L. T. 119; 22 W. R. 336. *But see following cases.*

In an action against a railway company for the loss of a parcel of money above the value of 10l., the issue being whether the loss was occasioned by the felonious act of one of the company's servants, who had absconded at the time of the parcel being missed, it is allowable to call a police officer to prove instructions which he received from the station master, tending to shew that he, the station master, had suspicions that the servant had stolen the parcel. *Kirkstall Brewery Company v. Furness Railway Company*, 9 L. R., Q. B. 468; 43 L. J., Q. B. 142; 30 L. T. 783; 22 W. R. 876.

**— Onus.**—In an action against a railway company for the loss of a passenger's luggage containing jewellery, the issue was, under the Carriers Act, s. 8, whether the loss had arisen from the felony of the company's servants:—Held, that it was not enough for the plaintiff to disclose a state of facts consistent with a felonious taking, but that it lay on him to prove a state of things rendering such felonious taking more probable than a loss by accident or mistake, and, therefore, that, in the case before the court, there was no evidence to go to the jury that the luggage in question was stolen by any person. *Gogarty v. Great Southern and Western Railway Company*, 9 Ir. R., C. L. 233—Ex. Ch.

When the Carriers Act is pleaded to an action against a carrier for loss of goods, proof that the goods were stolen, and the servants of the carrier had greater facility of access than other persons, is not evidence for the jury of a felony by servants. *Turner v. Great Western Railway Company*, 13 Cox, C. C. 191; 34 L. T. 22.

A box containing silk was delivered to a rail-

way company, not declared, and despatched by goods train on a truck. On the journey, after stopping at two junctions where the train divided, the box was found broken open and the silk gone:—Held, no evidence of felony by servants of the company. *Ib.*

**Servants having greater Facilities.]**—In an action against carriers for loss of goods, to make out a case for a jury in support of a replication of felony by their servants to a plea of the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, s. 8, it is not enough to shew that the servants had greater facilities of access to the goods than any other persons. *McQueen v. Great Western Railway Company*, 10 L. R., Q. B. 569; 44 L. J., Q. B. 130; 32 L. T. 759; 23 W. R. 698.

A heavy case containing pictures was delivered to a railway company to be forwarded by train from Carliff to London, and was not declared under the Carriers Act. It was packed by the porters on a truck and covered over, and remained for some hours on a long siding to which the public had access, and was stolen. Some of the porters were called by the plaintiff to prove delivery of the case to the company, but none were called by the company:—Held, that there was no evidence of a loss by the felony of the servants of the company. *Ib.*

**Prima facie Evidence.]**—A carrier was sued for the value of a parcel lost, and slight evidence was given to raise a suspicion that his servant, who was still in his employ, had stolen the parcel; on a verdict found for the plaintiff, a new trial was refused, on the ground that the carrier ought to have called the servant as a witness. *Boyre v. Chapman*, 2 Bing. N. C. 222; 2 Scott, 365; 1 Hodges, 338.

A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the waybill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van, and entered by him on the waybill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages the train reached London, when the parcel was missed:—Held, no evidence for the jury of the parcel having been stolen by a servant of the company. *Great Northern Railway Company v. Rimell*, 18 C. B. 575; 27 L. J., C. P. 201.

A mere suspicion that the loss arose from felony by the carrier's servants, is not sufficient; it must be proved. *Ib.*

A. sued a railway company for the loss of a travelling case, containing watches, which he was carrying with him as personal luggage. The company pleaded that A. had not made the requisite declaration as to the contents of the parcel; to which A. replied that the loss was occasioned by the felony of the servants of the company. It appeared at the trial that the case had been lost on a part of the journey; that A. was prevented, by a servant of the company, from carrying the case in the same carriage with himself, on the pretence that the luggage-van was the proper place for its conveyance; that the interference of the servant was no part of his duty; that the case was not afterwards forthcoming, and that he subsequently denied all knowledge of the transaction. A question having

been left to the jury, they found that a felony had been committed:—Held, that there was evidence to go to the jury of a felonious taking of the goods. *Keys v. Belfast Railway Company*, 8 Ir. C. L. R. 167.

**Effect of Allegation.]**—In cases within the carrier's notice, the carrier is not liable for the felonious acts of his servants, without gross negligence on his part; but felony by his servants is a good answer to a defence by him under 11 Geo. 4 & 1 Will. 4, c. 68, s. 1. *Great Western Railway Company v. Rimell*, 18 C. B. 575; 27 L. J., C. P. 201.

Where felony is set up as an answer to a defence, the question of negligence becomes immaterial. *Ib.*

In an action against a carrier for the loss of a parcel, a replication that the loss arose from the felonious acts of the carrier's servants is a good answer to a plea that the value exceeded 10*l.*, and was not declared at the time of the delivery to the carrier. *Metcalfe v. London, Brighton and South Coast Railway Company*, 4 C. B., N. S. 307; 27 L. J., C. P. 205.

In order to support this replication, in point of fact it is necessary to prove, not only that the goods had been feloniously abstracted by some one of the carrier's servants unknown, but that evidence ought to be given sufficient to convict some one or more of such servants of the felony. *S. C.*, 27 L. J., C. P. 333; 4 C. B., N. S. 311.

## V. RAILWAY AND CANAL TRAFFIC ACT.

(17 & 18 Vict. c. 31.)

### 1. LIMITATION OF RAILWAY AND CANAL COMPANIES BY SPECIAL CONTRACT AND CONDITIONS.

**Extent of Application of Statute.]**—The Railway and Canal Traffic Act (17 & 18 Vict. c. 31) does not apply to special contracts entered into between a railway company and other persons as to the receiving, forwarding and delivering of traffic beyond the limits of its own line, or of lines worked by it. *Turner v. South-Eastern Railway Company*, 17 W. R. 1096; *S. C.*, nom. *Zunz v. South-Eastern Railway Company*, 4 L. R., Q. B. 539; 38 L. J., Q. B. 209; 20 L. T. 873.

The proviso in s. 7, that no special contract shall be binding upon or affect any party unless the same be signed by him or by the person delivering, &c., only applies where the company is seeking to exempt itself from liability by reason of there being a special contract. *Barrendale v. Great Western Railway Company*, 4 L. R., Q. B. 244; 38 L. J., Q. B. 137; 17 W. R. 412—*Ex. Ch.*

Passengers' luggage is within s. 7 of the statute, the provisions of which are extended by 31 & 32 Vict. c. 119, to the conveyance by water of such luggage; railway companies using steam vessels for the purpose of carrying on a communication between any towns or ports. *Cohen v. South-Eastern Railway Company*, 2 Ex. D. 253; 46 L. J., Ex. 417; 36 L. T. 130; 25 W. R. 475.

### 2. SIGNING CONTRACT.

**Contract must be Reasonable and Signed.]**—The 17 & 18 Vict. c. 31, s. 7, makes notices by railway and canal companies, limiting their lia-

bility as carriers, void; but it does not prevent them from entering into special contracts for the carriage of goods, provided the conditions contained in such contracts are such as are held just and reasonable by the judge or court before whom any question relating thereto is tried, and provided the contract is signed by the party delivering the goods to be carried. *Simons v. Great Western Railway Company*, 18 C. B. 805; 26 L. J., C. P. 25.

All the parts of s. 7 of 17 & 18 Vict. c. 31, must be read together, and therefore the conditions there spoken of as capable of being imposed by railway companies in limitation of their liability as common carriers must not only be, in the opinion of a court or a judge, just and reasonable, but must also be embodied in a special contract in writing, signed by the owner or sender of the goods. *Peek v. North Staffordshire Railway Company*, 10 H. L. Cas. 473; 32 L. J., Q. B. 241; 9 Jur., N. S. 914; 8 L. T. 768; 11 W. R. 1023.

An owner of some marble chimney-pieces desired to send them to London. Messages and notes passed between him and the agent of the railway company on the subject of the terms on which they were to be carried. The agent stated as a condition, that the company would not be responsible for goods sent by the railway, unless their value was declared, and they were insured, the rate of insurance being fixed at ten per cent. on the declared value. After some delay the agent received a note, requesting that the marbles might be forthwith sent to London "not insured;" they were sent, and suffered damage:—Held, that the condition thus sought to be imposed by the company was not just and reasonable; that there was not any special contract signed by the parties; that the note could not be connected with the other communications so as to constitute the required contract; that the words "not insured" could not be made the subject of explanation by parol evidence; and that they left the rights and liabilities of the parties as at common law. *Ib.*

The burden of shewing that a condition is just and reasonable lies on a railway company. *Ib.*

A plea that the goods were carried on a just and reasonable condition, made by the company and assented to by the sender, that they should not be liable for loss or injury unless the goods were insured according to value, and that they were not insured, is a plea in bar to the whole cause of action in respect of damage, however caused. *Ib.*

A special contract in writing must itself, either in terms or by distinct reference, set out or embody the condition. *Ib.*

— **Written or Printed, and Signed.**—Any condition limiting the liability of railway companies as carriers must be a condition just and reasonable in the judgment of the court, and must be set out in a written (or printed) contract, signed by or on behalf of the consignor of the goods. *Aldridge v. Great Western Railway Company*, 15 C. B., N. S. 582; 33 L. J., C. P. 161.

A signature of the special contract by a railway agent employed by the consignor to deliver and by the company to receive the goods for him, is a sufficient signature to satisfy the statute. *Ib.*

The statute extends to cases where a special contract has been signed, in accordance with the proviso in the section, that no special contract between company and customer, respecting the receiving of animals, shall be binding, unless it be signed by the customer or person delivering the animals. *M'Manus v. Lancashire and Yorkshire Railway Company*, 4 H. & N. 327; 28 L. J., Ex. 353; 5 Jur., N. S. 651; 33 L. T., O. S. 259—Ex. Ch.

**After Signature Contract taken to have been Read.**—The plaintiff delivered to a railway company eighteen packages, to be carried on their line. He filled up and signed a receiving-note, describing the goods as furniture. On the paper, under the head "conditions," were these words:—"No claim for deficiency, damage or detention will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within seven days of the time they should have been delivered, and that the company will not be answerable for the loss or detention of any goods which may be untruly or incorrectly described in the receiving-note." The plaintiff said "he was told to sign the paper, and did so. He might have seen the word 'conditions,' but he did not read them, and did not know and was not told what they were." One of the packages consisted of a sack of clothes, which was not delivered, but no claim was made until more than seven days from the time when the same should have been delivered:—Held, that there was nothing to rebut the presumption arising from the signature of the paper by the plaintiff that he understood that the contract was subject to the conditions. *Lewis v. Great Western Railway Company*, 5 H. & N. 867; 29 L. J., Ex. 425.

A declaration against a railway company for damage to goods intrusted to them to carry, alleged that the goods were delivered to the company as common carriers, and that the company received them as such common carriers. Plea, that the goods were received by the company to be carried subject to a special contract, whereby the company was not to be answerable for any loss or damage, however caused. In support of the plea the company produced a paper, signed by the plaintiff, acknowledging that the goods were to be carried subject to certain conditions, one of which was, that the company was not to be responsible for any loss or damage, however caused. On the part of the plaintiff, it was proved, that, when asked by the clerk of the company, at the time the goods were delivered at the company's warehouse, to sign the paper, the plaintiff expressed his unwillingness to do so, inasmuch as he could not see to read it, whereupon the clerk said that it was of no consequence, and that the signature was a mere matter of form; and that the plaintiff, relying upon that assurance, signed the paper:—Held, that upon this evidence the jury was warranted in finding that the goods were not delivered to the company to be carried under the special contract. *Simons v. Great Western Railway Company*, 2 C. B., N. S. 620.

**Effect of employing illiterate Agent to Sign.]**

—A man, who can read, who sends an agent who cannot read, to sign a document or to enter into a contract in which a document must to his knowledge be signed, cannot dispute his liability on the document so signed, on the ground that



his agent could not read its contents; for in such a case the principal must be taken to be in the same position as though he had signed it himself without reading it. *Foreman v. Great Western Railway Company*, 38 L. T. 851.

#### Where Reasonable and Signed, Effect of.]—

In an action against a railway company for negligence in forwarding goods, whereby the plaintiff lost a market, the declaration alleged that the company were common carriers, and received the goods to be carried by them as such common carriers for hire and reward. It appeared that the company did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions subject to which they were to be carried. The judge, holding that the conditions were reasonable, and the contract a special contract within 17 & 18 Vict. c. 31, s. 7, and that consequently the company did not receive the goods to be carried as common carriers, directed a nonsuit:—Held, that the nonsuit was right. *White v. Great Western Railway Company*, 2 C. B., N. S. 7; 26 L. J., C. P. 158.

In general, notice given by a railway company would be valid in law for the purpose of limiting the common-law liability of the company as carriers. *Park v. North Staffordshire Railway Company*, 10 H. L. Cas. 473; 32 L. J., Q. B. 241; 9 Jur., N. S. 914; 8 L. T. 768; 11 W. R. 1023.

Such common-law liability might be limited by such conditions as the court or judge shall determine to be just and reasonable, but any condition so limiting the liability of the company must be embodied in a special contract, in writing, between the owner or person delivering the goods to the company, and signed by such owner or person. *Ib.*

### 3. WHAT ARE JUST AND REASONABLE CONDITIONS.

#### a. As to Goods.

##### i. Generally.

**What are.]—**A condition, that the company will not be accountable for the loss, detention, or damage of any package, insufficiently or improperly packed, is unjust and unreasonable. *Simons v. Great Western Railway Company*, 18 C. B. 805; 26 L. J., C. P. 25; *S. P., Garton v. Bristol and Exeter Railway Company*, 1 B. & S. 112; 30 L. J., Q. B. 273; 7 Jur., N. S. 1234; 9 W. R. 734.

Seem, that a condition that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered, is just and reasonable. *Ib.*

A condition, that in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, however caused, is just and reasonable. *Ib.* But see cases below.

So a condition that a railway company should not be liable for loss of market, or other delay arising from detention, is a reasonable condition. *White v. Great Western Railway Company*, 2 C. B., N. S. 7; 26 L. J., C. P. 158.

#### Owner's Risk-rate, except wilful Default—

**Misdelivery.]—**Clover seed consigned to the plaintiff by the defendants' railway was misdelivered by the defendants, and the plaintiff did not receive it till after a fortnight's delay, too late for the season's market. The goods had been forwarded at the defendants' lower rate of charge, and, therefore, by special contract "solely at the risk of the sender, with the exception that the company shall be responsible for any wilful act or wilful default of the company or their servants if proved, for fraud or theft by their servants, and for collision of trains conveying the goods within the company's limits":—Held, that, under the circumstances there was nothing in the special contract to free the defendants from their ordinary liability as carriers. *Goldsmith v. Great Eastern Railway Company*, 44 L. T. 181; 29 W. R. 651.

A case sent by a county court judge for the opinion of the court stated that the goods were received by a railway company, under the following note, signed by the plaintiff:—"Risk-note. London and North-Western Railway Company, Park Lane Station, December 19. 1855. Hay, straw, furniture, glass, marble, china, castings and other brittle and hazardous articles, conveyed at the risk of the owners. Delivered to London and North-Western Railway Company, from R. C. Dunham, three crates of beef, for Duckworth, Newgate Market, to be forwarded from Liverpool to London, at owner's risk:—"Held, that the court could not from this statement judge whether or not the condition was just and reasonable. *Dunham v. London and North-Western Railway Company*, 18 C. B. 828.

**"No Responsibility"—Negligence.]—**A railway company carried troops and their baggage in India, under a written contract with the government, which provided for the due supply of suitable goods-waggons and for special trains when required, and contained the following clause:—"The baggage shall remain in charge of a guard provided by the troops, the company accepting no responsibility:—"Held, that this clause did not exempt the company from responsibility for damage caused by their own negligence. *Martin v. Great Indian Peninsula Railway Company*, 3 L. R., Ex. 9; 37 L. J., Ex. 27; 17 L. T. 349.

**Gross Negligence and Fraud excepted.]—**A railway company gave public notice that fish would only be conveyed on their line by special agreement, and by particular trains; and that the sender should sign the following conditions:—"The company shall not be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud":—Held, that the conditions were just and reasonable. *Beal v. South Devon Railway Company*, 3 H. & C. 337; 11 L. T. 184; 12 W. R. 1115. Affirming 5 H. & N. 875; 29 L. J., Ex. 441; 8 W. R. 651—Ex. Ch.

**Time of Claim and Description.]—**A party on removing his household effects, delivered them in eighteen packages to a railway company for carriage, and signed a delivery note which described them as furniture, and containing at the

foot "Conditions:—The company will not be answerable for the loss of goods truly or incorrectly described; no claim for loss will be allowed unless made within seven days after the time when the goods should have been delivered." The packages arrived in due course at the station of their destination, where they were kept for four days at the owner's request, and they were then delivered by the company at his residence. On opening one of the packages, which contained books and clothes and not furniture, he found that the whole had been abstracted, and empty sacks substituted, and immediately made a claim against the company. This was more than seven days after the arrival of the packages at the station, but within seven days of their actual delivery at the owner's residence. He having brought an action for the loss, the company pleaded that the packages were delivered to them on the conditions, and that the claim was not within seven days of the time when the packages ought to have been delivered, and that the contents were not correctly described. At the trial the judge ruled that the conditions were just and reasonable:—Held, that the conditions were reasonable. *Lewis v. Great Western Railway Company*, 5 H. & N. 867; 29 L. J., Ex. 425. And see *Simons v. Great Western Railway*, *supra*, and *Moore v. Great Northern Railway*, 10 L. R., 1r. 95, *infra*.

**Loss of Market—Reasonable Time.**—A consignment note signed by the party sending meat by a railway company contained a condition as to meat and other perishable articles, in which it was stated that the company would not be responsible "for any damage to any such articles on the ground of loss of market, provided the same was delivered within a reasonable time after the arrival thereof at the station from whence delivery was made:—Held, that the condition was unreasonable. *Lord v. Midland Railway Company*, 2 L. R., C. P. 339; 36 L. J., C. P. 170; 16 L. T. 576; 15 W. R. 405.

**Insurance according to Value.**—A condition that the company will not be responsible for injury to a case of marbles, unless the same are declared and insured according to their value, is not a just and reasonable condition. *Peck v. North Staffordshire Railway Company*, 10 H. L. Cas. 473; 32 L. J., Q. B. 241; 9 Jur., N. S. 914; 8 L. T. 768; 11 W. R. 1023.

**Beyond Limit of Line.**—Packages, called empties, were delivered to a railway company to be carried to a place beyond their line, the person to whom they were delivered signing on the consignor's behalf a printed note, containing the following conditions: 1. The company will not be answerable for the loss or detention of, or damage to, wrappers or packages of any description charged by the company as empties. 2. Nor in respect of goods destined for places beyond the limits of the company's railway; and as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier. 3. The company will not be liable

for any loss of or injury to articles, except on proof that such loss or injury was occasioned by the neglect or default of the company or its servants. The goods were carried duly to Gloucester, where the company's line ended, and were there handed over to the Midland Railway Company, in further prosecution of the transit; after which the detention and damage of which the consignor complained took place:—Held, that the second of these conditions discharged the company from liability in respect of the damage and detention complained of. *Aldridge v. Great Western Railway Company*, 15 C. B., N. S. 582; 33 L. J., C. P. 161.

## ii. *Alternative Rates.*

**Condition excluding all Liability.**—A fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one-fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market:—Held, that upon the facts the merchant had a *bonâ fide* option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, and covered the delay; and that the company were not liable for the loss. *Manchester, Sheffield, and Lincolnshire Railway Company v. Brown*, 8 App. Cas. 703; 32 W. R. 207—H. L. (E.). Reversing 10 Q. B. D. 250; 52 L. J., Q. B. 132; 48 L. T. 473; 31 W. R. 491; 47 J. P. 436—C. A., sub nom. *Brown v. Manchester, &c.*

**At Lower Rate—Owner's Risk.**—Goods contained in several packages were delivered to a railway company at Chester to be conveyed to Halifax, under a contract note which expressed that they were to be carried "at owner's risk." Several of the packages were delayed, through the negligence of the company, for an unreasonable time, and their contents were in consequence damaged:—Held, that the special terms of the contract did not absolve the company from responsibility for these consequences, notwithstanding that the goods were to be carried at a lower rate than the ordinary rate. *D'Arc v. London and North-Western Railway Company*, 9 L. R., C. P. 325; 30 L. T. 763; 22 W. R. 919.

**Option — Amount of Higher Rate.**—When a railway company charges alternative rates for conveyance of cattle or goods, the lower rate being at owner's risk, *a priori* the higher rate, if within the parliamentary limit, is not necessarily unreasonable or prohibitory. *Foreman v. Great Western Railway Company*, 38 L. T. 851.

It is a question for a jury whether the higher rate is unreasonable in the sense that it is so high as to be prohibitory; and the mere fact that the lower rate is so low that cattle dealers invariably avail themselves of it is not, standing

alone, evidence that the higher rate is unreasonable or prohibitory. *Id.*

Where the servant of the sender of goods signed a consignment note on which there was a notice that the railway company charged alternative rates, lower or higher according as the goods were carried at owner's or at company's risk, and it was in evidence that the higher rate which was within the parliamentary limit was posted up in the office of the company; that if the sender had declined to send on the conditions contained in the consignment note at the lower rate a general consignment note would have been offered him for carriage of the goods at the higher rate; and that the consignment note signed on behalf of the sender had been in general use for a long time and had been adopted by the sender:—Held, that under the circumstances there was a sufficient offer of an option to render the contract contained in the consignment note reasonable within the Railway and Canal Traffic Act, 1854. *Id.*

**Reality of Option.**—The plaintiff, under a contract in writing signed by his agent, delivered to a railway company certain cheeses to be carried from London to Shrewsbury at owner's risk. As the plaintiff knew, the company had two rates of carriage; a higher rate, when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk," the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the company's liability. The company's servants packed the cheeses in such a manner that during their transit upon the railway they were damaged, but the company's servants did not know that damage would result from the mode in which the cheeses were packed:—Held, that as the company carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable; and that the injury to the cheeses had not arisen from the wilful misconduct of their servants. *Lewis v. Great Western Railway Company*, 3 Q. B. D. 195; 47 L. J., Q. B. 131; 37 L. T. 774; 26 W. R. 255—C. A.

**Wilful Misconduct—Exception.**—When a railway company agrees to carry, at a reduced rate (the contract being bona fide and not colourable), upon condition of being relieved from the ordinary liability for negligence, and to be responsible only for the consequences of the wilful misconduct of their servants, it will be for the plaintiff, in an action for injury to the goods carried, to prove more than culpable negligence. There must be evidence of actual wilful misconduct causing the injury. *Great Western Railway Company v. Glenister*, 29 L. T. 422; 22 W. R. 72.

— **Evidence of.**—A railway company contracted with the plaintiff to carry a van at a reduced rate, on the terms that the company should not be liable for damage or delay except such as was occasioned by wilful misconduct on the part of its servants. The van was to be delivered at a station outside the company's system and on the line of another company. A

delay having been occasioned by the vans having been loaded on a truck which was too high to allow of its passing under the other company's gauge, although it passed under that of the company:—Held, that there was not sufficient evidence of wilful misconduct on the part of the company's servants to go to a jury, inasmuch as it was not proved that they knew that the truck was too high to carry the van under the other company's gauge. *Webb v. Great Western Railway Company*, 26 W. R. 111.

— **Delivery to Wrong Person.**—A railway company having carried goods from one of its stations to another, the station master at the place to which they were carried, without making inquiries of the consignor, after a delay of a week, delivered the goods to a person of a name very similar to that of the person named as consignee. The contract of carriage was at a reduced tariff conditioned to exclude all liability except for wilful misconduct:—Held, that the delivery of the goods amounted to wilful misconduct. *Hoare v. Great Western Railway Company*, 37 L. T. 186; 25 W. R. 63. And see *Goldsmith v. Great Eastern Railway*, 44 L. T. 181; 29 W. R. 651.

## b. As to Animals.

### i. Alternative Rates.

**Non-liability for "Detention."**—The plaintiff delivered cattle, carriage prepaid, to the defendant railway company for carriage on the terms of signed conditions, whereby, in consideration of an alternative reduced rate, it was agreed that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding or delivery thereof, except upon proof that such loss, detention or injury arose from the wilful misconduct of the company or its servants." The cattle were carried; but, on application made for them by the plaintiff, the defendants, in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when the mistake having then been ascertained, they were delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence:—Held, that the withholding of the cattle, under a groundless claim to retain them, at the end of the transit was not "detention" within the conditions, and the company were therefore liable. *Gordon v. Great Western Railway Company*, 8 Q. B. D. 44; 51 L. J., Q. B. 58; 45 L. T. 509; 30 W. R. 230; 46 J. P. 294.

A knew that there was a certain rate for carrying horses on a railway by a passenger train, and in horse-boxes, and that there was a lower rate for carrying them by goods train and in waggons. He sent his horses by goods train:—Held, that it was a reasonable condition of the contract for conveyance that the horses should be carried entirely at the owner's risk, and that such condition would protect the railway company if the horses were injured on the journey, but would not protect them from the consequences of delay where the contract was to deliver in a reasonable time. *Robinson v. Great Western Railway*

*Company*, 1 L. R., C. P. 329; 35 L. J., C. P. 123; 14 W. R. 206; 1 H. & R. 97.

**Injury occasioned by Restiveness.**—In an action against a railway company, as carriers, for negligence, whereby a horse delivered to them by the plaintiff was injured at one of their stations, the defendants pleaded (1) that they received the horse under a special contract containing a condition that, in case of animals for which a contract note with two rates of carriage should be offered to the customer, the defendants would give him the alternative of carrying at either rate; that at the full rate, which would be charged when the contrary was not expressed, the defendants would undertake the ordinary duties of carriers, subject to the conditions in the said contract note and their statutory rights; but that at the reduced rate the defendants would carry at the owner's risk, exempt from all liability not occasioned by the wilful misconduct of their servants acting within the scope of their authority; and that the plaintiff elected to have his horse carried at the lower rate; and that the injuries were not caused by the wilful misconduct of the defendants' servants acting as aforesaid; (2) that another condition in the said contract was that the defendants should not be liable for injuries occasioned by the fear or restiveness of animals; and that the injuries complained of were solely occasioned by the restiveness of the horse. The plaintiff signed a contract note containing the above conditions:—Held, that the latter condition did not embrace cases in which the injury immediately flowed from the fear and restiveness of the animals directly occasioned by some act of negligence or want of care on the part of the defendants, but applied only to injury from fear or restiveness caused by the transit with its ordinary incidents, and without any negligence or default on the part of the company; and that, taken in this limited sense, the condition was not unreasonable. *Moore v. Great Northern Railway*, 10 L. R., Ir. 95.

**Need not appear on Face of Contract Note.**—Held, also, that it was unnecessary that the alternative rates should appear on the face of the contract, but that it was sufficient that the contract note referred to the defendants' tariff containing all the rates. *Ib.*

**Claim to be made in Three Days—General Lien.**—The contract note also contained a condition that no claim in respect of goods would be allowed unless made within three days after delivery; and a further condition that all goods were received subject to the company's general lien both for carriage thereof and all other charges against the customer:—Held, that "goods" in these conditions meant inanimate goods, not horses or cattle, and that the conditions were reasonable. *Ib.*

**Power of Court to decide on Reasonableness.**—But semble, that they did not properly come before the court for decision under 17 & 18 Vict. c. 31, s. 7, which only deals with the receiving, forwarding or delivering of animals, goods and things, and these conditions related to something occurring after delivery. *Ib.*

**Exemptions from Liability on Unloading.**—

As an alternative to a carrier's contract which admittedly contained unreasonable conditions, the carriers offered to carry at certain reasonable rates, but subject to a condition "that they would not be accountable for the correct selection of the owners' cattle on landing, nor on loading into the waggon at L." (the termination of the sea journey), "nor on unloading at destination:"—Held, that this condition, upon its fair construction, would extend to exempt the carriers from responsibility for negligence or default on their own part in the selection of the cattle on landing, and was therefore unreasonable and unjust. *McNally v. Lancashire and Yorkshire Railway Company*, 8 L. R., Ir. 81.

Semble (per Lord O'Hagan, L. C., and Fitz-Gibbon, L. J.), that a carriers' contract in itself unreasonable may be validated by the offer of an alternative contract, which, though it limited the ordinary common-law liability of the carrier, would in itself constitute a just and reasonable contract, and if standing alone would satisfy the requirements of the Railway and Canal Traffic Act. *Ib.*

In considering whether conditions annexed to carriers' special contracts are just and reasonable, such conditions must be construed according to the ordinary meaning of their language, without implying any limitation or exception not expressed. *Ib.*

**Through Traffic—Land and Sea Carriage—Burden of Proof.**—In an action against a railway company, as carriers, for breach of an alleged contract in failing to carry pigs of the plaintiff from a station on their railway in Ireland to London within a reasonable time, the defendants, amongst other defences, pleaded that the pigs were received by them under a certain "reasonable" condition in that behalf, signed by the plaintiff, providing that, in consideration of carriage at a reduced rate, or charge below the ordinary rate, the defendant company should be free from all liability for injury or delay in the transit or conveyance of the pigs, unless occasioned by the intentional and wilful misconduct of the defendants' servants, and that the injury and delay complained of was not occasioned by such intentional or wilful misconduct. A verdict having been directed for the defendants, subject to leave reserved for the plaintiff to move to have the verdict changed into one for him for damages, contingently assessed, if the case should have been left to the jury upon any of the issues raised by the pleadings:—Held, that assuming this defence valid as a pleading, the burden of proving that the condition relied on was a reasonable one lay upon the defendants, that therefore the question whether an alternative higher price, at which, as the company alleged, they offered to carry upon the ordinary carriers' liability, was a reasonable alternative, should not have been withdrawn from the jury, and that, under the reservation, the plaintiff was entitled to the verdict. *Ruddy v. Midland Great Western Railway Company*, 8 L. R., Ir. 224.

**Owner's Risk—Loading.**—The defendants, a railway company, contracted to carry the plaintiffs' cattle from Dublin to certain towns in England. During the sea part of the journey some of the animals were injured and others killed, through alleged negligence in securing and stowing them. In an action for the loss of

the cattle, the defendants pleaded that the ordinary rate charged by them for the carriage of the cattle to the places to which the plaintiffs' cattle were booked was a reasonable rate, and that at such rate they undertook the carriage of cattle to those places, without, as regarded the sea portion of their journey, any limitation to their liability so far as imposed by law, and, as regarded the land portion, without any unjust or unreasonable conditions; of which the plaintiffs had notice when delivering their cattle for carriage; and that the plaintiffs elected and contracted to have their cattle carried at a certain reduced rate, upon a special contract that the same should be conveyed at the owner's sole risk in connexion with the sea part of the transit. The plaintiffs, by their reply alleged that the alternative contract of carriage at ordinary rates offered by the defendants was not, as regarded the land portion of the carriage, without any unjust or unreasonable conditions imposed, but was subject to a condition "that, where the charge of conveyance is per waggon, as the owner or his servant is required to superintend the loading of the stock, and is allowed to place as many animals in such waggon as he considers may be conveyed with safety, the company will not be responsible for loss arising in any way from overcrowding of such waggons, or for injuries done in the loading or unloading thereof, or in consequence of one animal injuring another."—Held, on demurrer to the replication, that both the condition respecting the sea part of the transit to which the special contract was subject, and the condition alleged in the replication to have been annexed to the alternative contract of carriage offered, were unjust and unreasonable, and that, therefore, the demurrer should be overruled. *Corrigan v. Great Northern and Manchester, Sheffield and Lincolnshire Railway Companies*, 6 L. R., 1r. 90.

**Special Contract supported by Reasonable Alternative.**—Query, whether the principle that in such a case the special contract may be supported by the option of a just and reasonable alternative contract, applies where the alternative offered is subject to conditions limiting the common-law liability of the carrier. *Ib.*

— **Lower Rate—"Negligence only."**—When a railway company entered into a special contract by which they agreed to carry cattle at a lower rate, on condition that they should be liable for negligence only:—Held, that this was not an unreasonable condition within 17 & 18 Vict. c. 31, s. 7. *Harris v. Midland Railway Company*, 25 W. R. 63.

Held, also, that the condition took the company out of the category of common carriers, and that accordingly, in an action against the company for damage to the cattle during the journey, the onus of proving negligence was on the plaintiff. *Ib.*

A railway company contracted to carry goods "through," partly by railway and partly by sea, and to an action for loss and injury to the goods pleaded a special condition exempting them from liability in respect of the negligence of the captain and crew of a steamer (the property of and worked by a steam-packet company, who had made arrangements with the railway company for through booking) which was lost through the negligence either of the captain or the crew:—Held, that

(through the operation of the 31 & 32 Vict. c. 119, s. 16, and the 34 & 35 Vict. c. 78, s. 12) the 17 & 18 Vict. c. 31, s. 7, applied, and that the condition, being unreasonable, was null and void. *Moore v. Midland Railway Company*, 9 Ir. R., C. L. 20.

**Unreasonable Contract mended by Alternative Claim.**—A railway company may, by a special contract signed as required by the Railway and Canal Traffic Act, 1854, s. 9, limit their liability for their own neglect or default, and this limitation is subject to but one restriction—that it be adjudged to be just and reasonable. *Gallagher v. Great Western Railway Company*, 8 Ir. R., C. L. 326.

The principle deducible from the authorities is, that a contract of this nature, *prima facie* unjust and unreasonable, becomes just and reasonable if an alternative is left to the party forwarding or delivering the goods to enter into a contract which is just and reasonable. *Ib.*

A railway company had two rates for the carriage of goods—one, the ordinary or higher rate, when it undertook the ordinary liability of the carrier; the other a reduced rate, when the sender relieved the company of all liability for loss, or damage or delay, except upon proof that such loss, or damage, or delay arose from wilful misconduct on the part of its servants:—Held, the higher rate not being shewn to be prohibitive or excessive, that the alternative afforded to the public was just and reasonable; and, therefore, that a contract founded upon the latter branch of it was valid. *Ib.*

A railway company introduced into a special contract for the conveyance of horses at a low rate, a condition exempting themselves from all liability in respect of the horses, whether in the loading or unloading, or in transit and conveyance, or whilst in the company's vehicles or on their premises:—Held, that the condition was in itself unjust and unreasonable. *Lloyd v. Waterford and Limerick Railway Company*, 15 Ir. C. L. R. 37; 9 L. T. 89.

Held, also, that it could not be aided by an alternative condition, whereby the company offered to "undertake the risk of conveyance only in consideration of an additional payment of twenty per cent. on the low rate of charge, but refused to entertain any claim for damage sustained by any animal conveyed at such additional rate, unless the injury was stated and pointed out to the company's agent at the time of unloading," that condition also not being in itself just or reasonable. *Ib.*

**"Any Injury."**—A condition whereby a railway company stipulates to be free from any injury, however caused, to cattle carried by them, in consequence of over carriage, detention, or delay, is unreasonable, although the rate for carriage charged is reduced below the sum ordinarily demanded. *Allday v. Great Western Railway Company*, 5 B. & S. 903; 34 L. J., Q. B. 5; 11 Jur., N. S. 12; 11 L. T. 267; 13 W. R. 43.

If cattle become out of condition during the journey, through the default of the company, they are injured, within the meaning of 17 & 18 Vict. c. 31, s. 7. *Ib.*

A railway company received certain cattle to be carried for A. to B. station. The master induced him to sign a ticket containing certain

special conditions, that the company was not to be answerable for "any consequences arising from over carriage, detention, or delay in, or in relation to, the conveying or delivering of the said animals, however caused." The cattle were sent to a station which was more distant than the B. station, and where they remained for some hours until they were found by A. In consequence of the delay, and from want of food and water, the cattle were injured. There was no consideration for the special contract by charging A. a smaller rate of charge, or anything of the kind:—Held, that the cattle were injured within the meaning of 17 & 18 Vict. c. 31, s. 7, and also that the condition in the ticket was unreasonable within the meaning of that section. *Id.*

#### ii. In other Cases.

**Where no Contract or complete Delivery.]**—A railway company is entitled to the protection against responsibility for the carriage of animals given by the second proviso in 17 & 18 Vict. c. 31, s. 7, although no complete contract for carriage of the animal has been entered into, and no complete delivery of it has taken place; it is enough if the animal was in the course of being delivered to or received by the company. *Hodgman v. West Midland Railway Company*, 5 B. & S. 173; 33 L. J., Q. B. 233; 10 Jur., N. S. 673; 10 L. T. 609; 12 W. R. 1054. Affirmed on appeal, 35 L. J., Q. B. 85; 13 W. R. 758—Ex. Ch.

A railway company has no right to compel the owner of an animal to insure it, and mere statements of value not intended to bind the company do not entitle the company to refuse to receive it. *Id.*

**Declaration of Value.]**—A statement of the value of an article sent by a railway company, to be within the 17 & 18 Vict. c. 31, s. 7, must be a declaration of value made by the sender, with the intention that it shall be so understood, and for the purpose of insurance. *Robinson v. London and South-Western Railway Company*, 19 C. B., N. S. 51; 34 L. J., C. P. 234; 11 Jur., N. S. 390; 13 W. R. 660.

**No Written Contract.]**—The plaintiff's ram, delivered to the defendants to be carried upon their railway, was injured through the negligence of their servants. No written contract was entered into, nor any declaration of its value made on its delivery to the defendants:—Held, in an action to recover the value of the ram, that although no written contract had been made, the liability of the defendants was limited to the amount specified in the second proviso of s. 7 of the Railway and Canal Traffic Act. *Hill v. London and North-Western Railway Company*, 42 L. T. 513.

**Sufficiency of Conveyance.]**—A party sent cattle, under the care of a drover, to be carried by a railway. At the time of receiving the cattle the drover signed a note presented to him by the company, containing the following stipulation:—"The company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation, or from being trampled on, bruised or otherwise injured in transit, from fire, or from any other cause whatsoever. The company is not to be held responsible for car-

riage or delivery within any certain or definite time, nor in time for any particular market." The company gave the drover a free pass to travel with the train. The cattle were not put into the trucks used for the carriage of cattle, but into two vans used for the carriage of goods, which were entirely closed on every side, and could only be opened by a sort of lid or slide. The drover saw all this, and did not complain, and the train started with the cattle in these vans, and the drover in a railway carriage. On arriving at the end of the journey it was found that the lid of one of the vans had from some unascertained cause been closed, and on opening it some of the cattle were found suffocated, and others much injured. Those in the other van where the lid remained open arrived safe:—Held, that the stipulation was a just and reasonable condition. *Pardington v. South Wales Railway Company*, 1 H. & N. 392; 26 L. J., C. P. 105; 2 Jur., N. S. 1210.

Conditions annexed by a railway company to their cattle tickets, that the company is to be free from all risk and responsibility with respect to any loss or damage arising in the loading or unloading or injury in the transit from any cause whatever, it being agreed that the animals are to be carried at the owner's risk, and that the owner of the cattle is to see to the efficiency of the waggon before his stock is placed therein, complaint to be made in writing to the company's officer before the waggon leaves the station, are neither just nor reasonable. *Gregory v. West Midland Railway Company*, 2 H. & C. 944; 33 L. J., Ex. 155; 10 Jur., N. S. 243; 12 W. R. 528.

**Negligence of Consignee.]**—A horse was sent by railway, directed to the owner at Eton. The sender signed a document in the following terms:—"Mr. Wise paid for one horse 12s. 6d., Newbury to Windsor. Notice. The directors will not be answerable for damage to any horses conveyed by this railway." The horse arrived safe at the Windsor station, but the owner not appearing to claim it, it was forgotten and left tied up in a horse-box in an exposed situation for twenty-four hours, and was injured by such neglect:—Held, that the railway company was not responsible (by reason of the signed contract) for the injury done to the horse. *Wise v. Great Western Railway Company*, 1 H. & N. 63; 25 L. J., Ex. 258.

Semble, independently of such contract, the company would not have been responsible, the injury having been the result of the owner not being ready to receive the horse on its arrival at Windsor. *Id.*

**Horses—Owner's Risk.]**—A stipulation, that horses should be carried by a railway company, at the owner's risk, is not unreasonable or void. *M'Cance v. London and North-Western Railway Company*, 7 H. & N. 477; 31 L. J., Ex. 65; 7 Jur., N. S. 1304; 10 W. R. 154. Affirmed, *infra*, *S. P.*, *Gannell v. Ford*, 5 L. T. 604; *Harrison v. London and Brighton and South Coast Railway Company*, 2 B. & S. 122; 31 L. J., Q. B. 113; 8 Jur., N. S. 740—Ex. Ch.

M. delivered to a railway company some horses to be carried on their railway, and at their request signed a declaration that the value of the horses did not exceed 10l. per horse, and that, in consideration of the rate charged for

their conveyance, he thereby agreed that the same were to be carried entirely at the owner's risk. In the course of the journey the horses were injured in consequence of the defective state of the truck in which they were carried. In an action against the railway company they paid 25*l.* into court. The horses were, in fact, worth more than 10*l.* each; and if taken at their real value, 40*l.* was the measure of the owner's damage; if at 10*l.* each, the 25*l.* covered his claim:—Held, that the declaration of the value of the horses was no part of the contract, but a statement which formed the basis of the intended contract, and by which it was to be regulated and governed, and therefore it was not competent to the owner of the horses to deny the truth of the statement, and prove that the real value of the horses exceeded 10*l.* each. *M'Canee v. London and North-Western Railway Company*, 3 H. & C. 343; 34 L. J., Ex. 39; 10 Jur., N. S. 1058; 11 L. T. 426; 12 W. R. 1086—Ex. Ch.

A condition that a railway company will not be liable "in any case" for loss or damage to a horse or dog above certain specified values delivered to them for carriage unless the value is declared, is not just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854, as it is in its terms unconditional, and would, if valid, protect the company, even in case of the negligence or wilful misconduct of their servants. *Ashenden v. London and Brighton Railway Company*, 5 Ex. D. 190; 42 L. T. 586; 28 W. R. 511; 44 J. P. 203.

**Dogs—Restiveness.**—A party delivered to a railway company a dog to be carried, subject to the following conditions, printed on a ticket and signed by him:—"The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*l.* 10*s.* per cent., or 6*d.* in the pound, upon the declared value above 40*l.*, whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried." The plaintiff made no declaration of the value of the dog, which was estimated at 21*l.*, and paid only the ordinary fare, 3*s.*, for its carriage. During the journey the dog (by no neglect or default of the company) escaped from the train, and was lost:—Held, that 17 & 18 Vict. c. 31, s. 7, has application solely to cases where loss or injury is occasioned by the neglect or default of the company; and that the loss of the dog being attributable to pure accident only, the company was exempt from liability by the terms of their contract. *Harrison v. London, Brighton and South Coast Railway Company*, 2 B. & S. 122; 31 L. J., Q. B. 113; 8 Jur., N. S. 740; 6 L. T. 466—Ex. Ch.

Held, also, that the condition was just and

reasonable, and was not to be construed as exempting the company from liability in respect of any loss or damage occasioned by their wilful neglect or misconduct. *Ib.*

**Duties of Judge and Jury as to Valuing.**—

A judge is incompetent to pronounce as to the reasonableness of the percentage charged upon the declared value of any animal, extra the sum to which by the conditions the liability of the company is limited, such being the office of a jury. *Ib.*

**By Sea and Land—Condition as to Vessels.**—

Sect. 16 of the Regulation of Railways Act, 1868, incorporates the whole of the Railway and Canal Traffic Act, 1854, and extends its provisions to all classes of traffic carried partly by railway and partly by steam vessels, even where the railway company contracting for the conveyance of the traffic has no parliamentary powers to work steam vessels; and the Regulation of Railways Act, 1871, s. 12, extends the whole of the Railway and Canal Traffic Act, 1854, to all cases where railway companies procure traffic to be carried in a steam vessel belonging to them. *Doolan v. Midland Railway Company*, 2 App. Cas. 792; 37 L. T. 317; 25 W. R. 882.

An English railway company, having no special powers to work steam vessels, contracted at their office in Dublin to convey cattle by sea to Liverpool, and thence by railway to St. Ives. The cattle were lost on the passage to Liverpool through the negligence of the crew of the steam vessel, with the owners of which the railway company had a through booking arrangement for the conveyance of their traffic. The contract was made subject to a written condition exempting the railway company from liability for "loss of, or any damage or injury to, animals, goods, or property intrusted to them, arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels":—Held, that the contract was governed by the Railway and Canal Traffic Act, 1854, s. 7; that its conditions were unreasonable; and that the railway company was liable for the loss of the cattle. *Ib.*

Held, also, that the words "master and crew of the company's vessels," in this condition applied to all such vessels as the company should employ, and not merely vessels owned by the company itself, and that the condition was unreasonable and void. Judgment of Ir. Ex. Ch., 10 Ir. R., C. L. 47, reversed.

**Owner's Risk—Free Pass to Drivers.**—

A condition, in a special contract by a railway company for the carriage of cattle, that the owner shall undertake all risks of loading, unloading, and damage, whether arising from the negligence or default of the company or of their servants or from defect or imperfection in the station, platform, or place of loading and unloading, or the carriage in which they may have been conveyed, or from other cause whatsoever, is unreasonable; and it does not cease to be so because, by another condition, the company undertakes to grant free passes to persons having the care of live stock, as

an inducement to owners to send proper persons with and to take care of them. *Routh v. North-Eastern Railway Company*, 2 L. R., Ex. 173; 36 L. J., Ex. 83; 15 L. T. 624; 15 W. R. 695.

Such conditions do not relieve the company from their common-law duty to keep their station in a safe and proper condition, and to deliver the cattle in a fit and proper place. *Ib.*

#### Part vitiating Whole—Agent's Authority.]

—A set of conditions in a consignment note is unreasonable and void, if any part of it is unreasonable. *Kirby v. Great Western Railway Company*, 18 L. T. 658.

A condition not to be liable for delay, however caused, is unreasonable. *Ib.*

Where an agent, who is employed to deliver cattle to be sent by a railway company, signs the consignment note, he must be taken to have known the contents, and to bind his principal. *Ib.*

An agent for a railway company, who is employed to obtain custom for them, does not bind them by his representations as to the railway accommodation. *Ib.*

#### Beyond Limit of Line—Special Condition—

**Extent of Protection—Negligence in Discharging.]**—The Great Northern Railway Company and the Manchester Railway Company agreed

that a complete and full system of interchange of traffic should be established from all parts of one company and beyond its limits, to all parts of the other company and beyond its limits, with through tickets, through rates and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock. The agreement provided for the division of the traffic. The plaintiff, wishing to send a cow from D. to S., went to the station of the Great Northern Railway Company at D. and booked her for S. by the Manchester line. He signed a contract, by which it was agreed that the cow was to be conveyed upon certain conditions, one of which was as follows:—"The Great Northern Railway Company give notice that they convey horses, cattle, sheep, pigs and other live stock in waggons, subject to the following condition: That they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal, in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal." The cow was put into a truck belonging to the Manchester Railway Company, and was conveyed to S., where their servant, who was in charge of the yard or loading-place, let her out of the truck, although he was cautioned by the plaintiff not to do so at that time. The cow rushed out of the truck, and after running about the yard, got upon the line and was killed:—Held, that the Great Northern Railway Company was the agent of the Manchester Railway Company to make the contract for the carriage of the cow, and that as the Manchester Railway was not protected by the condition above set out, an action was maintainable against them. *Gill v. Manchester, Sheffield and Lincolnshire Railway Company*, 8 L. R., Q. B. 186; 42 L. J., Q. B. 89; 28 L. T. 587; 21 W. R. 525.

Held, also, that the accident to the cow was attributable to the fact that the porter let her out of the truck without waiting a reasonable

time, as he might have done, and that the Manchester Railway Company was therefore liable to the plaintiff for the value of the cow. *Ib.* See also cases, *supra*, III. 4.

#### 4. UNDUE PREFERENCE.

##### a. In Respect of Goods, &c.

**17 & 18 Vict. c. 31, s. 2.]**—The power given to the Common Law Courts by that statute is vested in the Railway Commissioners by 36 & 37 Vict. c. 48 (The Regulation of Railways Act, 1873), renewed by subsequent acts.

**Effect of 17 & 18 Vict. c. 31, s. 2.]**—This statute does not abolish or abridge the jurisdiction of the Court of Chancery or of the Attorney-General. *Att.-Gen. v. Great Northern Railway Company*, 1 Drew. & S. 164.

The 17 & 18 Vict. c. 31, was designed to afford a remedy against an undue preference or undue prejudice to a particular individual or class in respect of the traffic on the railway or canal, and was not intended to apply to the case of a breach or neglect by the company of a public duty, which was already susceptible of redress by mandamus or by indictment. *Bennett v. Manchester, Sheffield and Lincolnshire Railway Company*, 6 C. B., N. S. 707.

The Manchester, Sheffield, and Lincolnshire Railway Company were the proprietors of the Grimsby Old Dock and also of another dock, called the Grimsby New Dock, communicating with their railway. By act of parliament the company was authorized and required to maintain the old dock and the approach thereto of a given depth:—Held, that the failure to perform this duty, so that the dock and its approach became silted up and the depth of water therein insufficient for vessels to get to the wharfs adjoining, was not the subject of redress under 17 & 18 Vict. c. 31, although it was suggested that the object of the company was to discourage the traffic to the old dock and to divert it to the new one. *Ib.*

The 17 & 18 Vict. c. 31, which gives power to courts of common law to grant the preventive remedy, does not, by giving a concurrent jurisdiction, abridge the jurisdiction of the Court of Chancery. *Bazendale v. West Midland Railway Company*, 3 Giff. 650. Affirmed on appeal, 7 L. T. 297.

##### What is—Facilities for Storing Coal.]—A

railway company, having land adjoining one of their stations, let the whole of it to P., a coal merchant, for the purpose of storing coal brought by their line. P. did not require or actually use the whole of the land for this purpose. W., another coal merchant, applied to the company to provide him on similar terms with land for storing coal, or to let to him the part of the land not actually used by P. The company refused to do so. W. applied to the court for an order compelling the company to desist from allowing P. to store coals on the land, or to give similar facilities to him:—Held, by Bovill, C. J., and Keating, J., that a means of storing coals at the station to which it is sent being a necessary facility for the proper carrying on of the coal trade, the company had no right to grant greater facilities to P. than to W., and that they ought to be restrained from doing so; but, by Smith



and Brett, JJ., that the Railway and Canal Traffic Act only relates to facilities in the receiving, forwarding and delivering traffic, and that the court had no jurisdiction to interfere with matters not relating to these, and that facilities for storing coal after it had been delivered to the consignee do not relate to the receiving, forwarding or delivering of traffic, and are not therefore under the control of the court. *West v. London and North-Western Railway Company*, 5 L. R., C. P. 622; 39 L. J., C. P. 282; 23 L. T. 371; 18 W. R. 1028.

**Of their own Traffic.]**—A railway company, with a view to compete with other carriers in the collection and carriage of goods, established receiving-offices in various parts of London, from which goods were brought in vans to the railway station. The gates of the station were closed against the vans of the complainant and other carriers at 6.30 P.M., but the company's own vans were admitted at a much later hour, and the goods brought by them were forwarded by the same night's trains:—Held, that this was giving an undue and unreasonable preference to the company's own traffic, to the prejudice of the complainant, and a rule for an injunction was made absolute with costs. *Palmer and London, Brighton and South Coast Railway Company, In re*, 6 L. R., C. P. 194; 40 L. J., C. P. 133; 24 L. T. 135; 19 W. R. 627.

A railway company formerly charged a uniform rate of 3s. 6d. per ton on all goods conveyed on their line between B. & P. The goods were collected and delivered both by the company and B. at a charge of 4s. 10d. per ton. The company, who had power under their acts to impose their own rates of charge for carrying, but no power to impose tolls for collecting and delivering, raised the charge for carrying to 8s. 4d., being the aggregate of the above two charges, with an intimation to the public that they would collect and deliver goods free from all charge. The real purpose of this arrangement was to compel persons delivering to have their goods conveyed by the railway, to employ the company to collect and deliver such goods, and thus to secure this business, and the profits upon it, to the company, as well as to exclude B. from competing with them in this department of business:—Held, that this arrangement was an undue preference to the company in their separate capacity of carriers, other than on the line of railway; and also an undue prejudice to B. *Barndale v. Great Western Railway Company*, 5 C. B., N. S. 336; 28 L. J., C. P. 81; 4 Jur., N. S. 1279.

A railway company had been in the habit of carrying goods between the termini of their line, according to a tariff of rates, from which they made deductions to persons who brought or took away their goods to or from the termini up to a certain day, when they put a stop to these deductions, with a view to exclude other carriers from competing with them as carriers:—Held, an undue prejudice to all such customers as did not desire to have their goods collected and delivered for them. *Garton v. Great Western Railway Company*, 5 C. B., N. S. 669; 28 L. J., C. P. 158; 5 Jur., N. S. 685.

**—As regards Time.]**—A railway company fixed as a limit for receiving parcels to be forwarded the same night the hour of 6.30 P.M., but after that time, their own waggons, which had been

delayed in reaching the station, or in which the goods had been previously sorted and were ready for transmission. A carrier forwarding goods by the railway having applied for an injunction to restrain the company from giving undue preference to themselves:—Held, by Erle, C. J., and Smith, J., that an injunction ought not to issue; by Willes and Keating, JJ., that it ought. *Palmer v. London and South-Western Railway Company*, 1 L. R., C. P. 588; 35 L. J., C. P. 289; 12 Jur., N. S. 926; 15 L. T. 159; 15 W. R. 11.

**Of their own Agent.]**—Where a railway company employed an agent to receive goods arriving at the Cirencester station and deliver them to the consignees in the town, and refused to deliver at the station to carriers who had general written orders from persons in the town authorizing delivery of goods arriving for them, but required written orders specifying the goods, the court held that there was an undue preference of the company's agent, and enjoined the company to act on the general orders. *Parkinson v. Great Western Railway Company*, 6 L. R., C. P. 554; 40 L. J., C. P. 222; 24 L. T. 830; 19 W. R. 1063.

A railway company permitted a carrier (who also acted as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving-office of the company; and goods were received by him at that place without requiring the senders to sign conditions which the company required all other carriers who brought goods to their stations to sign:—Held, an undue preference. *Barndale and Bristol and Exeter Railway Company, In re*, 11 C. B., N. S. 787.

A company, possessed of line from B. to C., advertised to convey goods from A. to C. (in conjunction with another company) at the rate of 50s. per ton, provided they were consigned to their own agents at those respective places; but if consigned through any one else, they charged 2s. 6d. per ton more:—Held, ground for an injunction. *Barndale v. North Devon Railway Company*, 3 C. B., N. S. 324.

**Equal Charges—Competing Traffic.]**—Sect. 90 of the 8 & 9 Vict. c. 20 (Railways Clauses Act, 1845), requires equality of tolls for similar services rendered by railway companies to all persons; and s. 2 of the 17 & 18 Vict. c. 31 (Railway and Canal Traffic Act, 1854), forbids the giving of any undue or unreasonable preference or advantage to any particular person or company. A charge made by a railway against A. for services rendered by that company to him must not, therefore, be greater than the charge made by the same company against B. for rendering him services of the like nature. *London and North-Western Railway Company v. Evershed*, 3 App. Cas. 1029; 48 L. J., Q. B. 22; 39 L. T. 306.

E. was a brewer at the town of Burton, where three railways had their stations. With one of these railways (Midland), certain brewers in the town had direct communication by sidings, which enabled goods to be sent to the trains, and taken from the trains of the Midland with greater ease and less loss of time than by the way of ordinary cartage. The Midland charged them nothing for cartage, and made a rebate in the charge for station to station conveyance.

These brewers had no such communications with the North-Western, but it was often convenient for them to send by that railway; and the directors of that railway, in order to compete with the Midland, allowed these particular brewers the same advantages as to cartage and rebate as the Midland did. As to all others in the same trade (E. among the rest), the directors of the North-Western made the ordinary charge for cartage, and allowed no rebate on the charge for conveyance on the line:—Held, that this was an inequality and an undue preference within the meaning of the statutes. *Id.* Affirming the judgment of the Court of Appeal, 3 Q. B. D. 134; 47 L. J., Q. B. 284; 37 L. T. 623; 26 W. R. 863.

Where E., one of the persons thus paying the higher rate, had for some time paid it in ignorance of the facts, but afterwards, on finding that he was subjected to this higher charge, paid it under protest:—Held, that he was entitled to recover back, in an action for money had and received, the difference he had so paid under protest. *Id.*

**Small Parcels, same Consignee.]**—A railway company was authorized by act of parliament to carry and convey all such passengers, goods, merchandize, &c., as should be offered to them for that purpose, and to make such reasonable charges for such carriage and conveyance as they might from time to time determine on. The company was to fix the sums to be charged in respect of small parcels, not exceeding 500 lbs. weight each. By another act they were empowered to carry passengers and goods on other railways, and to make such reasonable charges for such carriage as they should determine on. And by another act the charges by the former acts authorized to be made for the carriage of passengers or goods should be at all times charged equally, and after the same rate in respect of all passengers, goods, &c., conveyed or propelled by a like carriage or engine, passing on the same portion of the line, and under the same circumstances. The company published a list of rates for the carriage of merchandize, divided into seven classes, of which the lowest was 16s. and the highest 60s. per ton; and for boxes, bales, hampers, or other packages, when they contained parcels or other packages or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person, they imposed a charge of 1d. per lb. weight:—Held, that this last was not a reasonable charge in the case of a package above 500 lbs. weight made up by a carrier and directed to one person, although containing a number of parcels under 112 lbs. weight each, consigned or directed to different persons. *Pickford v. Grand Junction Railway Company*, 10 M. & W. 399; 3 Railw. Cas. 193; *S. P., Edwards v. Great Western Railway Company*, 11 C. B. 588; 21 L. J., C. P. 72.

A railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons than for a package containing several parcels all belonging to one person. *Crouch v. Great Northern Railway Company*, 11 Ex. 742; 25 L. J., Ex. 137.

A railway company refusing to carry, at the ordinary rate, packed parcels tendered by a carrier, whereby he is obliged to send them by a more circuitous route and at a greater expense,

is not entitled to recover damages for an alleged loss of business. *Id.*

A railway company was entitled to charge for goods carried on their line at rates not exceeding certain rates per ton. They were permitted to charge a higher rate for small parcels not exceeding 500 lbs. weight, provided that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, should not be deemed small parcels, but such terms should apply only to single parcels in separate packages. A carrier sent to the company at once many packages, all consigned to one consignee, each less than 500 lbs., of articles of similar classes, but not being separate packages of one article. The company charged for these as separate parcels:—Held, that the company was justified in so doing; the proviso applying only to articles that were of such a nature that a large quantity was generally made up in separate packages. *Parker v. Great Western Railway Company*, 6 El. & Bl. 77; 25 L. J., Q. B. 209; 2 Jur., N. S. 325.

The carrier also sent a parcel of coffee less than 500 lbs. weight, and afterwards, on the same day, another parcel of coffee, both consigned to himself, and for the same train. When the first was left, notice was given that he probably would send more; but it was not received on any special terms. The company charged for these as separate parcels:—Held, that the company was justified in so doing. *Id.*

**— Where no additional Risk.]**—A railway company was empowered to fix the sum to be charged by them in respect of the carriage of small parcels (not exceeding 100 lbs. each) as to them should seem proper, but that provision was not to extend to articles, matters, or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels, unconnected with parcels of a like nature which might be sent upon the railway at the same time. By a subsequent act it was provided, that the charges by that act authorized to be made for the carriage of goods by the company should be at all times charged equally to all persons, and after the same rate, in respect of all goods of a like description and conveyed on the same portion of the line; and that no reduction or advance should be made, either directly or indirectly, in favour of or against any particular company or person:—Held, that the company was restricted to a reasonable charge, and was not justified in making an increased charge in respect of the conveyance of packed parcels, the jury having negatived that they incurred any additional risk or expense in the carriage. *Piddington v. South-Eastern Railway Company*, 5 C. B., N. S. 111; 27 L. J., C. P. 295; 4 Jur., N. S. 953.

A railway company was empowered to charge certain tonnage rates or tolls for all articles, matters, and things carried or conveyed along the line, and to provide locomotive or other power for the carriage and conveyance of passengers, cattle, goods, &c., and to make reasonable charges for such carriage and conveyance, in addition to the tonnage rates. The company might, from time to time, make such orders for fixing, and by such orders fix the sum to be charged by them in respect of small parcels, not exceeding 1 cwt. each, as to them should seem proper. And the

aforesaid rates and tolls should, at all times, be charged equally, and after the same rate per ton, throughout the whole of the railway in respect of the same description of articles, matters, or things, and no reduction or advance in the rates and tolls should, either directly or indirectly, be made partially, or in favour of or against any particular person or company. The company framed a scale of charges for the carriage of parcels not exceeding 1 cwt. each with charges higher than the tonnage rates, but which included a reasonable charge for the use of their carriages and locomotive power. Under this scale, where a number of separate parcels (each weighing less than 1 cwt., but exceeding 1 cwt. if taken in the aggregate) was brought to the railway by the same person, and containing the same article, and all directed to the same person at their place of destination, the company charged tonnage or lower rate; but, if similar parcels were brought addressed to several different persons, they were charged the higher or parcels rate:—Held, that there was nothing to induce the court (or which ought to induce a jury) to infer that the charges so made were unreasonable, regard being had to the additional trouble incurred by the company. *Barendale v. Eastern Counties Railway Company*, 4 C. B., N. S. 63; 27 L. J., C. P. 137.

—**Evidence of Knowledge of Company—Former Procedure.**—S., whose trade was to pack parcels and forward them by railway in a single package, under protest, paid to the company a sum in excess of what they charged certain wholesale houses for carrying parcels containing enclosures of their customers, and sued to recover the excess; and at the trial adduced evidence (which was excepted to), upon which the judge told the jury they were at liberty to find that parcels had been carried by the company for other persons, viz., the wholesale houses, containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for S., and that the company knowingly and purposely charged S. more than other persons. S. obtained a verdict and judgment, and in the Exchequer Chamber the exceptions were overruled and judgment affirmed. The company continuing the same charges, S. issued a fresh writ of summons, indorsed with a claim for an injunction, and applied, upon affidavits stating facts substantially similar to the evidence adduced on the trial, for an injunction to restrain the company from charging him for the carriage of his goods otherwise than equally with all other persons, and after the same rate in respect of goods of the like description, under the like circumstances:—Held, that this was not a case in which the court could enjoin under 17 & 18 Vict. c. 125, ss. 79, 82. *Sutton v. South-Eastern Railway Company*, 1 L. R., Ex. 33; 35 L. J., Ex. 38; 4 H. & C. 325. See *S. C.*, in H. L., 4 L. R., H. L. 226; 38 L. J., Ex. 177; 18 W. R. 92.

—**Sending Goods with Notice of Terms.**—A railway company, who carried certain bulky commodities at a certain rate per ton, gave notice to the defendant that they would only carry such commodities on certain terms, that is, at a certain minimum rate per truck (capable of carrying three tons), whether filled or not, the rate per ton being far less than the ordinary rate. The defendant, although objecting to these

terms, yet without any departure by the company therefrom, continued to send such commodities, sometimes in quantities of less than three tons, and claimed to be charged at the minimum rate per ton for the quantities actually carried:—Held, that he was not entitled to claim to be so charged, and was bound to pay at the rate charged per truck; that there was nothing unreasonable therein, and that even if there were the remedy was under 17 & 18 Vict. c. 31. *Great Western Railway Company v. Toornier*, 11 W. R. 464.

—**Where no Collection or Delivery—Recovery of Overcharge.**—A railway company cannot, in addition to the charges for the carriage of goods between the place where the goods are handed to them and the place where they are ordered to be delivered, charge for collection and delivery, where they have not, in fact, collected or delivered the goods. Such charges, if imposed, and paid under protest, may be recovered back. *Garton v. Bristol and Exeter Railway Company*, 1 B. & S. 112; 30 L. J., Q. B. 273; 7 Jur., N. S. 1234; 9 W. R. 734.

A railway company was empowered to charge for the carriage of parcels. By a subsequent act, amending the former act, the company was authorized to charge at so much per ton per mile:—Held, that this provision overrode the provisions of the former act, so far as concerned parcels exceeding 500 lbs. in weight, but not as to parcels below that weight. *Ib.*

The company obliged parties to pay more than the maximum amount allowed by the latter act:—Held, that the excess paid on all parcels exceeding 500 lbs. in weight might be recovered back by such parties. *Ib.*

A railway company, being common carriers from B. to E., and also from B. to B., charged the plaintiffs, who employed them to carry goods between those places, higher rates than were charged to other persons:—Held, that the sums paid in excess of the sums charged to other people could not be recovered by the plaintiffs on the ground simply that the charges made by the company were unequal. *Ib.*

The company sometimes intentionally and sometimes by mistake charged the plaintiff heavier rates than were set out in the bills published by them:—Held, that he could recover the excess paid. *Ib.* And see preceding case in H. L.

—**Charge for Collection—Receipt at Station.**—

A railway company was entitled to charge for goods which they might carry along their line such sum as they should think expedient, not exceeding the sum limited by former acts, and it was provided that in whatever way the charges were made they should be made equally to all persons; and that it should be lawful for the company to enter into such arrangements as they should think fit with reference to the collection and delivery of goods, and upon such terms as the company and such parties respectively might be willing to accept and abide by. By a subsequent act the company might demand for the carriage of small parcels, i.e. parcels not exceeding 500 lbs. weight each, any sum which they might think fit. A railway company, having been in the habit of allowing a rebate in their charge for the conveyance of goods along their line, when the goods were brought to, or received at, their stations, issued a notice, that

for parcels under 500 lbs. weight they would no longer make the usual allowance, and they then charged the through rates if the goods had been collected and delivered by themselves:—Held, that the company was not entitled to charge parties who brought their goods to, and received them at, the different stations, the same rate that was charged to others not so bringing and receiving their goods. *Barendale v. Great Western Railway Company*, 14 C. B., N. S. 1; 32 L. J., C. P. 225; 9 Jur., N. S. 1174; 8 L. T. 833. Affirmed on appeal, 16 C. B., N. S. 137; 33 L. J., C. P. 197; 10 Jur., N. S. 496; 9 L. T. 814; 12 W. R. 602—Ex. Ch.

A railway company has no right to impose a charge for the conveyance of goods to or from their station where the customer does not require such service to be performed by them. *Garton v. Bristol and Exeter Railway Company*, 6 C. B., N. S. 639; 28 L. J., C. P. 306; 5 Jur., N. S. 1313.

The general rate of charge for the carriage of goods from Bristol to Bridgewater, and vice versa, was 6s. 8d. per ton for first class; 8s. 4d. for second class; 12s. 6d. per ton for third class; and 16s. 8d. per ton for fourth class goods. The company had special contracts with certain grocers and ironmongers at Bridgewater, under which they agreed to carry all their grocery and ironmongery goods at a uniform rate of 6s. per ton, including delivery:—Held, an undue preference, it not appearing that this diminished charge was justified by any special circumstances of advantage to the company, or to meet competition for another railway or any other mode of carriage. *Id.*

A railway company was required to carry, as common carriers for hire, and to afford to all persons conveying or sending goods upon their railway every reasonable convenience and facility for loading and unloading goods. The act authorized the company for carriage of goods, to demand a toll not exceeding 3d. per ton per mile:—Held, that the company was not entitled to charge an additional sum for services performed, accommodation afforded and expenses and risk incurred in and about the receiving, loading, unloading and delivering the goods. *Pegler v. Monmouthshire Railway and Canal Company*, 6 H. & N. 644; 39 L. J., Ex. 249; 4 L. T. 331; 9 W. R. 597.

The Grand Junction Railway Company became carriers on the London and Birmingham lines, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester packs" were charged 3s. 3d. per cwt., or 65s. per ton. At the foot of this list was a notice, that goods were brought to the station at Camden Town without extra charge, and that there was no charge for booking or delivery in London. The company made an agreement with C. and H., that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10s. per ton out of the entire charge of 65s. per ton:—Held, that the charge of 65s. per ton when made to any other persons who were ready to receive their goods at the station at Camden Town, was both unreasonable and unequal. *Pickford v. Grand Junction Railway Company*, 10 M. & W. 399; 3 Railw. Cas. 193.

**Beyond Limit of Line—Different Consignees—**

**Packed Parcels.**—A railway company, bound by act of parliament to take the same rates and tolls from all persons alike under the same or similar circumstances, charged a tonnage rate upon goods over 1 cwt., and a higher rate for articles under that weight. When several parcels, each under 1 cwt., were delivered to the company by one person in a single consignment, at one and the same time, and addressed to the same consignee, the company charged a tonnage rate upon the aggregate weight. Common carriers sent by the company's railway large consignments of goods directed to themselves as consignees, each consignment consisting of several packages, many of them having the names and addresses of the persons to whom the carriers intended to deliver them. The company charged the carriers for each package contained in each consignment according to the weight of the package:—Held, an inequality of charge, and that the carriers were entitled to recover back the excess. *Barendale v. London and South-Western Railway Company*, 1 L. R., Ex. 137; 35 L. J., Ex. 108; 12 Jur., N. S. 274; 14 L. T. 26; 14 W. R. 458; 4 H. & C. 130.

B. carried goods from London to the Isle of Wight, using the company's railway for the carriage to Southampton. The company, whose railway did not extend beyond Southampton, also carried goods from London to the Isle of Wight. The company charged B. for the carriage of goods from London to Southampton a higher rate in proportion than, under a contract to carry from London to the Isle of Wight, they charged their customers for the carriage between London and Southampton; but for the carriage between the two latter places they charged B. and the rest of the public alike:—Held, no inequality of charge. *Id.*

**Abroad.**—A railway company incorporated for the conveyance of passengers and goods from London to Folkestone under acts of parliament which prohibited them from making unequal charges, obtained another act, enabling them to establish a communication by steam vessels with Boulogne, which act contained no provision as to equality of rates for the carriage of goods. There was nothing in the law of France which disabled the company, as public carriers, from making such contracts for that purpose as they might think most for their own interest. The company, by their tariff, charged certain rates for small parcels, with a double charge for packed parcels:—Held, that, so far as regarded the contract for the carriage of such parcels from Boulogne to London, there was nothing illegal in this increased charge. *Branley v. South-Eastern Railway Company*, 12 C. B., N. S. 63; 31 L. J., C. P. 286; 9 Jur., N. S. 329; 6 L. T. 468.

**Dangerous Goods.**—A charge of 50l. per cent., in addition to the usual rate for the highest charged description of goods, made to carriers for packed parcels, which contain articles of a dangerous character, is an unequal charge. *Bristol and Exeter Railway Company v. Garton*, 4 H. & N. 33; 28 L. J., Ex. 169; 5 Jur., N. S. 1172—Ex. Ch.

**Unequal and Unlike.**—By their act, a railway company was to take rates and tolls from all persons alike under the same or similar circum-

stances. Their ordinary price for carrying a parcel from L. to B. was  $\frac{1}{4}$ d. per lb. They refused to carry a parcel for plaintiff from L. to B. unless he paid 1d. per lb., which he did:—Held, that he might recover back the excess. *Crouch v. London and North-Western Railway Company*, 2 C. & K. 789.

Though limited to a reasonable charge, there is no common-law obligation on a carrier to charge equal rates of carriage to all his customers. *Barendse v. Eastern Counties Railway Company*, 4 C. B., N. S. 63; 27 L. J., C. P. 137.

**Allowance to Class—Refusal to Individual.]—**A railway company was authorized to make rates and tolls for goods and passengers conveyed by others than the company along the railway, and which should be reasonable and equal to all persons; and by a subsequent act the charges for the carriage of any passengers, goods, &c., to be conveyed by the company, or for the use of any power supplied by them, should be at all times charged equally to all persons, and after the same rate per mile, or per ton per mile, in respect of all passengers and of all goods, of a like description, to be conveyed by a like carriage on the same portion of the line, and no reduction or advance in any charge for conveyance, or for the use of any locomotive power to be supplied by the company, should be made either directly or indirectly in favour of or against any particular company or persons travelling upon or using the same portions of the railway. The company always charged the public for the carriage of goods at a rate specified, and for such charge performed the duties of the loading, &c., of the goods; but, by a general arrangement with carriers, the latter performed those duties, and were allowed by the company a deduction of 10l. per cent. from the charges made to the public (this being a reasonable equivalent); the company having, in consequence of a disagreement, refused to make this deduction to a carrier willing to perform, and in fact performing, all the duties performed by the other carriers:—Held, that they were not justified in their refusal. *Parker v. Great Western Railway Company*, 7 M. & G. 253; 7 Scott, N. R. 835; 13 L. J., C. P. 105; 8 Jur. 194.

The company also made an allowance to other carriers for the collection and delivery of parcels:—Held, that they were bound to make the same allowance to a carrier, who also collected for himself. *Id.*

If any of the public, as a consignor (not being a carrier), brought several packages of goods, addressed to different consignees, and paid the charge; or if several of the public brought several packages addressed to one consignee (not being a carrier), who paid the carriage, the company charged upon the weight of the aggregate only; but if, under the same circumstances, a carrier acted as consignor or consignee of goods, the company charged separately for each package:—Held, that the company was not justified in making this distinction between carriers and other members of the public. *Id.*

The company made an allowance to carriers in cases where they disclosed the names of the consignors and consignees of the goods:—Held, that they were not justified in withholding from a carrier, who refused to make such disclosure, any allowance to which he would otherwise have been entitled. *Id.*

**Overcharge to Carrier.]—**A special act of a railway company empowered the company to charge for the carriage of small parcels any sum which the company might think fit; and by 8 & 9 Vict. c. 20, s. 90, which was incorporated with the special act, after reciting that it was expedient that the company should be enabled to vary the tolls upon the railway, so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, empowered the company to vary tolls, provided that all such tolls be at all times charged equally to all persons, and after the same rate in respect of all passengers and of all goods conveyed or propelled by a like carriage or engine passing over only the same portion of the line, under the same circumstances; and no reduction or advance in any such tolls should be made directly or indirectly in favour of or against any particular company or person travelling upon or using the railway:—Held, that the company was bound to charge the public alike, and therefore the fact of a party using the line being a common carrier did not justify the company in charging him more than the rest of the public, although the company might charge for packed parcels at a higher rate than an ordinary package. *Crouch v. Great Northern Railway Company*, 9 Ex. 556; 7 Railw. Cas. 787; 23 L. J., Ex. 148.

A railway company agreed with agents to collect and deliver goods for them, charging the public a small charge for doing so, in addition to the charge for conveyance on the railway; to those agents the company allowed in addition a sum out of the receipts of the company. A carrier who collected and delivered his own parcels, but was charged as highly as the rest of the public, complained that in effect this arrangement caused his goods to be charged higher than those sent through the agents, and that the difference was an overcharge. By their act the company was to charge all persons equally for conveyance, but there was a proviso that they might make agreements as to the collection and delivery of merchandize; and there was an appeal given by the act to the sessions, by any one prejudiced against any arrangement giving special facilities to others:—Held, that the agreement with the agents, against which there had been no appeal, did not render the charges to the carrier overcharges. *Parker v. Great Western Railway Company*, 6 El. & Bl. 77; 25 L. J., Q. B. 209; 2 Jur., N. S. 325.

A railway company closed its goods station at B. at 5.15 P.M. against all persons except its agent W., who had a receiving-house about a mile distant from the station, and from whom the company received goods up to 8 P.M. For the conveyance of goods from the receiving-house to the station, W. charged 1s. 8d. per ton on all goods above 3 cwt. and 3d. for each package below that weight:—Held, upon the complaint of a rival carrier, that the refusal to receive goods sent by him to the station at 5.15, unless sent through the receiving-house of W., was imposing upon him an undue prejudice, although it was sworn on the part of the company that the goods so brought to the station by W. came there properly classified, weighed, and prepared for loading. *Garton v. Bristol and Exeter Railway Company*, 6 C. B., N. S. 633; 28 L. J., C. P. 306; 5 Jur., N. S. 1313.

A railway company is justified in carrying goods for one person at a less rate than that at which the company carries the same description of goods for another, if there are circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter. *Oxlade v. North-Eastern Railway Company*, 1 O. B., N. S. 454; 26 L. J., C. P. 129; 3 Jur., N. S. 637.

**Arrangement with Coal Owners to meet Demand—Coal Merchants.**—A railway company, in order to prevent the obstruction of their railway, which would be caused by an unlimited coal traffic, ascertained the probable consumption of coal in the neighbourhood of each of their stations, and the sort required, and made arrangements with the collieries supplying the particular sort of coal for the requisite supply; they appointed depôt agents to manage the sale of the coal, who from time to time ordered the quantity wanted from the collieries, and caused the waggons wanted for the carriage to be sent up. All the depôts were in the hands of these agents, who accounted to the collieries for the proceeds of the sale. No coal merchant was dealt with in this way, but only coal owners; but each dealer was treated alike, and as one of the public. On a motion by a coal merchant to enjoin the company to afford him the same facilities for receiving and forwarding his coals as to those who consigned their coals to the company:—Held, that the arrangements of the company were proper, and not such as gave or caused any unreasonable preference or disadvantage. *1b*.

A northern railway company, from a desire to introduce the northern coke into Staffordshire, made special agreements with certain merchants for the carriage of coal and coke at a lower rate than their ordinary charge; there being nothing to shew that the pecuniary interests of the company were affected:—Held, that the lowering of the rate for this traffic was giving it an undue preference. *1b*.

In dealing with the first branch of the section of the statute which prohibits railway companies from giving any undue or unreasonable preference or advantage to or in favour of any particular person, or any particular description of traffic, or subjecting any particular person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, the fair interests of the company are to be taken into the account. *Ransome v. Eastern Counties Railway Company*, *In re*, 1 O. B., N. S. 437; 26 L. J., C. P. 91; 3 Jur., N. S. 217.

A company made an agreement with A. to carry for him coals during three years, from Peterborough to various places on their lines of railway, at certain rates. B., a coal merchant at Ipswich, sent coals (which had been brought to that port by sea) to various places on the same lines of railway, and the company charged him a much larger sum per ton in proportion to the distance over which his coals were carried than the company charged to A.; the professed object of the difference being to enable A. (whose coal came to Peterborough by railway) to compete in the coal trade of the district with B., who had the advantage of having his coals brought to Ipswich by sea:—Held, that this was giving undue preference to A. *1b*.

**Advantages of Proximity to Railway.**—Car-

rying coals from a colliery along a railway at a lower rate of charges than coals from other coal pits situate in the same locality, in consequence of a threat from the owner of the colliery to construct another railway, by which the traffic would have been diverted if the railway company had not consented to carry at such lower rate, is an undue preference by the railway company. *Harrison v. Cockermouth and Workington Railway Company*, 3 C. B., N. S. 693; 27 L. J., C. P. 169; 4 Jur., N. S. 239.

Every one has a right to the natural advantages which have been acquired by the proximity of his land to a railway, and a railway company is not justified in depriving him of it by allowing to another not so favourably situated the expense which the latter has incurred in connecting his place with the railway, in the reduced charge at which they carry his goods on their railway. *1b*.

If a railway company is in the habit of carrying coals along the line, belonging to various owners, who compete to supply the population along the line, and a tariff of charges is published by the company, and approved by the Court of Common Pleas, by which they fix lower rates to be paid for the carriage of all coal consigned to places along the line, which are distributed into districts, in quantities of 200 tons at a time, then if such population is supplied with inland coal from P., and with seaborne coal from I., which is situate in No. 8 district, it is no undue preference to the P. owners, and no undue disadvantage to the I. owners, if the company, starting from S. with coal trains of 200 tons each, are in the habit of breaking off portions of those trains at C., in their progress to the No. 8 district, leaving such portions of trains at C., whilst the residue goes on to its original destination, but the parts left at C. being always sent on by detachments of fewer than 200 tons each, and charging the lower rates for such detachments. *Ransome v. Eastern Counties Railway Company*, 8 C. B., N. S. 709; 29 L. J., C. P. 329; 7 Jur., N. S. 99; 2 L. T. 376; 8 W. R. 527.

**Small and Large Consignments.**—A railway company had been in the habit of unloading goods coming by railway from the Southampton docks, consigned to carriers in London, out of their trucks, and of placing them (by their servants) in or conveniently near to the waggons of the consignees, without extra charge. This practice they discontinued, refusing to allow their servants to unload the trucks without an extra charge for such service, except in the case of Pickford & Co., whose goods they continued to unload as before, the smallness of their quantity and the fact of their being carried intermixed with the company's own traffic, rendering it (as the company alleged) more convenient to themselves to do so. C., however, another carrier, was denied the aid of the company's servants in the unloading of his goods of the same description, and coming from the same place, the company alleging that the same reason did not apply to his goods as to Pickford & Co.'s, inasmuch as the former came in large quantities and in separate trucks. The court refused to make absolute a rule enjoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C., by placing the same in or adjacent to his waggons, holding the demand to be too large; but the court intimated that if C.'s complaint had been

confined to the company's giving an advantage to Pickford & Co. in the unloading of their goods, which they withheld from him, C. might have been entitled to relief. *Cooper v. South-Western Railway Company*, 4 C. B. 738; 27 L. J., C. P. 324.

It is competent to a railway company to enter into special agreements, whereby advantages may be secured to individuals in the carriage of goods upon the railway where it is made clearly to appear that in entering into such agreements the company has only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them is adequate, and the company is willing to afford the same facilities to all others upon the same terms. *Nicholson v. Great Western Railway Company*, 4 C. B., N. S. 366; 28 L. J., C. P. 89; 4 Jur., N. S. 1187.

The 17 & 18 Vict. c. 31, s. 2, is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full-train loads at regular periods, provided the real object of the company is to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. *Ib.*

**Consideration—Use of Branch Lines.**—A preference given by a railway company to a customer who engaged to employ other lines of the company for traffic, distinct from and unconnected with that in respect of which such preference was given, is an undue preference. *Barendale v. Great Western Railway Company*, 5 C. B., N. S. 309; 28 L. J., C. P. 69; 4 Jur., N. S. 1241.

**Convenience of Company and Wants of Neighbourhood.**—A railway company established a system of carrying coals according to assigned districts, comprising certain places on their lines and branches, carrying them within those several districts at certain lower rates for quantities not less than a train load of 200 tons. The complainants, who were coal dealers at Ipswich, also carried on that business at N. S., E. T., and B., also at M. and D., which are on another branch line communicating with that first mentioned, and also at H., which is another distinct branch. These districts were so adjusted that the places where the complainants dealt were distributed into three of them, so that in order to take advantage of the reduced rates the complainants would have to send from Ipswich three full train loads, which was a larger quantity than they could profitably send to those districts, and thus they sustained great injury; whereas, the rival dealers at Peterborough, by reason of one of the assigned districts embracing seven of those places at which the complainants dealt, were enabled to send their coals in such quantities as to avail themselves of the reduction. It being sworn on the part of the company that these districts were adjusted, not with a view to give an undue preference to the one set of dealers over the other, but solely with regard to their own convenience and the wants of the neighbourhood:—Held, that the complaint was not sustained. *Ransome v. Eastern Counties Railway Company*, 4 C. B., N. S. 135; 27 L. J., C. P. 166; 4 Jur., N. S. 284.

The company made a scale of charges for the carriage of coals from Peterborough and Ipswich

respectively to various places, the effect of which was to diminish the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expense of carriage) in favour of the latter a certain portion of the distance between Peterborough and those places:—Held, an undue preference of the Peterborough dealers over those of Ipswich. *Ib.*

#### b. In Respect of Persons.

**Trespass on Approaches to Station—Remedies.**—Where a party is prejudiced within the meaning of 17 & 18 Vict. c. 31, s. 2, by a preference given to some other person, his only remedy is by appeal to the railway commissioners. *Holt v. Digby*, 27 W. R. 884.

If a railway company licenses one man to ply with carriage for passengers within their station-yard, any person not so licensed may not do so, and if in attempting to do so he commits a trespass within the meaning of s. 16 of 3 & 4 Vict. c. 97, the justices cannot acquit him on the ground that such licence is, in their opinion, an undue preference, and, therefore, contrary to 17 & 18 Vict. c. 31, s. 2. *Ib.*

A railway company was possessed of a thoroughfare which had the appearance of a public street. The company allowed certain cabs to stand in the thoroughfare upon payment of a weekly sum by the drivers. A person, not being one of the drivers who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company to do so:—Held, that he was a wilful trespasser within 3 & 4 Vict. c. 97, s. 16. *Fowler v. Steadman*, 8 L. R., Q. B. 65; 42 L. J., M. C. 3; 26 L. T. 395.

G. kept his van standing for twenty minutes outside a public-house, during part of which time he was refreshing himself within. The ground upon which the van stood was part of the premises of a railway company, whose station was close by, but the only access to the public-house was across this ground, and the customers frequently went there with vehicles. G. was charged, under 3 & 4 Vict. c. 97, s. 16, with wilfully trespassing on railway premises, but the justices considered his claim of right to use the ground as a customer of the public-house to be *bonâ fide*, and their jurisdiction to be ousted thereby:—Held, that as there might be a legal foundation for this claim of right, the justices came to a proper conclusion. *Wilkinson v. Gaffin*, 33 L. T. 824.

An omnibus proprietor who carries passengers and luggage, for hire, to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station-yard. *Barker v. Midland Railway Company*, 18 C. B. 46; 25 L. J., C. P. 184.

A railway company made arrangements, at one of their stations, with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodation for all passengers by any of their trains to and from K., and allowed A. the exclusive privilege of driving his vehicle into the station-yard for the purpose of taking up and setting down passengers at the door of the booking-office:—Held, that in the absence of special circumstances shewing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant

the like facilities to another, who also brought passengers from K. as well as from other places beyond, was a breach of the prohibition against the granting of undue and unreasonable preferences. *Marriott, In re*, 1 C. B., N. S. 499; 26 L. J., C. P. 154; 3 Jur., N. S. 493.

A railway company made arrangements with a cab proprietor, whereby the company gave him the exclusive right to have his cabs standing at their station, and plying there. Another cab proprietor, who had been refused leave for his cabs to stand and ply at the station, applied for an injunction, but the injunction was refused, on the ground that no inconvenience to the public was made out. *Beadell v. Eastern Counties Railway Company*, 2 C. B., N. S. 509; 26 L. J., C. P. 250.

A railway company granted exclusive right to a limited number of fly-proprietors to ply for hire within their station. The court refused to grant a writ of injunction against the company at the instance of a fly-proprietor who was excluded from participation in this advantage, although it was sworn by the complainant, and by several other fly-proprietors who were likewise excluded, that occasional delay and inconvenience resulted to the public from the course pursued. *Painter, Ex parte*, 2 C. B., N. S. 702.

**Reasonableness of Fares.**—The court refused to grant an injunction on the complaint of a company having a branch on a trunk line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainants' terminus than they charged for the conveyance of passengers to the terminus of another branch line (in which they themselves were interested) extending over the same number of miles. *Caterham Railway Company, In re*, 1 C. B., N. S. 410; 26 L. J., C. P. 161.

To constitute an undue or unreasonable preference, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the same line, or the same portion of the line. *Ib.*

To induce the court to interfere on a complaint by the proprietors of a branch line, that a sufficient number of trains of the main line does not stop at the junction, or stop at convenient times, it must be distinctly shewn that sufficient accommodation is not afforded to meet the fair requirements of the public. *Ib.*

It is no ground of complaint that the company working the main line refuses to grant third-class return tickets to the branch line, if it appears that no such tickets are issued to other branches similarly situated. *Ib.*

But, semble, it is a good ground of complaint that there is no place of shelter provided at the junction, for passengers on the branch line waiting the arrival of trains; the public being entitled in this respect to reasonable accommodation. *Ib.*

To justify the interference of the court to enforce the running of through trains on a continuous line of railways, it must be shewn that public convenience requires it, and that it can reasonably be done. *Barret, In re*, 1 C. B., N. S. 423; 26 L. J., C. P. 83.

The court will not interfere, at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route, no additional cost, or serious loss of time, being thereby

incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation. *Ib.*

The court refused to grant a rule for an injunction against the Eastern Counties Railway Company to compel them to issue season tickets between Colchester and London, on the same terms as they issued them between Harwich and London, upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. *Jones v. Eastern Counties Railway Company*, 3 C. B., N. S. 718.

## VI. DELIVERY OF GOODS BY CARRIER.

### 1. LIABILITY FOR SAFE DELIVERY.

**Duty Generally.**—A carrier is bound to deliver the goods, if it is the general course of his trade so to do. *Golden v. Manning*, 2 W. Bl. 916; 3 Wils. 429.

So, he is bound to deliver a parcel at the place to which it is directed. *Duff v. Budd*, 6 Moore, 469; 3 B. & B. 177.

A carrier is bound to deliver goods intrusted to him, at the place to which they are addressed; and if he delivers them elsewhere, trover lies against him. *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476.

**On Acceptance.**—If a parcel is given to a waggoner for hire to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel is lost. *Butler v. Basing*, 2 C. & P. 613.

In proving a delivery of goods by a carrier, though it is not necessary to give evidence of a delivery into the hands of the consignee or his servants, it is necessary to shew an actual delivery of the goods into their possession. *Evans v. Bristol and Exeter Railway Company*, 10 W. R. 559.

Where, in an action for the loss of a parcel, the shopman of the consignee proved that he did not know of the delivery of the parcel, and believed that it could not have been delivered without his knowledge:—Held, to be *prima facie* evidence of non-delivery, or it is, at all events, sufficient to call on the plaintiff to prove a delivery to the carrier. *Griffiths v. Lee*, 1 C. & P. 110.

**Right to know Contents.**—A party receiving a parcel to be carried ought to inquire as to its contents, and if nothing is done by the party delivering it to deceive him, or to give the transaction a false complexion, he is answerable for the parcel. *Walker v. Jackson*, 10 M. & W. 16; 12 L. J., Ex. 165.

A carrier has no general right in all cases to inquire and be informed of the contents of a parcel tendered to him to be carried. *Crouch v. London and North-Western Railway Company*, 14 C. B. 255; Railw. Cas. 717; 2 C. L. R. 188; 23 L. J., C. P. 73; 18 Jur. 148.

**Where Goods Destroyed by Fire—Carrier ceasing to be Liable as such and becoming Warehouseman.**—A package of goods was delivered to the Great Western Railway Company, and another to the London and North-Western Railway Company for carriage to the station of the



former company at W., both packages being addressed to the plaintiff, "to be left till called for." One of the packages arrived at W. on the 24th of March, the other on the 25th. On their arrival they were placed in the station warehouse to await their being called for. The defendants did not know the address of the plaintiff, who travelled about the country with drapery goods. The goods had not been called for when, on the morning of the 27th of March, a fire having accidentally broken out, the warehouse was burned down and the goods were consumed by fire. The plaintiff on the same day after the fire called for the goods, and, not receiving them, brought actions against the defendant companies as common carriers to recover their value:—Held, that after the interval of time which the plaintiff had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen of them, and consequently that the actions were not maintainable in the absence of any evidence of negligence on the part of the defendants. *Chapman v. Great Western Railway Company*, 5 Q. B. D. 278; 49 L. J., Q. B. 420; 42 L. T. 252; 28 W. R. 566; 44 J. P. 363.

A., B., C. and D., being in partnership as carriers, entered into an agreement with S. & Co. to carry goods for them from London to Frome, where they should be deposited in the warehouse of A., the resident partner, till S. & Co. should be ready to receive them into their own. The goods, having been forwarded, were, after they had been deposited in A.'s warehouse, destroyed there by fire:—Held, that the liability of A., B., C. and D., as carriers, ceased on the arrival of the goods at Frome, and that when they were deposited in A.'s warehouse, they could only be considered as warehousemen. *Widd, In re*, 2 Moore, 500; 8 Taunt. 443.

A common carrier between A. and B. (employed to carry goods from A. to B. to be forwarded to C.) carried them to B., and there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them:—Held, that he was not answerable for the loss. *Garride v. Trent Navigation*, 4 T. R. 581.

If common carriers from A. to B. charge and receive for cartage of goods to the consignor's house at B. from a warehouse there, where they usually unload, but which does not belong to them, they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance was known to the consignee. *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389; 1 Esp. 36.

In a declaration against a carrier, a count averred the contract to be to carry goods from D. to L., and to take care of them on landing them at a wharf there, and to deliver them to the plaintiff. A plea that he did take care of the goods at the wharf till they were destroyed by fire, without his fault, is a good plea to the count. *Bourne v. Gatliff*, 11 C. & F. 45; 8 Scott, N. R. 604.

**Right to Insurance Moneys.**—Where a railway company effected an insurance against fire on goods "their own, and in trust as carriers," in a certain warehouse, and the goods were burnt:—Held, in an action on the policy, that, to the amount named in the policy, the whole value of

the goods in the warehouse in their possession as carriers was insured by it, and not merely their interest as carriers; that they were entitled to recover the whole value of such goods destroyed by fire in the warehouse; although, as the value of such goods exceeded 10l., and the owners had not declared their value, the Carriers Act protected the company. *London and North-Western Railway Company v. Glyn*, 1 El. & El. 652.

Held, further, that the company would be trustees for the owners of the goods of the amount thus recovered. *Id.*

**— Goods Lost—Bailees for Reward.**—Goods were forwarded by a carrier's waggon to A., in London, and delivered by the carrier to him. A. sent them back to the carrier's warehouse, with directions that they should remain there to await his orders. They remained there accordingly for upwards of a year, when they were lost out of the warehouse. A printed bill issued by the carrier, and sent to A. with the goods, stated that any goods that should remain three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, would be sold to defray the carriage or other charges thereon, or the general lien, as the case might be, together with warehouse rent and expenses. The carrier had often before carried goods to A., but no goods of his had before lain in the carrier's warehouse:—Held, that the carrier was not a mere gratuitous bailee of the goods at the time of their loss; and therefore, that A. might recover against him the value of the goods, on a declaration, alleging that they were delivered to the defendant to be safely kept for the plaintiff, for reasonable compensation and reward to be therefore paid by him. *Cairns v. Robins*, 8 M. & W. 258.

A carrier received hops for the purpose of being carried for hire, and kept them in a warehouse for thirteen months; for that time he had warehouses which before had belonged to another, but had not made any charge for warehousing:—Held, that he was not a gratuitous bailee. *White v. Humphrey*, 11 Q. B. 43; 12 Jur. 417.

**— When Carriage at End.**—Cattle delivered to a railway company arrived in London at noon on Sunday. If the train had kept its time it would have arrived at seven in the morning. As the police regulations prevented the cattle being driven through the streets till midnight, they were placed in pens at the station by the servants of the company, assisted by a man who was employed by the owner. After midnight, when his drover went to fetch them away, he found that two were dead; and the servants of the company would not let him take the rest away unless he signed a receipt for the whole number. Afterwards the owner came himself and took them away; but, in the meantime, the Monday's market was lost:—Held, by Bramwell, B., and Channell, B., that the liability of the company as carriers was over before the damage occurred. *Contra* by Martin, B., that, at the time of the damage, there had been no delivery of the cattle to the owner, and that the company was responsible for the consequences of their servant's refusal to deliver. *Shepherd v. Bristol and Exeter Railway Company*, 3 L. R., Ex. 189; 37 L. J., Ex. 113; 18 L. T. 528; 16 W. R. 982.

*And see* CARRIAGE OF ANIMALS, *ubi sup.*

**Goods improperly Packed.**—B., intending to send furniture by railway, wrote for rates, and subsequently whether the rates included packing and unpacking; the rates were forwarded with an extract of the notices and conditions relating to the terms on which goods could be forwarded, one of which was that the railway company would not be responsible for improper packing. There was also a notice that no officer of the company had power to dispense with the conditions. The company declined the packing and unpacking. When their carman, in pursuance of instructions from B., arrived to fetch away the furniture it was found not to be packed (although there were materials at hand for the purpose); and, as the carman declined to undertake the packing himself, it was conveyed away unprotected, and suffered damage during transit. It was found as a fact that the damage was occasioned by improper packing:—Held, that it was B.'s duty to pack the furniture, and that, as the damage was occasioned by his neglect to do so, he was not entitled to recover compensation from the railway company. *Barbour v. South-Eastern Railway*, 34 L. T. 67.

If a cargo weighing a certain weight is delivered to a carrier to be carried, and when the cargo arrives at its destination the weight is deficient, this is evidence from which a jury may infer negligence in the carrier; and if the deficiency did not arise from the negligence of the carrier, it is incumbent on him to shew that. *Hawkes v. Smith, Car. & M.* 72.

A carrier is not responsible for leakage arising from an imperfection in the bung of a cask intrusted to him to be carried, without any negligence or omission on his part. *Hudson v. Bazendale*, 2 H. & N. 575; 27 L. J., Ex. 93.

In an action against a carrier for damage to goods, it is enough to prove the condition and value of the goods when delivered to him and when received by the consignee, and if damaged in the hands of the carrier he is entitled to recover; and the fact that the damage was partly caused by bad packing goes only to the amount of damage. *Higginbotham v. Great Northern Railway Company*, 2 F. & F. 796; 10 W. R. 358.

In an action against carriers for injury to casks of oil, alleged by them to have arisen from defects in the casks, it was left to the jury to say whether it arose from such defects, and whether, even if it did, the carriers knew or ought to have known thereof, and had acted negligently in sending them on in that state. *Cox v. London and North-Western Railway Company*, 3 F. & F. 77.

**Necessary Delay.**—In the absence of a contract to deliver at a particular time, the duty of a carrier is to deliver goods intrusted to him at a reasonable time, looking at all the circumstances of the case; and since his first duty is to carry safely, he is justified in incurring delay and delivering after the usual time when delay is necessary to secure the safe carriage. *Great Northern Railway Company v. Taylor*, 1 L. R., C. P. 385; 35 L. J., C. P. 210; 12 Jur., N. S. 372; 14 L. T. 363; 14 W. R. 639; 1 H. & R. 471.

Where a railway company, in exercise of a statutory right, runs its trains over the line of another railway company, and causes an obstruction, and thereby the latter company is prevented from delivering goods within the ordinary time,

such company will, nevertheless, have fulfilled a contract to deliver those goods within a reasonable time if it is proved that the company has used every exertion to clear the line, and has delivered as soon as was possible under the circumstances. *Id.*

By the common law carriers are bound to deliver and are responsible for the loss of goods, unless they are prevented from delivering them by the act of God or the Queen's enemies, or by some act contributing to the loss on the part of the consignors. *McKean v. McIver*, 18 L. T. 410.

**Damages resulting from Misdelivery.**—A statement of claim alleged that the defendants were common carriers; that C. and B. were in the habit of sending empty casks by defendants' railway to plaintiff, which plaintiff filled with ketchup and returned; that defendants, by their agents and servants, knew the purpose for which the casks were delivered to plaintiff; that defendants negligently and improperly delivered to plaintiff, as C. and B.'s casks, certain other casks not belonging to C. and B., and which had contained turpentine; that plaintiff, not knowing, or having reasonable means of knowing, that the empty casks delivered were not C. and B.'s, filled them with ketchup, which was spoiled:—Held, on demurrer, that the statement of claim shewed no duty on the part of the defendants which could give rise to a cause of action, and therefore they were not liable. *Cunnington v. Great Northern Railway Company*, 49 L. T. 392—C. A.

**Addresses.**—H., agent for obtaining orders for the plaintiffs' goods in Glasgow, directed them to send parcels of goods to C. & Co. and T. & Co. respectively, giving the addresses of those firms in Glasgow. The defendants, in accordance with the plaintiffs' instructions, carried the goods to Glasgow, and there delivered them (having observed all the rules of their ordinary course of business) at the addresses written on the parcels. H., who had indorsed delivery orders in the names of the firms, received the parcels at both addresses and made away with them. The name of C. & Co. was found put up at the one address, but there was no such name or firm as T. & Co. at the other:—Held, that the defendants having, in following the plaintiffs' directions, pursued bonâ fide their usual course of business, were not liable for misdelivery in the case of either parcel. *McKean v. McIver*, 6 L. R., Ex. 36; 40 L. J., Ex. 30; 24 L. T. 559.

**Liability for Loss or Detention excluded, except for Wilful Misconduct—Detention after Transit completed.**—The defendants contracted to convey certain cattle belonging to the plaintiff from W. to G. at the "owner's risk rate," by which, in consideration of a reduced rate, they were to be relieved of all liability in respect of any loss, detention or injury to the cattle in the receiving or forwarding, except that arising from the wilful misconduct of their servants. The carriage was prepaid, but through the carelessness of the defendants' servants at W. that fact was not communicated to the servants at G., who in consequence refused to deliver the cattle to the consignee. The cattle were detained for two days before the mistake was discovered, whereby damage by exposure was occasioned. In an

action for such detention:—Held, that the protection afforded by the contract was confined to the case of loss, injury or detention during the course of receiving, forwarding or delivery of the cattle, and that the refusal to deliver did not come within the meaning of detention so used, and that consequently the defendants were liable apart from the question of wilful misconduct. *Gordon v. Great Western Railway Company*, 8 Q. B. D. 44; 51 L. J., Q. B. 58; 45 L. T. 509.

— **Reasonable Care.**—A railway company, as carriers, brought some goods by their railway to one of their stations, and immediately gave the consignee notice of the arrival, and that they held the goods "not as common carriers, but as warehousemen, at owners' sole risk, and subject to the usual warehouse charges." The consignee acquiesced in this, and the goods remained in the charge of the company, and, by their negligence, were damaged. In an action by the consignee against the company:—Held, that on the true construction of the notice, the company were not exempted from all liability, but were bound as bailees to take reasonable care of the goods. *Mitchell v. Lancashire and Yorkshire Railway Company*, 10 L. R., Q. B. 256; 44 L. J., Q. B. 107; 33 L. T. 161; 23 W. R. 853.

## 2. ORDERS AS TO.

**Countermanded by Consignor.**—A party who delivers goods to a railway company to carry, directed to a particular place, may countermand the direction at any moment of the transit, and demand back his goods, at least on payment of the carriage: unless perhaps when the unpacking and redelivering them would be productive of much inconvenience. *Scotthorn v. South Staffordshire Railway Company*, 8 Ex. 341; 22 L. J., Ex. 121; 7 Railw. Cas. 870.

A. delivered at a station of a railway company a package addressed "S. & Co., East India Docks, passenger-ship Melbourne, Australia," and paid one sum for the carriage to London. By the practice of the company, goods delivered at that station for London are carried by their own line to Birmingham, and thence by the London and North-Western Railway to London. Before the package reaching London, A. gave the clerk at the London station of the London and North-Western Railway Company an order (written across the receipt which had been given for the package) to send it to "S. & Co., Bell Wharf, Ratcliffe, London," which order the clerk promised to obey, saying there was no extra charge. The package was, however, delivered according to the first address, and consequently lost:—Held, that the company's contract was to deliver according to A.'s directions; that he had a right to countermand his original direction; that the clerk was the agent of the company to carry out their contract, and therefore to receive the countermand; and that the company was liable for the loss consequent on the countermand having been disobeyed. *Id.*

**By Consignee.**—Although a carrier has contracted with the consignor of goods to deliver them at a particular place, he may deliver them at any place at which the consignee has ordered their delivery. *London and North-Western Railway Company v. Bartlett*, 7 H. & N. 400; 31 L. J., Ex. 92; 8 Jur., N. S. 58; 5 L. T. 399; 10 W. R. 109.

B. having sold wheat by sample, to be delivered to the purchaser at his mill, sent it by a railway company. On the arrival of the wheat at a station, two miles from the mill, the company kept it there in consequence of instructions given to them by the consignee that wheat arriving for him at the station should not be forwarded to the mill without his written order. B. had no knowledge of these instructions. The consignee examined the wheat at the station, but refused to accept, and whilst it remained there it became deteriorated in quality and value:—Held, that the consignor had no right of action against the company for not delivering the wheat at the mill, as the non-delivery was by order of the consignee. *Id.*

A., a carrier between Hull and the continent, employed B. as his agent to carry goods between Hull and Manchester, the course of business being to deliver the goods to the consignee immediately on their arrival. C., a customer, requested B. not to deliver goods consigned to him, but to send him notice of their arrival, and await his orders. To this B. assented, A. being ignorant of the arrangement. A quantity of cotton-waste, consigned to C. from Lisle, arrived at Hull, and was forwarded thence to Manchester by B.; but B. omitted to give C. notice of its arrival, and C. in consequence sustained loss:—Held, that A. was not responsible. *Butterworth v. Brownlow*, 19 C. B., N. S. 409; 34 L. J., C. P. 266.

**What is Effect of Advice Note.**—An advice note sent by a railway company to a consignee of goods is not such a representation of the possession by them of the goods as will, without evidence of a custom to do so, entitle the consignee to act upon it in the way of reselling the goods; nor will it, in the absence of wilful misstatement or culpable negligence leading proximately to the consignee's suffering loss, estop the company in an action of trover from denying that they in fact ever had the goods, although the consignee had paid the carriers' charges in respect of them. *Carr v. London and North-Western Railway Company*, 10 L. R., C. P. 307; 44 L. J., C. P. 109; 31 L. T. 785; 23 W. R. 747.

A contract cannot be implied from the sending of such an advice note to deliver to the consignee's order, so as to make the company liable for a breach in not delivering. *Id.*

C. entered into a contract with A. & Co. to purchase goods which were consigned to him by railway. The railway company by a mistake, without culpable negligence, advised C. of three parcels, whereas two only had been delivered to them for carriage. C. contracted to sell three parcels, and had to pay damages to his vendees in consequence of being able only to deliver two. The company did not notify the mistake to C. until he had resold:—Held, that the company was not estopped from shewing that they never received the third parcel. *Id.*

**Negligence in issuing two Notes referring to one Consignment—Estoppel.**—The defendants, having received a consignment of wheat, sent to the consignees an advice note, which described the consignment as "Sacks wheat, four trucks," and did not contain any details as to weight, rates or charges, but across the printed form was written, "Account to follow." The consignees gave B. a delivery order in respect of this wheat, and he obtained an advance from the plaintiffs

upon it; the plaintiffs sent this delivery order to the defendants, and they accepted it. On the following day the defendants sent to B. another advice note on a printed form similar to the one already sent, but across the upper part was written the words, "Charges only"; the invoice number was different; the consignment was described as 151 sacks of wheat; the weight, the rate, and the amount of charges were filled in. B. filled up the delivery order at the bottom in favour of the plaintiffs, produced it to them, and obtained a second advance from them, as they believed it to relate to a second parcel of wheat. The plaintiffs delivered this order to the defendants, who accepted it, and who allowed the plaintiffs on both occasions to take samples of the wheat. There was, in fact, only one parcel of wheat, and the two advice notes related to the same parcel. B. went into liquidation, and the plaintiffs, having lost the amount of one of the advances so made by them, sued the defendants for the amount:—Held, that the plaintiffs were entitled to recover the amount claimed, for that the defendants had so dealt with the wheat and advice notes as to lead the plaintiffs to believe that there were in fact two consignments of wheat, and that they were in consequence estopped from afterwards alleging that there was in fact but one consignment of wheat. *Coventry v. Great Eastern Railway Company*, 11 Q. B. D. 776; 52 L. J., Q. B. 694—C. A.

**Consignee demanding Delivery before Destination.**—When goods are delivered by a vendor to a carrier to be conveyed to a certain place, with the added words, "for Messrs. Stein & Co.," these persons thus appearing to be the consignees of the goods, may demand them of the carrier at another place; and if on such demand, and on receiving payment for the carriage, the carrier (who has not received from the vendor any special communication on the subject of the place of delivery) delivers them up to the consignees, he will not be responsible to the vendor for any damages which may arise to the vendor from such delivery. *Cork Distilleries Company v. Great Southern and Western Railway Company (Ireland)*, 7 L. R., H. L. 269; 8 Ir. R., C. L. 334.

Distillers in Cork, who were under bond to the crown to pay the duties on all spirits which they might be permitted to remove from one bonded warehouse to another, sold a quantity of whisky to Messrs. Stein & Co., spirit dealers in Limerick. The duty on the whisky had not been paid. The distillers obtained the regular permit for its removal (the permit expressly describing the whisky as spirit on which duty had not been paid), and delivered it to a railway company to carry it to Limerick. The delivery note described it as sent from Cork to "Custom Warehouse, Limerick. . . . For Messrs. J. Stein & Co., Limerick Station, Limerick." The railway company gave a receipt note in these terms, "From Hewitt & Co. . . . One puncheon of whisky addressed to 'Seymour's Customs Warehouse at Limerick. For Stein & Co.'" If it had been taken to the customs warehouse the consignees could not have obtained possession of it without having first paid the duty on it, but no special communication was made by the vendor to the railway company on this subject. Before arriving there the consignees, Messrs. Stein & Co., demanded it at the railway station, and on

paying the carriage obtained possession of it, and thus escaped paying the duty. The vendors were compelled, under their excise bond, to pay the duty, and brought an action against the railway company for the amount:—Held, that this was the case of an ordinary consignment; that the consignees had the right to demand the whisky from the railway company; and that the latter was not liable to make good the loss occasioned to the distillers by its delivery. *Id.*

### 3. REFUSAL OF CONSIGNEE TO ACCEPT.

**Duty of Company.**—Goods intrusted to a railway company having been tendered by them for delivery at the address of the consignees, were refused acceptance, and the company thereupon took them back to their own premises. They then (in accordance with their practice under such circumstance) sent an advice note to the consignees' address by post, stating that the goods remained at the risk of the consignees, and would be delivered to the person producing the note. They subsequently delivered the goods to a person who had formerly been in the service of the consignees, and who having obtained the advice note fraudulently, produced it at the company's premises:—Held, that upon the goods being returned on the company's hands their duty as carriers was at an end, and they became involuntary bailees; and that in an action brought against them by the consignor for misdelivery and conversion, it was a question of fact whether they had acted under the circumstances with due and reasonable care and diligence. *Heugh v. London and North-Western Railway Company*, 5 L. R., Ex. 51; 39 L. J., Ex. 48; 21 L. T. 676.

A railway company carried coals to the station to which they were addressed, and gave notice to the consignee of their arrival, upon which, according to the usual course of practice between them and the consignee, it lay upon him to send for them and take them away; and he not having done so within a reasonable time, they unloaded the coals and left them on the siding, where they were lost:—Held, in an action against them as common carriers, for non-delivery, that they had performed their contract by a constructive delivery. *Bradshaw v. Irish North-Western Railway Company*, 7 Ir. R., C. L. 252; 21 W. R. 581.

**Detention of Goods by Carrier.**—Where goods are tendered by a carrier to a consignee who refuses to pay the carriage, whereupon the carrier refuses to deliver the goods, it is the duty of the carrier to retain the goods at their place of destination, at least for a reasonable time, and during that time to await any directions from, if not to communicate with, the consignee. *Crouch v. Great Western Railway Company*, 2 H. & N. 491; 26 L. J., Ex. 418; 3 Jur., N. S. 796.

**Notice of.**—Where goods have been tendered by a carrier to a consignee, and refused by him, there is no rule of law that the carrier must give notice of such refusal to the consignor; he is only bound to do what is reasonable. *Hudson v. Bazendale*, 2 H. & N. 575; 27 L. J., Ex. 93. Semble, that whether the circumstances of the case make it reasonable that the carrier should give such notice, is a question for the jury. *Id.*

**Tender—Refusal—Lien.]**—Carriers received goods of S., at L., on an undertaking to carry them to W., and deliver them there to S. for his use, on payment of the hire. The goods were carried to W., and sent from the warehouse, nearly half a mile, to the house of S., but, the hire not being ready to be paid, were taken back to the warehouse. Applications to send the goods again to the house were refused, not on the ground that the contract had been performed by the proffer, but until satisfaction of a lien set up on one side, and resisted on the other, and which proved to be unfounded in fact:—Held, that the carriers had waived the benefit which would probably have resulted to them from insisting on the proffer as an execution of their undertaking; that both parties had treated the contract as one continuing contract from the commencement of the transaction till an actual delivery should have taken place; and that the carriers, not having performed their part of the agreement, the consignee was entitled to recover the value of the goods. *Stoer v. Crowley, McClell. & Y.* 129.

## VII. LIEN AND REMUNERATION.

### 1. GENERALLY.

**Insurable Interest.]**—Carriers effected an insurance against fire, by which the sum of 15,000*l.* was insured "on goods their own, and in trust as carriers" in a warehouse. One of the conditions of the policy was, that goods held in trust or on commission were to be insured as such, otherwise the policy would not extend to cover such property:—Held, that the words in the policy "goods in trust as carriers" covered the whole value of goods sent to the carriers to be carried, and also any interest they might have in them for their lien as carriers, and also that the goods were properly described. *London and North-Western Railway Company v. Glyn, 1 El. & Bl. 652; 28 L. J., Q. B. 188; 5 Jur., N. S. 1004; 33 L. T., O. S. 199; 7 W. R. 238.*

Held, also, that the carriers could recover for goods destroyed by fire, for the loss of which they themselves were not liable under the 11 Geo. 4 & 1 Will. 4, c. 68. *Id.*

**Effect of 8 & 9 Vict. c. 20, s. 97.]**—This enactment gives no lien upon goods for tolls or charges due to the company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages. *Wallis v. London and South-Western Railway Company, 5 L. R., Ex. 62; 39 L. J., Ex. 57; 21 L. T. 675; 18 W. R. 347.*

**Lien does not Determine on Refusal of Consignee to accept Goods.]**—The plaintiff consigned certain goods for carriage by the defendant company to the consignee's address. The consignment note, which was signed by the plaintiff, contained a condition that "all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges," &c.:—Held, that the lien continued so long as the company held the goods, and was in no way affected by the refusal of the consignee to accept the goods after they had arrived at their destination. *Westfield v.*

*Great Western Railway Company, 52 L. J., Q. B. 276.*

**Agreement for General Lien with Bankrupt—Receiver's Goods not Liable.]**—A trader opened a credit account with a railway company for freight. An account of what was due was to be delivered once a month, and payment was to be made within seven days after delivery; and the company were to have a general lien, for all the moneys due upon any account, upon all goods in the hands of the company. The trader filed a petition for liquidation; and a receiver and manager of his estate and business was appointed, who, in order to carry on the business, bought goods with his own money and sent them to the railway company consigned to the trader. The company refused to deliver the goods until they were paid what was owing to them by the trader for freight due when the petition was filed. The receiver paid the money under protest, and the goods were delivered. The Court of Bankruptcy, on the receiver's application, ordered the money to be repaid:—Held, on appeal, that the company would have no defence to an action by the receiver for the money paid to them, but that the Court of Bankruptcy had no jurisdiction to order repayment. *Great Western Railway Company, Ex parte, Bushell, In re, 22 Ch. D. 470; 52 L. J., Ch. 734; 48 L. T. 196; 31 W. R. 419—C. A.*

**Customary Lien must be clearly Proved.]**—The lien of a common carrier for his general balance—however it may arise in point of law from an implied agreement—to be inferred from a general usage of trade, must be proved by clear and satisfactory instances, sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm; yet it is not to be favoured, nor can it be supported by a few recent instances of detention of goods by four or five carriers for their general balance. But such a lien may be inferred from evidence of the particular mode of dealing between the respective parties. *Rushforth v. Hadfield, 6 East, 519; 2 Smith, 264. And see Whitehead v. Vaughan, 6 East, 523, n.; Holderness v. Collison, 7 B. & C. 212; 1 M. & R. 55.*

And a jury having negatived such a general usage, though proved to have been frequently exercised by the defendant and various other common carriers throughout the north for ten or twelve years before, and in one instance, so far back as thirty years, though not opposed by other evidence, the court refused to grant a new trial. *Rushforth v. Hadfield, 7 East, 224; 3 Smith, 221.*

A carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to detain them, against the consignee, for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcott, 2 N. R. 64.*

**Against whom.]**—Where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular articles, but also for any general balance due from their respective owners; and goods were sent by the carrier addressed to the order of J. S., who was merely a factor:—Held, that the carrier had not any lien as against the real owner, for a balance due from J. S. *Wright v. Snell, 5 B. & A. 350.*

Where goods are taken by the owner from the waggon, the carrier or warehouseman has no claim for booking or warehouse room, there being in such case no lien. *Lambert v. Robinson*, 1 Esp. 119.

If a person goes to a coach-office, and directs that a place be booked for him by a particular coach, and that is done, and he leaves his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but if the party merely leaves the portmanteau while he goes to inquire if there is an earlier coach, and no place is actually booked, the coach proprietor has no lien at all. *Higgins v. Bretherton*, 5 C. & P. 2.

If a carrier receives goods to be carried, he cannot retain the goods, and put the consignor of the goods upon proof of his title to them. *Anon.*, cited 3 Esp. 115.

If, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk, who is transacting the business there, 2s. 6d. per cwt., and on the faith of this he sends the goods, the carrier cannot charge more, although it is proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates, in which 3s. 6d. per cwt. was set down for goods of the sort in question. *Winkfield v. Paekington*, 2 C. & P. 599.

**Obligation to preserve Goods for a Reasonable Time.**—The lien which a carrier has on goods carried for the carriage-money is to be exercised subject to the obligation of keeping the goods for such a time in such a place as may be reasonably adapted for allowing the consignee means of taking possession of them on payment of the charge; which, semble, are questions for the jury in each case. *Great Western Railway Company v. Crouch*, 3 H. & N. 183; 27 L. J., Ex. 345; 4 Jur., N. S. 457—Ex. Ch.

If a railway company, carrying goods for hire from A. to B., offers them to the consignor's agent at C., to whom they are addressed, and he refuses to pay the sum demanded for carriage, the company is not entitled to take back the goods forthwith to A., but is bound to keep them for a reasonable time at B., so as to give the agent an opportunity of obtaining the goods upon paying the demand. *Ib.*

When carriers by land have carried goods to their destination, in pursuance of a contract with one who is both consignor and consignee, and through his default the goods are left in the carriers' hands, they are bound to take reasonable measures for the preservation of the goods, and can recover from him payments they have made on account of expenses so incurred. *Great Northern Railway Company v. Swaffield*, 9 L. R., Ex. 132; 43 L. J., Ex. 89; 30 L. T. 562.

A person sent a horse by railway, consigned to himself at a station on the line, and paid the fare. When the horse arrived at the station there was no one on his behalf to receive it, and the railway company therefore placed it with a livery-stable keeper.—Held, that the company could recover from the owner of the horse the reasonable charges which it had paid to the stable keeper. *Ib.*

**Recovery of Payment by Carrier.**—If a car-

rier, by mistake, delivers goods to B. which were consigned and sold to C., and B. appropriates them, and the carrier on demand, without action, pays C. their value, the carrier may recover it against B., as money paid to the use of B., but not as the price of goods sold and delivered to B. *Brown v. Hodgson*, 4 Taunt. 189.

## 2. TOLLS AND CHARGES.

**What are.]**—The word "tolls" in 8 & 9 Vict. c. 20, s. 90, and in 17 & 18 Vict. c. 31, s. 2, applies to traffic generally, and is not limited to tolls strictly so called. *Evershed v. London and North-Western Railway Company*, 2 Q. B. D. 254; S. C., 3 App. Cas. 1029; 46 L. J., Q. B. 289; 48 L. J., Q. B. 22; 36 L. T. 12; 39 L. T. 306.

**Construction of Acts.]**—When the language of an act of parliament, obtained by a company for imposing a rate or toll upon the public, is ambiguous, or will admit of different meanings, that construction is to be adopted which is most favourable to the public. *Barrett v. Stockton and Darlington Railway Company*, 2 M. & G. 134; 2 Scott, N. R. 337; 11 C. & F. 590.

**Reasonableness, how Determined.]**—As to the reasonableness of charges, the principle is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. *Canada Southern Railway Company v. International Bridge Company*, 8 App. Cas. 723—P. C.

**Overcharges Recoverable by Action.]**—A colliery owner had paid several sums, which in his action he sought to recover as overcharges, but he had paid them under protest and for the purpose of obtaining possession of his goods.—Held, that his payment of them under such circumstances was not a fact which would disqualify him from recovering them in an action for money had and received. *Lancashire and Yorkshire Railway v. Gidlou*, 7 L. R., H. L. 517; 42 L. J., Ex. 129; 32 L. T. 573; 24 W. R. 144.

And see *Evershed v. London and North-Western Railway*, *supra*.

**—As Money had and received.]**—Money paid in excess, in disregard of the equality clauses of railway acts, can be recovered back in an action for money had and received. *Great Western Railway Company v. Sutton*, 4 L. R., H. L. 226; 38 L. J., Ex. 177; 18 W. R. 92.

A carrier sent goods by the Bristol and Exeter Railway Company, to be carried on their line, as also on that of the Great Western, a continuous line; he objected to the charges as excessive, but paid the amount claimed, under protest, making no tender of any sum as a reasonable charge.—Held, that he was entitled to recover back the amount paid above what was a fair and reasonable charge in an action for money had and received, and that the whole sum so overpaid was recoverable against the Bristol and Exeter Company, though a portion of it was received by them as agents for the Great Western Railway Company. *Parker v. Bristol and Exeter Railway Company*, 6 Railw. Cas. 776; 6 Ex. 702.

— **Payment under Protest.**—Carriers refused to redeliver the plaintiff's goods, which they had carried for him, except on payment of 5*l.* 5*s.* charges. He insisted that he was not liable to pay anything; but, ultimately, the carriers, having said that they would take nothing less than the whole sum, he paid the whole to regain his goods, protesting that he was not liable to pay anything, and that, if he was liable, the charge was exorbitant. He had not tendered or named any smaller sum. Afterwards, without having demanded the return of any surplus, he brought an action for money had and received, claiming, by his particulars, the whole sum, as having been paid in order to obtain possession of his goods, under protest that he was not liable to pay the same or any part thereof; or, if he was liable to pay some part, that the sum was exorbitant. The jury found, that the carriers were entitled to charge 1*l.* 10*s.* 6*d.*:—Held, that the plaintiff was entitled to recover the difference in this form of action, and that it was not necessary to his right of recovery, that he should have tendered any specific sum. *Ashmole v. Wainwright*, 2 Q. B. 837; 2 G. & D. 217; 6 Jur. 729.

— **Effect of 17 & 18 Vict. c. 31.**—This enactment does not interfere with the right of a party aggrieved by overcharges to maintain an action to recover back the sums paid in excess. *Barendale v. Eastern Counties Railway Company*, 4 C. B., N. S. 63; 27 L. J., C. P. 137.

**Publication of.**—A company obtained an act (8 & 9 Vict. c. 169) authorizing it to construct a railway and to demand tolls for the conveyance of passengers and goods thereon. The charge for the conveyance of goods was generally thus expressed, "per ton per mile not exceeding," &c. One clause provided that "for articles or persons conveyed on the railway for a less distance than four miles" there might be, "in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading, and unloading." No publication of this charge in the form of a "toll" had been made upon the toll-board:—Held, that this "charge" for stopping was not properly a "toll," and that the non-publication of it on the toll-board in the form required by the Railways Clauses Consolidation Act, 1845, ss. 93 and 95, did not prevent the company from demanding it. *Pryce v. Monmouthshire Canal and Railway Companies*, 4 App. Cas. 197; 49 L. J., Ex. 130; 40 L. T. 630; 27 W. R. 666.

A pier company was authorized by act of parliament to charge, for goods laden or unladen on the pier, the rates specified in a schedule to the act, but they could only demand them so long as "the rates for the time being authorized to be taken as thereinbefore mentioned" were painted on a board affixed to the premises. By a subsequent section power was given to lower the tolls and to raise them to such sums as the company should think proper, not exceeding the sums authorized by the act. The company lowered some of the rates, but put up a board shewing the tolls contained in the schedule to the act:—Held, that the act required the actual tolls in force for the time being, and not the maximum tolls authorized by the act, to be

painted on the board. *Gregson v. Potter*, 4 Ex. D. 142; 27 W. R. 840.

— **Recovery of Charges.**—By an act of parliament it was enacted that a railway company should paint on boards an account of the several rates and tolls to be taken by them, and should affix such boards upon the toll-houses, or building at which the rates or tolls should be taken, and that the company should not take any rates or tolls, except during the time that the board should be so affixed:—Held, that the omission to put up such boards did not prevent the company from recovering such sums of money as they had a right to charge, and that the parties who had paid them could not, as a result of such omission, recover back such sums as they had been charged. *Garton v. Bristol and Exeter Railway Company*, 1 B. & S. 112; 30 L. J., Q. B. 273; 7 Jur., N. S. 1234; 9 W. R. 734.

**Mileage—Passengers—Fractions of Miles.**—The plaintiff travelled third class up and down between Bristol and Paddington on the defendants' railway, by trains other than those which the defendants run daily in pursuance of the Cheap Trains Acts, 1844 and 1858. He brought this action to recover the amounts, or part of them, which he had paid for his fares under protest; the distance is somewhat less than 118½ miles, the duty actually paid by the defendants amounts to about 6½*d.*, and the amount charged was 10*s.* 6*d.* each way:—Held, upon a special case, that the omission of the defendants to maintain some of the quarter-mile stones required by their local act of 1835, s. 178, and the Railways Clauses Consolidation Act, 1845, s. 95, as a condition to their charge for tolls on carriages running over their line, did not prevent their making charges for passengers in their own carriages; that the general limit of their charge for third-class passengers at 1*d.* a mile by their local act of 1847 in effect repealed their authority to charge not more than 2*s.* for the five miles next to Paddington given them by their local act of 1837; that the provision for fractions of a mile contained in the Cheap Trains Act, 1858, did not apply to third-class passengers by other than the trains run in pursuance of the Cheap Trains Act, 1844; and that the full amount chargeable third-class by these trains was only the amount of the passenger duty beyond the penny a mile authorized by the local act of 1847. *Brown v. Great Western Railway Company*, 9 Q. B. D. 744; 51 L. J., Q. B. 529; 47 L. T. 216; 30 W. R. 671; 46 J. P. 803—C. A. Affirming 51 L. J., Q. B. 156; 45 L. T. 471; 30 W. R. 214; 46 J. P. 596.

The private act of a railway company granted tolls for "a fraction of a mile beyond four miles," &c.; the company claimed such tolls when the whole distance traversed was less than four miles. The Lord Chancellor (Earl Cairns) and Lord Selborne were of opinion that the charge was, on the whole, warranted by the words of the act, and that the judgment of the court below must on this point also be affirmed. Lord Penzance and Lord O'Hagan, applying the principle that no charge could be imposed on the public but by the clearly-expressed intention of the legislature:—Held, that in this case the legislature had not clearly expressed an intention, nor had intended, to authorize such a charge.

The judgment of the court below therefore stood affirmed. *Pryce v. Monmouthshire Canal and Railway Companies*, 4 App. Cas. 197; 49 L. J., Ex. 130; 40 L. T. 630; 27 W. R. 666.

— **Increased Exigencies of Traffic.**—A railway company, in carrying goods, took them past a junction to a station and back, and then on by other lines, and charged a mileage rate which included the mileage to and fro between these places; such rate was reasonable, usual, and accustomed:—Held, that they could so charge. *London and South-Western Railway Company v. Myers*, 5 L. R., C. P. 1; 39 L. J., C. P. 57; 21 L. T. 461.

— **How Counted.**—By the private act of a railway company, the maximum charge for carriage was limited to a certain sum per mile:—Held, that the mileage was not necessarily to be counted by the most direct and shortest route; but that if the route adopted by the company in the carriage of goods intrusted to them was a reasonable one under the circumstances, they were entitled to charge the maximum rate for the number of miles over which they actually carried the goods. *Id.*

**Special Services—Increased Rate—Construction of Acts.**—The Lancashire and Yorkshire Railway Company conveyed goods to Wigan, over a portion of their own line, a distance less than six miles; from Wigan the goods were conveyed to their destination at Windermere and elsewhere, a distance more than six miles, over another line of railway, of which the Lancashire and Yorkshire Railway was a part owner with another company. By the company's acts, they were entitled to charge as for six miles on goods carried less than that distance on the railway, or any railway of which they were part owners, and the charges were to be computed as if such railways formed one line. The maximum rate of charges fixed by the act was to include all expenses incidental to conveyance, except certain specified services; the company being empowered to make increased charges by special agreement with parties:—Held, that the Lancashire and Yorkshire Railway Company was not entitled to make two distinct charges, viz., as for six miles on the distance to Wigan, and afterwards on the distance from Wigan to the destination of the goods; and that the company could not recover for special services, alleged to have been rendered for the goods, the finding of the jury not clearly shewing that these services were of the kind specified by the act, and there not being sufficient evidence of an agreement for an increased charge for special services. *Lancashire and Yorkshire Railway Company v. Gidlow* (No. 1), 42 L. J., Ex. 129; 29 L. T. 346; 21 W. R. 649—H. L.

Under a special clause in a railway act, the directors were empowered to make a maximum charge for conveyance of coal along their line, including tolls for the use of waggons, &c., "and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier." Under another clause, the directors were empowered to make increased charges by agreement in respect of any other

special service performed by them. By a third clause, it was enacted that the company should "provide sufficient locomotive power when and as the same should be required, and as soon as an adequate and sufficient load should be in readiness, to convey all merchandize," &c. Under the act, the company sought to impose additional charges on a colliery owner, in respect of taking his waggons to and from a siding belonging to the colliery owner. It appeared that whatever peculiar difficulty was experienced in this work arose from the position of the points joining the siding to the company's line. The company also sought to impose an additional charge, in respect of their allowing the coals of the colliery owner to be left on ground adjoining their line:—Held, that neither of these "were services incidental to the business of a carrier," within the meaning of the act. Also, that the second-mentioned charge, being for an advantage obtained by the colliery owner, might have been made the subject of agreement. *Lancashire and Yorkshire Railway Company v. Gidlow* (No. 2), 7 L. R., H. L. 517; 45 L. J., Ex. 625; 32 L. T. 573; 24 W. R. 144.

The company had also refused to convey the coals of the colliery owner unless he had ready fifteen waggons containing a minimum load of forty tons each, while they conveyed the coals of others in smaller quantities:—Held, that this restriction was unreasonable, and not warranted by the act. *Id.*

Held, also, that damages in respect of loss of custom to the colliery owner occasioned by the restriction were not too remote. *Id.*

A railway company, by its act, was empowered to "demand and take for the use of the railway any tolls not exceeding the following: with respect to the conveyance of . . . coals . . . per ton per mile, three farthings." A subsequent section provided that, "Nothing in this act contained shall prevent the company from taking any increased charges, over and above the charges by this act limited, for the conveyance of goods of any description by agreement with the owners of, or persons in charge of, the goods either with respect to the conveyance thereof, except small parcels by passenger trains, or by reason of any other special service performed by the company in relation thereto:"—Held, that the latter section empowered the company to agree with any persons to carry coals at a higher rate than three farthings per ton per mile, notwithstanding that there were no special services involved in the conveyance of the coal. *Wrexham Railway Company v. Little Mountain Colliery Company*, 38 L. T. 290.

**Claim of Through Toll.**—Goods carried by a railway company upon their railway, or to their railway station, entirely upon land belonging to them, and not upon any highway or in the enjoyment of any easement or other right reserved by the former owners of the land or those under whom they claim, cannot be the subject of a claim to a toll thorough or toll traverse arising either by prescription or by grant. *Brecon Markets Company v. Neath and Brecon Railway Company*, 7 L. R., C. P. 555; 41 L. J., C. P. 257; 27 L. T. 316. Affirmed, 8 L. R., C. P. 157; 42 L. J., C. P. 63—Ex. Ch.

The Brecon Markets Local Act, vested in the market company tolls which had been immemorably received by the corporation of Brecon



for cattle, goods, and carriages passing to, through, or from the borough. A railway company, under the sanction of an act of parliament passed in the same session, acquired land, not being a highway, on which they constructed a railway and station within the borough, whence passengers, goods, and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the market company were expressly reserved by the railway act, but there was no provision either in that or in the railway act enabling them to levy tolls on the railway:—Held, that the Brecon Market Company was not entitled to toll in respect of cattle, goods, or carriages passing along the railway. *Ib.*

**Through Rate—Statute fixing a Company's Tolls subject to Consent of another Company.]**—Where it is enacted by a special act that in consideration of a guarantee by a railway company of a dividend on the capital of a canal company, the canal company shall not reduce the rates for the time being payable on the canal without the consent of the railway company, the railway commissioners have no power without the consent of the railway company, and without the railway company being before them, to make an order establishing a through rate over that and other canals, and reducing the rates payable on that canal and others. *Warwick and Birmingham Canal Company v. Birmingham Canal Company; Birmingham Canal Company and London and North-Western Railway Company, Ex parte*, 5 Ex. D. 1; 48 L. J., Ex. 550; 40 L. T. 846.

**Over Junction and Branch Lines.]**—A railway company was empowered to make a line between certain termini, and to impose certain tolls and charges for carriage of goods on that line. The company afterwards obtained several other acts, and among them one passed for making a junction and branch railways, and incorporating the Lands and Railways Clauses Acts, and including a number of enactments, in which the words "the railway" were used, in some places, so as to be applicable only to the junction and branch lines, but, in others, also introducing, as to "the railway," a fresh system of tolls and charges:—Held, that the term "the railway" must, upon a consideration of all the statutes of the company, and all the circumstances, be considered to mean the whole system of railway belonging to the company, and that it was over it that the tolls and charges imposed were intended to extend, and not over the junction and branch lines only. *Bristol and Exeter Railway Company v. Garton*, 4 H. & N. 33; 28 L. J., Ex. 169; 5 Jur., N. S. 1172—Ex. Ch. Affirmed, 8 H. L. Cas. 477; 30 L. J., Ex. 241; 7 Jur., N. S. 173.

**Charge for Stopping in Excess of Maximum Toll.]**—By 8 & 9 Vict. c. *clxiv.* s. 104, the Monmouthshire Railway Company was empowered to demand, in respect of coals conveyed upon their railway, tolls not exceeding  $\frac{1}{4}$ d. per ton per mile. And by s. 105, for articles conveyed on the railway for a less distance than four miles, the company might demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading and unloading. By 24 & 25 Vict. c. *ccxxii.* s. 26, the

maximum rates to be taken by the company for the conveyance of all things, including the tolls for the user of the railway, for carriages (when provided by the company), and for locomotive power, and every other expense incidental to the conveyance, except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, shall not exceed the sums following, that is to say, for coals, 1d. a ton a mile. A number of separate colliery owners, in the course of their business, loaded coals into their own trucks at their respective mines, and sent the trucks so loaded, by a railway to a terminal junction on the Monmouthshire Railway line, whereupon that company sent an engine to fetch the train of trucks thence, and to draw the same along their own line, in order to deliver the trucks at the wharves of the different freighters. The engine had to stop at the junction and occasionally wait there during a period of about half an hour, for the arrival of the trucks:—Held, that this was a stopping for which a reasonable charge might be legally made by the company, under s. 105, in addition to the tolls for conveyance; and that the limitation of rates by 24 & 25 Vict. c. 223, s. 26, to 1d. a ton per mile for coals did not comprise or include such charge for stoppage which was not incidental to the conveyance of the goods. *Monmouthshire Railway and Canal Company v. Williams*, 27 L. T. 134—Ex. Ch.

**Splitting Contract.]**—A special act, relating to the company, provided that where goods were carried on the company's railway, or partly on their railway and partly on some other railway of which they were joint owners, or which they had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The act also provided that the tolls for goods carried over the company's line and over portions of other lines of which they were part owners, or which they had a right to use, should be computed as if the company's line and the portions of the other lines formed one railway. Goods were passed over the line of which the company was sole owner for a distance of less than six miles; the same goods on their transit to their ultimate destination passed over another line of which the company was part owner for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same:—Held, that the company was not entitled to split the contract, that the two lines must be treated as one, and that the six-mile clause was not applicable. *Lancashire and Yorkshire Railway Company v. Gidlow* (No. 1), 42 L. J., Ex. 129; 29 L. T. 346; 21 W. R. 649—H. L.

**Consignee having no Option to do Services Himself.]**—The same act of parliament, while providing the maximum rate of tolls to be charged, made an exception in respect of special services to be rendered by the company for loading, unloading, collection and delivery of goods:—Held, that the company was not entitled to charge for

special services, though found by a jury to have been actually rendered by them; the customer charged for such services not having had the offer and option first distinctly given him of either availing himself of such services at the company's rate of charge or of doing them himself, such services being incidental to the ordinary business of a carrier, and such as the customer, without notice, might have supposed were covered by the company's charges for toll. *Ib.*

#### **Extra Charge for Attaching and Returning Waggon.**

—A railway act gave the directors of the company power to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and waggons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed:—"Except a reasonable sum for loading, covering and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are or is to be performed by the company." The services in respect of which the excepted charges were claimed to be made, were those of taking the waggons of a colliery owner from his own sidings and attaching them to the trains or returning them from the line of the railway to the sidings of the colliery owner; and whatever particular difficulty arose in this work was occasioned by the position of the points effecting the junction of the line with the sidings:—Held, that these were not services which came within the meaning of the exception. *Lancashire and Yorkshire Railway Company v. Gidlow* (No. 2), 7 L. R., H. L. 517; 45 L. J., Ex. 625; 32 L. T. 573; 24 W. R. 144.

**Goods left on Land adjoining Line.**—At some of the stations the colliery owner had been allowed to leave his coals on the grounds adjoining the lines:—Held, that this might have been made the subject of an agreement for payment for any advantage thus obtained by him, but did not come within the description of a service contained in the exception. *Ib.*

**Number of Waggon required before providing Engines.**—Another clause in the same act required that the company should at all times "provide sufficient locomotive power, when and as the same shall be required, and as soon as an adequate and sufficient load shall be in readiness, to convey all merchandise." The directors required the colliery owner to furnish a declaration of his having ready fifteen waggons with a minimum load of four tons in each wagon, and gave orders not to forward his coals in a smaller number of waggons containing coals. While this restriction existed the coals of other owners were carried in smaller quantities. The regulation requiring fifteen waggons was an unreasonable requirement:—Held, that this restriction was not warranted by the words of the section, and that the colliery owner, having suffered in his business from such restriction, was entitled to damages on that account. *Ib.*

#### **Railway crossing Turnpike-way—Double Toll.**

—An embankment company was, by an act of parliament (not limited in duration), empowered

to make a road, and to erect turnpikes upon or across any lanes or ways leading, or that might thereafter lead out of the same, and to take tolls at such turnpikes. By a subsequent act, another company was empowered to make a railway; and it was enacted, that all persons should have free liberty to use the same, with carriages properly constructed, upon payment only of such rates and tolls as should be demanded by the railway company, not exceeding the sums mentioned in the act. The railway was afterwards made, and it crossed the embankment company's road:—Held, first, that the railway, though made and opened to the public by act of parliament, was a "way" within the meaning of the first-mentioned act; and secondly, that the clause in favour of the public, in the railway act, did not take away the vested right of the embankment company to their tolls, and, consequently, that they might take toll from persons crossing their road upon the railway. *Rowe v. Shilson*, 4 B. & Ad. 726; 1 N. & M. 734.

**On Packed Parcels.**—A railway company, by s. 149 of its special act, was empowered to demand rates and tolls for the tonnage of all articles, matters and things carried on its line not exceeding certain sums; and by s. 155, the company might fix the sums to be charged or taken in respect of small parcels (not exceeding 500 lbs. in weight): "provided always, that the provisions hereinbefore contained as to parcels shall not extend to goods, articles, matters and things sent in large aggregate quantities, although made up of separate and distinct parcels, but only to single and undivided parcels." The company had two systems of charging. For packages exceeding 112 lbs. in weight it charged a tonnage rate, and for packages under 112 lbs., known as small parcels, it charged a higher rate. In both cases the goods were divided into classes, and the charge varied according to the class. S. sent goods, consisting partly of packages exceeding 112 lbs., and partly of packages under 112 lbs., both belonging to the same class, and contended that the company was bound to aggregate them and charge tonnage rates for the whole. The company, on the other hand, contended that it was only bound to aggregate the small parcels, and charge tonnage rates for them, if, when aggregated, they exceeded 112 lbs. in weight:—Held, that this, and not S.'s contention, was correct. *Sutton v. London and South-Western Railway Company*, 37 L. T. 158.

**On Military Contracts.**—A carrier, having a contract for his own benefit with the military authorities for the carriage of military stores and baggage, produced to a railway company the military route or order for the conveyance of military stores and baggage accompanied by a military escort, and required the company to carry them at the low rates prescribed by 5 & 6 Vict. c. 55, s. 20, and 7 & 8 Vict. c. 85, s. 12, but the company insisted upon charging the ordinary rate, which was paid by the carrier:—Held, that he could not recover back the excess as money had and received to his use. *Great Southern and Western Railway Company v. Robertson*, 11 Ir. R., C. L. 63.

**"Manufactures."**—A railway company was entitled to charge a certain rate "for all cotton and other wools, drugs and manufactured goods."

—Held, that this meant, not all goods on which skill was employed, but those articles which are, in popular language, called "manufactures." *Parker v. Western Railway Company*, 6 El. & Bl. 77; 25 L. J., Q. B. 209; 2 Jur., N. S. 325.

**Right to Sell Goods on Non-Payment.]**—By 8 & 9 Vict. c. 20, s. 97, it is provided that if, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell the carriage, or all or any part of such goods of the party liable to such tolls, and out of the moneys arising from such sale to retain the tolls:—Held, that a demand of the sum actually due for tolls is a condition precedent to the right to sell. *Field v. Newport, Abergavenny and Hereford Railway Company*, 3 H. & N. 409; 27 L. J., Ex. 396.

A railway company was empowered to take tolls for the use of their railway in respect of the tonnage of articles conveyed upon the railway, certain sums per ton, and a further sum if conveyed in the carriages of the company; and tolls for the use of engines. There was fixed a maximum rate of charge, including the charges for the use of carriages, waggons, or trucks, and for locomotive power and all other charges incident to such conveyance. The company was also empowered to take increased charges for the conveyance of goods by agreement with the owners of goods by reason of any special service. The company having for a considerable time carried on their line coals in carriages belonging to the plaintiff, from P. to H., made a demand of a gross sum equal to the amount of the tonnage rates for coals and use of engines; and also of a sum claimed by them for sending back the plaintiff's empty carriages from H. to P. They gave no explanation of the items making up the gross sum claimed. The plaintiff having omitted to pay the amount claimed, the company sold the plaintiff's carriages and goods to satisfy the amount due:—Held, that the sum claimed for sending back the return waggons was not toll, and that the company having demanded a larger sum than that due for tolls, the sale was unlawful. *Id.*

An act empowered a railway company to seize and sell goods, for which tolls due to the company had not been paid, providing the persons seizing the goods should have their names annexed to the list of tolls, and a demand had been previously made, and that on refusal the goods had been appraised. Where the first and last conditions had not been complied with by a railway company who had seized coals belonging to A., for tolls due by him, and the only evidence of a demand was the presenting of a bill of A. for the amount of the tolls, which was dishonoured:—Held, that the company had no right to seize the goods. *North v. London and South-Western Railway Company*, 14 C. B., N. S. 132; 32 L. J., C. P. 156; 9 Jur., N. S. 896; 8 L. T. 246; 11 W. R. 624.

#### VIII. MEASURE OF DAMAGES FOR NEGLIGENCE.

**For Non-delivery—Knowledge of Carriers.]**—Where the owners of a flour mill sent a broken iron shaft to an office of carriers, to be conveyed by them, and their clerk, who attended at the

office, was told that the mill was stopped; that the shaft must be delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery; and the delivery of the broken shaft to the consignee, to whom it had been sent as a pattern by which to make a new shaft, was delayed for an unreasonable time, in consequence of which the owners did not receive the new shaft for some days after the time they ought to have received it, and they were consequently unable to work their mill from want of the new shaft, and thereby incurred a loss of profits:—Held, that under the circumstances such loss could not be recovered in an action against the carriers. *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J., Ex. 179; 18 Jur. 358; 2 C. L. R. 517.

**Liability for Delay in Transmission of Goods with Inherent Defect.]**—On the 19th of December, 1881, eighteen bales, marked "Rags," were delivered by the plaintiffs in London to the defendants for conveyance to W. station in Kent, where in the ordinary course they should have been delivered within twenty-four hours. By mistake they were forwarded to another place, and did not reach the W. station until the 4th of January, 1882, when, finding them to have become heated (through being packed in a damp state) and therefore unfit for the manufacture of paper, the consignees rejected them; and ultimately the rags were found useless for any purpose, and were destroyed. There being an admitted breach of duty on the part of the defendants, and it being conceded that the rags would have sustained no injury if they had been packed dry, the county court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiffs' own act in packing the rags in a damp state, without informing the defendants that special care was necessary. Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods:—Held, that the ruling of the judge was correct. *Baldwin v. London, Chatham and Dover Railway Company*, 9 Q. B. D. 582.

**Wrong Delivery.]**—A statement of claim alleged that the defendants were common carriers; that C. and B. were in the habit of sending empty casks by defendants' railway to plaintiff, which plaintiff filled with ketchup and returned; that defendants, by their agents and servants, knew the purpose for which the casks were delivered to plaintiff; that defendants negligently and improperly delivered to plaintiff, as C. and B.'s casks, certain other casks not belonging to C. and B., and which had contained turpentine; that plaintiff not knowing, or having reasonable means of knowing, that the empty casks delivered were not C. and B.'s, filled them with ketchup, which was spoiled:—Held, on demurrer, that the statement of claim shewed no duty on the part of the defendants which could give rise to a cause of action, and therefore they were not liable. *Cunnington v. Great Northern Railway Company*, 49 L. T. 392—C. A.

**Loss, whether or not directly attributable to Breach of Contract.]**—The defendants, a railway company, contracted with the plaintiff to provide within a reasonable time a particular

description of large waggons, at a specified rate of freight per waggon, for the carriage of a quantity of hay from a station on their line to G., a town about twenty-five miles distant, where the hay was intended for sale. Five tons were delivered to the defendants, but carried by them in smaller waggons, for which they charged and were paid the same rate per waggon, thus increasing the cost of carriage per ton. They did not provide waggons of the description agreed for, and thus (as it was conceded) committed a breach of their contract. The plaintiff did not deliver to them for conveyance the rest of the hay, which he kept for some time, and, after notice to the company, sold and disposed of under cost price. In an action for breach of the contract, in which the defendants paid into court sufficient to cover the extra cost of carriage of the five tons, the jury, in answer to a question submitted to them by the learned judge, notwithstanding an objection by the defendants, found that the plaintiff acted in a reasonable manner in keeping and disposing of the residue of the hay as he did, and the learned judge directed a verdict for him for the profits which the jury found would have been realized, if the hay had been conveyed pursuant to contract, by sales at G. at the market prices, in addition to the actual loss which the plaintiff had incurred upon the sale and disposal of the residue:—Held, a misdirection, and that the question as to the reasonableness of the plaintiff's conduct in keeping, selling, and disposing of the residue of the hay ought not to have been submitted to the jury, inasmuch as the loss thereby sustained was not directly attributable to the breach of contract, and was therefore a loss for which the defendants were not liable. *Irvine v. Midland Great Western Railway Company*, 6 L. R., Ir. 55.

Held, further, that if the hay had been delivered to the defendants for carriage, or had been otherwise conveyed in a reasonable manner to its destination, the proper measure of damages would have been the extra cost of conveyance, and that the only damages which the plaintiff could recover was the extra cost in respect of the five tons actually delivered and conveyed, such being the only loss sustained by him directly attributable to the defendants' breach of contract. The rule in *Hadley v. Baxendale* (9 Ex. 341) considered. *Id.*

**Late Delivery—Sub-Contract.**—The plaintiffs, in the beginning of 1871, contracted to supply, at 4s. a pair, a large quantity of shoes to H. & Co., who required them to fulfil a contract for the supply of the French army during the war. The last day for delivery by the plaintiffs was the 3rd of February, 1872, and all shoes not so delivered would be thrown back on the plaintiffs' hands. The plaintiffs delivered a certain quantity of shoes to the Midland Railway Company at Kettering, consigned to H. & Co., in London, in time to be delivered on that day. Notice was given to the station-master that the plaintiffs were under contract to deliver on that day, and if not so delivered the shoes would be thrown on their hands, but no further information. The shoes were not delivered by the company till the morning of the next day, and were rejected. The plaintiffs, using their utmost endeavours, could only sell the rejected shoes at 2s. 9d. a pair, and in consequence of the cessation

of the war the consignees, but for their French contract, could not have sold them at a higher price even if duly received. The company paid into court 20l., which was sufficient to cover the incidental expenses and the ordinary damages to which the plaintiffs would be entitled, but the latter claimed to be entitled to recover the difference between 4s. and 2s. 9d. a pair:—Held, that they were not entitled to recover the difference. *Horne v. Midland Railway Company*, 8 L. R., C. P. 131; 42 L. J., C. P. 59; 28 L. T. 312; 21 W. R. 481—Ex. Ch.

R. sent goods from Manchester by railway to his traveller at Cardiff; the delivery of the goods was, through the negligence of the company, delayed until the traveller had left Cardiff, and R. in consequence lost the profits which he would have derived from a sale at Cardiff:—Held, that, in the absence of notice to the company of the object for which the goods were sent, R. could not recover from the company such profits as damages for the delay. *Great Western Railway Company v. Redmayne*, 1 L. R., C. P. 329; 35 L. J., C. P. 123; 12 Jur., N. S. 692; 14 W. R. 206; 1 H. & R. 97.

**Particular Purpose.**—The plaintiff was a dealer in cattle-spice and was in the habit of going about to agricultural shows exhibiting samples of his goods. He so exhibited them at Birmingham, and desiring to exhibit them at Newcastle, he had them delivered to an agent of a railway company who had a special office on the show-ground at Birmingham for the purpose of forwarding goods that had been exhibited. The company's clerk supplied a blank consignment note. This plaintiff's agent filled up, describing the goods as sundries, and the address as Newcastle show-ground, and indorsing it, "Must be delivered Monday certain." A conversation also took place with reference to the vital importance of having the goods at Newcastle on Monday. The goods not having been delivered at Newcastle on Monday, nor in time for the show, the plaintiff, who had gone there to meet them, sued the railway company for the non-delivery, claiming damages for his expenses and loss of time or profit. The company paid 10l. into court to cover expenses, and a verdict was entered for 20l. additional in respect of loss of time or profit:—Held, that the verdict was right, the surrounding circumstances justifying the inference that the clerk knew the purpose for which the goods were wanted, and made that the basis of the contract so as to render the company responsible for the damage naturally flowing from the non-delivery. *Simpson v. London and North-Western Railway Company*, 1 Q. B. D. 274; 45 L. J., Q. B. 182; 33 L. T. 805; 24 W. R. 294.

Held, also, that in the case of a man whose business it was to attend agricultural shows and make profit thereby, the profit which would have been made at a particular show is not too speculative to form the subject of damages. *Id.*

A prize had been offered for the best plan and model of a machine for loading colliers from barges, and plans and models intended for the competition were to be sent by a certain day; a party sent a plan and model accordingly by a railway, but, through negligence, it did not arrive at its destination until after the appointed day:—Sembles, the proper measure of damages

in such case is the value of the labour and materials expended in making the plan and model, and not the chance of obtaining the prize, as the latter is too remote a ground for damages. *Watson v. Ambergate Railway Company*, 15 Jur. 448.

**What is a sufficient Notice of a Sub-Contract.]**

—On the 6th June, C. delivered at a booking-office in London, samples to be carried by the Midland Railway Company to Chesterfield; no directions were given as to the mode of carriage, and the goods were sent by goods train at the ordinary rate. The samples were contained in a box, on the top of which was a special printed label in the following terms, "Traveller's goods. Deliver immediately," and underneath was written the address of the consignee. The goods not being delivered before the evening of the 8th of June, although they might reasonably have been delivered on the 7th, C. sued the company to recover one guinea paid by them to their traveller for his expenses at the usual rate of one guinea a day, for which time he was delayed at Chesterfield by the non-receipt of the goods:—Held, that there was no special contract between the parties, nor was the merely labelling the box as "Traveller's goods" sufficient notice to the company of the purpose for which the goods were being sent, so as to make that purpose common knowledge to both parties, or in any way to affect the company with special notice of the facts so as to make particular damages recoverable against them. *Candy v. Midland Railway Company*, 38 L. T. 226.

**Delay—Knowledge of Carrier.]**—On Wednesday, 7th August, a railway company received goods from the plaintiff to be carried from A. to B., near S., by luggage train; the plaintiff having contracted to supply them on hire at B. on Saturday, 10th August. The ordinary practice of the company, if goods did not make a truck load, was to send to N., which was farther from B. than S. from N.: they might be sent either by railway to S., from which there is a carrier to B., daily, or direct to B. by a carrier on Tuesdays and Thursdays. The company sent the goods, which were not a truck load, to N., and kept them there from Friday till Tuesday, and then sent them by the carrier to B., where they arrived on Wednesday. The plaintiff did not inform the company that it was important that the goods should arrive at B. on the 10th August, nor was it known to the plaintiff that the goods, if a truck load, would have been sent direct to S. In an action to recover the loss of the hire of his goods and for personal expenses in inquiring for them, the jury having found that the delay at N. was unreasonable:—Held, that the plaintiff was entitled to the latter damages but not to the former. *Hales v. London and North-Western Railway Company*, 4 B. & S. 66.

The plaintiffs delivered to a railway company ten tons of cotton, to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but it did not, in fact, arrive till four days afterwards. In consequence of the delay a new mill of the plaintiffs was stopped for want of cotton to go on with. At the time of the delivery of the cotton to the company nothing was said as to the particular delay likely to result from the delay in forwarding it. But, on the day before it was

delivered to the company, and repeatedly on each succeeding day, until it arrived at Oldham, one of the plaintiffs called to inquire about it; and on each occasion told the manager of the goods department, at the Oldham station, that the mill was at a stand, solely on the non-delivery of the cotton. In an action against the company for neglect in delivering the cotton, the plaintiffs proved that during the time the mill was at a stand they had paid in wages 7l.; and that the profit which would have been made, if the mill had been at work, was 7l. 10s. The judge of the county court told the jury, that when, by the neglect of a carrier, a man had no material to carry on his business, he had a right to charge, as legal damage, such loss as naturally and immediately arose from stopping the mill; that the plaintiffs were entitled to the money they had actually paid as wages, 7l.; and that the profit which the plaintiffs would have made was a fair subject of calculation; and the jury should therefore give, over and above the 7l., such amount as would be the actual loss and detriment the plaintiffs had suffered by the non-arrival of the cotton in due course:—Held, that this was a misdirection, and the plaintiffs were not entitled to the amount of wages paid, and of the profits lost as legal damages, inasmuch as it assumed that the stoppage of the mill arose entirely from the non-delivery of the cotton, when, in fact, it arose partly from that, and partly from the plaintiffs having no cotton to go on with. *Gee v. Lancashire and Yorkshire Railway Company*, 6 H. & N. 211; 30 L. J., Ex. 11; 3 L. T. 328; 9 W. R. 103.

**What is Reasonable Expedition.]**—Carriers are bound to convey with reasonable expedition, and if their course of business is inconsistent with that, it is no answer to an action against them for damages arising from delay, that they carried at the ordinary rate in which they conducted their business. *Blakemore v. Lancashire and Yorkshire Railway Company*, 1 F. & F. 76.

**Carriage beyond Limit of Line—Extra Demand.]**—A party delivered to a railway company goods to carry from A. to B., paying the carriage, to be delivered to a party there. Part of the transit was effected by another railway company, which refused to deliver up the goods to the consignee without payment of an additional specified sum; but an action having been threatened against the contracting company, an offer was made to deliver them up without that payment. The action was, however, persevered in, the plaintiff declaring against the company as carriers, with a count in trover for the conversion of the goods, subsequently to which they were given up in damaged state:—Held, that the additional sum demanded for the goods was not the measure of damage. *Davis v. North-Western Railway Company*, 4 Jur., N. S. 1303.

**Depreciation of Bulk—Injury to Part.]**—The plaintiff, a hop grower in Kent, sent to London by railway some pockets of hops consigned to a purchaser. The railway company kept the hops for some days on their premises in an open van, whereby a small portion was stained by wet, and the purchaser rejected the whole, as he was entitled to do by the custom of the market. The plaintiff dried the stained hops, and they were rendered as good as ever for actual use, but the

staining had depreciated the market value of the bulk. The plaintiff sent the hops to a factor for sale, but at that time the market price of hops had considerably fallen from what it was at the time the hops ought to have been delivered. The company had no notice that the hops were sent to London for sale:—Held, first, that he was entitled to recover, as damage, the amount of the depreciation in the market value of the hops, and was not confined to the value of the portion actually damaged. *Collard v. South-Eastern Railway Company*, 7 H. & N. 79; 30 L. J., Ex. 393; 7 Jur., N. S. 950; 4 L. T. 410; 9 W. R. 697.

Held, secondly, that he was entitled to recover, as damages, the difference between the market price on the day when the hops were sold, and the day when they ought to have been delivered. *Id.*

**Value—How estimated.]**—Where goods are delivered to a carrier, to be carried from A. to B., and are lost, the owner is entitled to recover the value of the goods at B.; and that value is the price for which they can be got *to*, not *at*, B. *Rice v. Bazendale*, 7 H. & N. 96; 30 L. J., Ex. 371.

C., by an agent at B., received small parcels, and had them put into a hamper addressed to himself at L., and sent by railway; these small parcels, which were addressed to different persons, it was the business of C. to deliver as addressed; in its transit on the railway, a small parcel addressed to Mr. K. was abstracted from the hamper:—Held, in an action by C. against the company, for loss of the parcel, that it was sufficient to prove, that it was not in the hamper when delivered to C. by the company, and that it was not necessary to go into evidence to shew that the company had not delivered it to Mr. K., and that the amount of damages in such action was the value of the lost parcel, as C. would be liable to that amount to the owner of it. *Crouch v. London and North-Western Railway Company*, 2 C. & K. 789.

Where goods are intrusted to a carrier for conveyance and lost by the way, the measure of damages is the market value of the goods at the place of destination at the time when they should have been delivered. If this test is inapplicable, by reason of there being no market for goods of the description at the place of delivery, the jury, in assessing the damages, must ascertain the cost price of the goods and the expenses of transit (if paid), and add to these items such a sum for importer's profits as in their discretion shall appear reasonable. *O'Hanlan v. Great Western Railway Company*, 6 B. & S. 484; 34 L. J., Q. B. 154; 11 Jur., N. S. 797; 12 L. T. 490; 13 W. R. 741.

**Profits to be derived from Manufacture.]**—The measure of damages payable by railway carriers who have received goods, ordered by the plaintiff from his correspondent living at a distance, and delivered to the company directed to the plaintiff, but not delivered until the season for them was past, is the difference between the exchangeable or marketable values of the goods which they would have had at the time when they ought to have arrived, and which they had when they actually arrived; and the loss of profits which the plaintiff would have derived from making up these goods

into articles of sale, and disposing of them cannot be taken into account. *Wilson v. Lancashire and Yorkshire Railway Company*, 9 C. B., N. S. 632; 30 L. J., C. P. 232; 7 Jur., N. S. 862; 3 L. T. 859; 9 W. R. 635.

**Contract subsequently Perfected.]**—The plaintiff having sent a quantity of hops, of more than 10l. value, by a railway company, the consignee, having refused to receive them on account of not being delivered in time, afterwards sent to the plaintiff a signed memorandum of the original contract:—Held, that in assessing the damages for negligence, the jury was not at liberty to take into account the loss of the bargain between the plaintiff and the consignee. *Simmons v. South-Eastern Railway Company*, 7 Jur., N. S. 849.

If goods are delivered too late by a carrier, the owner ought instantly to sell at market price, and realize his loss; and the difference between the price he obtains by the sale at that time, and that which he would have obtained, is the only measure of damages. *Id.*

**Costs of Removal.]**—B. sent goods by carriers, to be delivered in Bedford on a Thursday, in order to be ready for the market on Saturday, but did not give notice that they were sent for that purpose. On that day his clerk proceeded there, and owing to the non-delivery of the goods till the Monday following, he removed them to another place for sale. In an action for the non-delivery of the goods within a reasonable time, the expenses so incurred may be given by the jury as damages. *Black v. Bazendale*, 1 Ex. 410; 17 L. J., Ex. 50.

**Costs of Previous Action.]**—A. entered into a contract with B. to forward goods; B. entered into a contract with C. to carry them; the goods were damaged through C.'s default; A. brought an action against B., and B. defended and incurred costs:—Held, that B. could not, in an action against C., recover the costs of the previous action without C.'s express authority to defend it. *Bazendale v. London, Chatham and Dover Railway Company*, 10 L. R., Ex. 35; 44 L. J., Ex. 20; 32 L. T. 330; 23 W. R. 167—Ex. Ch.

**Failing to provide Horse-Boxes for Conveyance of Horses intended for Sale at Auction.]**—A railway company having failed to provide horse-boxes, pursuant to contract, for the conveyance of horses for sale by auction in Dublin on the day but one following, the owner was compelled to send them by road, a distance of twenty-four miles, in order that they might arrive in due time for the sale, and for previous inspection by purchasers. The horses, which were valuable hunters, were in soft condition at the time. They were deteriorated in appearance by the fatigue of the road journey; one of them was lamed; and such as were sold realized prices below what would have been otherwise obtained, the others being left on the owner's hands. It appears that if they had been in hard-fed condition they would have borne the journey without injury. The company's station-master was, at the time of the contract, aware of the intended sale, and on the day on which it was to take place:—Held, that the company were not liable in damages for the whole of the loss which the owner

sustained in consequence of the injuries occasioned to the horses by the road journey, but that the measure of damages was the deterioration which the horses, if in ordinary condition and fit to make the journey, would have suffered thereby, and the time and labour expended on the road. *Waller v. The Midland Great Western Railway (Ireland) Company*, 4 L. R., Ir. 376. Reversing 1 Ir. L. R. 520.

The plaintiff sent some horses to stables with which the defendant had contracted to supply him during a fair. Another person to whom the defendant had subsequently let the same stables, with the assistance of the defendant's servants, turned the plaintiff's horses out of the stables without their clothing, and while they were standing in the defendant's yard until other stables could be procured, some of them caught cold and became depreciated in value. The jury found that the depreciation in value was the result of the breach of contract by the defendant.—Held (by the Court of Appeal—dubitante Bramwell, L. J.), that the defendant was liable for the depreciation thus caused, and that the damage was not too remote. *Hobbs v. London and South-Western Railway Company* (10 L. R., Q. B. 111) questioned. *Mahon v. Field*, 7 Q. B. D. 591; 50 L. J., Q. B. 552; 45 L. T. 381.—C. A. Reversing 50 L. J., Q. B. 311; 44 L. T. 175; 29 W. R. 472.

#### Loss of Samples—Traveller—Hotel Expenses.]

—A commercial traveller delivered a parcel of samples to a carrier to be carried to A., but did not state the contents of the parcel, or the purpose for which it was required. By the negligence of the carrier the delivery of the parcel was delayed, and the traveller spent three days at A. unemployed, waiting for it. In an action against the carrier for negligence, in which the hotel expenses of the traveller during the time he was waiting for the parcel were claimed as damages:—Held, that such damages were too remote, and could not be recovered. *Woodger v. Great Western Railway Company*, 2 L. R., C. P. 318; 36 L. J., C. P. 177; 15 L. T. 579; 15 W. R. 383.

**Non-sale—Contract.]**—In order to recover damages for non-sale, owing to delay in carrying, there must have been an actual contract to buy for a price. *Hart v. Bazendale*, 16 L. T. 390.

#### General Description—Knowledge of Carrier.]

—B. delivered to a carrier's servant on a quay at Glasgow, for shipment on board his vessel which lay alongside, several cases containing machinery, which was intended for the erection of a saw-mill at Vancouver's Island. The master gave a bill of lading for them, describing the cases as containing merchandize. The carrier knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases, which contained machinery without which the mill could not be erected, could not be found on board; and B. was obliged to send to England to replace the lost articles:—Held, that the measure of damages for the breach of contract was, the cost of replacing the lost articles in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment, by way of compensation for the delay. *British*

*Columbia Saw-Mill Company v. Nettleship*, 3 L. R., C. P. 499; 37 L. J., C. P. 235; 18 L. T. 604.

#### Nominal Damages in Trover for Pre-Delivery.]

—The plaintiffs, grain merchants at Hull, were in the habit of employing G. at Birmingham as their broker and agent to sell grain for them in the Birmingham district, which grain was consigned by the plaintiffs from time to time to a station at Birmingham, to be there held by the company, as warehousemen, "to the plaintiffs' order." The course of business was for G. to take samples from the grain at the station for the purpose of effecting sales, and upon effecting a sale, to communicate to the plaintiffs the buyer's name, together with the quantity, quality, and price of the grain sold; and the plaintiffs would then forward an invoice with a delivery order on the railway company to the purchaser, who would thereupon obtain delivery of the grain from the railway company. In June, 1873, the plaintiffs discovered that, on various occasions between January, 1872, and June, 1873, G. had fraudulently obtained grain from the railway company, which the latter had delivered before receiving the plaintiffs' order, and that he had done this by making sales to persons in his own employ, and fictitious sales to non-existing persons, and then presenting to the company orders sometimes signed ostensibly by such persons, and indorsed by them for delivery to himself, sometimes mere orders for delivery to himself, and sometimes orders signed by himself for the plaintiffs, he not having their authority so to do. The company delivered grain in accordance with such orders before receiving any order from the plaintiffs, and in two instances they delivered without any order whatever. The plaintiffs, however, had been subsequently paid by cheques from G. for the grain so pre-delivered. In other cases of pre-delivery by the company to G.'s orders, the plaintiffs had not been paid; but the purchasers to whom the plaintiffs originally sent the delivery orders, were at the time debited in their books with the amounts which still remained due to them; and subsequently to such pre-deliveries, the company received from G. the plaintiffs' delivery orders, indorsed over to him by the original purchasers; the plaintiffs not knowing, at the time they sent the delivery orders and made the debits in their books, that the company had parted with the goods before receiving the plaintiffs' orders. In an action by the plaintiffs against the company:—Held, by Bramwell and Thesiger, L. JJ. (dissentiente, Baggallay, L. J.), that although there had been a conversion of the corn by the defendants, the plaintiffs were only entitled to nominal damages. By Baggallay, L. J., that the plaintiffs had not been damaged, and were not entitled to even nominal damages. *Hiort v. London and North-Western Railway Company*, 4 Ex. D. 188; 48 L. J., Ex. 545; 40 L. T. 674; 27 W. R. 778.—C. A. Reversing 38 L. T. 424.

## IX. ACTIONS AGAINST CARRIERS.

### 1. NOTICE OF.

**Method of, by Statute.]**—By 8 & 9 Vict. c. 20, s. 138, any notice, writ, or other proceeding at law or in equity may be served by being left at,

or transmitted through the post directed to the principal office of the company, or one of their principal offices, where there shall be more than one:—Held, that a notice of action against the Great Western Railway Company for an overcharge for the carriage of goods from Bristol to London, served upon the superintendent of the Bristol station by the plaintiff, who resided at Bristol, was insufficient, inasmuch as the secretary was in London, and the control of the railway was carried on, and the ordinary meetings of the directors were held, there. *Garton v. Great Western Railway Company*, 27 L. J., Q. B. 375; 4 Jur., N. S. 1036.

Where a railway company was by its act entitled to notice of action, before any action should be brought against them for anything done or omitted to be done in pursuance of their act, and an action was commenced against them for money received by them to the plaintiff's use, and on accounts stated, and they pleaded that no notice of action had been given, but failed to allege that the money was received or the accounts stated in pursuance of their act:—Held, that the plea was bad, as the court could not presume, even after verdict, that the receipt of the money or the stating of the accounts was a thing done in pursuance of their act. *Garton v. Great Western Railway Company*, El. Bl. & El. 837; 28 L. J., Q. B. 321; 5 Jur., N. S. 1244.—Ex. Ch.

By a railway act it was enacted, that no action should be brought for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers or authorities given by the act, unless a previous notice in writing should be given. The company having, contrary to the provisions of the act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff:—Held, that in an action to recover the sums so extorted, the company was entitled to notice of action. *Kent v. Great Western Railway Company*, 3 C. B. 714; 16 L. J., C. P. 72.

**Breach of Common Law Duty.**—A railway company was empowered by act of parliament to carry goods and passengers on the railway, and to keep in repair the fences of the same. The act contained a clause, that no action should be brought against the company for anything done or omitted to be done in pursuance of the act, unless fourteen days' previous notice of action was given of such intention. The company undertook to carry some horses by the railway, but in consequence of the fences of the railway having broken down, the train was upset and the horses injured:—Held, that the company, being sued in its capacity of carriers, was not entitled to notice of action. *Palmer v. Grand Junction Railway Company*, 4 M. & W. 749; 7 D. P. C. 232.

**As Carriers of Passengers.**—A railway company was empowered to make a railway, which all persons were to have the liberty of using with carriages, on payment of tolls. The company was also empowered to provide locomotive engines, and charge for their use, and to use locomotive engines and carriages for the conveyance of passengers, and to charge for such conveyance, in addition to the tolls, within a limited amount. It was enacted that no action should

be prosecuted against any person, for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers given by it, without twenty days' notice in writing. A declaration against the company charged, that they were owners of the railway, and of carriages used for the conveyance of passengers along it for reward; that the plaintiff became a passenger in one of the carriages, for reward to them; and it became their duty to use due care in conveying him. Breach, that they did not use due care in conveying him, but so negligently conducted themselves in carrying him, and managing the carriage in which he was a passenger, the train to which it was attached, and the engine, whereby it was drawn upon the railway, that the carriage was thrown off the rails, and the plaintiff injured:—Held, that no notice of action was necessary, the company being sued in their capacity of carriers, and not for anything done or omitted under the act. *Curpue v. London and Brighton Railway Company*, 5 Q. B. 747; D. & M. 608; 3 Railw. Cas. 692; 13 L. J., Q. B. 138; 8 Jur. 464.

## 2. FORM AND NATURE.

**On Tort or Contract.**—An action against a common carrier for negligence in non-delivery is an action founded on contract and not on tort within s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142). *Fleming v. Manchester, Sheffield and Lincolnshire Railway Company*, 4 Q. B. D. 81; 39 L. T. 555; 27 W. R. 481.—C. A.

But an action against a carrier for loss of goods by delivery to an insolvent purchaser contrary to notice given by the plaintiff in exercise of the right of stoppage in transitu, is an action founded on tort within the above section, and he is therefore entitled to costs, where he recovers 12*l.* *Pontifex v. Midland Railway Company*, 3 Q. B. D. 23; 47 L. J., Q. B. 28; 37 L. T. 403; 26 W. R. 209.

Proof of contract is not necessary to support an action against common carriers: they may be sued in an action on the case for the injury as arising ex delicto, and such an action is not necessarily to be considered quasi ex contractu, or founded on contract. *Brotherton v. Wood*, 6 Moore, 141; 9 Price, 408; 3 B. & S. 54.

A declaration stated that the plaintiff delivered to the defendants, and they accepted, a package to be taken care of and carried from L. to B., and there delivered to A., for reasonable reward, and thereupon it became their duty to take due care in the conveyance of the package. At the trial the jury found a verdict for one of the defendants and against the other:—Held, that the declaration might be read as charging the defendants in tort, on the general custom of the realm, and not on a contract, and the court was bound so to read it after verdict, and to support the finding, though against one only. *Pozzi v. Shipton*, 1 P. & D. 4; 8 A. & E. 963; 1 W., W. & H. 624.

An action against a common carrier for the breach of his duty to carry safely goods delivered to him as such to be carried for hire, whereby the goods are lost, is an action, not of contract but of tort, in substance as well as in form, the duty being imposed upon him by the custom of the realm, and being distinct from and independent of his obligation under the contract of carriage, in respect of which latter he may also be sued in an action of contract. *Taitan v. Great Western*



*Railway Company*, 2 El. & El. 844; 29 L. J., Q. B. 184; 6 Jur., N. S. 800; 8 W. R. 606.

Held, therefore, that a plaintiff in an action against a common carrier for the breach of the duty in question, brought in a superior court to recover a sum not exceeding 20*l.*, is not deprived of his costs by 19 & 20 Vict. c. 108, s. 30, if the defendant suffers judgment by default; for that the action is not one of contract within that section. *Ib.* See *Legge v. Tucker*, 1 H. & N. 500; 26 L. J., Ex. 71; 2 Jur., N. S. 1235.

In an action against a carrier for the loss of a trunk, the terminus a quo is immaterial, as the gist of the action is the non-delivery at the place it ought to have gone to. *Woodward v. Booth*, 7 B. & C. 301; *S. P.*, *Tucker v. Cracklin*, 2 Stark. 385.

Where a count against a carrier by water alleged that in consideration that the plaintiff, at the request of the defendant, had caused to be shipped on board his vessel a quantity of wheat, to be carried to a certain place for freight, to be therefor paid to the defendant, he undertook to carry the wheat safely, and deliver it for the plaintiff on a given day; but it appeared that the defendant's undertaking to carry was made before the whole of the wheat had been shipped on board the vessel:—Held, that the count might be supported, although it was objected that the consideration for the promise was executory. *Streeter v. Horlock*, 7 Moore, 283; 1 Bing. 34.

### 3. PARTIES TO SUE.

**With whom Contract made.**—A miller in Suffolk sold flour to the plaintiff, and, according to the usual course of business between them, consigned it to him in Kent, paying the carriage by the Great Eastern to London; and that company delivered it to the South-Eastern Railway Company, who forwarded it to the plaintiff in Kent, and charged him for the carriage by their line:—Held, that though the property in the flour might not have passed to the plaintiff under the Statute of Frauds, still, as he had contracted with the South-Eastern Company for its carriage, he could sue them for damage done to it in the transit over their line. *Mead v. South-Eastern Railway Company*, 18 W. R. 735.

An action lies against a carrier in the name of the consignor who agreed with him and was to pay him. *Davis v. James*, 5 Burr. 2680.

If the consignor of goods delivers them to a particular carrier by order of the consignee, and they are afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods; the action can only be brought by the consignee. *Daves v. Peck*, 8 T. R. 330; 3 Esp. 12.

**Payment of Hire.**—In an action by the consignor of goods against a carrier for non-delivery, where he alleged that the carrier undertook to deliver, in consideration of the hire to be paid by the plaintiff, and proved that the hire was to be paid by the consignee:—Held, not to be a variance, the consignor being liable by law. *Moore v. Wilson*, 1 T. R. 659.

**Property vesting.**—Where goods, consigned to a merchant in a foreign country, are stated in the bill of lading to be shipped by order and on account of the consignee, the con-

signor cannot maintain any action against the shipowner in respect of the goods, as the property must be taken to have vested in the consignee from the time they were put on board the ship. *Brown v. Hodgson*, 2 Camp. 36.

**Fraud.**—Where the plaintiffs consigned goods according to an order received to a person they did not know, and who afterwards appeared to be a swindler, but who got possession of them by the carrier's negligence:—Held, that they might maintain an action against the carrier, as the property had not passed to the consignee. *Duff v. Budd*, 6 Moore, 469; 3 B. & B. 177. And see *Stephenson v. Hart*, 4 Bing. 476; 1 M. & P. 357.

**Resident Abroad.**—A person who ships goods in an English port, as the agent of the owner of the goods resident abroad, and pays the freight of them, may maintain an action in his own name for not delivering them according to the bill of lading. *Joseph v. Knox*, 3 Camp. 320.

**Sale or Approval.**—When goods are forwarded for sale on approval, the consignor is the party to sue the carrier. *Swain v. Sheppard*, 1 M. & Rob. 223.

In an action against a carrier for the loss of a parcel of whalebone, it appearing that the plaintiff had agreed with A. to take such whalebone as he should send by the carrier at a certain price, and the parcel having been so sent:—Held, that the consignor, and not the plaintiff was the party to maintain the action. *Coombs v. Bristol and Exeter Railway Company*, 3 H. & N. 510; 27 L. J., Ex. 401.

**Special Contract.**—Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring an action against the carrier: yet, if the consignor makes a special contract with the carrier, such contract supersedes the necessity of shewing the ownership in the goods, and the consignor may maintain the action, though the goods may be the property of the consignee. The question whether the goods were delivered to the carrier at the risk of the consignor or consignee, is a question for the jury. The delivery of goods to a carrier by a consignor does not necessarily vest the property in them in the consignee. *Dunlop v. Lambert*, 6 C. & F. 600.

**Misdelivery—Agent and Principal.**—To an action against a carrier for the loss of goods, it is no answer that the goods were delivered to the carrier by A., who, as consignor thereof, claimed compensation for the loss, and that the carrier paid him as such consignor, without notice that he was the agent of the plaintiff, and believing that he delivered the goods on his own account, and was the person entitled to sue. *Coombs v. Bristol and Exeter Railway Company*, 3 H. & N. 1; 27 L. J., Ex. 269.

**Assent by Owner—Accord.**—If, on finding that goods have been misdelivered by a carrier, the owner assents to the party who has received them selling them on his account, though that may be an acceptance of the delivery, it is, per se, no defence to an action for the mis-

delivery, as there is no consideration to make it a discharge, and it is merely an accord without satisfaction. *Sanquer v. London and South-Western Railway Company*, 16 C. B. 163; 3 C. L. R. 811.

**Vendor or Vendee.**—Delivery of goods by the vendor, on behalf of the vendee, to a carrier, is a delivery to the vendee, though the particular carrier is not named by the vendee; and the vendor cannot maintain an action against the carrier for non-delivery. *Dutton v. Solomonson*, 3 B. & P. 582. And see *Jacobs v. Neilson*, 3 Taunt. 423.

Even though the carrier is to be paid by the vendor. *King v. Meredith*, 2 Camp. 639.

Goods exceeding 10l. in price were verbally ordered of C. No particular mode of carriage was specified, nor was there any evidence of any particular course of dealing between C. and the vendee. C. afterwards forwarded the goods by a carrier. The goods were lost while in his custody:—Held, that C. was the party to bring an action for the loss of the goods, the property therein not having passed to the vendee. *Coates v. Chaplin*, 2 G. & D. 552; 2 Q. B. 483; 6 Jur. 1123.

**Bailee or Bailor.**—The bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence. *Freeman v. Birch*, 1 N. & M. 420; 3 Q. B. 483.

**Joint Parties.**—If A. and B. are separately owners of several articles contained in a box which they delivered to a railway company to carry for them jointly, they may jointly sue the company for the loss of the goods, though the box is directed to one of them only, and the price of the carriage is paid by that one only. *Metcalfe v. London, Brighton, and South Coast Railway Company*, 4 C. B., N. S. 318; 27 L. J., C. P. 333; 4 Jur., N. S. 487.

**Estoppel.**—When carriers receive goods to be carried there is no estoppel precluding them from disputing the title of the sender of the goods. *Sheridan v. New Quay Company*, 4 C. B., N. S. 618; 28 L. J., C. P. 58; 5 Jur., N. S. 248.

To trover by such sender, it is an answer for the carriers that they have delivered the goods to the true owner at his request. *Ib.*

Guardians of a female under age who had eloped are justified in detaining her clothes; and a carrier to whom they had been delivered for the purpose of conveyance is justified in delivering them over to the guardians. *Barker v. Taylor*, 1 C. & P. 101.

And see ESTOPPEL and BAILMENT.

**Passengers and their Luggage.**—See *supra*, II.

#### 4. PLEADINGS AND EVIDENCE.

**Claims.**—A declaration, stating that goods had been delivered to the defendants as carriers, to be conveyed by them for a reasonable reward, and that they undertook to carry them safely and securely, and deliver them accordingly, and assigning for breach that they lost the same, is sufficient to admit proof that they had been guilty of gross negligence. *Smith v. Horne*, 2 Moore, 18; 8 Taunt. 144; Holt, 643.

VOL. I.

An averment of an undertaking to carry goods to R., to be delivered to C. B., to be paid for on delivery, shews with sufficient certainty that the price of the goods was to be paid by C. B., the consignee, to the carrier. *Jacobs v. Nelson*, 3 Taunt. 423.

A declaration that the defendant was indebted to the plaintiff for the carriage of goods is not supported by proof that the defendant undertook to carry goods for the plaintiff, in consideration that the plaintiff would carry a like quantity for the defendant. *Bracegirdle v. Hincks*, 9 Ex. 661; 23 L. J., Ex. 128; 18 Jur. 70.

A count alleged a delivery of goods to a railway company to be carried by them from C. to S., and there to be delivered to the plaintiff for reward, yet the company did not carry the goods from C. to S., nor there deliver the same, but therein made default, and by their neglect the goods have never been delivered to the plaintiff, although the time for doing so has long since elapsed. The company pleaded, as to so much of the count as alleged non-delivery within a reasonable time, payment into court of 5l. as sufficient to satisfy the claim of the plaintiff in respect of the matter therein pleaded to:—Held, that the count was a count, not only for damages for unreasonable delay in delivery, but also for non-delivery of the goods altogether, and comprised a cause of action which was not satisfied by the acceptance of the money paid into court. *Levene v. Great Western Railway Company*, 18 L. T. 295.

A declaration against a carrier for refusing to carry goods, averred that the plaintiff "was ready and willing, and offered to pay to the defendant such sum of money as he was legally entitled to receive for the receipt, carriage and conveyance of the goods:—"Held, that the averment was sufficient, and that it was not necessary to aver an actual tender of money for the carriage. *Pickford v. Grand Junction Railway Company*, 8 M. & W. 372; 9 D. P. C. 766; 2 Railw. Cas. 592; 5 Jur. 731.

In an action against a carrier, the declaration alleged that the plaintiff delivered goods to him to be carried for hire from L. to B., and there to be delivered, and that it became his duty safely and securely to carry and deliver the goods at B.; and that a reasonable time for so doing had elapsed, but that he did not safely or securely carry or deliver the same, but so negligently conducted himself, that the goods became wholly lost to the plaintiff:—Held, after verdict, that upon this declaration, the plaintiff might recover damages for the non-delivery of the goods within a reasonable time, inasmuch as the duty to deliver within a reasonable time was a duty engrafted by the law on the duty alleged to deliver generally; and that the breach might be read, as stating that the defendant did not, within a reasonable time, nor at any time afterwards, deliver the goods. *Raphael v. Pickford*, 2 D., N. S. 916; 5 M. & G. 551; 6 Scott, N. R. 478; 12 L. J., C. P. 176; 7 Jur. 815.

In an action against a cab proprietor, the declaration stated that the plaintiff hired the vehicle, and that, in consideration of the premises, and that the plaintiff with his luggage would become a passenger, and of certain reward, the defendant promised the plaintiff to carry and convey him and his luggage safely and securely, and alleged a loss of part of the luggage by the negligence of the defendant's servant:—Held

3 x

that the declaration was sufficient to charge the defendant for a breach of his implied duty to use an ordinary degree of care, the words "safely and securely" not necessarily importing a more extended liability. *Ross v. Mill*, 2 C. B. 877; 3 D. & L. 788; 15 L. J., C. P. 182; 10 Jur. 435.

In an action against a railway company, charging them as common carriers, for the loss of a package intrusted to them to carry, subject to the terms of a special notice by the company not to be responsible for articles of certain descriptions, or of a certain value, unless entered and paid for accordingly; an allegation in the declaration of a loss arising from the gross negligence of the company, and the felonious acts of their servants, is surplusage. *Butt v. Great Western Railway Company*, 11 C. B. 140; 20 L. J., C. P. 241.

The plaintiffs declared against the defendants on their common law liability as carriers, for the loss of a parcel, which the declaration stated that they, for certain hire and reward, undertook to carry from London, and deliver safely at Dover: and it appearing that the course of dealing between the parties was, for the plaintiffs to pay the defendants an annual sum for the carriage of parcels between London and Dover, and on the receipt of each parcel, the defendants were in the habit of delivering to the plaintiffs a written acknowledgment, stating that they undertook to carry and deliver the same safely (fire and robbery excepted); and the jury having found that this was the contract between the parties, though the loss was occasioned by negligence only:—Held, a variance. *Latham v. Rutley*, 3 D. & R. 211; 2 B. & C. 20.

**Defences.**—In an action against carriers, a count stated a delivery to them of a case containing maps to be carried, and alleged a receipt by them, whereby it became their duty to take due and proper care; but that they did not take due and proper care of them, whereby the maps were lost. A second count was in trover. Plea, to the first count, that, at the delivery of the case and its contents, the defendants were common carriers for hire, and gave notice to the plaintiff, who had notice and knowledge that they would not be responsible for the loss of, or damage done to, goods and chattels delivered to them for the purpose of carriage, and, maps in packages or otherwise, unless the same were insured according to their value, and paid for at the time of their delivery; that they received the case and maps to be carried, upon the terms and conditions of the notice, and upon no other terms whatsoever, of which the plaintiff, at the delivery, had notice, and that the maps were not, at the delivery, insured according to their value, or paid for. To the count in trover there was a similar plea, alleging the conversion to have been by a misdelivery through mistake and inadvertence:—Held, first, that the action being founded on a breach of duty *ex contractu*, the allegation in the plea of a special contract was sufficient; and that, as the defendants accepted the goods only on the terms of the notice, a special averment of the plaintiff's consent was unnecessary; secondly, that the plea was not an argumentative traverse of the facts in the declaration, from which the breach of duty was implied; thirdly, that as the declaration might apply to any kind of negligence, it was not necessary to allege in the plea, that the loss was occa-

sioned by such negligence as the defendants were not responsible for; and that if they had committed negligence, for which they were liable notwithstanding their notice, the plaintiff should have now assigned it; fourthly, that the case was not separable from the maps; fifthly, that the plea to the count in trover could not be supported, inasmuch as it admitted a conversion by inadvertent delivery, and did not shew that the inadvertence was such as was protected by the notice. *Wylde v. Pickford*, 8 M. & W. 443.

In an action by a passenger travelling on a railway, to a declaration containing counts alleging severally non-delivery of his luggage and injury caused to it by negligence of the company, the company pleaded that the passenger was an officer travelling in command of soldiers, and that the non-delivery and injury were caused by the mutinous acts of the soldiers:—Held, that the plea shewed a good defence as negating any default on the part of the railway company. *Martin v. Great Indian Peninsula Railway Company*, 3 L. R., Ex. 9; 37 L. J., Ex. 27; 17 L. T. 349.

The company also pleaded that the passenger and his luggage were carried by the company under a contract between them and her Majesty's government, and that there was no contract between the company and the passenger:—Held, that this was an answer to the count for non-delivery which sounded in contract; but not an answer to the count for negligence, there being a duty on the part of the company to carry the passenger and his luggage safely, for a breach of which he could sue. *Id.*

In an action for negligence against a carrier, it is not competent to him, under not guilty, to set up as a defence that the plaintiff misrepresented the weight of the goods which the defendant agreed to carry; the plea operating only as a denial of the loss or damage, and not of the receipt of the goods by the defendant, who ought either to plead the misrepresentation specially, or traverse the acceptance of the goods for the purpose of being carried. *Webb v. Page*, 1 D. & L. 531; 6 Scott, N. R. 951; 6 M. & G. 196.

A declaration alleged that the defendants were common carriers of passengers from Southampton to Gibraltar, a place beyond the seas. A plea, that they were not common carriers of passengers only puts in issue the fact of the defendants carrying passengers from Southampton to Gibraltar for hire, and not whether they were common carriers in the strict technical sense of the term, and liable as such according to the custom of England. *Bennett v. Peninsular and Oriental Steam Boat Company*, 6 D. & L. 387; 6 C. B. 775; 18 L. J., C. P. 85; 13 Jur. 347.

A declaration alleged that the defendants were carriers of goods for hire, and that the plaintiff delivered to them a package, to be carried by them to the Eastern station, and there to be safely and securely kept by them for the plaintiff, and that it became their duty safely and securely to carry and keep the package. Breach, that they did not safely and securely carry the same, but that through their negligence it was lost. Plea, that they gave notice to the plaintiff that they would not carry any package containing several packages addressed to and intended for several parties, unless the addresses and the contents of the enclosed packages were declared;

and that they would not be responsible for such packages unless such declaration were made; that each of the packages contained several parcels addressed to and intended for different parties, and that the addresses and contents of the enclosed parcels were not declared, is argumentative traverse of the bailment in the declaration. *Crouch v. London and North-Western Railway Company*, 7 Ex. 705; 21 L. J., Ex. 207.

Declaration stated that the defendants were the owners of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board her potatoes, to be safely carried by the defendants, as owners of the vessel, to Liverpool; and in consideration thereof, and of freight, they promised the plaintiff to take proper care of and safely carry the goods as aforesaid; with a breach that, through the defendants' negligence, they were damaged. Plea, non assumpsit:—Held, that the ownership of the vessel was not admitted by the plea. *Bennion v. Davison*, 3 M. & W. 179; 1 H. & H. 46.

In an action against a carrier for the loss of a parcel of more than 10*l.* value, if he wishes to avail himself of the want of notice of value, he must plead it specially. *Syms v. Chaplin*, 5 D. P. C. 429; 5 A. & E. 634.

Action against the defendant as a common carrier, to recover the value of goods delivered to him, to be taken care of, and safely carried by him as such carrier, in his cart, from N. to B., and there safely to be delivered by him for the plaintiff, but which were lost by his negligence. Plea, that when he received the goods, an express condition and agreement were made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen, but that he neglected and refused so to do; and by reason whereof, and not by reason of any negligence of the defendant, the goods were lost, was bad on special demurrer, as amounting to the general issue. *Brind v. Dale*, 2 M. & W. 775; M. & H. 217; 1 Jur. 847.

To a declaration against carriers for the loss of a trunk, containing articles of jewellery and female apparel, they pleaded as to the articles of jewellery, one of the dresses, &c., that the goods consisted of articles and property of the descriptions following, or of some or one of such descriptions, that is to say, gold or silver in a manufactured or unmanufactured state, &c. (enumerating the several articles mentioned in the 11 Geo. 4 & 1 Will. 4, c. 68), and that their value exceeded 10*l.*; that at the time of the receipt of the goods by them they had only affixed the notice required by s. 2; and that the plaintiff gave them no notice of the nature or value of the goods, nor did she pay or tender the increased rate of charge demandable under the act:—Held, that the plea was bad, for not alleging with certainty that the articles in question were articles of some or one of the descriptions mentioned in the act. *Smith v. London, Brighton, and South Coast Railway Company*, 7 C. B. 782.

A defence by a railway company, relying upon an inevitable accident must state all the facts which the company contends constitutes such inevitable accident. *Burns v. Cork and Bandon Railway Company*, 13 Ir. C. L. R. 543.

A passenger by railway, as to which notice had

been given that no merchandize would be carried as luggage, but must be paid for, took a box of merchandize with him as luggage. During the journey a guard demanded and took it to carry separately, but no extra rate was demanded or paid. It was stolen afterwards by some of the company's servants. He sued the company, and alleged that the company undertook to carry safely, and by reason of gross neglect it was lost. Plea, that the case contained merchandize, and that the passenger had not paid for it as such, though he knew the rule. Replication, that the box manifestly contained merchandize, and yet was received as luggage:—Held, that assuming the declaration shewed a good cause of action in tort, the plea answered it. *Belfast and Ballymena Railway Company v. Keys*, 9 H. L. Cas. 556; 8 Jur., N. S. 367; 4 L. T. 841; 9 W. R. 793.

Held, also, that the replication was bad for not averring that the company had notice that the box contained merchandize. *Id.*

**Replications.**—In an action against a railway company for the loss of a package intrusted to them to carry, subject to the terms of a special notice by the company, not to be responsible for articles of certain descriptions, or of a certain value, unless entered and paid for accordingly, the declaration alleging a loss arising from gross negligence of the company and the felonious acts of their servants, the company pleaded (except as to so much of the declaration as alleged that the loss arose from the gross negligence of the company and the felonious acts of their servants), that the goods were within the description, and of the value mentioned in the notice, and that their nature and value were not declared at the time of their delivery to the company. The plaintiff newly assigned, that he issued his writ and declared thereupon, for that, while the goods were in the custody and possession of the company as common carriers, they were feloniously stolen by certain servants of the company unknown to the plaintiff:—Held, that the new assignment was bad, as applying to a portion of the declaration to which the plea was not addressed. *Butt v. Great Western Railway Company*, 11 C. B. 140; 20 L. J., C. P. 241.

Held, also, that a replication of felony by the company's servants only, without alleging gross negligence in the company, would have been bad. *Id.*

Declaration against a railway company for the loss of goods delivered to them as common carriers, to be safely and securely carried and conveyed. Plea, that at the time of such delivery the plaintiff became and was a passenger by the railway; and that the goods were delivered to be conveyed with him as such passenger, and that no part thereof was an article of clothing of the plaintiff. To this plea there was a replication de injuriâ:—Held, that replication was ill, inasmuch as the plea did not consist of matter of excuse, but amounted to the general issue, being an argumentative traverse, that the goods were delivered to the defendants as common carriers. *Elwell v. Grand Junction Railway Company*, 5 M. & W. 669; 8 D. P. C. 225.

**Evidence in Actions.**—The inscription on a stage-coach of the name of the party licensed to use it, is evidence against him of ownership, as

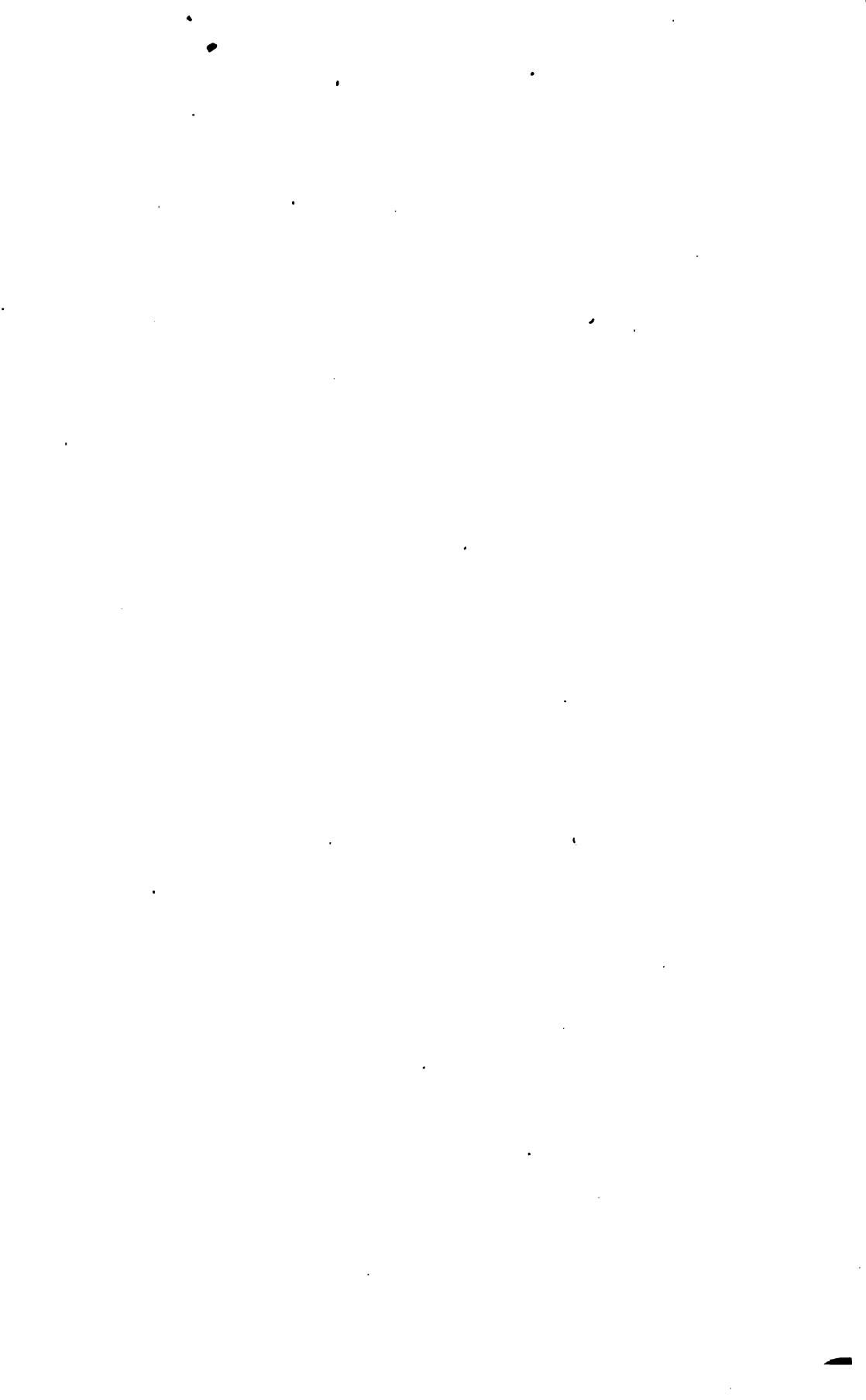
well in an action as on summary proceedings, *Barford v. Nelson*, 1 B. & Ad. 571.

A declaration stated that the plaintiff delivered a trunk to the defendant, to put in a coach at Chester, in the county of Chester. Proof that it was delivered at Chester, in the county of the city of Chester, is no variance, there being no other place of the same name. *Woodward v. Booth*, 7 B. & C. 301.

In an action against the proprietor of a stage-coach, for an injury sustained by a passenger, the declaration alleged that the defendant was the owner of a stage-coach for the conveyance of passengers from London to Blackheath, and that

the plaintiff agreed to become a passenger, and the defendant to receive him as such passenger, to be carried from London to Blackheath; and the evidence was that the words "London and Blackheath" were painted on the coach door; that the coach was licensed to run from Charing Cross only, and that the plaintiff was taken up at the Elephant and Castle, in St. George's Fields:—Held, that, as Charing Cross and St. George's Fields are both in common parlance styled London, the variance was immaterial, and the allegation sufficiently proved. *Ditcham v. Chiris*, 1 M. & P. 735; 4 Bing. 706.

END OF VOL. I.











Standard Law Library



3 6105 062 527 333